

Research Briefing

13 July 2023

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Financial provision when a relationship ends



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Summary

This research briefing deals with the law in England and Wales relating to the division of a couple's property and income when their marriage or civil partnership breaks down.

Division of assets on divorce or dissolution of civil partnership

A couple may agree between themselves how to divide their assets. Their agreement may be embodied in a consent order approved by the court which makes it legally binding and enforceable.

When agreement is not possible, the court may decide an application for financial provision. In deciding an application, the court is required [by statute](#) to have regard to “all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen”. Therefore, each case is dealt with on an individual basis according to its facts.

Case law

Case law has established that, in trying to achieve fairness in the division of property in any given case, the court should be guided by the principles of the needs of the parties; compensation; and equal sharing. The [Law Commission has commented](#) (PDF) that the sharing principle is relevant only in a minority of cases because of the overriding problem of meeting needs.

Application to court

Couples must attend a Mediation Information and Assessment Meeting (MIAM) before issuing an application to court for a financial remedy (with some exceptions). In March 2023, the [Government](#) and the [Family Procedure Rule Committee](#) consulted separately on proposals intended to strengthen the existing provisions around attendance at MIAMs and to encourage more people to attend mediation or other forms of non-court dispute resolution.

A party to divorce proceedings, who remarries before they have made any application for a financial order, generally loses the ability to apply to court. This is a matter on which it would be necessary to seek legal advice.

Guidance

The Coalition Government asked the Family Justice Council to take forward a Law Commission recommendation for guidance to clarify the meaning of 'financial needs'. In April 2016, the Family Justice Council published a guide, intended to help litigants in person, [Sorting out Finances on Divorce](#) (PDF). Separate guidance has been published for the judiciary.

Calls for reform

Private Members Bills have been introduced with the intention of reforming the law relating to financial provision on divorce. To date, no such bill has completed its passage through Parliament.

Review of the law

In April 2023, [the Law Commission announced](#) it was to review whether the law which determines how finances are divided on divorce or dissolution is working effectively and delivering fair and consistent outcomes for divorcing couples. The Commission intends to publish a scoping report in September 2024, which could provide the basis for a full review and future financial remedies reform.

The Law Commission has also conducted projects on the [enforcement of family financial orders](#) and on [matrimonial property, needs and agreements](#).

Pre-nuptial agreements

Some couples enter into a pre-nuptial or post-nuptial agreement which sets out how they would wish their property and income to be divided in the event of divorce or dissolution. These agreements are not automatically enforceable. However, following a [landmark ruling in the Supreme Court](#), some pre-nuptial agreements will now have effect in the absence of circumstances which would make this unfair.

Cohabitation

Cohabiting couples do not have the same rights to financial provision on relationship breakdown as married couples or civil partners.

1 How assets are usually divided on divorce or dissolution

1.1 Agreement between parties

During or after a divorce or dissolution of a civil partnership,¹ a couple may agree how to divide their property and income, sometimes with legal advice.

This may be embodied in a legally binding ‘consent order’ approved by the court. The agreement may be based on what the couple might expect to have been awarded had the matter been decided by a court.

1.2 The court’s discretion

When agreement is not possible, an application for a financial order (‘ancillary relief order’) may be decided by the court. This might involve, for example, the division of property and pensions, and the payment of maintenance.

Each case decided on its facts

Under the [Matrimonial Causes Act 1973](#) (as amended), the court has a wide discretion when deciding an application for a financial order on or after divorce, annulment of marriage or judicial separation. The court’s general duty in dealing with such applications is set out in section 25(1). This requires the court, when deciding whether and, if so, how, to make a financial order, “to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen”.²

Therefore, each case is dealt with on an individual basis according to its facts.

¹ Or annulment of a marriage or civil partnership or judicial separation,

² A ‘child of the family’ means a child of both parties or a child who has been treated by both parties as a child of their family, [Matrimonial Causes Act 1973, s52](#)

Matters the court must consider

[Section 25\(2\) of the Matrimonial Causes Act 1973](#) directs the court to have regard, in particular, to the following matters when dealing with an application for a financial order for a party to a marriage:

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future
- (c) the standard of living enjoyed by the family before the breakdown of the marriage
- (d) the age of each party to the marriage and the duration of the marriage
- (e) any physical or mental disability of either of the parties to the marriage
- (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family
- (g) the conduct of each of the parties, whatever the nature of the conduct and whether it occurred during the marriage or after the separation of the parties or (as the case may be) dissolution or annulment of the marriage, if that conduct is such that it would in the opinion of the court be inequitable to disregard it
- (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

Financial provision may be awarded to either party depending on the circumstances involved.

[Section 72](#) and [Schedule 5](#) of the [Civil Partnership Act 2004](#) require the court to have regard to equivalent matters when dealing with an application for financial provision on or after making a dissolution, nullity or separation order in respect of a civil partnership.

