

NATIONAL REPORT: ENGLAND & WALES

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England
August 2008

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A. GENERAL

- 1. Are there special rules concerning the property relationship between spouses (explaining what is meant by spouses)?
If so, briefly indicate the current sources of these rules.**

Definition of spouses

In England and Wales, spouses must be heterosexual and monogamous (although same-sex civil partners are treated almost identically since the English Civil Partnership Act 2004) as same-sex marriage like bigamous marriage is void in English law (S. 11(b) and (c) English Matrimonial Causes Act 1973. Polygamous marriages are normally void if entered into by a party domiciled in England and Wales unless nether spouse has an additional spouse at the inception of the marriage (S. 11(d) English Matrimonial Causes Act 1973).

a. upon marriage

No. Spouses retain their separate property (S. 1 and 2 English Law Reform (Married Women And Tortfeasors) Act 1935).

a. during marriage

No. Spouses retain their separate property (English Law Reform (Married Women And Tortfeasors) Act 1935).

b. upon separation

No. Spouses retain their separate property (although they can apply to the court for a property adjustment order if they obtain a formal judicial separation order - English Matrimonial Causes Act 1973 PART II - S. 24).

c. upon death

No, except where there is no will when succession takes place according to a statutory list - English Administration Of Estates Act 1925 - S. 46 (although a spouse can apply to the court for financial provision from their spouse's estate if no or insufficient provision is made for a spouse in a will under the Inheritance (English Provision for Family and Dependents) Act 1975).

d. upon divorce

Yes in the sense that either spouse may make a claim on their spouse's property and any disputes are settled at court (which is the competent authority) according to the statutory provisions - English Matrimonial Causes Act 1973 part ii - see S. 24 which gives the court a wide discretion (see S. 25).

e. upon annulment?

Yes - as for divorce- English Matrimonial Causes Act 1973 Part II - see especially S. 24 and S. 25.

2. Give a brief history of the main developments and most recent reforms of the rules regarding the property relationship between spouses.

Brief History

The rule under the doctrine of unity whereby a wife's property became owned by the husband on marriage was abolished by the English Married Women's Property Act 1882 and further clarified in the English Law Reform (Married Women and Tortfeasors) Act 1935 since which time marriage has had no effect on the property ownership of husbands and wives in English law. Until the English Matrimonial Property and Proceedings Act 1970, there was in effect a separate property regime with no redistribution of property on divorce, nullity or separation (and even maintenance claims from income were very restricted). However, the 1970 Act gave the court the power to make property adjustment orders on divorce and these provisions together with those relating to financial provision (that is maintenance and capital lump sum orders) are now contained in the English Matrimonial Causes Act 1973 Part II and apply following divorce, nullity and judicial separation. It is therefore a separate property system with distribution by competent authority. Unlike the position in civil law jurisdictions, the court is able to look globally at the financial provision orders (for maintenance and capital lump sums) and property adjustment orders before deciding what orders should be made in each category in order to achieve 'fairness' between the parties. Under S. 25 English Matrimonial Causes Act 1973, the court has a wide discretion as to the factors to be taken into account when making both financial provision and property adjustment orders. It comprises a checklist of matters to which the court shall in particular have regard (S. 25(2)), but since the English Matrimonial and Family Proceedings Act 1984 when the requirement to 'place the parties as nearly as possible in the position they would have been in had the marriage not broken down' was removed, there is now little statutory guidance given to the court on how to exercise its discretion.

However it must 'have regard to all the circumstances of the case, first consideration being given to the welfare, while a minor, or any children of the family who has not attained the age of 18' (S. 25(1) English Matrimonial Causes Act 1973) and it has a duty to consider whether it would be appropriate to exercise its powers so that the financial obligations of each party towards the other will be terminated as soon after the grant of the divorce decree as the court considers just and reasonable - the so-called 'clean-break principle' (S. 25A(1)). This aims to reduce the number of cases where there is spousal maintenance and implicitly permits the court to compensate the lack of spousal maintenance with a bigger property adjustment in order to achieve a fair outcome as between the parties. As discussed below, this lack of more specific statutory principles has led the courts to develop their own guiding principles, which have changed quite radically in recent years.

