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Needs in the Everyday Divorce

Max Guest

Abstract:

This thesis intends to critically evaluate the current model of asset reallocation, as it is applied in everyday, low-value divorces. In particular, it will focus on the principle of need, which has come to represent an integral element of our current model's approach. A primary research question that will guide this thesis is an assessment of why the law provides for needs on divorce. This will require a historical evaluation of the principle's foundations in order to identify the influences that have moulded this principle into its current form. An understanding will then be developed regarding the modern facets of this principle. This will enable this thesis to question the relevant and opposing policies that regulate the principle's contemporary operation.

It will then be queried whether it is justifiable to retain this principle in the light of its historical development, its contemporary use as well as the current state of divorce law. Alternatively, a number of proposals for reforms shall be identified and evaluated. It will be concluded that given recent legal developments and contemporary understandings of gender, obligation and marriage, the principle of needs is no longer an appropriate principle through which to govern the asset reallocation process in everyday divorces. A proposal for reforming the current model of asset reallocation will accordingly be identified and defended.

Needs in the Everyday Divorce

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2016

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Abbreviations

MCA 1857 Matrimonial Causes Act 1857

MCA 1973 Matrimonial Causes Act 1973

LASPO 2012 Legal Aid, Sentencing and Punishment of Offenders Act 2012

Introduction

Overview of the Asset Reallocation Process

This thesis will critically evaluate the law governing asset reallocation on divorce.¹ It is important to recognise at the outset that the current statutory provisions governing asset reallocation on divorce stem from a statute that is now more than forty years old: the Matrimonial Causes Act 1973 (MCA 1973).² This statute operates to grant the judiciary broad discretionary powers when reallocating assets on divorce.³ Legally, reallocation requires the grant of a financial order by the court, of which various are available.⁴ The salient statutory provisions that guide these far-reaching discretionary powers are contained within section 25 of the MCA 1973. It recognises a number of matters to which the judiciary should ‘have regard to’ when reallocating assets. It has since been confirmed that weight should be attributed to these statutory considerations to the extent that they are compatible with the overarching objective of the court; the grant of a ‘fair’ reallocation of the assets.⁵

This thesis will focus closely on section 25(2)(b), which requires the judiciary to have regard to the divorcing parties’ ‘financial needs’ when reallocating assets. Though this is the statutory foundation of modern needs provision, in recent years other statutory subsections have been deemed relevant when assessing needs on divorce.⁶ This has occurred following the increasing importance that the judiciary have attributed to provision for needs. This is most lucidly exemplified within the House of Lords ruling of *Miller v Miller; McFarlane v McFarlane*, where Lord Nicholls

¹ The term ‘divorce’ will be used for brevity, but encompasses heterosexual and same sex divorces, as well as dissolutions of civil partnerships. Similarly, the term ‘asset reallocation’ will be used in order to refer to the process by which the judiciary grant financial orders on divorce; previously known as ancillary relief and currently governed by Part II of the Matrimonial Causes Act 1973.

² Its provisions being largely reflected within the Marriage (Same Sex Couples) Act 2013 and the Civil Partnership Act 2004.

³ It can be contrasted with systems that operate a community of property regime. These regimes pool spouses’ assets on marriage and rely to a greater degree on rules to govern the financial consequences of divorce. For an outline of the variety of forms such regimes can take see, A Barlow, T Callus and E Cooke, ‘Community of Property: A Study for England and Wales’ (2004) 34 Fam Law 47.

⁴ The types of financial orders that judges can make are contained within MCA 1973 ss.23-24.

⁵ See, *White v White* [2000] UKHL 54, [2001] 1 AC 596, [35] (Lord Nicholls).

⁶ Particularly MCA 1973 s.25(2)(c), requiring judges to look at the spouses’ marital standard of living. See, *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 [70] (Sir Mark Potter P).

recognised that provision for spouses' needs was a key requirement of fairness.⁷ Accordingly, providing for the parties' needs on divorce has since been recognised as an important non-statutory principle governing the asset reallocation process.

While compensation and equal sharing of the assets were enunciated as additional requirements of fairness,⁸ it was with reference to the principle of need that Lord Nicholls stated, '[i]n most cases the search for fairness largely begins and ends at this stage'.⁹ Accordingly, when reallocating assets on divorce, the courts are frequently required 'to stretch modest finite resources so far as possible to meet the parties' needs'.¹⁰ It is only when this principle has been adequately satisfied that the courts will consider the alternative requirements of fairness.¹¹

It is in the context of divorces concerned with the division of limited assets or even debts, that divorcing spouses are often unable, or, unwilling to pursue court proceedings, often owing to 'the threat of increased costs that would arise from a final hearing'.¹² Such costs can quickly accumulate, as applications for financial orders on divorce generally take approximately six to twelve months to reach a final hearing.¹³ Instead, the couple are permitted to come to a voluntary financial contract stipulating the financial consequence of their divorce.¹⁴ However, in order for such agreements to be legally binding they must be endorsed by a judge, who is free to reject the agreement if they view it as unfair. Accordingly, it is apparent that, whether applied through the lens of the statute or as a requirement of the overarching objective of achieving a fair division of the assets, the principle of need is of crucial significance in low-value asset reallocation proceedings.

⁷ See, *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 FCR 213 [10] (Lord Nicholls).

⁸ *ibid* [16] (Lord Nicholls).

⁹ *ibid* [12] (Lord Nicholls).

¹⁰ *ibid* [12] (Lord Nicholls).

¹¹ Thus, they are often only raised in cases with significant assets for reallocation.

¹² Emma Hitchings, 'Chaos or Consistency?' in J Miles & R Probert (eds), *Sharing Lives: Dividing Assets: An Inter-disciplinary Study* (Hart Publishing 2009) 196.

¹³ See, 'Money and Property When A Relationship Ends' (*Gov.uk*, 10 August 2015) <<https://www.gov.uk/money-property-when-relationship-ends/apply-for-a-financial-order>> accessed 15 August 2015.

¹⁴ See MCA 1973, s.33A.

Problems with the Current Framework

Whilst the MCA 1973 has been amended,¹⁵ most would be quick to query why the English and Welsh system remains tied to the intents and purposes of a legislative body that operated at a time where social and moral expectations about marriage were dramatically different to those of today.¹⁶ This absence of legislative development is particularly pronounced when one considers the role that moral and social attitudes have to play in marriage; an area so innately concerned with religion, gender and obligation. Consequently, this thesis argues that the asset reallocation process should be viewed as ‘a concept in flux, ever-changing to meet the concerns of public policy’.¹⁷ In any case, it is apparent that the task of developing the law has been left to the judiciary. This has been pursued on a case-by-case basis through the application of their far-reaching discretionary powers. However, it must be recognised that a number of problems have arisen as a result of judicial adjudication being the primary means through which the domestic asset reallocation regime has been developed.

The recognition of some of these deficiencies led the Law Commission to undertake a two year consultation-driven, ‘targeted review’ into, *inter alia*, the modern need principle.¹⁸ Its express aim was ‘to bring clarity and predictability to areas of that law that cause particular difficulties’.¹⁹ It was the publication of this Report that helped to prompt this thesis, as whilst the Law Commission did take decisive and influential steps towards recognising the law’s unpredictability of outcome, it will be argued that

¹⁵ Most notably, via the Matrimonial and Family Proceedings Act 1984 and the Civil Partnership Act 2004.

¹⁶ For example, in 1966 there were fewer than 40,000 divorces in England and Wales and 384,497 marriages. Comparatively, in 2010 there were 119,589 divorces and a mere 243,808 marriages. See, Office for National Statistics, ‘Number of Divorces’ (*ONS Statistical Bulletin*, 6 February 2014) <<http://www.ons.gov.uk/ons/rel/vsob1/divorces-in-england-and-wales/2012/stb-divorces-2012.html#tab-Number-of-divorces>> accessed 20 July 2015. Whilst these figures are not conclusive, they are indicative of the fact that social and moral expectations surrounding marriage and divorce have evolved.

¹⁷ Laura Morgan, ‘Current Trends in Alimony Law: Where Are We Now?’ (*GPSolo eReport*, 2012) <http://www.americanbar.org/publications/gpsolo_ereport/2012/april_2012/current_trends_alimony_law.html> accessed 10 July 2015.

¹⁸ For their final report see, Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No. 343, 2014).

¹⁹ Law Commission, ‘Matrimonial Property, Needs and Agreements: Current Project Status’ (*Law Commission*) <<http://www.lawcom.gov.uk/project/matrimonial-property-needs-and-agreements/>> accessed 20 July 2015.

their Report did not go far enough towards recommending substantive reform. In particular, it shall be asserted that the Law Commission's recommendations failed to sufficiently recognise the need to rein in the excessive amount of discretion currently granted to the judiciary. This becomes apparent when looking at their omission to recommend a substantive change to the matters currently considered under MCA 1973 section 25(2), despite the existence of heavily subjective and outdated statutory facets of the need principle that are present within this section.²⁰

The discretionary nature of the current system has also caused legal unpredictability following the judiciary's failure to agree on the precise meaning and parameters of the need principle. It is an unsatisfactory state of law when legal principles have received divergent interpretations, such as in the House of Lords decision in *Miller; McFarlane*.²¹ It was in this case that Baroness Hale expanded the traditional understanding of the need principle, stating that it should be 'generously interpreted' in cases with substantial assets, so as to not limit the amount of the award.²² However, she went on to suggest that this principle would only justify redistribution for needs that have been generated by the relationship.²³ In the same ruling, Lord Nicholls stated that the need principle could justify provision for needs that have not arisen as a result of the relationship, such as those 'rising from age or disability'.²⁴ The fact that clear ambiguity regarding the precise role of the need principle is present within one senior court decision evidences the difficulties that may occur when applying the law.

The uncertainty present in the current law is likely to become a more prominent deficiency in the light of the austerity measures taken by the previous Coalition Government in relation to legal aid. The introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) reflected an intention to reduce the 2014 legal aid budget by £350m.²⁵ All private family law cases that do not

²⁰ This argument will be developed in Chapter Three.

²¹ *Miller; McFarlane* (n 7).

²² *ibid* [144] (Baroness Hale).

²³ *ibid* [138] (Baroness Hale).

²⁴ *ibid* [11] (Lord Nicholls).

²⁵ 'Legal Aid Cuts and Reforms' (*Chambers Students*, November 2013)

<<http://www.chambersstudent.co.uk/Articles/Newsletter/1155>> accessed 7 August 2014.

involve domestic violence are essentially no longer covered by legal aid.²⁶ Instead, the Government appears to be reserving court adjudication to those litigants that can afford it. This has led some academics to characterise the Government as incentivising a ‘settlement culture’.²⁷ In this context, increasing numbers of divorcing spouses are unable to obtain not only legal aid but also legal advice. These litigants are either forced into representing themselves in court or into cheaper forms of dispute resolution such as mediation.²⁸ This class of litigants will be referred to as ‘litigants in person’.²⁹

Whilst the legal aid reforms were aimed at reducing expenditure, the law’s current unpredictability is preventing them from having the desired effect. The costs of protracted proceedings involving litigants in person can be very substantial, and judicial criticism of disproportionate costs is frequently voiced.³⁰ This point has been recognised by the Lord Chief Justice Sir John Thomas, who has noted that the presence of litigants in person ‘significantly added to the time [a case takes]’.³¹ Thus, it is clear that if the current Government wants to successfully achieve its cost-cutting aims, it must guide litigants in person in order to prevent them ‘clogging up’ the court system, exacerbating an already laborious process.³² These sentiments have been recognised by both the President of the Supreme Court³³ and NAPO³⁴, who found that

²⁶ For further information see, ‘Legal Aid Changes: Key Information and Advice’ (*Law Society*, 13 March 2013) <<http://www.lawsociety.org.uk/support-services/advice/articles/legal-aid-changes-key-information-and-advice/>> accessed 22 January 2015.

²⁷ G Davis, S Cretney, J Collins, *Simple Quarrels* (Oxford: Clarendon Press, 1994) 211.

²⁸ Which is still covered by legal aid, see the Civil Legal Aid (Remuneration) Regulations 2013 SI 2013/422.

²⁹ For further information regarding the resulting negative consequences of these cuts, see, C Bevan ‘Self-Represented Litigants: the Overlooked and Unintended Consequence of Legal Aid Reform’ (2013) 35 JSWFL 43.

³⁰ See *A v A (No 2)* [2007] EWHC 1810 (Fam) (Munby J).

³¹ John Hyde, ‘Litigants in person putting pressure on courts system’ (*The Law Society Gazette*, 3 April 2014) <<http://www.lawgazette.co.uk/law/litigants-in-person-putting-pressure-on-courts-system-lcj/5040663.article>> Accessed 30 July 2014.

³² See; Lesley Pendlebury Cox, ‘Litigants in Person Cases: It Doesn’t Have to Be Like This’ (*Family Law Week*, 2012) <<http://www.familylawweek.co.uk/site.aspx?i=ed97034>> Accessed 6 August.

³³ Lord Neuberger, ‘Judges and Policy: A Delicate Balance’ (*Institute for Government Lecture*, 18 June 2013) [27]; ‘less legal aid means more unrepresented litigants and worse lawyers, which will lead to longer hearings and more judge time’.

³⁴ The union representing family court staff.

following the aforementioned legal aid cuts, almost two thirds of its surveyed members ‘said they spend more time on court duties and in longer first hearings’.³⁵

Consequently, some academics have argued that the law’s lack of clarity combined with the trend within family law to encourage private settlements may lead to ‘a risk that individuals may agree to accept inadequate financial support or be pressured into accepting unsafe contact arrangements’³⁶ when ‘bargaining in the shadow of the law’.³⁷ It is this thesis’ view that for the above reasons there is a need now more than ever to clarify the framework guiding the asset reallocation process. This requires the need principle to be sufficiently transparent for all practitioners and litigants who are required to interpret and apply it to their specific factual circumstances. Finding a potential solution to these criticisms and exploring the extent to which the legal framework should continue to rely on judicial discretion rather than strict rules will form central themes of this thesis.

Research Questions

Accordingly, a number of research questions must be raised in order to guide this thesis in its search for the most appropriate means of legal reform. Firstly, it will be queried *why* the law has traditionally made provision for needs on divorce. This will provide an initial understanding as to some of the traditional justifications for needs-based provision. These findings will then guide an assessment of the role of the need principle within modern asset reallocation proceedings. An understanding of the historical and contemporary objectives of the need principle will then assist this thesis to uncover whether the need principle remains fit for purpose.

The conclusions drawn from these questions will then justify the extent to which the implementation of objective, rule-based foundations are required in order to govern

³⁵See, ‘The impact of legal aid cuts on Family Justice’ (*Family Court Unions Parliamentary Group*, April 2014) <<https://www.napo.org.uk/sites/default/files/The%20Impact%20of%20Legal%20Aid%20Cuts%20on%20Family%20Justice.pdf>> accessed 22 January 2015.

³⁶ J. Masson, R. Bailey-Harris, R. Probert, *Principles of Family Law* (8th edn, Sweet & Maxwell, 2008) 7.

³⁷ See, RH Mnookin, L Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1979) 88 *Yale Law Journal* 950.

the asset reallocation process. This thesis will conclude by supporting the reform proposal that provides the most appropriate response to the prevailing criticisms of this area of law, whilst simultaneously recognising the context in which the current asset reallocation regime operates.

Methodology

This thesis' assessment of the need principle will occur within the context of the 'everyday divorce'.³⁸ This term is used to refer to those divorces that have insufficient assets to make provision beyond the need principle. This category of cases will be the focus of this thesis for two main reasons. Firstly, in everyday divorces assets that are expended in order to ascertain suitable provision under the need principle are subsequently unavailable to help realise this objective. Therefore, the law should be as transparent as possible in order to prevent wasted legal costs that could otherwise be used to meet spouses' needs. Secondly, it is in these cases that spouses are likely to lack access to legal representation, particularly following the introduction of the aforementioned legal aid cuts that have had a dramatic impact on private family law proceedings.³⁹ Thus, an uncertain and expensive asset reallocation process is likely to cause the greatest harm and inequity to spouses who are financially vulnerable and in the greatest need. Reference will be made to so-called 'big money' divorces only when such decisions affect the need principle's operation within everyday divorces.