‘Clean break’

The court must also consider whether it is possible to achieve a ‘clean break’ between the couple; this means that neither party would have a financial claim on, or responsibility towards, the other party following an order allocating their assets (except in respect of any children).³

³ [Matrimonial Causes Act 1973 s25A](#) and [Civil Partnership Act 2004 sch 5, para 23](#)

1.3

Practical problems

In 2011, the Law Commission commented that only a small minority of cases are contested in the courts and that, in many cases, there are practical problems in financing two separate households:

First, the vast majority of cases are not contested in the courts, and many couples do not take legal advice. Whether the problem is addressed by a judge or resolved by the couple themselves, the practical problem is that it is usually difficult to meet the needs of two households out of the resources formerly devoted to one. The resources available may be just adequate to meet the needs of the children, if any, and of the party with day-to-day care of the children; or there may be enough to re-house all the family. Rarely are there assets or income over and above what is required to ensure that all the family have accommodation and an adequate income. The objective that the courts are pursuing – and that lawyers will advise couples to try to achieve by negotiation – is clear; the problem is simply finding enough to go around.⁴

1.4

Information for litigants in person

Information about financial provision, which may be helpful for litigants in person (people who do not have a lawyer), is available online at:

- GOV.UK, [Money and property when you divorce or separate](#)
- Citizens Advice, [Dividing up money and belongings when you separate](#)
- Family Justice Council, [Sorting out Finances on Divorce](#) (PDF), April 2016
- Advicenow, [Sorting out your finances when you get divorced](#), March 2022
- Advicenow, [How to apply for a financial order without a lawyer](#), June 2022.⁵

⁴ Law Commission Consultation Paper No 198, [Marital Property Agreements](#) (PDF), 11 January 2011, para 1.19 (footnote omitted)

⁵ All the links in this section were accessed 13 July 2023

2 Division of wealth: The application of the statutory provision

The application of the statutory principles set out in section 25 of the Matrimonial Causes Act 1973⁶ has been considered in a number of reported ‘big money’ court cases. This means cases where the assets of the parties were well in excess of what was needed to meet the needs of the couple and any children.

2.1 Before 2000

Before 2000, awards were based on the principle that the reasonable requirements of the financially weaker party must be met, although this could result in that party receiving only a fraction of the richer party’s total wealth, whatever the circumstances or the length of the marriage.

2.2 2000: *White v White*

In 2000, in *White v White*, a judgment of the Appellate (Judicial) Committee of the House of Lords put the role of homemaker on an equal footing with that of the family breadwinner, and established ‘a yardstick of equality of division’.⁷ This does not necessarily lead to equal division in all cases as the circumstances of the case are also taken into account.

2.3 Later case law

In 2006, in *Miller v Miller and McFarlane v McFarlane*, the Appellate Committee of the House of Lords held that three principles should guide the court in trying to achieve fairness in the division of property in any given case:

- the needs of the parties

⁶ See section 1.2 of this briefing above

⁷ [2000] UKHL 54. The Appellate Committee of the House of Lords, as the predecessor of the Supreme Court, was the highest court of appeal at that time

- compensation aimed at redressing any significant prospective economic disparity between the parties arising from the way they had conducted their marriage
- equal sharing.⁸

The Law Commission has commented that the sharing principle is relevant in only a minority of cases because of the overriding problem of meeting needs:

Since [the] change in 2000, therefore, we can say that financial provision cases in the courts fall into two groups.

(1) At the lower end of the scale, where the vast majority of cases lie, all that can be achieved is an order that meets the needs of the parties, because there is not enough to do any more. Indeed, in most cases there is insufficient to do that; the court and the parties are trying to “get a quart out of a pint pot”. The “sharing principle” is not relevant here: there is no room for equal sharing because of the overriding problem of meeting needs.

(2) In the very wealthy cases the courts work out what the person applying for the order “needs”, by reference to his or her budget (which will be drawn up on the basis of the standard of living that person expects to maintain). If those needs are met by an award of half the matrimonial property, pursuant to the sharing principle, then no further financial award is made – the family property is simply shared, with the exception of any non-matrimonial property...⁹

⁸ [\[2006\] UKHL 24](#)

⁹ Law Commission, [Matrimonial Property, Needs and Agreements: The Future of Financial Orders on Divorce and Dissolution Executive Summary](#) (PDF), February 2014, Appendix, paragraph 1.14,

3 Application to court

3.1 Number of applications to court

The Government has noted the fluctuation in volume over time of applications to the court in financial remedy cases:

In 2011 there were 46,348 applications (15,602 contested and 30,746 not contested). In 2021, there were 48,666 applications (12,438 contested and 36,228 not contested).¹⁰ This is an increase of 5% of total applications.¹¹

3.2 Mediation Information and Assessment Meetings

The general requirement to attend a meeting

There is now a general requirement for couples to attend a Mediation Information and Assessment Meeting (MIAM) before issuing an application for a financial remedy.¹² The purpose of the MIAM is for the couple to find out about and consider mediation, or other forms of non-court-based dispute resolution. There are some exceptions to this requirement including, for example, where there is evidence of domestic violence or of a risk of domestic violence; in these cases, the applicant may proceed straight to court.¹³

Further information about mediation is available at:

- [The Family Mediation Council website](#)
- [Money and property when you divorce or separate: Get help agreeing - GOV.UK \(www.gov.uk\)](#)
- Advicenow, [A survival guide to family mediation](#).¹⁴