Recent statutory reforms

There have been few recent statutory developments concerning matrimonial property since 1973 other than

- the clean break principle introduced in the English Matrimonial and Family Proceedings Act 1984 which provided new emphasis on the court encouraging both parties to become self-sufficient post-divorce - see now S. 25A English Matrimonial Causes Act 1973 discussed above;
- the added power to order sale of a spouse's property in order in 1984 (now S. 24A English Matrimonial Causes Act 1973);
- the specific addition of pension attachment and pension sharing orders between spouses on divorce introduced by the English Pensions Act 1995 and the English Welfare Reform and Pensions Act 1999 respectively and now principally contained in S. 24B-D and S. 25B - E English Matrimonial Causes Act 1973.
- the extension of almost identical provisions governing financial relief (that is financial provision and property adjustment) on divorce, nullity and judicial separation to civil partners on dissolution, nullity and separation under the English Civil Partnership Act 2004 (Chapter 3 and Schedule 5).

Recent case law developments

Case law (jurisprudence) on how the courts should exercise their very wide statutory discretion has developed significantly in recent years and it is believed that the same principles will apply to both spouses and civil partners. Until the case of *White v White*¹ the court had restricted the weaker economic spouse's application for financial provision and property adjustment to that which would satisfy his or her 'reasonable requirements' judged in the context of the standard of living of the family (see *Dart v Dart*²). However, in *White v White*, the House of Lords (the highest court of law) indicated that the guiding principle in applying the S. 25 criteria should be to achieve a 'fair outcome' as between the spouses and removed the 'reasonable requirements' ceiling (on the basis that given marriage was a partnership of equals, it was discriminatory to the homemaker, typically the wife, to place greater value on financial contributions than on domestic contributions to the welfare of the family when deciding property division.) The House of Lords indicated that the starting point should instead be to consider and then to justify where appropriate why an equal division of both parties' property at the point of divorce should not apply (the yardstick of equality test). There followed case law considering whether this only applied to long marriages, whether it extended to all or just some assets and if so, which categories of assets should be equally divided. The leading case is now the House of Lords decision in *Miller v Miller; McFarlane v McFarlane*³ (Hereafter *Miller; McFarlane*) where two very different cases one involving a short childless marriage and the other involving a long marriage with three children were heard together in order to develop principles. Both were cases where the parties' assets exceeded the parties' needs, so called 'big money' cases. Whilst the law is still in a state of flux, 'fairness' embodying a principle of non-discrimination between homemaker and breadwinner has been confirmed as the overall objective of property adjustment orders and the following issues have been clarified:

- Fairness is stated to comprise three strands -
 - needs, (which are to be generously interpreted in the context of the standard of living of the family)
 - (equal) sharing (equal division applies only if appropriate - see below), and
 - compensation (for relationship-generated disadvantage - e.g. for giving up a career to raise children - over and above needs) (*Miller; McFarlane*)
- Where the parties' assets do not exceed their needs, then the property should normally be distributed to meet their respective needs, rather than divided equally between the parties, with the need to provide any children and the primary carer with accommodation being the starting point, followed by the provision of accommodation for the other spouse. (*Miller; McFarlane; B v B (Financial Provision: Welfare of Child and Conduct*⁴)
- The property which is available for redistribution on divorce has now been categorised by the House of Lords as matrimonial (or family) property **and** non-matrimonial (or non-family) property. However, where matrimonial assets exceed the needs of both parties, matrimonial property will be divided equally between the parties on divorce, regardless of the length of the marriage. Non-matrimonial property is also subject to the sharing principle but will not be automatically divided between the parties, equally or at all. Thus departure from the equal sharing principle is more likely with regard to non-matrimonial property. However non-matrimonial property may still be distributed to the other spouse, particularly if the marriage is long or in particular if the other spouse's needs cannot be met without recourse to it. There is no statutory definition of matrimonial and non-matrimonial property and the House of Lords itself was not unified in its attempt at definition in *Miller; McFarlane*. Generally, it is agreed that some assets such as the matrimonial home and assets acquired during the marriage as 'fruits of the partnership' or

¹ [2001] 1 AC 596 (HL).

² [1996] 2 FLR 286, CA.

³ [2006] UKHL 24.

⁴ [2002] 1 FLR 555.

the product of 'joint endeavour' will almost always be matrimonial property available for equal division. Non-matrimonial property may include property acquired by inheritance or gift prior to the marriage or after separation and possibly business assets acquired solely by the efforts of one spouse, but only providing this does not offend the non-discrimination principle. The distinction the court makes between the two types of property is likely to fade where the marriage is a long one and as indicated non-matrimonial assets may in any event be redistributed if need or compensation require their use. Whether needs should be met and then the remainder of the assets divided equally or rather whether the assets should just be divided equally upon the assumption needs will be met from the sum 'will depend' and is a matter for the discretion of the judge. (*Miller; McFarlane, Charman v Charman*⁵).