The first chapter of this thesis is a historical exploration into the evolving models of asset reallocation that have developed by varying institutions. This will assist in uncovering why parties have had their needs provided for on divorce. This will pave the way for later chapters to highlight where facets of the modern approach to need provision can be attributed to outdated justifications. This chapter will also illustrate that the law governing asset reallocation is a product of its time, having been

³⁸ This wording has been chosen due to the fact that this classification encompasses the majority of asset reallocation proceedings on divorce. This point was recently recognised by the Law Commission, see, Law Commission (n 18) para 1.16. This classification of divorces can be contrasted with those concerned with substantial assets for division, often referred to as 'big money cases'.

³⁹ See LASPO 2012.

consistently modified in order to respond to both the legal landscape it operates within and to societal views regarding marriage and divorce. Recognition of this will provide further justification for this thesis' call for reform.

Chapter Two will then turn to evaluate the current model of asset reallocation in England and Wales. This will be with a view to understanding the role that the need principle plays within everyday divorces as well as the objectives that this principle is explicitly and implicitly tasked with achieving. Hence, this thesis will turn to assess the principle's current mode of operation when governing the asset reallocation exercise. This will be achieved through assessing the effect that this principle has had on judicial reasoning when reallocating assets. It will also evaluate the statutory considerations now understood to be facets of the need principle. This chapter will then turn to evaluate the other matters that influence judicial applications of discretion. Such an evaluation will provide an understanding as to the compatibility, or otherwise, of these considerations with the need principle.

Chapter Three will then build upon the findings of the previous chapters through providing a critical evaluation of the need principle within everyday divorces. It will start by raising more general problems with the leading statute governing the asset reallocation process, the MCA 1973. This will be with a view to understanding the framework within which the need principle operates. It will also help to identify some of the implications that have resulted from this statute's reliance on exercises of judicial discretion.

Referencing both the context and framework within which the need principle operates, criticisms will then be levelled against the modern principle. Thus, criticisms will be targeted at specific examples of where the judiciary have failed to elucidate or agree upon the parameters and applicability of the need principle. It will also highlight aspects of the need principle that are no longer justified. This chapter will also draw upon socio-economic research in order to substantiate the claim that the objectives that the need principle has been tasked with are not being achieved.

This chapter will end with an evaluation of the Law Commission's recent report concerning the law governing asset reallocation on divorce. This will recognise any omissions from the Law Commission's Report, before identifying problems with their reform recommendations. Some of this Report's conclusions, however, will be supported, particularly the invitation for further research into a formula to govern the asset reallocation exercise.⁴⁰ This report will also provide an alternative basis on which to evaluate the forthcoming reform proposals.

With the aforementioned faults of the current law in mind, the final chapter of this thesis will turn to address the most appropriate means of rectifying or reforming the English and Welsh approach to asset reallocation and the need principle in everyday divorces. Thus, this chapter shall provide a response to the law's current deficiencies whilst acknowledging the changed landscape of modern family law. It will begin with a discussion as to some of the advantages and disadvantages of basing an asset reallocation regime on rules or discretion. This discussion will recognise that if the Government wishes the judiciary to continue to pursue its current model of asset reallocation, then an appropriate balance 'between different mixes of discretion and rules' is required.⁴¹ It will then go on to suggest an alternative justification for dividing assets that, if accepted, may provide coherent and transparent guidance in order to assist all litigants, especially those without legal representation, when calculating their entitlements on divorce.

Accordingly, this chapter will raise three alternative proposals for reform that attempt to realign the law with an appropriate balance between rules and discretion. Each of these proposals will offer alternative means of reaching this balance. This thesis will ultimately argue that the introduction of duration-based guiding presumptions will provide the most effective reform proposal. It will be argued that such presumptions provide an adequate middle ground between rules and discretion, whilst continuing to achieve the objective pursued through modern needs provision. It will also be argued that this proposal is largely compatible with the recent Law Commission Report's

⁴⁰ See, Law Commission (n 18) para 3.159.

⁴¹ Carl E Schneider, 'Discretion and Rules: A Lawyer's View' in K Hawkins (eds), *The Uses of Discretion* (Clarendon Press: Oxford, 1992) 49.

recommendations.⁴² However, it will be shown that this proposal offers a more proactive response to the law's current context and consequential shortfalls.

Whilst this thesis is incapable of defining the precise parameters of what the chosen reform proposal would require for its implementation into law, it is hoped that this thesis is able to generate further awareness and debate in pursuit of this proposal. To this end it invites further research and criticism into its findings.

⁴² See, Law Commission (n 18).

Chapter One: The Historical and Theoretical Development of Needs Provision

Synopsis:

This chapter intends to question why the law has traditionally made provision for spouses' needs on divorce. In order to achieve this it will explore some of the historical models of asset reallocation under which the concept of need has been drawn upon and attributed weight. In order to delineate these models, this chapter shall examine some of the societal influences and institutions that have constrained and guided the law's operation. This will provide this thesis with an understanding of why the principle of need has arrived at its current state. In turn, this will also pave the way for future chapters to attribute facets of modern needs provision to the context it developed within, thereby, adding weight to the view that it contains outdated elements.

This chapter shall also evidence that the identified models of asset reallocation are innately a product of their time, developed with reference to the religious, moral and societal views prevalent during their development. The recognition of these influences will allow this thesis to develop its proposal to reform the law in line with contemporary views regarding the modern role of religion, gender and entitlements within marriage.

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Introduction

The focus of this chapter will be on analysing the historical development of the law with respect to asset reallocation on divorce. This will be with a view to answering a core research question of this thesis, namely, why has the law made provision for financial needs on divorce? In order to answer this question, this thesis will discern the objectives that have influenced the courts when making financial provision between spouses on divorce. Accordingly, models of asset reallocation will be identified, with reference to the objectives they pursued and the bodies that administered them. It will be shown that three separate models of asset reallocation can be discerned, as applied by the Ecclesiastic Courts and the secular Judiciary. This will be with a view to understanding the varying justifications that have been raised in support of making provision for needs on divorce. This will provide an understanding as to why need provision has become a guiding consideration within our most recent model of asset reallocation.

It should be recognised at the outset that the law surrounding asset reallocation on divorce is inextricably linked to the evolution of societal views regarding the permissibility of obtaining a divorce. Hence, this chapter will inevitably make reference to the historical state of divorce law when evaluating the various models of asset reallocation. In this chapter, the link between the acceptability of divorce and the subsequent catering for its financial consequences will be shown. To this end, the effects of evolving societal views of marriage on the law relating to asset reallocation on divorce will be considered. This is because the understanding that society attributes to marriage has consistently played a central role in dictating the possibility of its dissolution and the resulting financial consequences. It will be shown that as societal views have changed so too have the justifications for granting financial reallocation on divorce. For example, the common law doctrine of coverture has had a profound influence over the asset reallocation exercise.⁴³

⁴³ The traditional definition of this doctrine is contained within 1 Bl Comm ch 15; '[b]y marriage, the husband and wife are one person in law; that is the very being or legal existence of the woman is suspended during the marriage'. Prior to its abolition, this doctrine resulted in the husband acquiring ownership rights to his wife's property on marriage.

This chapter will pave the way for the forthcoming chapters to evaluate contemporary views of marriage and divorce with a view to assessing the compatibility of the current law with contemporary social views and realities surrounding divorce. It will also evaluate the extent to which some of the historic statutory considerations had their roots in outdated understandings of marriage and divorce. Chapter Two will then turn to assess which contemporary statutory provisions embody these foundations and the extent to which the modern need principle remains influenced by these outdated views. This will justify the removal or amendment of any such statutory provisions in order to better align the law with current social practice. This objective will require thorough emphasis to be placed on tracking and evaluating the development and recognition of modern facets of needs provision within these historic models of asset reallocation.

The conclusions drawn in this chapter will lead on to an assessment as to whether modern provision for need is based on outdated foundations. This will involve identifying the similarities between the historic models and the approach currently taken by the judiciary when reallocating assets in everyday divorces. The comparison of the various models of asset reallocation will enable this thesis to assess the judiciary's current approach to needs, for its compatibility with the context it operates within and societal views regarding marriage and divorce.

The Evolution of Marriage, Divorce and Resulting Financial Obligations

The Ecclesiastical Model's *Divorce a Mensa Et Thoro*

A historical exploration into needs reveals that they have been considered from an early period of history. During the 11th century King William I separated the jurisdictions of the lay and ecclesiastical courts of England. As marriage was viewed as a 'sacrament of the Church, the ecclesiastical courts were not slow in asserting exclusive jurisdiction over matters appertaining thereto'.⁴⁴ The ecclesiastical courts maintained their day-to-day jurisdiction regarding marriage and divorce for almost

⁴⁴ EL Johnson, *Family Law* (Sweet & Maxwell 1958) 1.

eight centuries, due to their unique position to interpret canon law.⁴⁵ Throughout this period they remained steadfast in their deference to canon law and the Book of Common Prayer; where marriage was viewed as an indissoluble sacrament, enduring ‘till death do us part’.⁴⁶ Thus, if a married couple came before the ecclesiastical courts seeking a divorce, the best they could hope to achieve was a *divorce a mensa et thoro*;⁴⁷ grantable on the basis of cruelty, adultery or heresy.⁴⁸

This ecclesiastical doctrine, similar to the modern decree of ‘legal separation’,⁴⁹ did not ‘purport to dissolve the marriage’.⁵⁰ Consequently, the rationale for imposing a continued obligation to provide financial assistance to one’s spouse after divorce was clear-cut:

[A]t marriage a husband undertook a lifelong obligation to support his wife. Alimony [*sic*] was the tool for enforcing that obligation during the spouses’ separation.⁵¹

Thus, the husband’s common law obligation of spousal maintenance,⁵² which was described as ‘a concomitant of the husband’s “ownership” of his wife’s labour and of the legal doctrine of unity of husband and wife’, was not severed by the ecclesiastic *mensa et thoro*.⁵³ The orders that resulted from the refusal to sever this common law obligation were ‘allotted for the maintenance of a wife from year to year’⁵⁴ and so ‘invariably [were] periodical payments’.⁵⁵ Financial orders requiring the reallocation

⁴⁵ i.e. the body of rules and legal principles governing the practice of the Catholic religion and its followers; for a more in-depth discussion regarding the meaning and role of canon law see, Norman Doe, ‘Canon Law and Communion’ (2002) 6 Ecc LJ 241.

⁴⁶ The Book of Common Prayer, *Solemnization of Matrimony*.

⁴⁷ A divorce ‘from bed and board’ which relieved parties of the obligation to cohabit; see, 1 Bl Comm ch 15.

⁴⁸ This was confirmed by Archbishop of Canterbury Whitgift in, *Rye c Fuliambe* (1602) 3 Salk 138.

⁴⁹ This is a legal process enabling a married couple to formalize a *de facto* separation. However, it does not legally terminate the marriage. Such a separation is available via court order and does not require proof that the marriage has broken down irretrievably; see, MCA 1973, ss.17-18.

⁵⁰ CG Vernier and JB Hurlbut, ‘The Historical Background of Alimony Law and its Present Statutory Structure’ (1939) 6 LCP 197, 197.

⁵¹ Cynthia Lee Starnes, ‘Alimony Theory’ (2011) 45 Fam L.Q. 271, 276. Within English and Welsh Law, the term ‘alimony’ has been replaced with reference to the specific financial order/s granted on divorce.

⁵² This was a gender specific obligation discharged by providing for the necessities of life; it was unequivocally removed from law through Equality Act 2010, s.198.

⁵³ J Eekelaar and M Maclean, *Maintenance After Divorce* (OUP, 1986) 2.

⁵⁴ *Wilson c Wilson* (1830) 3 Hag. Ecc. 329, 331.

⁵⁵ Vernier and Hurlbut (n 50) 198.

of capital lump sum payments were not yet available. In exercising their discretion, the ecclesiastical courts' ultimate concern was the wife's 'comfortable subsistence in proportion to her husband's income',⁵⁶ which was also 'consistent with her station in society'.⁵⁷ The preservation of this obligation represented a response to the traditional gender-structure of marriage, whereby the care-giving wife was viewed as dependent on her husband for subsistence.

This emphasis on maintaining the wife's standard of living also reflected the ecclesiastic recognition of the life-long obligation of maintenance that stemmed from the 'indivisible spiritual unity' of the vows made on marriage.⁵⁸ That is to say that the standard of living maintenance obligation was grounded in the status of the spouses' sacramental relationship. The practical result of this ecclesiastical approach to maintenance was an implicit objective to place the parties in the position they would have been in had a separation never taken place. Thus, the ecclesiastical courts refused to absolve former spouses of their 'fiscal obligations'.⁵⁹

However, as a result of the sexual inequality that was pervasive prior to the nineteenth century, the asset reallocation exercise was also riddled with inequality. This is readily apparent in that the ecclesiastical courts frequently quantified the maintenance award to be periodic payments tantamount to one-third of the husband's income.⁶⁰ It was believed that this arbitrary and unfair fractional reallocation rule was the best way to pay respect to the wife's entitlement to maintenance that stemmed from the marriage. Clearly, any attempts to implement this rule into the law today would be rejected outright on the grounds of sexual discrimination.⁶¹ Nevertheless, as the asset reallocation exercise on divorce has always been innately tied to

⁵⁶ *Kempe c Kempe* (1828) 1 Hag. Ecc. 532, 533.

⁵⁷ *Durant c Durant* (1826) 1 Hag. Ecc. 528, 531.

⁵⁸ Kevin J Gray, *Reallocation of Property on Divorce* (Professional Books Ltd 1977) 284.

⁵⁹ The obligations can be described as 'fiscal' as they were directed towards ensuring a basic level of support that would ordinarily have been the obligation of the state. For more information relating to the Government's gradual acceptance and undertaking of this obligation see, P Thane, 'Women and the Poor Law in Victorian and Edwardian England' (1978) 6 *History Workshop* 29.

⁶⁰ See, L Stone, *The Road to Divorce, 1530-1987* (Oxford 1990) 210.

⁶¹ Nevertheless, as discussed below, an attempt was made by Lord Denning in *Wachtel v Wachtel* [1973] Fam 72, to revitalise this approach. However, it was rightly viewed as a historic relic and, accordingly, was greatly criticised thereby failing to attract widespread support.

contemporaneous views of marriage and divorce, this model of asset reallocation prevailed.

The approach taken by the ecclesiastic courts described above will be referred to as the Ecclesiastic Model. Its defining features are its refusal to permit divorces in the modern sense of the word and its attribution of considerable weight to the parties' previous standard of living. Provision for this consideration following the grant of a *divorce a mensa et thoro* was justified as being a natural result of the court's inability to interfere with the sanctity of marriage. Therefore, the common law obligations were not severed on divorce and any attempt to provide for a sustained standard of living through use of the other spouses' assets stems from the Ecclesiastic Model's refusal to sever the sacramental bonds and financial obligations that arose from marriage.

It has already been shown that some of the elements now relevant to provision under the modern need principle were being drawn upon by the ecclesiastical courts when undertaking the maintenance quantum assessment on the grant of a *divorce a mensa et thoro*.⁶² It will be questioned in Chapter Three whether it is still appropriate to consider the parties' standard of living when reallocating assets on the basis of need, given that today's law permits an absolute decree of divorce rather than a mere *divorce a mensa et thoro*. Accordingly, Chapter Four will incorporate these conclusions into its reform proposal assessment.

The prevailing societal understanding of the nature of marriage has not stayed consistent nor has the institution which has held jurisdiction to grant legal dissolutions of these relationships. As a result, justifications for providing spousal support beyond divorce have not remained straightforward or easily identifiable. The remaining sections in this chapter will examine how the change in societal institutions governing the asset reallocation exercise has affected the application of the asset reallocation process on divorce.

⁶² Namely the requirement to consider the parties previous standards of living before the marriage's breakdown; see, MCA 1973, s.25(2)(c).

The Move Away From Ecclesiastic Jurisdiction: Parliamentary and Judicial Divorce

Following the granting of a *divorce a mensa et thoro*, and the establishment of adultery via a ‘criminal conversation’ action,⁶³ extremely wealthy husbands did have access to a process to terminate their marriage.⁶⁴ This was via a Private Act of Parliament which upon receipt of royal assent would relieve the husband of his support obligations. These divorces were justified in a time of anti-Catholic sentiment where the indissoluble nature of marriage was attributed to Catholic teachings. Accordingly, the asset reallocation process, as applied by the legislature, evolved in response to religious agendas and the wealth of those parties who came before it. Ultimately, Parliament required that the wife’s ‘defection was accompanied by palliating circumstances’.⁶⁵ However, this often only amounted to the grant of ‘sufficient property to produce an income which would serve [the wife] at any rate for her bare support’.⁶⁶ The provision for *bare support* in these divorces, which were concerned with considerable assets, reflected the respect that was attributed to the wife’s matrimonial contributions.