¹⁰ Footnote to text: “Family Court Statistics Quarterly: July to September 2022 - GOV.UK (www.gov.uk)”

¹¹ Ministry of Justice, [Supporting earlier resolution of private family law arrangements](#) (PDF), CP 824, March 2023, p10

¹² [Children and Families Act 2014 s10](#) and the [Family Procedure \(Amendment No. 3\) Rules 2014, SI 2014/843, Practice Direction 3A](#) sets out the applications to which the MIAM requirement applies

¹³ [Family Procedure Rules 2010 \(as amended\), Rule 3.8](#) sets out the circumstances in which the requirement to attend a MIAM does not apply

¹⁴ December 2021. All links in this section accessed 13 July 2023

Consultations on family mediation

Government consultation

On 23 March 2023, the Government launched a [consultation](#) on resolving family disputes earlier through family mediation.¹⁵ In a written ministerial statement, Dominic Raab, who was then Deputy Prime Minister and Lord Chancellor and Secretary of State for Justice, said an increasing number of families were applying to court to resolve their disputes about children and financial matters. He said the Government believed many of these disputes could be successfully resolved outside of court, which would enable the courts to focus available resource on the cases which need to be there.

Dominic Raab summarised the key proposals in the consultation:

- **Supporting parents to resolve their children and financial arrangements without court involvement:** we propose to strengthen access to resources and guidance for parents/carers and separating couples, and seek views on requiring parents/carers, in appropriate cases, to attend a co-parenting programme alongside mediation to help them better understand their family's options.
- **Resolving private family law arrangements through mediation:** we propose to introduce a requirement, in appropriate cases, to make a reasonable attempt to mediate before applying to court. We are seeking views on how this could operate, and the circumstances which should make an individual or family exempt from the requirement. We propose that government would fund the cost of this mediation for child arrangement cases and seek views on the funding of mediation for finance cases.
- **Accountability and costs in court proceedings:** We are also consulting on how costs orders could be used by the family courts to enforce requirements to mediate and discourage unnecessary prolonging of court proceedings.

The consultation also sought views on the impact these proposals might have on the mediation sector, and the role of other forms of dispute resolution in family cases.¹⁶

This consultation closed on 15 June 2023.¹⁷

Family Procedure Rule Committee consultation

Following publication of the Government consultation, the Family Procedure Rule Committee consulted on the principle of proposed amendments to the existing Family Procedure Rules and supporting Practice Directions, to

¹⁵ Ministry of Justice, [Supporting earlier resolution of private family law arrangements](#), 23 March 2023

¹⁶ [HCWS666 \[on Supporting earlier resolution of private family law arrangements: a consultation on resolving private family disputes earlier through family mediation\]](#), 23 March 2023

¹⁷ [Supporting earlier resolution of private family law arrangements - GOV.UK \(www.gov.uk\)](#) (accessed 13 July 2023)

encourage early resolution of private law arrangements.¹⁸ The Ministry of Justice said the proposals were intended to strengthen the existing provisions around attendance at MIAMs and to encourage more people to attend mediation or other forms of non-court dispute resolution (NCDR).¹⁹

The Foreword to the consultation summarised work in this area:

To determine what rule changes could be considered to support the earlier resolution of private law cases, the Private Family Law Early Resolution Working Group (“the Group”) was established in summer 2022. The Group has worked alongside MoJ Policy to support the Committee in exploring how the Rules and Practice Directions could be strengthened to better enforce the requirement to attend a MIAM and to better encourage parties to attempt NCDR to support the earlier resolution of private law family cases. All proposed amendments recommended by the Group are outlined in this consultation paper. The consultation also includes questions on proposals the Group and Committee had not reached an agreement on, but are now seeking views of consultees to inform an approach.²⁰

The consultation closed on 25 May 2023.

3.3 Remarriage before application for financial provision

A party to divorce proceedings, who remarries before they have made any application for a financial order, generally loses the ability to apply to the Court.²¹ If a party makes an application for financial relief before they remarry, they can generally pursue their claim after remarriage,²² (although not for spousal maintenance).

An application for a financial order is usually made in the divorce application, or separately in [Form A](#) (Notice of [intention to proceed with] a financial application to which the standard procedure applies).²³

The application form for a divorce or dissolution,²⁴ asks the question:

8.1 Do you want to apply for a financial order?

¹⁸ [Early resolution of private family law arrangements - GOV.UK \(www.gov.uk\)](#) (accessed 13 July 2023)

¹⁹ Ministry of Justice, [Foreword to Family Procedure Rule Committee consultation](#), (PDF) 30 March 2023

²⁰ As above

²¹ [Matrimonial Causes Act 1973 s28\(3\). Form D8. Application for a divorce or dissolution \(ending a civil partnership\)](#) (PDF) states: “This restriction does not apply to pension sharing or pension compensation sharing orders”

²² This depends on the circumstances. It would be necessary to seek legal advice on this matter

²³ [Give notice of your intention to proceed with an application for a financial order: Form A - GOV.UK \(www.gov.uk\)](#)

²⁴ [Form D8. Application for a divorce or dissolution \(ending a civil partnership\)](#) (PDF), June 2023. It is also possible to apply online

This question has the following explanatory note:

If you answer 'Yes' to question 8.1 the court will take no action at this stage. To formally start financial proceedings, you will also need to complete a separate application **Form A** or **Form A1** and pay another court fee.

