

Family law reform: pre-nuptial agreements, needs and matrimonial property

A summary of the Law Commission's recommendations

The Law Commission has today (Thursday 27 February 2014) released their recommendations about if and how the law relating to financial division on divorce should be reformed.

More than pre-nuptial agreements

The focus of media and public attention thus far has been on the recommendations in relation to pre-nuptial agreements. The report is only partially about pre-nuptial agreements. The report does not recommend all encompassing automatic binding pre-nuptial agreements. The recommendations preserve the requirement that the financial needs of each spouse and their children must be met following a divorce and irrespective of what any pre-nuptial agreements say to the contrary.

A pre-nuptial agreement is entered into by prospective parties to a marriage and sets out what they wish to happen in relation to their finances should their relationship break down. It is currently permissible in law, and will be taken into account when agreeing or determining financial division, but crucially it is not binding. These agreements could continue to be entered into whether or not the recommendations were enacted.

A qualifying nuptial agreement does not yet exist in law. It is this that the Law Commission is recommending be introduced. This agreement allows a couple to partially bind themselves to a certain financial outcome in the event their marriage breaks down. It is restricted to whether non-matrimonial property (such as inheritance) that isn't required by either party to meet their financial needs or those of their children can be excluded from sharing such that it isn't available for subsequent re-distribution to the other spouse.

Qualifying agreements

So how does the Commission recommend that an agreement qualifies as binding? The Commission has made it clear that it is not just the subject matter that is relevant but how the parties came to agree such terms.

To become a qualifying nuptial agreement the parties will have to comply with certain strict formalities including having shared financial information, taken legal advice and having entered into the agreement at least 28 days before the wedding.

The recommendations do not compel parties not to share. Rather they allow them to decide (subject to providing for needs) if, how and what they want to share. Importantly an agreement could, and in reality commonly would, deal with only a single asset such as an inheritance.

Financial division on divorce

While the media focus has been on prenuptial agreements the report is more all encompassing and looks at how the law calculates financial division on divorce.

The Commission does not recommend the introduction of a formulaic approach to financial division on divorce. They specifically recommend we retain our discretionary system. That said, they do not firmly reject the idea that guidance can be given and further that the guidance can be descriptive as well as giving a range of possible actual outcomes.

The Commission states that such a development should be approached with caution and recommends undertaking work with the view to determining whether an aid to calculation could assist, in particular a codification of the principals that we apply to financial division on divorce, not only explaining what the considerations are, but how to apply them.

While the Commission favours retaining the discretionary system, it also acknowledges that family law is inaccessible to the public and difficult for all but specialist lawyers and judges to understand and apply. It is for this reason there is much emphasis on the need for guidance to help in understanding the law, the legitimate relevant factors that are taken into account (and those that are ignored) and most particularly the concept and calculation of needs.

What next?

Already the Law Commission's report has caused much consternation and debate. Already the subject has appeared on the front page of The Times. Whether or not the recommendations are taken up by government depends largely on whether there is political appetite for reform in an environment where there is unavoidable controversy in any entanglement with the often hot potato that is family law. Despite this, there will inevitably be increased interest in pre-nuptial agreements as a result of these discussions irrespective of whether the recommendations go forth.

For further information, please contact:

James Carroll

Partner

+44 (0)20 7440 4839

James.Carroll@russell-cooke.co.uk

This material does not give a full statement of the law. It is intended for guidance only and is not a substitute for professional advice. No responsibility for loss occasioned as a result of any person acting or refraining from acting can be accepted by Russell-Cooke LLP. © Russell-Cooke LLP. February 2014

www.russell-cooke.co.uk