Nevertheless, due to the innate difficulty in passing an idiosyncratic statute, such a Bill had to be the subject of arduous endeavour, and, consequently, such divorces were relatively unusual. However, despite religious contempt, many members of the nobility were not deterred. Accordingly, the frequency of such Private Acts increased over the decades.⁶⁷ The steady increase of such Private Acts evidenced the shift of societal understanding regarding the moral permissibility of divorce and, consequently, the acceptability of terminating life-long support obligations.

⁶³ This was a tort action directed against the ‘seducer’ of a man’s wife. Due to the doctrine of coverture, the wife had no right to intervene as she effectively lacked legal existence.

⁶⁴ As opposed to merely the termination of the obligation to cohabit. Grounds by which a woman could receive a parliamentary divorce did exist but were stricter.

⁶⁵ J MacQueen, *The Law of Marriage, Divorce and Legitimacy* (2nd edn, Sweet & Maxwell 1860) 145-46.

⁶⁶ J. Barton, ‘The Enforcement of Financial Provisions’ in RH Graveson, FR Crane (eds), *A Century of Family Law 1857-1957* (London, Sweet & Maxwell 1957) 357.

⁶⁷ I Holdsworth, *A History of the English Law* (Methuen & Company 1903) 390: ‘Before 1715 only 5 such bills were known, between 1715 and 1775 there were 60, between 1775 and 1800 there were 74, between 1800 and 1850 there were 90.’

This was the first time that recognition was paid to the inherent problems in forcing spouses to remain married, and the negative consequences of precluding parties from remarrying.⁶⁸ In this sense the law had taken an initial step towards the current law due to the permissibility of serial marriages. However, the fact that divorce was largely only available to rich men meant that the law continued to reflect both social and sexual inequality with respect to granting divorces and reallocating assets.⁶⁹

The exclusive jurisdiction of Parliament to dissolve marriages continued until 1857 and the enactment of the first Matrimonial Causes Act. A great number of factors led to the introduction of the Matrimonial Causes Act of 1857 (MCA 1857).⁷⁰ This statute removed the ecclesiastical court's divorce jurisdiction and for the first time granted the secular courts the jurisdiction to decree a divorce. Such decrees permitted the *divorce a vinculo matrimonii*.⁷¹ In determining the appropriate level of financial reallocation, the judiciary were guided by a number of statutory considerations. The MCA 1857 required the judiciary to pay regard to, 'her fortune, if any, to the ability of the husband and to the conduct of the parties' and to order such maintenance as it 'may consider *reasonable*'.⁷² However, it must be recognised that although this statute 'altered the procedure for obtaining divorce, [it] introduced no new principles'.⁷³ Accordingly, it remained outside of the secular judiciary's power to grant financial orders requiring the reallocation of capital lump sum payments between divorcing spouses.

The change in jurisdiction relating to financial matters on divorce was achieved by setting up a new court in order to exercise that function: the Court for Divorce and

⁶⁸ See, Stone (n 60) 301.

⁶⁹ During the 180 years they were available, only four Parliamentary divorces were granted to women; R. Phillips, *Untying the Knot – A Short History of Divorce* (CUP 1991) 66.

⁷⁰ This discussion largely goes beyond the remit of this thesis. For contextual purposes, it is sufficient to note that the reforms were influenced by a number of diverse groups recognising a number of different factors in justifying reform. For more information, see the prompting Report; Royal Commission, 'Report of the Royal Commission on Divorce and Matrimonial Causes' (HM Stationary Office, 1853).

⁷¹ i.e. a divorce from the financial obligations of marriage, permitting one or both of the parties to remarry. The MCA 1857 also replaced the *divorce a mensa et thoro* with the concept of judicial separation.

⁷² Matrimonial Causes Act 1950, ss.19(2), (3) (emphasis added); these provisions largely reflected those contained within the original Matrimonial Causes Act 1857, s.32.

⁷³ O.R. McGregor, 'The Morton Commission: A Social and Historical Commentary' (1956) 7 *The London School Of Economics and Political Science* 171, 173.

Matrimonial Causes. Following the Supreme Court of Judicature Act 1873 this jurisdiction was then vested within the Probate, Divorce and Admiralty Division of the new High Court, reaffirming that it was the secular judiciary that was the correct body to determine such matters. This reflected a move away from the traditional position of affording paramountcy to Anglo-Christian values governing this area, marking the ‘final shift in the modern secularization of divorce and an acceptance of the appropriateness of judicial oversight in matrimonial affairs’.⁷⁴ It also reflected the first time that the prohibitive cost of divorce had justified a change in the law.⁷⁵

Consequently, financial provision on divorce required justification beyond being the continuation of the common law maintenance obligation that stemmed from the creation of an indissoluble sacrament. Thus, the judiciary had to formulate a model of asset reallocation for cases where the available assets for division were limited. The justifications raised for such provision will now be explored.

Judicial Divorce: The Contractual Model

The Matrimonial Causes Act 1857 granted the judiciary the discretion to provide for spousal maintenance needs, ‘even after the obligations of marriage had been dissolved by judicial divorce... [Thus] the courts needed to find justification for creating such obligations’.⁷⁶ It no longer made sense to view an ecclesiastical sacrament as the sole theoretical justification for maintaining financial obligations beyond divorce. An alternative view that some members of the judiciary supported was that marriage should be viewed as a ‘civil contract to be regulated by the state’.⁷⁷ Accordingly, divorces began to be governed with reference to the same principles that

⁷⁴ DC Wright, ‘Untying the Knot: An Analysis of the English Divorce and Matrimonial Causes Court Records, 1858-1866’ (2004) 38 U. Rich. L. Rev. 903, 906.

⁷⁵ However, according to Phillips the cost of obtaining a judicial divorce remained a fifth of what was required to obtain a divorce through Parliament; Phillips (n 69) 129-130.

⁷⁶ Eekelaar and Maclean (n 53) 8.

⁷⁷ McGregor (n 73) 173. Nevertheless, the sacramental view of marriage continued to influence judicial views into the twentieth century; see, *Wilson v Carnley* (1908) 1 KB 729 (Kennedy LJ).

were used to govern contracts, and the judiciary gradually recognised the value of voluntary agreements.⁷⁸

In line with this contract-based understanding of marriage, the right to continue to receive support after the legal dissolution of the marriage was ‘inextricably linked with the concept of... relief for wrong doing’.⁷⁹ Consequently, the matrimonial offences⁸⁰ became both ‘the key to divorce... [and] a determinant in property distribution’.⁸¹ Therefore, reallocation was applied in order to provide for an innocent wife’s expectation interest. This method of awarding damages on divorce followed the contractual remedy of expectation damages. This requires innocent parties to a breached contract ‘to be placed in the same situation with respect to damages as if the contract had been performed’.⁸² This remedy for breach of contract has since been described as the ‘ruling principle’ of contract damages.⁸³

The reasoning for imposing this contractual doctrine into family law stemmed from the judicial recognition that the ‘object of the Legislature was to compel the husband to make such a provision... in substitution for that support to which she would have been entitled had she continued his wife’.⁸⁴ Thus, a husband who breached the marital contract, by committing a matrimonial offence, ‘remained under a liability to support his wife’.⁸⁵ This was enforced through the courts making an order for maintenance; in essence refusing to sever his support obligations on divorce. This also explained why a wife could continue to receive maintenance from her first husband, even if she remarried.⁸⁶ Alternatively, if the wife committed a matrimonial offence, the husband could obtain a *divorce a vinculo matrimonii* as a remedy, thus freeing himself from further support obligations. Therefore, despite the implicit rejection of marriage as an indissoluble spiritual sacrament, the view that the courts should seek to maintain

⁷⁸ See, *Hunt v Hunt* (1861) 4 De GF & J 221.

⁷⁹ Law Commission, *The Financial Consequences of Divorce: The Basic Policy* (Law Com No. 103, 1980) para 16.

⁸⁰ That is, the statutorily codified grounds for divorce.

⁸¹ Wright (n 74) 906.

⁸² See *Robinson v Harman* (1848) 1 Exch. 850, 855 (Parke B).

⁸³ *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No. 2)* [1997] 1 WLR 1627, 1634 (Lord Nicholls).

⁸⁴ *Watkins v Watkins* [1896] P. 222, 230 (Lopes LJ).

⁸⁵ Barton (n 66) 357.

⁸⁶ See, *Snelling v Snelling* (1952) 2 All ER 196.

marriages persisted. Enduring financial obligations were a means of deterring matrimonial offences and thus, a conservative ethos persevered.

Furthermore, overt discrimination remained present in the law of divorce, maintaining the position whereby it was more difficult for wives to prove a matrimonial offence had occurred than it was for husbands to do so. This was because wives had to provide evidence of desertion, cruelty, incest, rape, sodomy or bestiality in addition to their petition for adultery. No such additional hurdles were required of the husband.⁸⁷ This extra hurdle was a product of its time and ‘reflected the values of male-dominated Victorian society’.⁸⁸

By the beginning of the twentieth century, in cases with high earning husbands, any award was generally capped at £3,000 of the husband’s income.⁸⁹ The courts justified these awards by granting what was ‘adequate, having regard to the wife’s position in life and necessities’.⁹⁰ This was the first time that needs provision was drawn upon as a principle governing the asset reallocation exercise. Interestingly, it was utilised as a cap on the extent of entitlement to asset reallocation. This cap also limited the extent to which legal recognition could be paid to the value of the wife’s matrimonial contributions. Alternatively, where there were limited divisible assets, the courts continued to attempt to preserve the *innocent* spouse’s living standards as if the marriage had never dissolved.⁹¹ Whilst this may have led to a justifiable allocation for the innocent wife, it left the *guilty* wife with a substantial lack of support and employment prospects, as a direct result of her gender. This shows that in stark contrast to the modern system, a ‘fair’ distribution beyond a capped living allowance was not yet a prospect at the end of the twentieth century.

⁸⁷ Making it easier for husbands to avoid the detrimental financial consequences that would stem from the finding that they had committed a matrimonial offence.

⁸⁸ *White* (n 5) [17] (Lord Nicholls).

⁸⁹ See, *Kettlewell v Kettlewell* [1898] P 138.

⁹⁰ *Sykes v Sykes* [1897] P 306, 313 (Lord Ludlow LJ).

⁹¹ See, *Hartopp v Hartopp* [1899] P 65, 72 (Gorrell Barnes J); ‘the guiding principle which will be found running through the cases is... Where the breaking up of the family life has been caused by the fault of the respondent, the Court, exercising its powers... ought to place the petitioner and the children in... the same position as if the marriage had not been broken up’.

Until the twentieth century the judiciary continued to require that, ‘before a guilty wife could obtain an order for maintenance, she would have to show special circumstances, such as misconduct of her husband’.⁹² This was influenced, at least in part, by the ecclesiastic practice of refusing maintenance to adulterous wives. This practice had been justified on the basis that the wife’s adultery was deemed ‘so heinous a betrayal of her husband as to deprive her of all right to his protection and support’.⁹³ This model of asset reallocation was also supported by prominent legal commentators on the basis that, ‘morally it seems monstrous to compel a man to support through life the women who has dishonoured him’.⁹⁴ The continuation of this practice can also be viewed as informed by the same policy that prevents parties relying on their own breaches of contractual obligation in order to obtain a benefit under that contract.⁹⁵

For these reasons, the initial post-1857 judicial approach can be categorised as pursuing a Contractual Model of asset reallocation. This also expressly bound the asset reallocation exercise to the justification for the divorce. Within this model, needs were catered for in such a way as to sustain sexual inequality and perpetuate the subordination of wives as economically dependent spouses. The causes were twofold. Firstly, as noted above, it required wives to satisfy a higher evidential threshold in order to substantiate a matrimonial offence claim. This led to it being criticised on the basis that it ‘sanctioned two standards of morality’.⁹⁶ Secondly, this model appeared ignorant to the disproportionate financial consequences that wives would suffer on divorce. Either, the husband was guilty of a matrimonial offence and the wife was entitled to a capped living allowance, or, alternatively, the husband satisfied the lower threshold and it was the wife that was held guilty of a matrimonial offence. This latter finding opened up the very real potential for the wife to be left destitute and without entitlement. Thus, it can be readily assumed that this discriminatory law would have deterred married women from instigating such proceedings.

⁹² Home Office, *Royal Commission on Marriage and Divorce 1951-1955* (Cmd 9678, 1956) 132.

⁹³ Barton (n 66) 362.

⁹⁴ J MacQueen, *Divorce and Matrimonial Jurisdiction* (London : Maxwell & Son 1858) 55.

⁹⁵ See *New Zealand Shipping Co v Société des Ateliers et Chantiers de France* [1919] AC 1.

⁹⁶ McGregor (n 73) 178.

This makes it apparent that both of the historic models of asset reallocation used the concept of need as a device through which to maintain the wife's dependence on her former husband. Such provision was never granted on the basis of entitlement. It could be suggested that the contractual model used need provision as a reward for the innocent wife. However, due to the limited quantum of provision that was granted in pursuit of this objective, it arguably makes more sense to view the Contractual Model as using the concept of fault as a deterrent against offending the institution of marriage. Accordingly, both the Ecclesiastic and Contractual Models of asset reallocation viewed divorce as 'harm[ing] the moral and social fabric of society'.⁹⁷ However, due to their often-vulnerable financial positions, this had discriminatory consequences for many wives. Needless to say, these models were unfit for use within an egalitarian society and their use often failed to produce what would be considered a 'reasonable' award within modern financial proceedings.

The Gradual Move towards 'Reasonable' Awards and the Fairness Objective

With the turn of the twentieth century, the Court of Appeal expressly stated in *Ashcroft v Ashcroft and Roberts* that the terms of the MCA 1857 gave the court absolute discretion when determining an order for maintenance, 'so that she may not be turned out destitute on the streets'.⁹⁸ This arguably reflected the beginning of a move away from strict adherence to the theory that a breach of the marital contract was the sole justification for granting a maintenance order on divorce. Instead, a paternalistic judicial agenda can be detected here, recognising and responding to both the wording of the governing statute and the negative financial consequences divorce would often have for wives; who prior to the introduction of the Married Women's Property Act 1882 could not hold separate property or contract as a *feme sole*.

The Act's reference to, and emphasis on reaching, a 'reasonable' award led the President of the Probate, Divorce and Admiralty Division to state that:

⁹⁷ Carol Smart, 'Divorce in England 1950-2000: A Moral Tale' in S Katz et al (eds), *Cross Currents: Family Law and Policy in the United States and England* (OUP, New York, 2000) 366.

⁹⁸ *Ashcroft v Ashcroft and Roberts* [1902] P. 270, 273 (Gorell Barnes J).

[I]t is no doubt true that the considerations of good sense and *fairness* which apply in fixing alimony [*sic*] must have due weight in determining the proper award of maintenance after a decree of divorce.⁹⁹

This expanded the previous observation made by Lindley LJ in the Court of Appeal that, when making maintenance awards in cases where ‘the husband’s income is large, the practice of the Court is to fix a *fair* proportion’.¹⁰⁰ This development was influenced by the growing perception that divorce had a disproportionate effect on the financial standing of wives.¹⁰¹ Furthermore, the recognition of fairness as a guiding principle was encouraged given the contemporaneous attempts by the legislature to abolish the discriminatory common law doctrine of coverture.¹⁰² Thus, the courts began to recognise that:

[T]he origin of the wife’s right to alimony [*sic*] was the right which the husband had to all the property of the wife.¹⁰³

This recognition of fairness and the need to avoid the discriminatory consequences of coverture began to influence the judicial model of asset reallocation on divorce. This change was justified on the basis that the judiciary were ‘doing little more than returning to the wives what had been theirs and which was lost on marriage’.¹⁰⁴

Thus, it was with reference to attaining fairness that this new model of judicial asset reallocation began to supplant the view that maintenance was a remedy for a breach of the marital contract. Nevertheless, realisation of the new fairness objective continued to be influenced by the view that ‘women remained dependent and society

⁹⁹ *Gilbey v Gilbey* [1927] P 197, 200 (Lord Merrivale) (emphasis added).