You can find more guidance on financial orders and how to get help agreeing on any issues at www.gov.uk/money-property-when-relationship-ends/apply-for-a-financial-order

If you answer 'No' to question 8.1 you can still apply for a financial order in the future, but only **until you remarry or form another civil partnership**. This restriction does not apply to pension sharing or pension compensation sharing orders.

If you are unsure what to do here it is recommended you seek legal advice.

Please note that decisions regarding child maintenance are usually made by agreement or by the Child Maintenance Service and the court can only make these orders under certain circumstances.

Online information about making an application for financial provision includes:

- Gov.UK, [Money and property when you divorce or separate](#)
- Advicenow, [How to apply for a financial order without a lawyer](#), June 2022.

3.4

No other time limit for lifetime application

In March 2015, the Supreme Court ruled that an ex-wife could proceed with a claim for financial provision against her former husband (who since their divorce had amassed considerable wealth) even though it was more than 20 years since they divorced.²⁵ The Court confirmed there was no time limit in family law for seeking an order for financial provision.²⁶ Lord Wilson indicated, however, that in any case, a court would look at the reason for delaying making an application, and that delay might reduce or even eliminate the amount awarded.²⁷

In June 2023, the Supreme Court ruled that a financial claim on divorce does not survive the death of either party.²⁸ (Depending on the circumstances, it

²⁵ [Wyatt v Vince](#) [2015] UKSC 14 (11 March 2015)

²⁶ As above, para 32

²⁷ As above

²⁸ [Unger and another \(in substitution for Hasan\) v Ul-Hasan \(deceased\) and another](#) [2023] UKSC 22 (PDF)

may sometimes be possible to bring a claim for financial provision from the estate of the deceased under [different legislation](#)).²⁹

3.5 Financial Remedies Court

The Financial Remedies Court (FRC) is a specialist part of the Family Court. The purpose of the FRC is to ensure that family finances are resolved efficiently by specialist judges.³⁰ Information about how the FRC works is available at: [Financial Remedies Court - GOV.UK \(www.gov.uk\)](#).

3.6 Financial Dispute Resolution

The purpose of a Financial Dispute Resolution (FDR) appointment is to facilitate discussion and negotiation by the parties in the presence of a judge:

The financial dispute resolution (“FDR”) appointment was introduced into the court process, on a trial basis, in 1996 and was formally incorporated in the revised rules governing financial ancillary relief cases in June 2000. It was an innovative development, designed to enable the parties, with the assistance of the judge, to identify and seek to resolve the real issues in the case, at a time and in a manner intended to limit the overall financial cost for the parties, to reduce delay in resolving the case and to lessen the emotional and practical strain on the family of continuing litigation.³¹

Advicenow, [How to apply for a financial order without a lawyer](#), provides general information about FDR appointments.³²

In July 2018, Sir James Munby, who was then President of the Family Division, hoped that judges would develop and encourage the use of “private” FDRs locally:

A private FDR is a simple concept. The parties pay for a financial remedy specialist to act as a private FDR judge. That person may be a solicitor, barrister or retired judge. No additional qualification is required. The private FDR takes place at a time convenient to the parties, usually in solicitors’ offices or barristers’ chambers, and a full day is normally set aside to maximise the prospects of settlement. It takes the place of the in-court FDR.

At present, demand on court resources has led to instances of over-listing of FDRs. A high settlement success rate is not likely to be achieved if the district judge’s list for the day has more than five FDRs in it. This has the inevitable

²⁹ [Inheritance \(Provision for Family and Dependents\) Act 1975](#). This is a matter on which it would be necessary to seek legal advice.

³⁰ [Financial Remedies Court - GOV.UK \(www.gov.uk\)](#) (accessed 13 July 2023)

³¹ Family Justice Council, [Financial Dispute Resolution Appointments: Best Practice Guidance](#) (PDF), December 2012, p4

³² [How to apply for a financial order without a lawyer | Advicenow](#), June 2022, section 19

knock-on of far more cases being listed for a final hearing than should be so – a classic example of the law of diminishing returns.

Although a private FDR does require some (often quite modest) investment by the parties, this expense can be greatly outweighed by the advantages gained. The very fact of investment by the parties will signify a voluntary seat at the negotiating table rather than a sense of being dragged there. The “hearing” can take place at a time convenient to the parties, even in the evening or at a weekend, and for as long as the parties want. The private FDR judge will, by definition, have been given all the time needed to prepare fully for the hearing.³³

³³ [President’s Circular: Financial Remedies Court Pilot Phase 2](#), (PDF) July 2018, paras 7 to 9

4 Law Commission projects

4.1 Matrimonial Property, Needs and Agreements

Law Commission consultation

In 2009, the Law Commission started a project examining the status and enforceability of marital property agreements. Their [consultation](#) (PDF) closed on 11 April 2011.³⁴ In 2012, the project was extended to cover two further issues of financial provision on divorce or dissolution of a civil partnership:

- financial needs - to what extent one spouse should be required to meet the other's financial needs, and what exactly is meant by 'needs'; and
- the definition and treatment of non-matrimonial property - what happens to property that one of the partners owned before the relationship or acquired during the course of it.