- Equal sharing can be departed from where one spouse has made a truly exceptional or 'stellar' contribution to the marriage but the bar at which it will be accepted that a contribution is exceptional has been set very high. Even where it exists, this should operate within a division band of 55%:45% and 66.6%:33.3% in favour of the stellar contributor. (*Charman v Charman*)

3. Are there any recent proposals (e.g. parliament, reform bodies, academic community) for reform in this area?

The Court of Appeal in *Charman v Charman* in 2007 called for the Law Commission for England and Wales to be invited to review the law of financial relief on divorce in this area. Both practitioners and the academic community have expressed views that reform is needed. However, the most recent announcement of the Law Commission's Tenth Programme of Law Reform in June 2008 does not include such a review. It does however confirm that the status and enforceability of marital agreements between spouses and civil partners is to be reviewed as well as the law of intestate succession (English Administration of Estates Act 1925) and the English Inheritance (Provision for Family and Dependents) Act 1975 under which family members can apply to the court for discretionary financial provision and property adjustment to be made from the estate of a deceased.

4. Briefly explain whether or not the rules regarding the property relationship between spouses also apply to registered or civil partnerships?

Yes identical rules apply but are contained in Chapter 3 and Schedule 5 English Civil Partnership Act 2004.

5. Are the rules concerning the matrimonial property relationship between spouses exclusive or are there other mechanisms of property law, such as joint ownership, which also play a role in relation between spouses?

There are no exclusive rules as such during the marriage and so property law applies to both spouses and civil partners with disputes being resolved under the English Trusts of Land and Appointment of Trustees 1996 (S. 14) during marriage. On divorce, however, the jurisdiction under the English Matrimonial Causes Act 1973 Part II is used exclusively.

There are some specific provisions which relate to spouses and civil partners:-

- S. 17 English Married Women's Property Act 1882 and S. 66-67 English Civil Partnership Act 2004 entitle a court to hear questions in private between husband and wife or civil partners respectively as to title or possession of property and to make 'such order with respect to property as it thinks fit'.

- S. 37 English Matrimonial Proceedings and Property Act 1970 and S. 65 English Civil Partnership Act 2004 enable applications the court to decide the beneficial share attributable to a spouse or civil partner respectively who has made contributions in money or money's worth to their spouse or civil partner's property.

⁵ [2007] EWCA Civ 503.

6. What is the relationship, if any, between the law regarding the property relationship between spouses and the law of succession?

None – separate statutes govern this. The only link is that where an application is made by a spouse on the death of the other spouse, under the discretionary jurisdiction where no provision or insufficient provision has been made by will or on intestacy, the court normally orders the same provision as would have been made on divorce and must have regard to this (S. 3(2)(b) English Inheritance (Provision for Family and Dependents) Act 1975).

7. Are there distinct rules concerning general rights and duties of the spouses (as referred to in section B) that are independent of the specific property relationship of the spouses (matrimonial property regimes as referred to in section C)?

Yes, as there is not really a specific property relationship between spouses in England and Wales. Most general rights and duties relate to the duty to maintain a spouse or civil partner and are principally found in social security legislation and maintenance legislation. With regard to the household, S. 30 English Family Law Act 1996 entitles a spouse or civil partner to occupy the family home which their spouse or civil partner has a right to occupy and to pay the rent or mortgage or other outgoings on the home as if they were that spouse or civil partner. Under S. 31 of this Act, this right of occupation operates as a charge where the non-owner spouse or civil partner is in actual occupation of the home and which can be registered against the title of the family home at the Land Registry so that the home cannot be sold without the non-owner spouse's knowledge or consent.

B. GENERAL RIGHTS AND DUTIES OF SPOUSES CONCERNING HOUSEHOLD EXPENSES, TRANSACTIONS IN RESPECT TO THE MATRIMONIAL HOME AND OTHER MATTERS IRRESPECTIVE OF THE SINGEL MATRIMONIAL PROPERTY REGIME

8. What, if any, are the obligations of spouses to contribute to the costs and expenses of the family household? In answering this question, briefly explain what your system understands by "costs and expenses of the family household".

There are no obligations specific to spouses to contribute to the household as such, although each spouse is liable to maintain the other under social security legislation and divorce and separation legislation. There are separate provisions under the Child Support legislation requiring financial support of biological children and the ability for a child of the family (other than a biological child) to make a claim for financial support. Under domestic violence legislation where one spouse or civil partner is excluded from occupation of the home, they can be required to made contributions to the outgoings on the home during their spouse or civil partner's occupation (S. 40 English Family Law Act 1996).