¹⁰⁰ *Sykes* (n 100) 309 (Lindley LJ) (emphasis added).

¹⁰¹ This judicial move towards recognising sexual equality mirrored contemporary Parliamentary sentiments when enacting the Married Women’s Property Act 1882. This statute permitted, for the first time, married women in England, Wales and Ireland to control and own property in their own right. For more information see, Lee Holcombe, *Wives and Property: Reform of the Married Women’s Property Law in Nineteenth Century England* (University of Toronto Press, 1982).

¹⁰² See Married Women’s Property Acts 1870, 1882, 1883, 1893. Over the following decades, this trend towards implementing equality continued with the 1923 Matrimonial Causes Act’s removal of the unequal grounds for proving a matrimonial offence.

¹⁰³ See *Leslie v Leslie* [1911] P. 203, 205 (Evans P).

¹⁰⁴ *Eekelaar and Maclean* (n 53) 6.

expected husbands to support their wives'.¹⁰⁵ Accordingly, the courts continued to make provision for wives needs on divorce. However, it was argued that a narrow interpretation of spousal needs was 'not the primary consideration' when calculating maintenance orders on divorce.¹⁰⁶ Consequently, in a bid to respond to societal calls for a less discriminatory approach to asset reallocation, a Royal Commission recommended that the judiciary should be granted with greater discretionary powers, in order to interpret the statute's call for 'reasonable' awards more fairly.

Provision beyond Maintenance

A significant, albeit unexpected, expansion to the court's powers, when granting financial orders on divorce, occurred following the Royal Commission on Marriage and Divorce (Morton Commission) of 1956.¹⁰⁷ This Commission was set up in order to respond to the wide-ranging calls for divorce reform in the light of societal changes following World War II and the most recent Matrimonial Causes Act of 1937.¹⁰⁸ Their remit was extensive, looking at a number of issues relating to marriage, divorce and matrimonial finance and property.

There is little doubt that the Morton Commission had a conservative ethos, warning that abandoning the view of marriage as a 'life-long union of one man and one woman' would be 'an irreparable loss to the community'.¹⁰⁹ However, this Commission did take some steps to respond to the disproportionate financial consequences that resulted from divorce. In particular, it recommended that the judiciary be given an unfettered power to grant financial orders requiring the reallocation of capital lump-sums between spouses on, or after, granting a decree of divorce.¹¹⁰ This was later enacted via the Matrimonial Causes Act 1963, which gave the courts the power to order the husband to pay the wife 'such lump sum as the court

¹⁰⁵ Ira Mark Ellman, 'The Theory of Alimony' (1989) 77 Cal.L.Rev 3, 5.

¹⁰⁶ See *Acworth v Acworth* [1943] P 21, 23 (Scott LJ).

¹⁰⁷ Home Office (n 92).

¹⁰⁸ This statute had extended the grounds for obtaining a divorce. However, a ground for divorce that did not require fault to be proved remained notably absent.

¹⁰⁹ *ibid* 9-11.

¹¹⁰ *ibid* 516.

thinks reasonable'.¹¹¹ Accordingly, as Cretney aptly states, 'the courts and the legislature began to move away from thinking solely in terms of income maintenance, and towards making provision by way of capital adjustment'.¹¹²

This was a huge step towards permitting independence after divorce, as lump-sum payments had the potential to preclude the dependency of ex-wives. For the first time a clean break between the financial obligations of the spouses became feasible. The potential to avoid continued dependence was created as the judiciary no longer had to rely solely on granting periodic need-based maintenance orders. This continued the twentieth century theme of removing sexual discrimination from this area of law. Accordingly, in a bid to avoid discrimination, the courts began to attribute weight to various novel considerations, including the wife's matrimonial contributions and the objective of spousal self-sufficiency.¹¹³ For the purposes of this thesis it should be recognised that it was this grant of far-reaching discretion that enabled the judiciary to begin to respond to the discriminatory result that often resulted from divorce.¹¹⁴

However, this common law trend to avoid discrimination and realigning the historical law with its current state was not permitted to advance uninterrupted. Instead, legislative intervention attempted to modernise English and Welsh divorce law, whilst contemporaneously introducing an outdated, ill-conceived objective to guide the exercise of judicial discretion.

The New Ground for Divorce: Irretrievable Breakdown

It was during the 1960s that the Church of England produced the Report, *Putting Asunder*. This Report had recommended the introduction of the concept of breakdown as the new ground for divorce in England and Wales, on the basis that 'empty ties add increasing harm to the community and injury to the ideal of marriage'.¹¹⁵ They believed that it was necessary that 'the court should be empowered to declare defunct

¹¹¹ Consolidated in the Matrimonial Causes Act 1965, s.16(1).

¹¹² Stephen Cretney, *Family Law in the Twentieth Century* (OUP 2003) 416.

¹¹³ Eventually codified in the amended MCA 1973.

¹¹⁴ Whereby wives had been reliant on meagre maintenance orders.

¹¹⁵ Home Office (n 92) 341.

de jure what in their view is already defunct *de facto*'.¹¹⁶ These recommendations, which were drawn upon by the Law Commission in 1969,¹¹⁷ resulted in the introduction of the Divorce Reform Act 1969. This required a new, single ground to be proven before a judge could declare a decree of divorce; that the marriage had 'broken-down irretrievably'.¹¹⁸

Ostensibly, this reflected a legislative endorsement of the dissolubility of marriage as well as the negative consequences that can stem from requiring fault to be proved. It also recognised that the attribution of fault was no longer an essential element of the asset reallocation process. However, many of the grounds used to establish whether the relationship had 'broken down irretrievably' remained directly attributable to fault.¹¹⁹ Furthermore, the judiciary were directed to have regard to the parties' marital 'conduct' when reallocating assets on divorce.¹²⁰ For these reasons, 'fault' continued to influence judicial reasoning when reallocating assets, long after the introduction of the breakdown legislation.¹²¹ Thus, it is apparent that whilst the Government intended to modernise the asset reallocation process, central elements of the Contractual Model continued to restrain the law's development.¹²²

Nevertheless, it was clear that the importance attributed to matrimonial conduct in 'ancillary relief' proceedings was diminishing. Even prior to the legislative reforms of the late 1960s, the Church of England Report, *Putting Asunder*, recognised that:

[T]he law is moving away from basing divorce on a finding concerning the delinquency of one of the parties towards basing it on a finding concerning the state of the marriage relationship and the demands of distributive justice.¹²³

¹¹⁶ Report of a Group Appointed by the Archbishop of Canterbury in January 1964, *Putting Asunder: A Divorce Law for Contemporary Societies* (Society for Promoting Christian Knowledge, London 1966) 38.

¹¹⁷ See, Law Commission, *Financial Provision in Matrimonial Proceedings* (Law Com No. 25, 1969).

¹¹⁸ This was proved via the satisfaction of a number of statutory grounds; see Divorce Reform Act 1969, s.2.

¹¹⁹ For example see Divorce Reform Act 1969, s.2(1)(a), which accepted adultery as a fact for proving the ground in s.1 that the marriage had broken-down irretrievably.

¹²⁰ Matrimonial Proceedings and Property Act 1970, s.5(1)

¹²¹ E.g. see, *Wachtel v Wachtel* [1973] Fam 72.

¹²² This offered a compromise position for more radical supporters of the indissoluble nature of marriage. Nevertheless, these issues largely go beyond the remit of this thesis.

¹²³ *Putting Asunder* (n 116) 37.

Therefore, it was apparent during the mid-twentieth century, that the general societal consensus was that divorce should be easier to obtain, and that asset reallocation should be based on a model that strives for distributive justice and the avoidance of discrimination. However, it will now be shown that the means by which the Government introduced these policies into the law led to the realisation of neither. Nevertheless, it will be recognised that these legislative reforms were also an important step towards entrenching the current emphasis that is placed on the need principle.

The Matrimonial Proceedings and Property Act of 1970 and the ‘Minimal Loss Principle’

The reforms of the late 1960s were accompanied by the enactment of the Matrimonial Proceedings and Property Act 1970.¹²⁴ This Act was directed towards amending the law surrounding the financial consequences of divorce, in the light of the liberalised ground for divorce. The combined effects of these statutes were to vest the jurisdiction to determine whether the marriage had irretrievably broken down, and the resultant financial consequences, within the discretion of the courts.

The 1970 Act followed the Law Commission’s recommendation to remove gender discrimination by ending the ‘distinction between the powers of the courts in relation to husbands and wives or petitioners and respondents’.¹²⁵ The 1970 Act also sought to introduce considerations to which the judiciary had a ‘duty’ to regard when exercising their judicial discretion.¹²⁶ Section 5(1) expressly required the courts to have regard to the parties’ ‘financial needs’ on divorce.¹²⁷ This was a significant development for the purposes of this thesis as it was the first time that the judiciary were placed under a duty to consider the concept of need as a unique consideration within asset reallocation hearings. The fact that the judiciary had a ‘duty’ to consider this concept emphasises the importance that the legislature had decided to attribute to it. Similarly,

¹²⁴ Which was later consolidated by the MCA 1973.

¹²⁵ Law Commission (n 117) para 115.

¹²⁶ Matrimonial Proceedings and Property Act 1970, s.5(1).

¹²⁷ *ibid*, s.5(1)(b).

the courts were required to consider ‘contributions made by looking after the home or caring for the family’ when exercising their discretionary powers to grant financial orders on divorce.¹²⁸

The Act of 1970 introduced these considerations in order that the judiciary could then exercise their discretion so ‘as to place the parties, so far as it is practicable, and having regard to their conduct just to do so, in the financial position in which they would have been if the marriage had not broken down’.¹²⁹ This was dubbed the ‘minimal loss principle’. Supporters of this principle argued that its implementation was a measure that intended to avoid the ‘systematic impoverishment of divorced women’ that inevitably resulted from the increased availability of divorce.¹³⁰ Consequently, any reallocation made under the heading of need was directed towards sustaining the marital standard of living; similar to the Ecclesiastic Model’s approach. Owing to the power to make financial orders for capital lump sum payments unrestricted in amount, the court’s power to distribute assets and allocate maintenance was now far greater than it had ever been previously.¹³¹ Thus, it is apparent that the need principle’s first statutory codification was an attempt to protect wives from the impoverishment that often occurred on divorce. Whilst, *prima facie*, this was a laudable objective, the principle itself was greatly criticised.

Firstly, the principle has been described by Cretney¹³² as an attempt by the Law Commission¹³³ to codify the dictum of Lord Merrivale in the 1928 case of *N v N*.¹³⁴ However, Cretney noted that Lord Merrivale was focused on discouraging the use of the ‘one-third principle’ as opposed to introducing a universal principle of ancillary relief.¹³⁵ Therefore, the introduction of the minimal-loss principle may have been based on an inaccurate interpretation of the existing case law.

¹²⁸ *ibid*, s.5(1)(f).

¹²⁹ *ibid* s.5; subsequently consolidated as MCA 1973 s.25(1).

¹³⁰ See L Weitzman, *The Divorce Revolution* (The Free Press 1985) 14.

¹³¹ MCA 1965, s.16(1) allowed the court to order such lump sums ‘as the court thinks reasonable’.

¹³² See, Cretney (n 112) 427.

¹³³ In their report; Law Commission, (n 117) 71.

¹³⁴ (1928) 44 TLR 324, 328 (Lord Merrivale P); ‘I must take into consideration the position in which the parties were, and the position in which the wife was entitled to expect herself to be and would have been, if her husband had properly discharged his marital obligation’.

¹³⁵ Cretney (n 112) 427.

It was a surprising oversight that the Law Commission's Report of 1969,¹³⁶ which led to the introduction of the Matrimonial Proceedings and Property Act 1970, 'contained virtually no discussion of the implications that the change in the basis of the ground for divorce might have for the determination of the financial consequences of divorce'.¹³⁷ Despite the removal of both the doctrine of coverture and the requirement to prove fault, it appeared that the courts were prevented from severing the marital obligations. As the Law Commission put it, 'in short, although divorce terminates the legal status of the marriage it will usually not terminate the financial ties of the marriage which remain lifelong'.¹³⁸

This legal principle also seemed to be inconsistent with the era's liberalised social views, where divorce had come to be viewed as acceptable.¹³⁹ Similarly, Kevin Gray criticised the minimal loss principle for being at odds with the general current of legal reform at the time, which had contemporaneously made it much easier for parties 'in a broken marriage to make a fresh start in life'.¹⁴⁰ Thus, it appeared that the legislature had disregarded the fundamental goal of divorce: bringing an end to the legal relationship and enabling a separation of the spouses' lives.

Subordination of the Contractual Model and the Rise of Needs Provision

The recognition of some of these criticisms cumulated in the Court of Appeal ruling in *Wachtel v Wachtel* where Lord Denning MR stated, that 'there are divergences of view and of practice between Judge[s]'.¹⁴¹ Lord Denning MR confirmed that conduct should only be considered in 'rare cases where blame can be assessed'.¹⁴² Thus, despite the absence of legislative guidance, Lord Denning MR quickly recognised that in the new era of liberalised divorce laws, an evaluation of spousal conduct should no longer be a central tenet of the financial reallocation process. Accordingly,

¹³⁶ Law Commission (n 117).

¹³⁷ Masson, Bailey-Harris and Probert (n 36) 350.

¹³⁸ Law Commission (n 79) para 22.

¹³⁹ See, Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society* (CUP 1988) 561-71.

¹⁴⁰ Gray (n 58) 317.

¹⁴¹ *Wachtel* (n 61) 72 (Lord Denning MR).

¹⁴² *ibid* 85 (Lord Denning MR)

this case represented a renewed move away from the Contractual Model's approach, as the consideration of conduct was confined to extreme cases.

Instead, the court seemed to fall back onto a needs-based fractional allocation of income and capital, through a revival of the one-third rule; a doctrine whose lineage, as noted above, has resonance with principles applied in the Ecclesiastic Courts. The only justification that can be found for this rule, other than tradition, is the case of *Sansom v Sansom*.¹⁴³ Here, Sir Jocelyn Simon P justified the one-third rule on the basis that, 'in a typical case the court was concerned with three groups of needs – those of the wife, those of the husband and those of children for whose support the husband was liable'.¹⁴⁴ However, no longer was it the case that the husband would receive custody by default, thereby precluding the fractional allocation rule from being practically relevant or legally justifiable. However, the reliance placed on it by Lord Denning MR in 1974 implicitly supported a needs-oriented approach to asset reallocation.

Unsurprisingly, the judiciary subsequently refused to follow this arbitrary and often unfair fractional allocation rule.¹⁴⁵ Instead, it became clear that in routine cases 'the court would use its powers to ensure that the wife and children were adequately housed'.¹⁴⁶ This was the first time that the judiciary had begun to exercise their discretion compatibly with the modern approach to needs in everyday divorces, whereby, if assets are limited, priority provision is made for parties' needs. Thus, early provision for needs appeared to develop in a bid to protect wives from suffering a financial detriment on divorce.

The Matrimonial and Family Proceedings Act 1984 – Pursuit of the 'Clean Break' Objective

¹⁴³ [1966] P 52.

¹⁴⁴ *ibid* 55 [Sir Jocelyn Simon P].

¹⁴⁵ See, *Page v Page* (1981) 2 FLR 198 CA; Ormrod LJ noted that, 'in many cases where the assets are small relative to the needs and obligations of one party, [the application of a one third principle would produce] a result which is too low and obviously does not accord with the requirements of [the Act].'

¹⁴⁶ *Cretney* (n 112) 429.

Owing to the criticisms surrounding the minimal loss principle and pressure from *The Campaign for Justice in Divorce*,¹⁴⁷ in 1980 the Law Commission undertook another examination of the options for reform in this area of law.¹⁴⁸ In particular, they recommended the removal of the minimal loss principle and argued that instead the law should promote the parties to become self-sufficient through the imposition of a clean break; to the extent that this would be consistent with the welfare of any children.¹⁴⁹ These recommendations were implemented into the MCA 1973 via the Matrimonial and Family Proceedings Act 1984.

Thus, the express objective of the asset reallocation process on divorce was almost completely reversed. It went from adherence to the Ecclesiastic Model, whereby financial obligations stemming from marriage were consistently preserved following separation, to one that recognised that the preservation of such obligations would hang ‘like millstones round [the spouses] necks’.¹⁵⁰ This left questions regarding the continued relevance of needs provision; which was, ostensibly, at odds with the new objective of the asset reallocation exercise.