The Law Commission published a [supplementary consultation paper](#) (PDF) in September 2012.³⁵ This consultation closed on 11 December 2012. The Law Commission said the project was not a full-scale reform project directed at the entirety of the law of financial orders, rather the aim was "to bring clarity and predictability to areas of that law that cause particular difficulties".³⁶

The Law Commission drew attention to the fact that, although there are detailed statutory provisions about the orders the court can make in connection with a divorce or dissolution, the statute does not say what the court is to achieve by making these orders:

The judge in the family court has been compared to a bus driver, who has been told how to drive the bus and told that he must drive it, but has not been told where to go, nor why he is to go there. Couples who do not go to court have to make their own financial arrangements by agreement. In doing so they need to know what their rights and obligations are, and the fact that the law is incomplete and uninformative does not help them.³⁷

³⁴ Law Commission Consultation Paper No 198, [Marital Property Agreements](#) (PDF), 11 January 2011

³⁵ Law Commission Consultation Paper No 208, [Matrimonial Property, Needs and Agreements A Supplementary Consultation Paper](#) (PDF), 11 September 2012

³⁶ Law Commission, [Matrimonial Property, Needs and Agreements](#) (accessed 13 July 2023)

³⁷ Law Commission Consultation Paper No 208, [Matrimonial Property, Needs and Agreements Executive Summary](#) (PDF), 11 September 2012, p3, para 5

Law Commission report and recommendations

In February 2014, the Law Commission published its final report, [Matrimonial Property, Needs and Agreements](#) (PDF),³⁸ together with an [Executive Summary](#) (PDF)³⁹

The Law Commission concluded, at that time, that the underlying law relating to the responsibilities of former spouses to meet each other's 'financial needs' was not in need of statutory reform. It did not recommend an overall change in the courts' approach which, it said, tended to lead the parties to financial independence. However, the Commission found the law was inaccessible to the general public, and that there was evidence the courts in different areas of the country did not always apply the law consistently.

The Law Commission found the lack of clear law was problematic when so many settlements were reached out of court, sometimes without the advice of lawyers:

Most couples going through divorce, or the dissolution of civil partnership, do not have their financial arrangements made by a judge. Many reach a settlement with the assistance of lawyers. Some go through mediation; others make use of collaborative law negotiations, or of family law arbitration. Increasingly, many do not have access to lawyers because of the withdrawal of legal aid in this area. They do have access to the courts, but the majority nevertheless resolve their financial arrangements out of court; and we have to add that if all or even a majority of couples going through divorce or dissolution were to go to court for financial orders, the court system would be unable to cope.

Against that practical background, the lack of clear law is problematic. For the law to say, in effect, "it is up to the judge" may be acceptable if everyone gets to see a judge; but now that is the exception rather than the rule. There is a need for clearer and more transparent law so as to give people an indication of the sort of financial settlement that they ought to reach, as well as more certainty so that they can have confidence in the arrangements they have made.⁴⁰

The Law Commission's report included recommendations for reform (among other things) to:

- clarify, through the provision of guidance by the Family Justice Council, the meaning of 'financial needs' to ensure:
 - the term is applied consistently by the courts and
 - people without legal representation are given access to a clear statement of their responsibilities and the objective of eventual

³⁸ Law Commission, Law Com No 343, [Matrimonial Property, Needs and Agreements](#) (PDF), February 2014

³⁹ Law Commission, [Matrimonial Property, Needs and Agreements: The Future of Financial Orders on Divorce and Dissolution Executive Summary](#) (PDF), February 2014

⁴⁰ Law Commission, [Matrimonial Property, Needs and Agreements: The Future of Financial Orders on Divorce and Dissolution Executive Summary](#) (PDF), paras 1.14-15

independence that a financial settlement should strive to achieve and

- investigate the possibility of whether an aid to calculation of ‘financial needs’ could be devised, to take the form of non-statutory guidance, which would give a range of outcomes, in figures, within which separating couples might negotiate.⁴¹

The Law Commission said it was not recommending the guidance regarding financial needs should prevent the application by the court of the sharing and compensation principles (where appropriate).⁴²

Taking into account consultation responses, the Law Commission did not make any recommendations in respect of non-matrimonial property, but considered it could be covered by contractual arrangements:

At the outset of our examination of non-matrimonial property we felt that the courts’ practice of not sharing pre-acquired, gifted and inherited property might usefully be captured in the form of statutory rules. We also felt that statute should address the sort of issues that are likely to arise in the context of such property, for example when it is sold and replaced, or grows as a result of the investment of either party. These are issues to which the courts have not yet been able to provide clear answers.