Generally, the normal rules of property or contract law apply in respect of payments for household goods, expenses and outgoings, with marriage or civil partnership making no difference to the law applied. However, where a housekeeping allowance is made by a husband to the wife to meet household expenses, if a dispute arises as to their right to money derived from that allowance, unless agreed otherwise, it is deemed to be owned by the husband and wife in equal shares (S. 1 English Married Women's Property Act 1964). This provision does not apply to civil partners, nor where the wife makes an allowance to the husband.

9. Is one spouse liable for the household debts incurred by the other? And if so, to what extent?

No. – English Law Reform (Married Women and Tortfeasors) Act 1935.

10. To what extent, if at all, are there specific rules governing acquisition and/or transactions in respect of the matrimonial/family home irrespective of the matrimonial property regime?

In answering this question, briefly explain what your system understands by "matrimonial/family home".

There are no specific rules on acquisition or transactions in respect of the home. A right of occupation is provided for the spouse or civil partner in respect of a 'dwelling-house' in which their spouse or civil partner has a right of occupation of the dwelling-house by virtue of a beneficial estate or interest or contract or any enactment (S. 30 English Family Law Act 1996). The law is intended to protect the family home which the spouses or civil partners occupy or intend to occupy together as their 'matrimonial home' or 'civil partnership home' (S. 30(7)) but only during the subsistence of the marriage or civil partnership. It seems it is possible that this provision may give occupation rights in more than one home. The right of occupation for the non-owner spouse/civil partner protects them from sale to a third party without their knowledge or consent providing they remain in actual occupation of the home (S. 31 English Family Law Act 1996).

11. To what extent, if at all, are there specific rules governing acquisition and/or transactions in respect of household goods irrespective of the matrimonial property regime? In answering this question, briefly explain what your system understands by "household assets".

None.

12. To what extent, if at all, are there other rules governing transactions entered into by one spouse irrespective of the matrimonial property regime (e.g. entering into guarantees, incurring debts...)?

None that are specific to spouses.

13. To what extent, if at all, are there specific rules concerning one spouse acting as agent for the other?

None that are specific to spouses – power of attorney is required.

14. What restrictions or limitations, if any, are there concerning transactions between spouses irrespective of the matrimonial property regime (e.g. gifts...).

None.

C. MATRIMONIAL PROPERTY REGIMES

C.1. General issues

15. Are spouses entitled to make a contract regarding their matrimonial property regime?

Yes, contracts are permitted but are not strictly enforceable. They can be taken into account as one of the circumstances of the case on divorce or as conduct it is inequitable to disregard under S. 25 English Matrimonial Causes Act 1973.

16. What regime is applicable, using the list below,⁶ if spouses have not made a contract (default regime) or are not allowed to make a contract or are not allowed to make a contract with binding effect?

I.	Community of property	Communauté des biens	Gütergemeinschaft
II.	Community of accrued gains/Participation in acquisitions	Participation aux acquêts	Zugewinnngemeinschaft/ Errungenschaftsbeteiligung
III.	Deferred community of property	Communauté différée des biens	Aufgeschobene Gütergemeinschaft
IV.	Separation of property	Séparation de biens	Gütertrennung
V.	Separation of property with distribution by the competent authority	Séparation de biens avec une distribution des biens par l'autorité compétente	Gütertrennung mit behördlicher Vermögensverteilung

17. Using the list above, are there other alternative matrimonial property regimes regulated by statute for which spouses can opt besides the default regime (where applicable)?

No.

18. Briefly describe the regimes indicated in the answers to:

a. Question 16.

It is a separate property regime during marriage with no inter-spousal liability or sharing of assets other than where assets and liabilities are contracted for jointly. On divorce, the court alone has authority to redistribute assets and any agreement made between the spouses should be approved by the court to prevent a claim being subsequently made against the other spouse.

b. Question 17.

Not relevant.

19. Indicate the frequency of the use made of the regimes (where possible by reference to statistical data) referred to in Questions 16 and 17.

All cases fall into category V in England and Wales.

⁶ For an explanation of this list, see the document: CLASSIFICATION OF MATRIMONIAL PROPERTY REGIMES PROPOSED BY THE CEFL.

C.2. Specific regimes

I. Community of property

Not relevant.

II. Community of accrued gains/Participation in acquisitions

Not relevant.

III. Deferred Community

Not relevant.

IV. Separation of property

Not relevant.

V. Separation of property with distribution by the competent authority

V.1. Assets

161. Describe the system. Indicate the different categories of assets involved.

Marriage does not affect the ownership of assets of spouses and so all assets acquired before or during the marriage remain the property of the spouse who acquired that asset, although assets may be jointly owned where they are purchased jointly in the joint names of the spouses. It is also possible where one spouse contributes to the purchase of an asset held in the other spouse's name that they have a beneficial interest in that asset which is held on trust by the legal owner for themselves and their spouse, but unless there is a written agreement to that effect, then the court has to investigate whether such a beneficial interest under a trust exists. Where spouses divorce, given that the court has such wide redistributive powers, this issue is rarely litigated, although it can be significant during a marriage in actions brought by third parties.