In effect, the clean break objective promoted lump-sum capital reallocation, enabling the divorced spouses to ‘go their separate ways without the running irritant of financial inter-dependence or dispute’.¹⁵¹ Consequently, it may be argued that this statute represented the first successful attempt to provide judicial discretion with a principled objective that was compatible with the modern context of divorce law, ‘where women have become potentially equal economic partners and marriages frequently do break down.’¹⁵² However, to state that reaching a clean break is *the* guiding objective of the asset reallocation exercise, may be to overstate its importance. Instead, the courts are merely under a duty to ‘consider’ whether it could be achieved when making financial orders on divorce.¹⁵³ Consequently, provision for

¹⁴⁷ A pressure group which represented the grievances of divorced men.

¹⁴⁸ Law Commission (n 79).

¹⁴⁹ *ibid* paras 24, 46(5)(a).

¹⁵⁰ Law Commission (n 117) para 9.

¹⁵¹ *Whitting v Whitting* [1988] 1 WLR 565,574 (Balcombe LJ), citing *Tandy v Tandy* (CA, October 24 1986).

¹⁵² J Freedman and others, ‘Property and Marriage: An Integrated Approach’ (Institute for Fiscal Studies, Report No. 29, 1988) 1.

¹⁵³ See, s.25A MCA 1973.

need has remained a distinct and respected concept within the asset reallocation exercise. The discussion as to the weight currently granted to the clean break objective will be returned to in Chapter Two. This chapter will also question its compatibility with modern need provision.

Conclusion

This chapter has shown that reallocating the assets owned by one spouse in order to provide for the needs of their former spouse has a convoluted and somewhat uncertain legal pedigree. It has also evidenced that the asset reallocation process is a product of its time, consistently being developed in order to respond to the context it operates within. Accordingly, whilst various concepts have been developed and retained in a bid to guide this process, their meaning and application has been required to change. This is evident when looking at the development and evolving use of need provision.

Whilst not receiving statutory recognition until 1970, needs provision has consistently been attributed weight when reallocating assets in everyday divorces.¹⁵⁴ Thus, it has been shown that facets of modern needs provision can be evidenced within the Ecclesiastic Model. Under this model the Ecclesiastic Courts refused to permit anything more than a *divorce a mensa et thoro*, as ‘marriage had the immutable character of divine law and was held, by God’s own ordinance, absolutely indissoluble’.¹⁵⁵ Accordingly, the maintenance obligation that was voluntarily undertaken on marriage was life-long. Periodic maintenance for spousal needs was the means by which the Ecclesiastic Courts continued to enforce this fiscal obligation. Ultimately, such provision was granted with the aim of preserving the parties’ marital standard of living.

Contrastingly, provision for needs on divorce was later justified by the secular judiciary under the Contractual Model.¹⁵⁶ This model often awarded innocent wives

¹⁵⁴ See, Matrimonial Proceedings and Property Act 1970, s.5(1)(b).

¹⁵⁵ McGregor (n 73) 172.

¹⁵⁶ Following the implementation of the MCA 1857.

their expectation interest, in order to place them in the position they would be in had their spouse not committed a matrimonial offence. Thus, provision for needs was justified under the guise of damages for breach of the civil contract that the couple entered into on marriage. This reliance on establishing guilt was again raised in order to justify sustaining the marital standard of living for the innocent spouse.¹⁵⁷

It was with the turn of the twentieth century that a willingness to avoid discrimination and pay increased respect to spousal entitlement can be detected within legislative activity¹⁵⁸ and judicial reasoning.¹⁵⁹ Thus, as the century progressed, needs provision through a fractional allocation rule, or, as a ceiling to awards,¹⁶⁰ began to be viewed as inappropriate interpretations in order to protect spousal entitlements on divorce. Instead, the understanding that ‘considerations of good sense and fairness... must have due weight in determining the proper award’ began to receive recognition.¹⁶¹ Unsurprisingly, this led to the judiciary interpreting the governing statute as granting them vast powers of discretion, in order to reallocate assets so as to prevent inequitable results.¹⁶² Thus, provision for a broader understanding of needs was justified as a response to the discriminatory consequences that arose through the doctrine of coverture.¹⁶³

It was following these developments that a number of statutes were implemented in a bid to update the law and provide guidance for judicial discretion.¹⁶⁴ Whilst this did not always lead to positive developments,¹⁶⁵ the leading statute, the Matrimonial Causes Act, began to enshrine a number of considerations to which the judiciary should have regard. This now includes an express obligation on the courts to consider parties ‘financial needs’ on divorce.¹⁶⁶ However, since this consideration’s

¹⁵⁷ See, *Hartopp* (n 91) 72 (Gorrell Barnes J).

¹⁵⁸ See, *Holcombe* (n 101).

¹⁵⁹ See, *Ashcroft* (n 98) 273 (Gorell Barnes J).

¹⁶⁰ Within the context of big-money divorces.

¹⁶¹ *Gilbey* (n 99) 200 (Lord Merrivale).

¹⁶² See, *Ashcroft* (n 98) 273 (Gorell Barnes J).

¹⁶³ See *Leslie* (n 103) 205 (Evans P).

¹⁶⁴ Matrimonial Proceedings and Property Act 1970; MCA 1973; Matrimonial and Family Proceedings Act 1984.

¹⁶⁵ In particular, given the introduction of the minimal loss objective contained within the Matrimonial Proceedings and Property Act 1970.

¹⁶⁶ This consideration is now contained within MCA 1973, s.25(2)(b).

codification the only guidance that has been provided as to the meaning and operation of this term has stemmed from the common law.

This thesis will now go on to identify recent judicial developments that have influenced the role and objectives that are now associated with need provision. The next chapter will attempt to assess the emergence of the current model of asset reallocation, and the importance attributed to need provision within this process. In order to extrapolate the various objectives and facets of modern need provision, this forthcoming chapter will evaluate its position in statute and subsequent judicial embellishment. In turn, this will allow a comprehensive critical evaluation of the current model of asset reallocation and the role and requirements of needs provision in this process.

**Chapter Two: The Fairness Model of Asset Reallocation: The Role of Needs
within Everyday Divorces**

Synopsis

This chapter will identify the role that the need principle plays in everyday divorces under the current Fairness Model. Ultimately this chapter will show that as provision for needs has come to be respected as a guiding principle under the Fairness Model, the judiciary have justified an expanded remit in which to exercise their discretionary powers.

Through analysing the growing recognition that has been paid to need provision, this chapter shall explore the range of pragmatic considerations that have been subsumed and considered under this principle's heading. This will be with a view to identifying the existence of any guidance or rules fettering judicial discretion. It will also look to the leading statute in order to develop an understanding of the influence that the judicial approach to the need principle has had when interpreting the codified considerations designed to govern the asset reallocation process.

This chapter will end with an examination of the other relevant objectives that have been attributed weight under the Fairness Model. This section will question the compatibility of these objectives with the current approach to need provision. This section will provide further evidence of the primary weight that is currently attributed to the need principle within modern asset reallocation hearings.

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Introduction

This chapter analyses the current approach to the reallocation of assets in everyday divorces, which will be termed a Fairness Model and involves catering for needs with a view to obtaining a fair division of the assets. The first step towards achieving this is to uncover the implications of recent judicial embellishment regarding the concept of need. As this concept is now considered a judicial tool that, ‘is relevant to every divorce and dissolution’, this chapter will inevitably have a strong focus on the principle’s development through the case law.¹⁶⁷

This chapter will then investigate the statutory facets of modern need provision. This will provide a greater understanding as to the objectives pursued via such provision. Reference will be made to some ‘big money’ divorces during this chapter, to the extent that they provide useful obiter statements that guide the everyday needs provision exercise.

This chapter will then turn to assess the other policies and objectives that influence the use of judicial discretion in everyday divorces. These will be evaluated for their compatibility with the current clear prioritisation of needs. They will also be assessed for their continued relevance within the Fairness Model of asset reallocation, given recent changes to the family law landscape.

These findings will lead on to the following chapter’s focus on the deficiencies of modern need provision. Ultimately, it will be argued that excessive reliance is being placed on need provision within everyday divorces. In turn, it will be argued that the failings of the law justify an exploration into proposals for reforming the asset reallocation process.

¹⁶⁷ Law Commission (n 18) para 3.1.

The Fairness Model

This section plots recent judicial developments that led to the emergence of the Fairness Model of asset reallocation. This will allow this thesis to evaluate the effect that these developments have had on need provision within everyday divorces. This will be achieved by assessing the case law that continues to guide the asset reallocation process.

It is important to note at the outset, *why* the judiciary have taken on the role of developing the current model of asset reallocation. Since its amendment in 1984, the MCA 1973:

[e]xpresses no objective, and... does not of itself give any clear guidance as to the principles on which the court should act, nor of the underlying policies on which asset and income distribution are justified.¹⁶⁸

Due to this vacuum evident in the key statutes, ‘the House of Lords and the Court of Appeal displayed increased enthusiasm for a judicial role articulating fundamental policies and rationales to underpin the distribution of assets and income on marriage breakdown’.¹⁶⁹ Thus, the senior judiciary have become the leading authority for guidance on these issues. However, this has had to occur incrementally. Nevertheless, the judiciary have always recognised the impossibility of laying strict rules to guide their discretion, due to the multitude of factual scenarios that present themselves to the courts. Thus, it has frequently been recognised ‘that judicial glosses on the statute should be treated with caution’.¹⁷⁰

When looking at financial reallocation cases heard during the 1990s, Diduck identified a shift in judicial focus at the end of the twentieth century. She firstly noted, ‘decisions expressed in a language of paternalism/ welfare... in which the breadwinner was obliged post-separation simply, in effect, to continue his pre-

¹⁶⁸ *Miller; McFarlane* (n 7) [5] (Lord Nicholls); [124]-[125] (Baroness Hale).

¹⁶⁹ Masson, Bailey-Harris and Probert, (n 36) 328.

¹⁷⁰ R Probert, *Cretney and Probert's Family Law* (8th edn, Sweet & Maxwell 2012) 197. See also *B v B (Ancillary Relief)* [2008] EWCA Civ 543; *Robson v Robson* [2010] EWCA Civ 1171.

separation marital obligation to support reasonably his dependents'.¹⁷¹ This reasoning was evident even in cases concerned with considerable assets. For example, in *Dart v Dart*¹⁷² Diduck opined that Thorpe LJ's judgment was:

[F]irmly located within the traditional discourse of the provider's responsibility to his dependant – to meet needs.¹⁷³

However, towards the end of the 1990s she noted a judicial shift towards, 'language of equality/ rights... in which the breadwinner became responsible to "share" what became re-conceived as the "fruits of the marital partnership"'.¹⁷⁴ She attributed this move to egalitarian social movements of the time. Thus, in cases such as *SRJ v DWJ*¹⁷⁵ the respondent's continuing obligation to financially support his wife was 'located in a discourse of rights, compensation, mutuality, and gender equality'.¹⁷⁶ This change of emphasis was later justified by Hale LJ¹⁷⁷ as:

The Matrimonial Causes Act 1973 was designed to move away from the application of strict property law principles, with their dependence upon evaluating contributions in money or money's worth, towards the recognition of marriage as a relationship to which each spouse contributes what they can in their different ways.¹⁷⁸

Therefore, whilst the provision of needs had historically been used as a tool to protect dependant wives, the judiciary had begun to view such provision as inadequate to satisfy the requirements of the twenty-first century approach to asset reallocation. However, needs provision was preserved in those cases concerned with the division of limited assets out of necessity; as assets are often incapable of stretching beyond it.¹⁷⁹

¹⁷¹ Alison Diduck, 'What is Family Law For?' (2011) 64 CLP 1, 6.

¹⁷² [1996] 2 FLR 286; [1996] 1 FCR 21; In this case the wife was granted an award of £9m of a fortune estimated to be between £400-800m.

¹⁷³ Diduck (n 171) 9.

¹⁷⁴ *ibid* 7.

¹⁷⁵ [1999] 3 FCR 153 CA.

¹⁷⁶ Diduck (n 171) 23.

¹⁷⁷ As she then was.

¹⁷⁸ *Foster v Foster* [2005] 3 FCR 26 [18] (Hale LJ).

¹⁷⁹ See, Law Commission (n 18) para 1.3.

Accordingly, in the everyday divorce, provision for needs began to take on a central role in the evolving reallocation exercise.¹⁸⁰ This has occurred over the past fifteen years as a result of common law attempts to pursue a new model of asset reallocation; the Fairness Model. Thus, the judiciary attempted to align the law with principles of entitlement, partnership, and gender equality. This forthcoming section will identify why the judiciary have used the concept of need as an integral requirement of the Fairness Model's operation within everyday divorces.

The Twenty-First Century Judicial Approach to Needs

In *White v White* the House of Lords unequivocally recognised that the objective to be pursued when reallocating assets on divorce 'must be to achieve a fair outcome'.¹⁸¹ This case stands for the proposition that the focus of judicial discretion when reallocating assets should be the pursuit of a fair division. As Lord Nicholls stated '[i]n seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles'.¹⁸² Hence, *White* confirmed that a central concern of the Fairness Model was the avoidance of discrimination. It was also established that implicit in the Fairness Model's approach were three components, namely:

[T]he overall objective of achieving a fair outcome; consideration of all the s.25(2) criteria relevant on the facts and, at the end of the exercise, application of the yardstick of equal division of assets as a check on the provisional quantum of an award.¹⁸³

It was Lord Nicholls view that 'fairness requires the court to take into account all the circumstances of the case'.¹⁸⁴ Accordingly, the extent to which the statutory considerations were to be attributed weight and balanced was left as a matter for the judges to decide, in the light of the specific factual circumstances. Hence, the

¹⁸⁰ See, *Diduck* (n 171).

¹⁸¹ *White* (n 5) [23] (Lord Nicholls).

¹⁸² *White* (n 5) [24] (Lord Nicholls).

¹⁸³ *Masson, Bailey-Harris and Probert* (n 36) 360.

¹⁸⁴ *White* (n 5) [24] (Lord Nicholls).

consideration of ‘financial needs’¹⁸⁵ was entirely subsumed within the discretionary search for a fair division of the assets. Lord Nicholls went on to state that:

In assessing financial needs, a court will have regard to a person’s age, health and accustomed standard of living... [and] the available pool of resources.¹⁸⁶

Nevertheless, he consistently emphasised that in ‘big money’ divorces¹⁸⁷ the parties’ ‘financial needs’ were merely one of the statutory considerations to be considered within the search for fairness.¹⁸⁸ Accordingly, in ‘big money’ divorces this new judicial gloss represented a move away from the paramountcy of providing for needs, towards recognising the spouses’ entitlements to the assets that stemmed from the marriage.¹⁸⁹ This new model’s change in emphasis was influenced by trends occurring within family law generally. In particular, there was an increasing recognition from both academics¹⁹⁰ and members of the judiciary¹⁹¹ that divorce had a disproportionate impact on the financial standing of wives. Accordingly, the Fairness Model attempted to respond to this.

Nevertheless, in everyday divorces, the available pool of resources dictated that the judicial approach would continue to be guided by basic need provision. However, the attribution of various statutory considerations meant that need provision was given an elevated role within the Fairness Model’s approach in everyday divorces.

It was in the case of *Miller; McFarlane* that the House of Lords articulated further guiding principles in order to ‘determine what is the content of fairness... that [justifies] the redistribution of assets on divorce’.¹⁹² As Lord Nicholls stated, the need for like cases to be treated alike is an important aspect of fairness, and ‘if there is to be an acceptable degree of consistency of decision from one case to the next, the

¹⁸⁵ As required by MCA 1973, s.25(2)(b).

¹⁸⁶ *White* (n 5) [36] (Lord Nicholls).

¹⁸⁷ i.e. those divorces where the available assets ‘exceed the parties’ financial needs for housing and income’; *White* (n 5) [2] (Lord Nicholls).

¹⁸⁸ *ibid* [36] (Lord Nicholls).

¹⁸⁹ J Eekelaar, ‘Asset Distribution on Divorce – The Durational Element’ (2001) 117 LQR 552.