We have not made any recommendations about reform relating to non-matrimonial property. Although we would have liked to recommend statutory provisions to address those situations in which the case law has not yet provided clear answers, consultation responses have demonstrated that such provisions would be unacceptably controversial. Where the parties to a marriage want to achieve certainty in advance about the continued ownership of non-matrimonial property they should be free to make contractual arrangements to that effect, without having to submit their agreements to the courts’ assessment of fairness. Such contracts could also encompass other property, in particular property acquired or generated during the marriage, if the parties agree that they will not wish to share it in the event of divorce or dissolution. Equally, though, such agreements should not be able to prejudice the parties’ entitlement to have their financial needs met. Accordingly we have recommended the introduction of qualifying nuptial agreements.⁴³

The Coalition Government’s response

In April 2014, the then Justice Minister, Simon Hughes, announced the Ministry of Justice had asked the Family Justice Council “to take forward the Law Commission’s recommendation to clarify the law of ‘financial needs’ on divorce or dissolution of a civil partnership”.⁴⁴

⁴¹ Law Commission, [Matrimonial Property, Needs and Agreements](#) (accessed 13 July 2023)

⁴² Law Commission, [Matrimonial Property, Needs and Agreements: The Future of Financial Orders on Divorce and Dissolution Executive Summary](#) (PDF), Appendix para 1.15

⁴³ Law Commission, [Matrimonial Property, Needs and Agreements: The Future of Financial Orders on Divorce and Dissolution Executive Summary](#) (PDF) paras 1.24-25

⁴⁴ [Divorce myths to be dispelled - GOV.UK \(www.gov.uk\)](#), 17 April 2014 (accessed 13 July 2023)

Simon Hughes also wrote to the Law Commission on 8 April 2014 and 18 September 2014 - the Law Commission has said these two letters together formed the Coalition Government's interim response to their recommendations.⁴⁵

The Law Commission has set out what further action has been taken but notes it is still awaiting a final response from Government:

We recommended that the Family Justice Council produce guidance on needs.

This has now been done with the Family Justice Council producing two sets of guidance, [one for the public and litigants in person](#), and the other addressed primarily to the [judiciary and legal advisers](#).

The AdviceNow organisation has also produced [guidance on needs for the public](#).

The Ministry of Justice is undertaking scoping work on the feasibility of developing non-statutory and numerical guidance on the calculation of financial needs.

The Government considered that there was unlikely to be time for the Nuptial Agreements Bill to progress through Parliament before it was dissolved in March 2015.

Accordingly, it took the view that the Government's final response regarding nuptial agreements should await the next Parliament, giving the new Government time to consider our policy recommendations on this topic and the Bill.

We await Government's final response.⁴⁶

Family Justice Council Guidance

Guide for litigants in person

In April 2016, the Family Justice Council published a guide, intended to help litigants in person, [Sorting out Finances on Divorce](#) (PDF). The guide sets out how the Family Court approaches financial needs on divorce and is a response to the Law Commission's recommendation for clear guidance.

The guide sets out a general overview of the law and covers:

- making an agreement without going to court
- what the law aims to do and takes into account – and so what a couple should aim to agree
- the sort of orders which can be made.

⁴⁵ Law Commission, [Matrimonial Property, Needs and Agreements](#) (accessed 13 July 2023)

⁴⁶ As above

It includes more detailed information on matters including:

- housing and other capital
- maintenance and income and
- pensions.

There are also examples showing how the law would generally be applied in some typical situations, and some FAQs, which deal with particular issues that come up on divorce.

Guide for the Judiciary

The Family Justice Council also published further guidance, this time for the Judiciary, [Guidance on “Financial Needs” on Divorce](#) (PDF). This guidance was first published in June 2016 and a second edition was published in April 2018.

4.2 Enforcement of Family Financial Orders

Sometimes people do not comply with court orders for financial provision, for example because changing circumstances mean they are no longer able to comply, or because they are unwilling to do so.

The Law Commission has noted the law of enforcement of family financial orders is a complicated area, contained in a range of legislation and court rules. This can make it difficult for parties, particularly litigants in person, to recover the money they are owed, and “can lead to significant hardship both for the parties and for their children”.⁴⁷

Law Commission report

Following consultation,⁴⁸ in December 2016, the Law Commission published its report, [Enforcement of Family Financial Orders](#) (PDF).⁴⁹ It made 63 recommendations designed “to create an effective system that produces compliance with court orders in a way that is fair to both the creditor and the debtor”.⁵⁰ The Law Commission said many of the recommendations could be implemented without primary legislation:

These non-statutory reforms can be implemented through changes in court rules and practice directions; court administration; and the provision of guidance. This is the case for much of what we recommend and we believe that

⁴⁷ Law Commission, [Enforcement of family financial orders](#), (accessed 13 July 2023)

⁴⁸ Law Commission Consultation Paper No 219, [Enforcement of Family Financial Orders](#) (PDF), 11 March 2015

⁴⁹ Law Commission Law Com 370, [Enforcement of Family Financial Orders](#) (PDF), HC 862, 15 December 2016

⁵⁰ Law Commission, [Enforcement of family financial orders](#), (accessed 13 July 2023)

these changes will go a long way towards making enforcement in this area more efficient, effective and accessible.⁵¹

The Commission summarised its recommendations as including:

- consolidating the procedural rules, which can be hard to find and difficult to follow
- providing more guidance and information for litigants
- increasing the obligations on the debtor to provide honest and early disclosure of his or her financial circumstances
- providing the court with wide powers to obtain information from third parties
- extending existing methods of enforcement to assets that currently cannot be enforced against. Our project recommends, for example, that creditors are able to enforce against funds held in a joint account and against pension assets
- that the courts should be able to apply pressure to debtors that have the means to pay but are refusing to pay what is owed to the creditor – including that debtors may be disqualified from driving or prevented from travelling out of the country until the judgment debt is settled, where it is in the interests of justice to do so.⁵²

The Law Commission said its recommendations took into account four key problems with the current law:

- the complexity of the rules;
- a lack of information about the debtor;
- some of the debtor’s assets being beyond existing enforcement powers;
- a lack of means to apply pressure to debtors who can but will not pay.⁵³

Government response

The Government’s response was set out in a [letter from the then junior Justice Minister, Lucy Frazer, dated 23 July 2018](#) (PDF).⁵⁴ This said the Government shared the Commission’s concerns about the complexity of the current enforcement system, adding it was “open to exploitation by those debtors who choose not to comply with a court order”. The Government also accepted more should be done to assist those debtors who cannot pay.

⁵¹ As above

⁵² As above

⁵³ As above

⁵⁴ Letter from Lucy Frazer QC MP to Professor Nick Hopkins, [Law Commission report of enforcement of family financial orders](#), 23 July 2018 (PDF)

Lucy Frazer said she had asked officials to work with the senior family judiciary, Family Procedure Rule Committee and HM Courts and Tribunals Service to “explore amendments to the Family Procedure Rules 2010 and to operational procedures” in line with the Law Commission’s recommendations.

The Government considered the Family Procedure Rule Committee’s expertise would enable procedural rules to be developed which would be clear and accessible to all court users, particularly litigants in person.

Lucy Frazer said she could not indicate how long it would take to implement reforms to the existing process. However, she regarded the work as important and said she would support the Family Procedure Rule Committee in progressing it in a timely manner.

With regard to the recommendations requiring primary legislation, the letter said, “the demands on parliamentary time currently are significant”. The Government had decided to await the implementation of the non-statutory reforms before taking a view on whether additional measures were required.

4.3 Financial remedies on divorce

On 4 April 2023, the Law Commission announced the Ministry of Justice had commissioned it to review whether the law which determines how finances are divided on divorce or dissolution is working effectively and delivering fair and consistent outcomes for divorcing couples.⁵⁵

The Law Commission said its project would consider the financial orders made by courts in England and Wales, as well as the law in other countries. The Commission intends to publish a scoping report in September 2024, which could provide the basis for a full review and future financial remedies reform.⁵⁶

As part of its analysis of existing law, the Law Commission will consider whether there is potential for reform in specific areas such as:

- The discretionary powers given to judges over the division of financial assets, and whether there is a need for a clear set of principles, enshrined in law, to give more certainty to divorcing couples.
- Whether there should be wider powers given to the courts to make orders for children over the age of eighteen.
- How maintenance payments for an ex-spouse or civil partner should work.

⁵⁵ Law Commission, [Review to examine 50-year-old laws on finances after divorce and the ending of a civil partnership](#), 4 April 2023 (accessed 13 July 2023)

⁵⁶ Law Commission, [Financial remedies on divorce](#) (accessed 13 July 2023)

- What consideration the courts should give to the behaviour of separating parties when making financial remedy orders.
- Orders relating to pensions and whether they are overlooked when dividing the divorcing parties' assets.
- The factors judges must consider when deciding which, if any, financial remedy orders to make.⁵⁷

As part of the new review, the Law Commission is to scope whether the issues covered in its Matrimonial Property, Needs and Agreements project need to be reviewed beyond its 2014 recommendations.

Further information is available on the [Law Commission's project page](#).⁵⁸

⁵⁷ As above

⁵⁸ As above

5 Calls for reform

5.1 Private Members' Bills

Baroness Shackleton of Belgravia (Conservative) and Baroness Deech (Crossbench) are among those who have called for reform of the current system. Each has introduced Private Members' Bills which have not completed their passage through Parliament including:

- Baroness Shackleton of Belgravia introduced the [Divorce \(Financial Provision\) Bill \[HL\] 2019-21](#);⁵⁹
- Baroness Deech introduced bills in various sessions, most recently the [Divorce \(Financial Provision\) Bill \[HL\] 2021-22](#).⁶⁰

5.2 Debate on the Divorce, Dissolution and Separation Bill [HL] 2019-21

The [Divorce, Dissolution and Separation Act 2020](#) has introduced a form of no-fault divorce. The Government said the changes to divorce law would remove unnecessary conflict to ease stress on couples and children.⁶¹ At Lords Committee stage of the bill which preceded this Act, Baroness Deech said the Government would not succeed in removing hostility from the divorce proceedings without also dealing with financial provision law:

In brief, there is no point in trying to achieve the aims of the divorce Bill—to make divorce less acrimonious and harmful to children—if the laws relating to the division of money on divorce remain as uncertain, expensive and acrimonious as they are. Research has shown that the quicker the divorce, the less likely the parties are to come to an agreed settlement, and that they will be more likely to settle on financial matters when more time has elapsed. This does not augur well for consensus in the proposed new law.⁶²