On divorce, as described above and repeated here, the court has wide powers to redistribute assets to achieve a fair outcome between the spouses according to a set of statutory criteria in S. 25 English Matrimonial Causes Act 1973 as interpreted by the courts.

The court has power to make property adjustment orders under S. 24 English Matrimonial Causes Act 1973 and these provisions together with those relating to financial provision (that is maintenance and capital lump sum orders) are contained in the English Matrimonial Causes Act 1973 Part II and apply following divorce, nullity and judicial separation. Unlike the position in civil law jurisdictions, the court is able to look globally at the financial provision orders (for maintenance and capital lump sums) and property adjustment orders before deciding what orders should be made in each category in order to achieve 'fairness' between the parties. Under S. 25 of this statute, the court has a wide discretion as to the factors to be taken into account when making both financial provision and property adjustment orders. There is a checklist of matters to which the court shall in particular have regard (S. 25(2)), and it must 'have regard to all the circumstances of the case, first consideration being given to the welfare, while a minor, or any children of the family who has not attained the age of 18' (S. 25(1) English Matrimonial Causes Act 1973) and it has a duty to consider the so-called 'clean-break principle' (S. 25A(1)) which aims to reduce the number of cases where there is spousal maintenance and implicitly permits the court to compensate the

lack of spousal maintenance with a bigger property adjustment in order to achieve a fair outcome as between the parties.

The checklist of factors which must be considered in order to achieve fairness between the parties as set out in S. 25 comprises the following:

- (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, 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 (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

The checklist is not set out in order of priority and it is for the court to decide which factors are most important. However, the lack of more specific statutory principles has led the courts to develop their own guiding principles, which have changed over the years, but generally it seems that where assets do not exceed the parties needs, then the assets are distributed in order to meet the parties needs, giving priority if necessary to the needs of any minor children of the family and their primary carer. Where assets exceed needs, then case law is still in the process of developing clear principles, as explained below.

Recent case law developments

Case law (jurisprudence) on how the courts should exercise their very wide statutory discretion has developed significantly in recent years and it is believed that the same principles will apply to both spouses and civil partners. Until the case of *White v White* [2001] 1 AC 596 (HL) the court had restricted the weaker economic spouse's application for financial provision and property adjustment to that which would satisfy his or her 'reasonable requirements' judged in the context of the standard of living of the family (see *Dart v Dart* [1996] 2 FLR 286, CA). However, in *White v White*, the House of Lords (the highest court of law) indicated that the guiding principle in applying the S. 25 criteria should be to achieve a fair outcome as between the spouses and removed the 'reasonable requirements' ceiling (on the basis that given marriage was a partnership of equals, it was discriminatory to the homemaker, typically the wife, to place greater value on financial contributions than on domestic contributions to the welfare of the family when deciding property division.) The House of Lords indicated that the starting point should instead be to consider and then to justify where appropriate why an equal division of both parties' property at the point of divorce should not apply (the yardstick of equality test). There followed case law considering whether this only applied to long marriages, whether it extended to all or just some assets and if so, which categories of assets should be equally divided. The leading case is now the House of Lords decision in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 where two very different cases one involving a short childless marriage and the other involving a long marriage with three children were heard together. Both were cases where the parties' assets exceeded the parties' needs, so called 'big money' cases. Whilst the law is still in a state of flux, 'fairness' embodying a principle of non-discrimination between homemaker and breadwinner has been confirmed as the overall objective of property adjustment orders and the following issues have been clarified:

- Fairness comprises three strands –
 - needs, (which are to be generously interpreted in the context of the standard of living of the family)
 - equal (if appropriate – see below) sharing, and
 - compensation (for relationship-generated disadvantage - e.g. for giving up a career to raise children - over and above needs) (Miller; McFarlane)
- Where the parties' assets do NOT exceed their needs, then the property should normally be distributed to meet their respective needs, rather than divided equally between the parties, with the need to provide any children and the primary carer with accommodation being the starting point, followed by the provision of accommodation for the other spouse. (Miller; McFarlane; B v B (Financial Provision: Welfare of Child and Conduct)⁷)
- The property which is available for redistribution on divorce has now been categorised as both matrimonial and non-matrimonial property. Matrimonial property will always be divided equally between the parties on divorce, regardless of the length of the marriage. Non-matrimonial property is also subject to the sharing principle but will not be automatically divided between the parties. Departure from the equal sharing principle is more easily departed from. However non-matrimonial property may be redistributed, particularly if the marriage is long or if the other spouse's needs cannot be met without recourse to it. There is no statutory definition of matrimonial and non-matrimonial property and the House of Lords itself was not unified in its attempt at definition in *Miller; McFarlane*. Generally, it is agreed that some assets such as the matrimonial home (however acquired) and assets acquired during the marriage as 'fruits of the partnership' or the product of 'joint endeavour' will always be matrimonial property available for equal division. Non-matrimonial property may include property acquired by inheritance or gift prior to the marriage or after separation and possibly business assets acquired solely by the efforts of one spouse, but only providing this does not offend the non-discrimination principle. The distinction the court makes between the two types of property is likely to fade over time and non-matrimonial assets may in any event be redistributed if need or compensation require their use. Whether needs should be met and then the remainder of the assets divided equally or rather whether the assets should just be divided equally upon the assumption needs will be met from the sum will depend and is a matter for the discretion of the judge. (Miller; McFarlane, *Charman v Charman*).⁸
- Equal sharing could be departed from where one spouse had made a truly exceptional or 'stellar' contribution to the marriage but the bar at which it will be accepted a contribution is exceptional has been set very high. Even where it exists, this should operate within a division band of 55%:45% and 66.6%:33.3% in favour of the stellar contributor. (*Charman v Charman*)
- Compensation, whilst available in situations such as *McFarlane* where the wife had given up a career as a city solicitor to care for children should not be awarded where lost career opportunities were 'ordinary' and the loss of a high flying career is not made out (*H v H*,⁹ *RP v RP*¹⁰).

162. What assets comprise the separate property of the spouses?

All assets which have not been specifically acquired jointly.

163. Can spouses acquire assets jointly? If so, what rules apply?

Yes. In English law, ownership of assets has two layers. Legal ownership – the ownership set out on the legal title which will be conclusive as regards third parties. There is also the

⁷ [2002] 1 FLR 555.

⁸ [2007] EWCA Civ 503.

⁹ [2007] EWHC 459.

¹⁰ [2006] EWHC 3409.

possibility of 'beneficial ownership' which may be different to the legal ownership. This occurs where another party has contributed to the purchase of the property and did not intend it as a gift, in which case the property is deemed to be held on trust in shares determined by the court if not agreed by the parties. If property is purchased in joint names, then unless agreed otherwise, the normal rule is that the spouses own the asset in equal shares. Where the agreement as to the beneficial ownership is in writing and in the correct form required (e.g. in a deed for real property) that agreement will be conclusive. Where there is no agreement and no specific declaration as to the ownership, then the legal ownership will prevail unless the beneficial ownership is proved to the court's satisfaction - see *Stack v Dowden*¹¹. Spouses rarely litigate on these issues on divorce due to the redistributive powers of the court at this juncture.

164. What is the position of pension rights and claims and insurance rights?

These are treated as part of the separate property of the spouses which can be redistributed as part of the global package aiming to achieve fairness on divorce.

165. Can a third party make a disposition (e.g. a gift or a bequest) so as to avoid the competent authority's power over the spouses' assets?

Yes, this is possible if it is done under trust, but it will be taken into account as part of that spouse's resources and so would normally operate to reduce their needs on divorce.

166. How is the ownership of the assets proved as between the spouses? Are there rebuttable presumptions?

Ownership of assets is proved by legal ownership documentation in the normal course. Where a trust is claimed, the court will look at all the documentary evidence and hear the parties' evidence as to their intentions and actions at the time of the acquisition. The rebuttable presumption is that the beneficial ownership follows the legal ownership.

167. How is the ownership of the assets proved as against third parties? Are there rebuttable presumptions?

In the same way, by looking first at legal ownership and then by looking at whether a constructive or resulting trust has arisen which changes the beneficial ownership.

168. Which debts are personal debts?

All debts in that spouse's name.

169. Which debts are joint debts?

All debts in joint names, although each spouse would normally be jointly and severally liable so the debt can be enforced in full against either of them.

170. On which assets can the creditor recover personal debts?

All assets in that spouse's name and creditors can get a charge against joint assets to the extent of that spouse's interest in that asset, but may not be able to force a sale of a joint asset although this will be possible if a spouse is bankrupt.

171. On which assets can the creditor recover joint debts?

¹¹ [2007] UKHL 17.

Normally all assets of either of the joint debtors.