¹⁹⁰ E.g. see, S Jarvis and SP Jenkins, ‘Marital dissolution and income change: Evidence for Britain’ in R Ford and J Millar (eds), *Private Lives & Public Responses* (London: Policy Studies Institute, 1998).

¹⁹¹ See, *White* (n 5) [35] (Lord Nicholls).

¹⁹² *Masson, Bailey-Harris and Probert*, (n 36) 363.

courts must themselves articulate... the applicable if unspoken principles guiding the court's approach.¹⁹³ He went on to articulate that these implicit guiding principles are the concepts of needs, compensation and sharing.¹⁹⁴

With reference to the principle of need, Lord Nicholls stated that in everyday divorces, 'the search for fairness largely begins and ends at this stage... [as] the available assets are insufficient to provide adequately for the needs of two homes'.¹⁹⁵ This case made it apparent that in the context of everyday divorces, the newly conceived need principle was to be a central guide in the Fairness Model's approach.

Supporting this dictum, Baroness Hale stated that the ultimate objective of the court should be 'to give each party an equal start on the road to independent living'.¹⁹⁶ This approach instilled renewed importance in pursuing the clean break objective.¹⁹⁷ Nevertheless, with this objective in mind, Baroness Hale suggested that, 'it can be assumed that the marital partnership does not stay alive... unless this is justified by need or compensation'.¹⁹⁸ This implied that spouses were entitled to have their needs provided for, to the extent that this was compatible with the objective of achieving a fair division of the assets. However, this failed to explain the *extent* to which provision was to be made for the spouses' needs. Nor did it provide an idea as to the substantive considerations of this principle. The need principle's precise contemporary role will now be the subject of evaluation.

An Application Dependent on Available Assets

In order to understand the role of the need principle in modern day litigation, the first question that requires addressing is; in what class of divorces does the principle of need become a guiding judicial consideration? The answer to this question will

¹⁹³ *Miller; McFarlane* (n 7) [6] (Lord Nicholls)

¹⁹⁴ *ibid* [10], [13], [16] (Lord Nicholls).

¹⁹⁵ *ibid* [12] (Lord Nicholls).

¹⁹⁶ *ibid* [144] (Baroness Hale).

¹⁹⁷ Contained within MCA 1973, s.25A

¹⁹⁸ *Miller; McFarlane* (n 7) [144] (Baroness Hale).

illuminate the importance of this principle, under the Fairness Model's approach to reallocating assets in everyday divorces.

It is readily apparent that the judicial application of this principle is not a static exercise. This is despite it being described as a 'factor of magnetic importance'.¹⁹⁹ There are two broad categories of cases that need distinguishing. Firstly, there is the everyday divorce, which, as described above, is concerned with reallocating limited assets or even debts. In these cases the judiciary have the difficult task of meeting the needs of two households, out of the assets that formerly supported one. These cases are classified as 'everyday divorces' as they form the bulk of applications for financial reallocation on divorce. This is because 'even at fairly high asset and income levels it can be difficult to divide one household into two while retaining a similar standard of living'.²⁰⁰

The second, more unusual, class of cases is where the divisible resources exceed what would be required to meet both spouses' needs. The approach of the judiciary in these cases is remarkably distinct and accordingly an in-depth analysis of these cases goes beyond the remit of this thesis. However, the approach of the judiciary in such cases will be recognised, to the extent that it affects the asset reallocation exercise in everyday divorces.

The following discussion will identify the prevailing approach that has been adopted by the judiciary when recognising the applicability of the needs principle under the Fairness Model. The purpose of this discussion is to evaluate the weight attributed to the needs principle during the everyday asset reallocation process. It will be shown that the Fairness Model attributes weight to the need principle solely in accordance with the court's conception of fairness. However, broad themes or considerations, which can be shown to have consistently affected judicial reasoning, will be drawn out from the available reported judgments in this area.

¹⁹⁹ *McCartney v Mills McCartney* [2008] EWHC 401 (Fam); [2008] 1 FLR 1508 [311] (Bennett J).

²⁰⁰ 'Translating Big Money Principles in Divorce' (*Cambridge Family Law Practice*, 1 October 2014) <<http://www.cflp.co.uk/translating-big-money-principles-in-divorce/>> accessed 16 June 2015.

Weight Attributed to Needs in Everyday Divorces under the Modern Fairness Model

Where the available assets are less than what would be required to maintain the parties' previous standard of living, the Fairness Model pays central reference to parties' needs. Consequently, 'determining needs for a couple is arguably the most significant factor in the overwhelming majority of cases'.²⁰¹ Given the central role it plays, one may expect that the principle's application is a transparent task. However, this is not the case and, as a result, the law is relatively inaccessible to litigants and has suffered from regional variations in its judicial application.²⁰² Recognition of these points recently prompted the Law Commission to produce a Report concerned with, *inter alia*, evaluating the current state of contemporary needs provision.²⁰³ A critical evaluation of this Report's findings and recommendations will be reserved for Chapter Three.

The needs principle is still applicable to cases concerned with the division of considerable assets; however, it is not applied with the same frugality. *Miller; McFarlane* held that the three strands of fairness, 'must be applied in the light of the size and nature of all the computed resources, which are usually heavily circumscribing factors'.²⁰⁴ Thus, what is readily apparent from the relevant case law is that the principle of needs is heavily reliant on the couple's particular circumstances. Needs, therefore, is not a principle of objective universal application. Instead, quantum justified under this principle's heading requires consideration of a number of factors. According to Sir Mark Potter P:

The principle of need requires consideration of the financial needs, obligations and responsibilities of the parties (s.25(2)(b)); of the standard of living enjoyed by the family before the breakdown of the marriage (s.25(2)(c)); of the age of each party

²⁰¹ E Marshall and others, 'The Law Relating to Needs and Spousal Maintenance: One Firm's View' (2013) 43 Fam Law 323, 323.

²⁰² See, Law Commission (n 18) para 3.5.

²⁰³ *ibid.*

²⁰⁴ *Charman* (n 6).

(half of s.25(2)(d)); and of any physical or mental disability of either of them (s.25(2)(e)).²⁰⁵

This dictum makes clear the opinion of the previous President of the Family Division; needs provision should be applied through recourse to the relevant statutory considerations contained within section 25 of the MCA 1973. Accordingly, this chapter will assess the need principle through the lens of the relevant statutory considerations.

Nevertheless, before this is undertaken, this thesis will now look at the pragmatic considerations that the courts recognise when reallocating assets on the basis of the need principle. This will involve evaluating the specific circumstantial factors that are considered under this principle's heading. Again, any reference to 'big money' cases will be for illustrative purposes only.

Circumstantial Considerations of Needs Provision: S.25(2)(b)

There remains no definition of 'need', nor any codified guidance outside of the complex and somewhat contradictory case law. However, a careful evaluation of the relevant statutory provisions and case law does reveal some general trends the judiciary follow in order to self-regiment their discretionary interpretations of this principle. As Schneider has stated, 'it may be *efficient* to accord discretion to the decision-maker who is a "repeat player" who regularly applies a narrow set of policies to standard fact patterns'.²⁰⁶ This efficiency occurs given the unique position of the judiciary, who are required on a daily basis to calculate needs under the asset reallocation process. These pragmatic considerations will be analysed in order to gain a comprehensive understanding of the principle's operation within everyday divorces. This will then inform the forthcoming chapter, which intends to critically evaluate the Fairness Model's approach to the need principle.

²⁰⁵ *ibid* [70] (Sir Mark Potter P).

²⁰⁶ Schneider (n 41) 78 (emphasis added).

i) Children of the Family

The relevant statutory provision states that where there is a ‘child of the family’ who is under eighteen, their welfare must be the court’s ‘first consideration’.²⁰⁷ The importance of providing for children of the family has also been consistently recognised by the judiciary, who have acknowledged that, ‘the most common source of need is the presence of children’.²⁰⁸ It should be noted that provision for children’s welfare needs is considered separately from child maintenance; now calculated and enforced by the new governmental body, the Child Maintenance Service.²⁰⁹

Children’s welfare ‘needs go beyond just the cost of housing, food and clothing, and are understood to include the need to have someone to care for them’.²¹⁰ Therefore, the parent to whom a child arrangement order is made granting the children the ability to reside with them, generally has their needs provided for first, as an extension of the provision for the child’s welfare.²¹¹ This is because it has frequently been reiterated by the judiciary that, ‘it is one of the paramount considerations... to cover the need of each [party] for a home, particularly where there are young children involved’.²¹²

Thus, the statutory requirement to first consider the children’s welfare, inevitably translates into prioritising the needs of the care-giving spouse. This supports the implicit policy of need provision; as care-givers are likely to become increasingly financially vulnerable, following their withdrawal from the employment market. Furthermore, child-carers will have great difficulties in finding employment that provides financial remuneration on par to the earnings of their ex-spouses. Therefore, the priority given to provision for care-givers’ needs recognises that these spouses are less likely to be able to maintain their own, or their children’s needs. Consequently,

²⁰⁷ MCA 1973, s.25(1).

²⁰⁸ *Miller; McFarlane* (n 7) [138] (Baroness Hale).

²⁰⁹ This new body will operate a revised system of maintenance collection due to be fully in place by 2017.

²¹⁰ Law Commission, *Marital Property Agreements* (Law Com No. 198, 2011) para 1.17.

²¹¹ See, Children Act 1989, s.8, as amended by the Children and Families Act 2014, s.12.

²¹² *M v B (Ancillary Proceedings: Lump Sum)* [1998] 1 F.L.R. 53, 60 (Thorpe LJ).

such provision helps to redress economic disparity between the spouses following divorce and is also in line with current social attitudes.²¹³

ii) Housing

In order to achieve the Fairness Model's objective, 'in the typical ancillary relief case the District Judge will always look first to the housing needs of the parties'.²¹⁴ Providing separate housing for the parties following a divorce is a primary and often exclusive issue for the law to deal with as 'there is nothing more awful than homelessness'.²¹⁵ In cases involving minimal assets, sale of the matrimonial home will often be the primary means by which to obtain capital, in order to provide for both parties' housing needs.²¹⁶ This approach is no doubt influenced by the value attributed to owner-occupation in England and Wales, which is particularly high when compared to home-ownership rates in continental Europe.²¹⁷

A sale of the matrimonial home may be required either at the time of divorce or, at a later date when a stipulated event occurs.²¹⁸ The judicial innovation and precedent set in the cases of *Mesher v Mesher*²¹⁹ and *Martin (BH) v Martin (D)*²²⁰ show a paternalistic rationale of asset reallocation. Such judicial innovation can be seen as precluding the historic inequalities that were present during the operation of the

²¹³ The 2010 British Social Attitudes Survey found that 88% of the public thought that a father 'should always be made to make maintenance arrangements to support the child' who is in primary school and resides with the mother; 'Child Maintenance: How Much the State Should Require Fathers to Pay When Families Separate' (*British Social Attitudes*, 2010) <http://www.bsa-30.natcen.ac.uk/media/36317/bsa30_child_maintenance.pdf> accessed 23rd March 2015.

²¹⁴ *Cordle v Cordle* [2001] EWCA Civ 1791; [2002] 1 FLR 241 [33] (Thorpe LJ).

²¹⁵ *ibid.*

²¹⁶ Consequently, the courts now have the power to order the sale of any property that either spouse has a beneficial interest in; see, MCA 1973, s.24A(1).

²¹⁷ In 2007 71% of UK households owned their home. In Switzerland this figure was only 37%. European Commission, 'Consumers in Europe: An Extensive Range of Statistics on Consumers' (*Eurostat News Release*, 26 June 2009) <http://europa.eu/rapid/press-release_STAT-09-95_en.htm?locale=en> accessed 23 March 2015.

²¹⁸ E.g. when the children reach a certain age, leave full-time education or the wife remarries; see, MCA 1973, s.24A(4).

²¹⁹ [1980] 1 All ER 126. This case gave rise to Mesher Orders, which postpones the sale of the matrimonial house until the occurrence of a stipulated event. Until this event occurs, or further orders are made, one spouse and the children are allowed to continue to reside in the property.

²²⁰ [1978] Fam 12. This case gave rise to Martin Orders, which are similar to Mesher Orders but do not require the separating couple to have children in order to be granted.

Contractual Model of asset reallocation, whereby, the courts had to be aware of the need to protect wives from being ‘turned out destitute on the streets’.²²¹

This prioritisation of housing need has led the court to generally allocate a ‘larger share in the capital value of the family home’ to the party who has given up work in order to care for and raise the family’s children.²²² This is because the partner who has continued to work will have their income to rely on when applying for a mortgage. Thus, the current pattern by which judges provide for housing needs supports the implied policy of the needs principle; to protect vulnerable spouses from suffering unfair financial consequences on divorce.

iii) Spousal Maintenance

Spousal maintenance is often the final facet of need considered when ordering financial reallocation on divorce.²²³ It is generally intended to ‘assist the receiving party to pay living expenses’.²²⁴ This is often achieved by considering the section 25 factors and, consequently, granting a periodical payment order; which requires one spouse to make periodic financial contributions to support the other spouse.²²⁵ The likelihood of such an order being granted is higher among cases concerned with the division of limited assets. This is because of the impossibility of granting a capital lump sum order in such cases.

Following the introduction of the power to order lump sum or property reallocation,²²⁶ the extent of financial provision via periodic payments between spouses has become the centre of much contentious academic debate.²²⁷ In particular, some academics have claimed that they are ‘very much [in] doubt that an indefinite order for periodical payments in sums well in excess of strict need are in tune with the

²²¹ See, *Ashcroft* (n 98)

²²² Law Commission (n 210) para 2.28.

²²³ If there are children of the family then provision for the caregiver’s needs will have already been considered at an earlier stage as an extension of the ‘first consideration’ to provide for the children’s welfare. See, MCA 1973, s.25(1).

²²⁴ ‘Maintenance: A Short Ride on the Alimony Pony’ (*Cambridge Family Law Practice*, July 25 2012) <<http://www.cflp.co.uk/maintenance-alimony-pony/>> accessed 23 March 2015.

²²⁵ See MCA 1973, s.23(1)(a).

²²⁶ See MCA 1973, ss.22A, s.24.

²²⁷ Introduced by the MCA 1973.

views of the population as a whole'.²²⁸ Ultimately, there remains a clear tension between, 'crystal ball gazing' and providing 'a meal ticket for life'; in other words, between making a fixed term or a joint lives maintenance order.²²⁹

These debates have become more pronounced following the introduction of the statutory obligation requiring the court to consider the desirability of limiting the duration of a periodic payment order.²³⁰ Some claim that this consideration should be 'upgraded to one which directs the court to bring the financial obligations of each party towards the other to an end where possible... [with] time limits on support'.²³¹ To this end Baroness Deech has introduced a Private Member's Bill into the House of Lords, which intends to limit the duration of periodic payments between divorced spouses to a period of five years.²³² However, as noted above, 'the courts are aware of the difficulties experienced by those who have given up work, wholly or in part, to look after children'.²³³ Periodic payment orders are often granted as a response to this difficulty.²³⁴ Thus, it is apparent that some discretion must be permitted to a judge in order to consider the entire circumstances of the case when deciding on a fair duration of a periodic payment order.

Nevertheless, it remains the case that once both parties have had their housing needs calculated the courts will generally then turn to:

[D]etermine what budget the [spouse] reasonably requires to fund... expenditure in maintaining the home and its contents and in meeting other expenditure external to the home.²³⁵

²²⁸ P Moor and V LeGrice, 'Periodical Payment Orders following Miller and McFarlane: A Series of Unfortunate Events' (2006) 36 Fam Law 655, 659.

²²⁹ See, C Bradley and E Moore, 'The Maintenance Conflict: Crystal Ball Gazing Versus a Meal Ticket for Life' (2011) 41 Fam Law 733.

²³⁰ Now contained within MCA 1973, s.25A(2).

²³¹ Marshall (n 201) 327.

²³² Divorce (Financial Provision) HL Bill (2015-16) 56, cl.5(1)(c). For the latest information on the Bill's progress through Parliament see, <<http://services.parliament.uk/bills/2015-16/divorce.html>>. The contents of Baroness Deech's Bill will be returned to for evaluation in Chapter Four.

²³³ Law Commission (n 210) para 2.28.

²³⁴ Particularly where the couple have young children; see, *Suter v Suter & Jones* [1987] 3 WLR 9.

²³⁵ *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865 [47] (Thorpe LJ).