Baroness Deech spoke to an amendment which would have required the Government “to carry out a prompt review of the law on financial provision and to consider a more certain, less costly regime, with priority for children

⁵⁹ HL Bill 39 of 2019-21

⁶⁰ HL Bill 45 of 2021-22

⁶¹ [“Blame game” ends as no-fault divorce comes into force - GOV.UK \(www.gov.uk\)](#) (accessed 13 July 2023)

⁶² [HL Deb 3 March 2020 c590](#)

up to 21 and, like Scotland, a statutory basis for prenups, equal division of assets and shorter-term maintenance”.⁶³

In response, Lord Keen of Elie, who was then Advocate-General for Scotland, said preparatory work on a review of financial provision law was already underway.⁶⁴ Baroness Deech’s amendment was disagreed.⁶⁵

Lord Keen subsequently wrote to Baroness Deech setting out what a review might require and how long it might take.⁶⁶

5.3 House of Lords debate 8 March 2023

On 8 March 2023, Baroness Deech asked the Government for an update on what progress they had made with reviewing the law governing financial provision on divorce since Lord Keen of Elie’s letter of 16 March 2020.⁶⁷

Lord Bellamy, Parliamentary Under-Secretary of State at the Ministry of Justice said he hoped to announce a review of financial provision very shortly.⁶⁸

Baroness Deech pressed for further information:

The law that relates to splitting money on divorce is so antagonistic and unreformed that it undermines the alleged good points of the no-fault divorce law. We are lagging 50 years behind nearly every other country in the western world, including Australia. The amount of discretion in our law makes it very hard for unrepresented parties. Money that should go to the children is being spent on legal costs. Even judges have called this law “apocalyptic” — accessible only to the rich. When will the Government reform this very bad law?⁶⁹

Lord Bellamy said the Government were in close consultation with the Law Commission, which, he considered, was the most appropriate body to carry out a review.⁷⁰

When pressed further on the Law Commission’s potential timescale, Lord Bellamy added:

Typically, Law Commission work takes place in two phases. There is an initial phase of the kind I have just outlined, where the problem is identified and comparative studies are made. That is typically followed by a consultation

⁶³ [HL Deb 3 March 2021 c591](#)

⁶⁴ [HL Deb 3 March 2021 c597](#)

⁶⁵ [HL Deb 3 March 2021 c606](#)

⁶⁶ Letter from Lord Keen of Elie QC to Baroness Deech DBE QC, [Financial provision on divorce](#) (PDF), DEP2020-0150, 16 March 2020

⁶⁷ [HL Deb 8 March 2023 c789](#)

⁶⁸ As above. See also section 4.3 above of this briefing.

⁶⁹ [HL Deb 8 March 2023 c789](#)

⁷⁰ As above

phase in which all stakeholders' views are fully taken into account, which results in final recommendations and possibly draft legislation. That process will probably take at least two years.⁷¹

⁷¹ [HL Deb 8 March 2023 cc790-791](#)

6 Pre-nuptial agreements

Some couples try to decide in advance how they would wish their property and income to be divided in the event of divorce or dissolution and enter into a pre-nuptial or post-nuptial agreement. Such agreements are not automatically enforceable in courts in England and Wales.

6.1 Case law

In a landmark ruling in 2010, in the case of *Radmacher v Granatino*, the Supreme Court held that courts should give effect to a pre-nuptial agreement that is freely entered into by each party with a full appreciation of its implications, unless, in the circumstances prevailing, it would not be fair to hold the parties to their agreement.⁷² The ruling does not make pre-nuptial agreements binding in all cases; the fairness of upholding any particular agreement will be considered by the court on a case by case basis. However, some pre-nuptial agreements will now have effect in the absence of circumstances which would make this unfair.

6.2 Law Commission recommendations

The Law Commission has recommended the introduction of ‘qualifying nuptial agreements’, as enforceable contracts, which would enable couples to make binding arrangements for the financial consequences of divorce or dissolution. These agreements, which would have to meet certain requirements, would not be subject to the court’s assessment of fairness. Couples would not be able to contract out of meeting the financial needs of each other and of any children.

The Government has not yet responded in full to these recommendations.

Further information is available from the Law Commission, [Matrimonial Property, Needs and Agreements - Law Commission](#).⁷³

⁷² [2010] UKSC 427

⁷³ Law Commission, [Matrimonial Property, Needs and Agreements](#) (accessed 13 July 2023)

7

Cohabitation

Although couples who live together (cohabit) in a stable intimate relationship, without entering into a formal relationship (marriage or civil partnership), do have some legal protection in a number of areas, they do not have as many rights and responsibilities as married couples. In particular, unmarried couples have no automatic rights to ownership of each other's property on relationship breakdown. If a cohabiting couple separate, the courts have no power to override the strict legal ownership of property and divide it as they may do on divorce or dissolution.

Further information about the rights of cohabiting couples is set out in another [Commons Library research briefing, “Common law marriage” and cohabitation](#).⁷⁴

⁷⁴ CBP-3372

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