V.2. Administration of assets

172. How are assets administered?

During the marriage, each spouse administers their own assets. With joint assets, depending on what arrangement has been made and also the nature of the asset, either one spouse may administer the joint assets or both spouses may be required to do so.

173. Can one spouse mandate the other to administer the assets?

With joint assets, depending on the nature of the asset, often they can e.g. savings accounts, bank accounts. However, with stocks and shares or real property, then a formal power of attorney is required even where the property is jointly owned.

174. Are there important acts concerning assets (e.g. significant gifts, disposal of the matrimonial/family home or other immovable property) that require the consent of the other spouse?

Where the property is jointly owned, both spouses would be required to consent to sale and there are restrictions on sale of the matrimonial home where it is occupied by both spouses but owned by just one of them and the spouse's consent must be obtained (S. 31 Family Law Act 1996).

175. Are there special rules for the administration of professional assets?

No.

176. Is there a duty for one spouse to provide information to the other about the administration of the assets?

On divorce there is a duty of full disclosure of assets. If it is feared that a spouse will dissipate or hide assets which should be redistributed on divorce, then the court can make an order restraining or reversing disposition of the assets (S. 37 English Matrimonial Causes Act 1973)

177. How are disputes between the spouses concerning the administration of assets resolved?

They are resolved as part of the property adjustment applications on divorce. Otherwise, general law of contract or property law applies.

178. What are the possible consequences when a spouse violates the rules governing the administration of assets? What are the possible consequences in other cases of maladministration of the assets?

On divorce, this will be conduct it is inequitable to disregard under S. 25(g) English Matrimonial Causes Act 1973 and the court will usually adjust the redistribution to take this into account.

179. What are the possible consequences if a spouse is incapable of administering the assets?

If an enduring power of attorney (or since 2007 a lasting power of attorney) has been made and registered, then the attorney has power to act in the place of that spouse. Otherwise, the

court of protection has power to appoint a Deputy to act in the best interests of the incapacitated spouse. This is all now governed by the English Mental Incapacity Act 2005.

S. 40 English Matrimonial Causes Act 1973 enables sums payable to a spouse on divorce who lacks mental capacity to be paid to a third party in that spouse's interests.

V.3. Distribution of assets upon dissolution

180. When do the competent authority's powers of redistribution arise, e.g. on separation, death of a spouse or divorce?

On decree nisi of divorce, the court has power to make property adjustment orders which take effect on decree absolute (S. 24(3)). On death, if a spouse has received insufficient financial provision under the will, they may make an application for financial provision under the English Inheritance (Provision for Family and Dependents) Act 1975 at which point the court's powers arise. On intestacy, S. 46 of the English Administration of Estates 1925 provides for division of the estate according to a specific order and in specific shares.

181. What powers does the competent authority have to redistribute the spouses' assets?

The court has complete power to redistribute all assets as between the spouses in accordance with the statutory criteria in S. 25.

182. What assets are taken into account? Are e.g. premarital assets and debts, assets acquired by gift, will or inheritance and debts related those assets, the increase in value of the spouses' property and debts related to that property, pension rights and claims and insurance rights taken into account? How are they valued?

In principle, all assets and liabilities are taken into account, but some may be excluded. All property will be redistributed in order to meet the parties' needs. Where assets exceed needs, then matrimonial property will be shared first, and whether non-matrimonial property, - pre-acquired assets, inheritances, gifts to one spouse, are redistributed is a matter for the court but are less likely to be.

Valuation may be by two different expert valuers for the wife and husband but usually the court instructs the parties to jointly instruct an independent and appropriately qualified expert who will value the property and the parties agree to abide by that valuation.

183. What are the relevant dates for the determination and valuation of assets? E.g. is the fact that the spouses are living apart before the dissolution of the marriage relevant?

Usually, the date of the court hearing is the relevant date.

184. What happens if one spouse's assets are used for investments in the other spouse's assets? Is there any right to compensation? If so is this a nominal compensation or is it based on the accrual in value?

There is no specific right to compensation, but this would certainly be taken into account and an adjustment made. The recent case of *B v B* [2008] EWCA Civ 483 dealt with this and it confirmed that the investment of an inheritance in the other spouse's business justified departure from the equal sharing principle and also indicated that a joint valuation should be undertaken. The compensation would not be nominal.

185. What happens if one spouse's assets have been used for payment of a debt of the other spouse? Is there a rule of compensation? And if so, how is compensation calculated?

There is no rule, but it would be taken into account in distributing assets on divorce.

186. Do the spouses have preferential rights over the matrimonial/family home and/or the household's assets?

No.

187. Do the spouses have preferential rights over other assets?

No.