The available assets will inevitably dictate the extent to which the courts can provide for the financially vulnerable party's needs. However, ascertaining the scope of 'maintenance needs'²³⁶ requires predicting the presiding judge's understanding of fairness. This is inevitably an extremely difficult task, due to the extent of discretion that is granted to the judiciary when making this decision. Chapter Three will return to evaluate the consequences of the current Fairness Model's reliance on discretion, before Chapter Four queries the likely advantages of implementing Baroness Deech's reform proposal.

vi) Rehabilitative Vocational Training

In order to prevent divorced parties becoming dependent on either the state or their ex-partners, the courts have shown themselves willing to consider and make orders that enable the parties to pursue work. This trend is interesting for the purposes of this thesis, as it is directed towards providing spouses with the means to provide for their own long-term needs. Some judges have gone as far as to state that this consideration is as important as housing:

Just as homes are of primary importance, so is the ability and the opportunity to work. It may be that as a result of the years of marriage, one or other of the parties will need some capital provision to enable him or her to get back into the labour market, or to retrain for a profession, or to modernise a skill which, through the years of marriage, has grown rusty.²³⁷

Provision under this heading may help to achieve a clean break, even if pursued via the grant of a periodical payment order.²³⁸ This is because vocational training will enable an ex-spouse to return to the workforce in order to earn their own income. This will assist in precluding dependence upon the receipt of long-term periodic payments from their ex-spouses. Provision under this heading has been supported by Kevin Gray who has stated that, maintenance after divorce 'should be limited in amount and duration to that which is necessary to obviate "marriage-conditioned" needs and to

²³⁶ A term used to denote those facets of the need principle which are concerned with maintaining an ex-spouse.

²³⁷ *Cordle* (n 214) [33] (Thorpe LJ).

²³⁸ See MCA 1973, s.25A.

enable a former spouse to acquire financial independence for the future'.²³⁹ This reflects an attempt to affect a *restitutio in integrum*, as such provision will attempt to return the spouse to the position they would have been in had the marriage never taken place.

The above section has identified the need principle's contemporary operation, when applied within the context of everyday divorces. However, it must be remembered that the above approach has *informally* developed through the accretion of judicial decision-making patterns, with recognition of the fact that each case will turn on its facts. Thus, as the law stands, 'the only universal rule [guiding judicial discretion] is to apply the section 25(2) criteria to all the circumstances of the case (giving first consideration to the welfare of the children) and to arrive at a fair result that avoids discrimination'.²⁴⁰

Whilst, in practice, the need principle often dominates the asset reallocation process in everyday divorces, it has consistently been emphasised that although the need principle, 'is very helpful in ensuring the court achieves a fair result... care needs to be taken to ensure that [this principle is] not treated as some kind of quasi-statutory amendment'.²⁴¹ Thus, it is apparent that the asset reallocation process must be guided by the section 25 considerations and the need principle merely offers a description, 'of the approach to the reasoning to be used in applying the statute to achieve a fair result'.²⁴²

Accordingly, this chapter will now turn to assess the extent to which the need principle has influenced the court's approach to the section 25 statutory exercise. Focus will be placed on those statutory considerations whose interpretations have been influenced by the need principle. The conclusions drawn from this section will allow this thesis to extrapolate the objectives currently justifying the weight attributed to the need principle in the typical everyday divorce.

²³⁹ Gray (n 58) 293.

²⁴⁰ *Cordle* (n 214) [34] (Thorpe LJ).

²⁴¹ *RP v RP* [2007] 1 FLR 2105 [58] (Coleridge J).

²⁴² *McFarlane v McFarlane (No 2)* [2009] EWHC 891 (Fam) [112] (Charles J).

Other Statutory Considerations Relevant to the Interpretation of Needs

i) S.25(2)(c) – Standard of Living Enjoyed Before Breakdown

It is clear from Chapter One that within the early Ecclesiastic Model of asset reallocation, the parties' standard of living has been a key consideration when quantifying maintenance. The marital standard of living also remained a particularly important consideration during the latter half of the nineteenth century, where the Contractual Model dictated that the judiciary should attempt to maintain an *innocent* spouses' standard of living.²⁴³

In recent years, the spouse's standard of living has remained a primary component in the need-assessment exercise. This is evident in *G v G*, where Charles J stated, 'the lifestyle enjoyed during the marriage sets a level or benchmark that is relevant to the assessment of the level of... lifestyles to be enjoyed by the parties'.²⁴⁴ However, he did go on to recognise that, 'the objective of achieving a fair result... is not met by an approach that seeks to... fund a lifestyle equivalent to that enjoyed during the marriage'.²⁴⁵ Therefore, regardless of the available divisible assets, the parties' previous standard of living is going to be a relevant consideration when calculating the extent of need provision. Thus, tying need provision to the parties' previous standard of living pays respect to the historic development of needs provision. However, Chapter Three will question whether the continued emphasis on this consideration fails to respect contemporary legal developments and views of divorce.

Attempts have consistently been made by the courts to provide guidance as to the standard of living that should be maintained when providing for needs. In the context of 'big money' cases, Baroness Hale's dictum in *Miller; McFarlane*, that needs should be 'generously interpreted' with reference to the matrimonial standard of living, has received some support.²⁴⁶ However, this fails to provide guidance for everyday divorces and this expansion of the need principle has recently been the

²⁴³ See, *Hartopp* (n 91) 72 (Gorrell Barnes J).

²⁴⁴ [2012] EWHC 167 (Fam), [2012] 2 FLR 48 [136] (Charles J).

²⁴⁵ *ibid* [136] (Charles J).

²⁴⁶ *Miller; McFarlane* (n 7) [140] (Baroness Hale); see, *Lauder v Lauder* [2007] EWHC 1227, [2007] 2 FLR 802 [42] (Baron J).

subject of criticism for creating confusion due to its deviation from the ‘precise language of the statute’.²⁴⁷

It has since been held that appellate courts should be unwilling to interfere with an assessment of need based on ‘reference to the standard of living during the marriage’ unless it is ‘plainly wrong in the sense that it was outside the generous ambit within which there is room for reasonable disagreement’.²⁴⁸ This dictum makes it apparent that the assessment of need, established with reference to the parties’ previous standard of living, is a wholly discretionary exercise. Thus, there remains no clear guidance as to the extent that the previous marital standard of living should affect the type and quantum of financial orders likely to be made in everyday divorces. The consequences of relying on such a discretionary consideration in the majority of asset reallocation cases shall be the subject of evaluation in Chapter Three.

ii) S.25(2)(d) – The Age of Each Party

The application of this statutory consideration reaffirms that needs provision is highly dependant on spousal circumstances. In relation to this subsection, it has been stated that ‘it is of importance... particularly where the people concerned are not young, to look very closely to see what the effect of the marriage has been’.²⁴⁹ This has enabled the judiciary to take into account a range of considerations when assessing the relevance of section 25(2)(d), including comparing the financial position of the spouse had they not married with their financial position following the divorce.²⁵⁰ Particular emphasis has been placed on assessing spouses’ pension entitlements and their ability to earn their own living.²⁵¹

Nevertheless, these considerations have not always weighed in favour of the economically dependant spouse. The recent Court of Appeal case of *Wright v Wright*,²⁵² evidences this. Mrs Wright, a 51 year old mother, who was in receipt of a

²⁴⁷ *Robson* (n 170) [43] (Ward LJ).

²⁴⁸ *ibid* [74] (Ward LJ).

²⁴⁹ *S v S* [1977] Fam. 127, 134 (Ormrod LJ).

²⁵⁰ *ibid*.

²⁵¹ See the Welfare Reform and Pensions Act 1999 which empowered the court to make pension-sharing orders. These powers are now contained within MCA 1973, s.24B.

²⁵² [2015] EWCA Civ 201.

periodical payment order, had been expected to start to contribute financially due to the impending retirement of her 59 year old ex-husband. However, in the years prior to the husband's application to vary the maintenance order, it was held that she had failed to train, start work or 'save or add to her pension provision'.²⁵³ Consequently, she had failed to 'relieve pressure on Mr Wright and his resources... [and failed] to prepare for independence'.²⁵⁴ Therefore, Roberts J held that it was appropriate, given the husband's impending retirement, to reduce the maintenance payments over the next four years until its cessation.²⁵⁵ This decision was upheld by the Court of Appeal.²⁵⁶

This case makes it apparent that this subsection's inclusion in the MCA 1973 does not necessarily require the judiciary to calculate need on the basis of the spouse's age. Instead, it prompts the judiciary to look at all of the surrounding circumstances and factors that are connected to the parties' ages. Financial independence, the ability to find employment and pension arrangements are all carefully considered when viewing need in the light of this statutory subsection. This reveals that when this section is applied through reference to the need principle, the courts are looking solely at the spouses' age, but rather the effect that their age has on their ability to support themselves financially.

iii) S.25(2)(e) – Any Physical or Mental Disability of Either Spouse.

It is readily apparent that section 25(2)(e) can be a very influential consideration when quantifying awards on the basis of need. The Court of Appeal stated that, '[i]n some cases the needs of the disabled spouse may absorb all the available capital'.²⁵⁷ This case ultimately held that '[t]he needs, both immediate and long term of the [disabled] husband have *priority* and no order should be made for the wife which would interfere with providing, within reason, for those needs'.²⁵⁸ This makes it apparent that the needs of the disabled spouse will take priority. However, if the assets that are awarded to a disabled party extend beyond their needs, the remainder

²⁵³ *Mr X v Mrs X* [2015] EWFC B17 (26 June 2014) [27] (Roberts J).

²⁵⁴ *ibid* [27] (Roberts J).

²⁵⁵ *ibid* [31] (Roberts J).

²⁵⁶ *Wright* (n 252) [44] (Pitchford LJ).

²⁵⁷ *Wagstaff v Wagstaff* [1992] 1 W.L.R. 320, 325 (Butler-Sloss LJ).

²⁵⁸ *ibid* 326 (Butler-Sloss LJ) (emphasis added).

can revert to the other spouse, ‘subject to the s.25 factors’.²⁵⁹ This reasoning transposes into modern law a paternalistic policy, similar to that which guided the judiciary in the latter half of the twentieth century.²⁶⁰ This demonstrates that the need principle under the Fairness Model continues to influence the judiciary to pursue a paternalistic policy, through making provision for those needs that the former spouse would otherwise be unable to satisfy.

This approach is also supported when one looks to the recent High Court decision of *SS v NS* where Mostyn J stated, ‘[w]here the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship’.²⁶¹ Clearly, special consideration and provision for the needs of a disabled spouse can be justified with regards to this objective of alleviating significant hardship. This reasoning has clear implications for the provision of needs in everyday divorces. In particular, this approach makes it clear that judges are required to not only calculate the extent of needs, but must also balance the parties’ ability to provide for their own needs following divorce. Thus, it is apparent that the needs principle requires a number of speculative judgements to be made by the court. Nevertheless, this is to be expected in an area of law such as this, due to its pivotal reliance on the exercise of judicial discretion.

The above evaluation of needs provision through the lens of the statutory provisions makes a couple of points evident. Firstly, it is apparent that the weight attributed to the various facets of need will depend on the application of judicial discretion. This prioritises flexibility and allows the judiciary to reallocate assets in the manner which they deem fair, with careful reference being given to the spouses’ circumstances.

What is interesting is that it appears that the need principle is being drawn upon as a more general means of protecting financially vulnerable spouses on divorce. Thus, sections 25(2)(d) and (e) protect spouses who may be unable to work and more broadly section 25(2)(c) seems to be directed towards preventing divorcees from

²⁵⁹ John Bolch, ‘Personal Injury Damages and Ancillary Relief’ (*Family Lore Focus*, March 2009) <http://www.familylorefocus.com/files/PERSONAL_INJURY_DAMAGES_AND_ANCILLARY_RELIEF.pdf> accessed 21 March 2015.

²⁶⁰ See MCA 1950, s.19 that permitted the judiciary to make ‘reasonable’ reallocations.

²⁶¹ *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam) [46] (Mostyn J).

having suffer a greatly reduced standard of living. In this sense, the needs principle appears to reflect a paternalistic agenda to protect financially vulnerable spouses from suffering unfair financial consequences on divorce. Accordingly, in everyday divorces the need principle is of pivotal importance, with reference to the parties' current and future abilities to satisfy their own needs.

Thus, the above sections have concluded that an implicit objective guiding the operation of the need principle is the protection of financially vulnerable spouses. However, it must be remembered that there are many other considerations that have influenced judicial decision-making. Therefore, this thesis will now evaluate the other objectives and principles that have been recognised by the judiciary to be relevant to the asset reallocation exercise. These matters will be assessed for the extent to which they are reconcilable with the need principle, the current context of the law and current societal views. This will lead to a conclusion as to whether they should continue to receive recognition within the asset reallocation process, and to what extent.

Other Objectives Present Within the Fairness Model

It is now apparent that in everyday divorces, protecting financially vulnerable spouses has become a central guiding objective in the asset reallocation process. It is the influence of the need principle that has led to the guiding statutory provisions to be interpreted compatibly with this objective. However, although the need principle is given a priority status in such cases, protecting vulnerable spouses is not the only relevant objective influencing applications of judicial discretion.

This section intends to evaluate the various alternative objectives that are present within the Farness Model. Whilst, this section is unlikely to identify an overarching consensus as to what the objectives of the asset reallocation process should be, uncovering some of the debate concerning the objectives that are present within the law will help to expose any shortfalls. Thus, this section will focus on identifying those competing policies that judges are required to balance. This will be with a view to assessing their relative weight and the extent to which they are compatible with the

need principle. Brief conclusions will also be drawn as to whether these objectives are being given sufficient or excessive weight during the asset reallocation process. These conclusions will inevitably have implications for this thesis' view regarding appropriate paths for reform, discussed in Chapter Four.

i) Fairness and the Avoidance of Discrimination

As shown in Chapter One, it is since the beginning of the twentieth century that fairness has been considered an important consideration within the asset reallocation process on divorce.²⁶² Unsurprisingly, in recent years, it has been endorsed as an important objective by academics and the judiciary alike: '[e]veryone would accept that the outcome... should be fair'.²⁶³ Accordingly, this policy consideration has now unequivocally reached the status of an overarching objective of the asset reallocation process.²⁶⁴ It is for this reason that this thesis classifies the current law as reflecting a Fairness Model when reallocating assets on divorce. Any counter argument to the use of fairness as a guiding principle goes against an instinctive understanding of what the role of the law should be when guiding this process.

However, the controversy with this policy objective does not arise with its acceptance; instead it becomes apparent on its application. Lord Nicholls rightly recognised that, 'fairness, like beauty, lies in the eye of the beholder'.²⁶⁵ In a later case, he elaborated on this by stating that, fairness 'is grounded in social and moral values... [which] cannot be justified, or refuted, by any objective process of logical reasoning'.²⁶⁶ This led Eekelaar to criticise the law on the basis that, '[fairness] is only presented as a device for structuring the reasoning process: we are not told what reasons do or do not justify departing from it'.²⁶⁷ Therefore, it is apparent that the aim of a fair division of the assets reflects a notoriously elusive objective, depending upon parties' expectations, burdens and other factors unique to the case.

²⁶² See, *Gilbey* (n 99) 200 (Lord Merrivale).

²⁶³ *White* (n 5) [24] (Lord Nicholls) See also Freedman (n 152) 135.

²⁶⁴ Particularly following, *White* (n 5) (Lord Nicholls).

²⁶⁵ *ibid* [1] (Lord Nicholls)

²⁶⁶ *Miller; McFarlane* (n 7) [4] (Lord Nicholls).

²⁶⁷ J Eekelaar, 'Back to Basics and Forward into the Unknown' (2001) 31 Fam. Law 30, 32.

This is an unsatisfactory position given the current state of the law, where increasing numbers of litigants are divorcing without legal advice. The implementation of this policy as an overarching objective may have exacerbated the potential for disagreement in this context. This is because once litigants learn of this objective their sense of entitlement will be based on an entirely individual, subjective interpretation of fairness. This may lead to wasted expenditure on litigation if parties have vastly divergent interpretations of fairness. Nevertheless, this elusive objective continues to guide the exercise of judicial discretion when reallocating assets on divorce, regardless of its reliance on subjective social judgments. However, whilst precise applications of the fairness objective may lead to inconsistent findings, this is not to preclude a reasonable investigation into the requirements of fairness.