188. To what extent, if at all, does the distribution of the assets affect the attribution of maintenance?

It is looked at as a global package. So if maintenance is not awarded but is appropriate in principle, this may increase the amount of property awarded to that spouse.

189. To what extent, if at all, can the competent authority transfer or modify the pension rights and claims of one or both spouses?

The court can attach a pension when making an order for financial provision under S. 23 English Matrimonial Causes Act 1973 which requires the spouse who has the pension fund to make payments into it for the benefit of their former spouse. A better option is for the court to make a pension sharing order under S. 24B English Matrimonial Causes 1973, which will effectively transfer part of the pension into the name of the other spouse who then keeps this as their own pension fund to which they can make further contributions.

190. Are there, besides the rules of succession, specific rules governing the competent authority's power to redistribute the assets upon the death of one spouse?

Yes but only on the application of a spouse under the English Inheritance (Provision for Family and Dependents) 1975 for financial provision. Normally the court will ensure that a spouse gets on death what they would have got had the parties divorced (S. 3(2)(b) English Inheritance Act 1975.)

D. MARITAL AGREEMENTS

191. Are future spouses permitted to make a pre-nuptial agreement regulating their property relationship? If so, is it binding? Or if it is not binding, does it have any effect?

Yes they are permitted, but no they are not strictly binding. Yes it may have an effect as it will be taken into account as one of the circumstances of the case on divorce and as conduct it would be inequitable to disregard under S. 25 English Matrimonial Causes Act 1973. The leading case on this is *K v K (ancillary relief: pre-nuptial agreement)*.¹² If the parties have both taken independent legal advice, there has been full disclosure of assets, there is no great inequality of bargaining power or undue influence, have entered into the agreement some time before the marriage (e.g. 21 days), have taken account of the position where there are children and the agreement is still appropriate to their situation, the terms are not completely out of line with what the court could order, then the courts are now influenced by the agreement although it will not be strictly enforced as is the position in civil law jurisdictions. Particularly where the marriage is short, there seems to be a growing inclination to follow the agreement, at least in part.

192. Are spouses permitted to make a post-nuptial agreement regulating or changing their property relationship? If so, is it binding? Or if it is not binding, does it have any effect?

Yes, providing it does not restrict the right to apply to the court, but it is not necessarily strictly binding as it cannot oust the jurisdiction of the court (S. 34 English Matrimonial Causes Act 1973).

193. What formal requirements must the pre- and/or post-nuptial agreement fulfil to be valid as between the spouses?

They need to be in the form of a deed. They can also be approved by the court as a consent order following full disclosure of all assets at which point they are enforceable as a court order (S. 33A English Matrimonial Causes Act 1973).

194. What formal requirements must the pre- and/or post-nuptial agreement fulfil to be valid in relation to a third party?

They are not and would need the consent of the third party or a separate agreement with them to effect the provision.

Is there a system of registration of pre- and/or post-nuptial agreements? If so describe briefly the system and its effect.

No.

195. Is full disclosure of the spouses' assets and debts necessary for the making of a pre- and/or post-nuptial agreement?

There are no rules, but case law indicates that if this has not occurred, it is unlikely to take the agreement into account see e.g. *Kv K* (above).

196. If the agreement has to be made before an official (e.g. a notary), is that official obliged to inform the spouses about the content and the consequences of the pre-

¹²) [2003] 1 FLR 120.

and/or post-marital agreement? If so, what happens if the official does not fulfil his or her obligation?

No - Not relevant.

197. Provide statistical data, if available, regarding the making of pre- and/or post-nuptial agreements.

Not relevant. There is anecdotal evidence from solicitors that more people are making pre-nuptial agreements, particularly if they are remarrying, despite the lack of certainty surrounding enforceability.

198. May spouses through pre- and/or post-nuptial agreements only choose, where applicable, a statutory matrimonial property regime and/or do they have the freedom to modify such a regime or even create their own regime?

Not relevant.

199. If spouses can modify through pre- and/or post-nuptial agreements a statutory regime or create their own regime, can those modifications be made to:

- a. categories of assets;**
- b. administration of assets;**
- c. distribution of assets;**
- d. depend upon the ground of dissolution of the marriage?**

Not relevant.

200. Are there typical contractual clauses used in practice to modify essential elements of the matrimonial property regime, where applicable, or to achieve a certain result, e.g. that certain rights are excluded only upon divorce but not on death of a spouse?

No - Not relevant.

201. Can the competent authority override, modify or set aside pre- and/or post-nuptial agreements on account of unfairness or any other ground?

Yes, they have complete discretion as whether to enforce the agreement, or take it into account or ignore it, subject to case law referred to above.