One accepted ‘community value that can inform the judicial answer’ as to the requirements of fairness is the removal of discrimination.²⁶⁸ Lord Nicholls has clearly supported this reasoning by stating, ‘discrimination is the antithesis of fairness.’²⁶⁹ Accordingly, some members of the judiciary have since read these leading judgments and come to the conclusion that, beyond fairness, ‘[t]he only other principle of universal application... is non-discrimination’.²⁷⁰ Similarly, Hasday has argued that, ‘a crucial question in any family law debate has to be whether the particular proposal at issue is consistent with *equality* or not’.²⁷¹ Thus, the law should have no space for discriminatory presumptions stemming from gender. However, beyond this requirement to treat all litigants equally, there are no clear requirements of fairness.

In order to implement this policy into practice, the law cannot impose universal rules, as these will not achieve fairness in all of the situations that present themselves to the court. Inevitably, a degree of flexibility is required that can only be achieved through permitting a measure of judicial discretion. However, this recourse to discretion fails to assist the average litigant when attempting to reach an out of court settlement or evaluating their likely entitlements. Nevertheless, a compromise is required and due

²⁶⁸ Masson, Bailey-Harris and Probert (n 36) 327.

²⁶⁹ *Miller; McFarlane* (n 7) [1] (Lord Nicholls).

²⁷⁰ *B v B* (n 170) [51] (Wall LJ).

²⁷¹ JE Hasday, ‘The Canon of Family Law’ (2004) 57 *Stan L Rev* 825, 870 (emphasis added).

to the impossibility of choosing either rules or discretion, Schneider has concluded that the correct question is to ask, what would be the best *mix* of rules and discretion?²⁷² Reaching the correct balance between these two countervailing adjudicative methods will be the subject of evaluation within Chapter Four.

Owing to the difficulties of defining fairness, there is inherent uncertainty in any given case as to the extent that needs provision would be compatible with the objective of achieving a fair division of the assets. It has been established above that ‘the search for fairness largely begins and ends at this stage’.²⁷³ This implies that fairness dictates that adequate provision must be made for the financially vulnerable or dependent spouse. However, it must also be recognised that fairness has ‘two faces’ and that any order made ‘must be fair both to the applicant in need and to the respondent who must pay’.²⁷⁴ Thus, whilst the need principle may justify financial provision for the financially weaker spouse, the court must also consider the extent to which it remains fair to enforce the marital obligations beyond divorce. What is often the counter-consideration to the need principle shall now be examined.²⁷⁵

ii) Clean Break and the Need to Disentangle Lives

Alongside the need principle, the grant of a clean break order is another modern objective that helps to guide the Fairness Model’s approach to reallocating assets on divorce. The clean break provisions within section 25A MCA 1973 reflect the policy of the law to ‘encourage spouses to avoid bitterness after family-breakdown and to settle their money and property problems... begin[ning] a new life which is not overshadowed by the relationship which has broken down’.²⁷⁶ This section imposes a duty on the court to consider terminating parties’ financial obligations to one another when making orders on divorce. Thus, these statutory provisions seek to recognise and enforce the finality of divorce and those financial obligations, which stemmed from the now legally-terminated relationship.

²⁷² Schneider (n 41) 49-50.

²⁷³ See *Miller; McFarlane* (n 7) [12] (Lord Nicholls).

²⁷⁴ *North v North* [2007] EWCA Civ 760 [32] (Thorpe LJ).

²⁷⁵ In that it frequently protects the interests of the financially stronger party.

²⁷⁶ *Minton v Minton* [1979] AC 593, 608 (Lord Scarman).

Following the divorce of a childless marriage, enduring provision currently made under the need principle sits uncomfortably with the desire to bring a clean break between ex-spouses' financial obligations to one another. Thus, whilst the courts have rightly recognised that a clean break may not always be achievable,²⁷⁷ the use of the need principle in order to provide a 'meal ticket for life' is patently wrong, stretching its significance beyond what it can justifiably be intended to achieve.²⁷⁸ As Probert argues, 'an ex-spouse is not an insurer against all hazards'.²⁷⁹ To impose such an obligation on former spouses clearly fails to strike the correct balance between these competing considerations. Ultimately, the clean break objective weighs against the finding that long-standing periodic payments, on the basis of needs, represent a fair reallocation of the divisible assets.

This policy may justify orders that are aimed at enabling financially vulnerable parties to re-enter the workplace; a 'rehabilitative' order.²⁸⁰ Such orders may promote the parties to work together in order to reach individual self-sufficiency. Williams supports this argument and claims that these orders will give 'former husbands an incentive to provide the child care and other support needs in order to enhance [the mother's] market potential'.²⁸¹ Thus, such orders help to prevent dependency, as both parties will be empowered to earn their own living; thereby, precluding dependence on maintenance payments from their ex-spouse.

However, when seeking to balance these considerations, it is important to recognise that over the course of a marriage, spouses' lives and assets become increasingly entwined. This is amplified when the marriage has existed over a long period of time and with the existence of dependent children. Therefore, it is often not possible to sever all maintenance obligations between spouses immediately on divorce and, the court must be wary of the importance of periodical payment orders in many everyday divorces where capital lump-sum orders are not feasible. Furthermore, as noted

²⁷⁷ See, *H v H (Financial Provision)* [2009] EWHC 494 (Fam).

²⁷⁸ Although there is currently nothing to prevent the judiciary giving effect to the principle in this manner.

²⁷⁹ Probert (n 170) 217.

²⁸⁰ See, CJ Frantz and H Dagan, 'Properties of Marriage' (2004) 104 *Colum.L.Rev* 75.

²⁸¹ JC Williams, 'Is Coverture Dead? Beyond a New Theory of Alimony' (1994) 82 *Geo L.J.* 2227, 2262.

above, parties who have been out of work for decades cannot be expected to obtain equivalent employment to the spouse who had been working for the duration of the marriage. Therefore, in many everyday divorces the Fairness Model will often weigh in favour of long-term maintenance orders.

This fact has recently been recognised by the Law Commission as a justification for the retention of the need principle within the asset reallocation process.²⁸² They noted that over the course of the marriage the parties' lives become increasingly merged and recommended that any reallocation of assets on divorce should be directed towards unravelling this fusion i.e. through transitional provision for needs.²⁸³ Thus, it is important to recognise that in order to reach the correct balance between the need principle and a clean break the available financial orders must be applicable with sufficient flexibility in order to cater for the myriad of factual scenarios that come before the courts. Thus, discretion continues to play an inevitable role in the Fairness Model's approach to asset reallocation.²⁸⁴

Accordingly, the clean break statutory provisions must be recognised in tandem with the other statutory considerations when attempting to reach a fair reallocation. This was clearly recognised by the draftsmen behind these provisions, given that the wording of the statute states that financial obligations should only be terminated when it is 'just and reasonable' and periodic payments should only cease when it is possible for the receiving ex-spouse to, 'adjust without undue hardship to the termination of his or her financial dependence on the other party'.²⁸⁵ Therefore, judges are only likely to implement a clean break, when to do so is *reasonable* and not going to cause the financially vulnerable spouse *undue hardship*. Again the statute is relying on a judicial interpretation of these subjective terms in its search for a fair allocation.

Thus, the clean break policy can be seen as an important objective, given the current trend of divorce law and the need to prevent the law imposing endless obligations between ex-spouses. However, given the importance that has been attributed to

²⁸² Law Commission (n 18) para. 3.19.

²⁸³ They termed this the 'merger over time' approach to asset reallocation.

²⁸⁴ Just as it did under the Ecclesiastic and Contractual Model's assessments of parties' standards of living, see Chapter One.

²⁸⁵ ss.25A(1), (2).

protecting vulnerable spouses on divorce, it must be recognised that attaining a clean break ‘is inadequate as the sole objective of the law dealing with financial provision on divorce’, especially within everyday divorces.²⁸⁶ Instead, its realisation must be balanced against the need to protect vulnerable spouses, currently applied through the lens of the need principle, under the broader heading of fairness. Chapter Four will return to explore the most appropriate means of balancing and attributing these competing policies weight, given the current context of the law.

iii) Saving State Expenditure

An obvious, albeit controversial, policy that is currently effecting the operation of the Fairness Model is the desire to save State expenditure. This has resulted from the fundamental worry that, ‘the community may become responsible for supporting individuals (through state benefits) if the agreement reached does not meet the weaker party’s needs’.²⁸⁷ In recent years, following important changes to legal aid access, the Government is clearly pursuing this policy within the context of asset reallocation proceedings. In particular, the Government is dissuading couples from pursuing court adjudication whilst the judiciary are preventing divorced parties becoming dependant on welfare payments. This section intends to analyse the effects that this policy has had on the current asset reallocation process.

As noted above, LASPO 2012 reflected an intention to cut the legal aid budget by £350m and with legal aid in private family law disputes bearing the brunt of these austerity cuts.²⁸⁸ This has promoted increasing numbers of divorcees to pursue self-ordered financial settlements.²⁸⁹ In recent years this policy has helped to reduce the number of financial remedy applications to the court by over 23%.²⁹⁰ Whilst the

²⁸⁶ Freedman (n 152) 48.

²⁸⁷ Probert (n 170) 181.

²⁸⁸ ‘Legal Aid Cuts and Reforms’ (n 25).

²⁸⁹ Mediation still being covered by legal aid; Legal Aid Agency, ‘Family Mediation Guidance Manual’ (March 2015)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419977/mediation-guidance-manual-mar-2015.pdf> accessed 20 April 2015.

²⁹⁰ Cf. Ministry of Justice, ‘Court Statistics Quarterly January to March 2013’ (*Ministry of Justice Statistics Bulletin*, 20 June 2013)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207804/court-stats-q1-

precise figures of savings are unobtainable, inevitably, reduced numbers of cases reaching court adjudication will result in reduced costs for the State.

The argument that ex-spouses, rather than the State, should hold the responsibility to provide for each other's needs following divorce, has long been recognised by senior members of the judiciary. Most notably, in the House of Lords ruling in *Hyman v Hyman*, Lord Atkin recognised that it is, 'in the public interest to... prevent the wife from being thrown upon the public for support'.²⁹¹ More recently, whilst writing extra-judicially, Baroness Hale argued that it should be impossible to opt-out of providing for needs on divorce, as 'relationship generated needs should be catered for within the family rather than by the state'.²⁹² These arguments help to explain both the current law's approach to need provision and why the, 'first consideration... [is to be] given to the welfare, while a minor, of any child of the family'.²⁹³ Hence, both judicial dicta and current legislative policy support the view that preventing State dependence is an important policy within the asset reallocation process.

However, this objective has not received universal acceptance among academics. Firstly it should be recognised that '[p]rivate domestic labour benefits both the state and the men they live with', thus it appears unreasonable for the state to impose all liability for reimbursement onto the private sphere.²⁹⁴ The most condemnatory criticisms of this reasoning can be traced back to the 1970's, following the introduction of the irretrievable breakdown ground for divorce. It is from this period that recognition began to grow for the fact that divorce 'carries no stigma [and]... no longer is one [spouse] guilty and the other innocent'.²⁹⁵ Thus, the notion of personal responsibility for a divorce was removed and the possibility of serial marriages began to be accepted. According to Kevin Gray, this 'abrogation of personal responsibility for the success of the marital relationship necessarily entails the socialisation of the

2013.pdf> accessed 30 March 2015; Ministry of Justice, 'Court Statistics Quarterly April to June 2014' (*Ministry of Justice Statistics Bulletin*, 25 September 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358230/court-statistics-quarterly-april-to-june-2014.pdf> accessed 30 March 2015.

²⁹¹ [1929] AC 601, 629 (Lord Atkin).

²⁹² B Hale, 'Equality and Autonomy in Family Law' (2011) 33 JSWFL 3.

²⁹³ MCA 1973, s.25(1).

²⁹⁴ A Diduck and H Orton, 'Equality and Support for Spouses' (1994) 57 MLR 681, 686.

²⁹⁵ *Wachtel* (n 61) 89 (Lord Denning MR).

maintenance obligation after divorce'.²⁹⁶ This leaves advocates of a need-centric approach with a difficult question to answer; what is the justification for imposing 'the State's role as social insurer' on to an ex-spouse?²⁹⁷ As the Scottish Law Commission has recognised:

[t]he whole point of divorce is to sever the relationship of husband and wife... the desire to spare the public purse is arguably not a sufficient reason for requiring a man to support an impoverished stranger.²⁹⁸

As Gray viewed it, orders made under this policy are 'in reality an unconstitutional form of taxation'.²⁹⁹ Furthermore, this implicit policy of the law is likely to obscure the extent of entitlement, thereby, increasing uncertainty for all litigants. Therefore, the desire to save State expenditure can be seen to be an inadequate policy on which to justify asset reallocation, as there are insufficient reasons justifying imposing the state's obligation of social security onto an ex-spouse.

However, whilst it is apparent the need principle currently furthers this objective, the degree to which this policy influences modern needs provision is uncertain. For one, the extent to which this policy affects the reasoning of a judge is incalculable. Furthermore, it has yet to receive express statutory recognition as a guiding objective. Instead, this policy's influence occurs impliedly when judges interpret the legislative intent behind the leading statutory provisions which guide their discretion.

Nevertheless, given the current application of the need principle, it is apparent that this policy continues to influence judicial reasoning in everyday cases. Thus, in such cases, excessive weight is being attributed to the need to provide for the financially vulnerable spouse's needs out of the assets of the breadwinner. As shown above, this is resulting in the care-giving spouse having a priority claim to their ex-spouses'

²⁹⁶ Gray (n 58) 327.

²⁹⁷ H Stocker, 'Zur Kritik des Familienvermögensrechts' [1972] NJW 553, 557.

²⁹⁸ Scottish Law Commission, *Financial Provision on Divorce and Declarator of Nullity* (Scot Law Com Memorandum No. 22, 1976) 200.

²⁹⁹ Gray (n 58) 348.

assets. Accordingly, it is argued that the law is incorrectly ascribing excessive weight to the need principle in its pursuit of an unjustified policy objective.³⁰⁰

vi) Compensation

Another policy that has guided the modern asset reallocation process in everyday divorces is the desire to compensate spouses for, ‘any significant prospective economic disparity between the parties arising from the way they conducted their marriage’.³⁰¹ This was another of the enunciated rationales of fairness identified in *Miller; McFarlane*.³⁰² This policy is reflected in the statutory consideration, which requires judges to have regard to, ‘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’.³⁰³

This principle has generally justified financial provision for the care-giving spouse who has given up their job to look after the family’s children and home, thereby negatively impacting their earning potential.³⁰⁴ The policy behind this principle recognises that ‘men can only earn their incomes and accumulate capital by virtue of the division of labour between themselves and their wives... The cock bird can feather his nest precisely because he is not required to spend most of his time sitting in it’.³⁰⁵ Therefore, the care-giving spouse’s non-financial contributions enabled the bread-winning spouse to maximise his or her earning capacity.³⁰⁶ Any such ‘relationship-generated disadvantage’ may justify imposing a continuing financial obligation on to the ex-spouse.³⁰⁷

³⁰⁰ Although the difficulties of quantifying the effects of this are conceded.

³⁰¹ *Miller; McFarlane* (n 7) [13] (Lord Nicholls).

³⁰² *ibid.*

³⁰³ MCA 1973, s.25(2)(f).

³⁰⁴ The classic example being Mrs McFarlane in *Miller; McFarlane* (n 7).

³⁰⁵ See Lord Simon, ‘Recent Developments in the Matrimonial Law’ in W Rayden (eds), *Rayden’s Law and Practice in Divorce and Family Matters* (11th edn, London 1971) app VII, 3228.

³⁰⁶ These arguments justified a more favourable allocation in, *Parlour v Parlour* [2004] EWCA Civ 872.

³⁰⁷ See, *Miller McFarlane* (n 7) [138] (Baroness Hale).

Nevertheless, in recent years, there has been academic and judicial discourse as to whether this principle should be recognised as a freestanding objective in the asset reallocation process, or, alternatively, merely recognised as a facet of the need principle.³⁰⁸ These issues and implications will be returned to in Chapter Three, which will question the precise contemporary interaction between the principles of compensation and need.

The purpose of looking at these policy objectives which influence the modern asset reallocation process has been to assess their relative importance, legitimacy and the extent to which they are compatible with the need principle. It is concluded that the Fairness Model, as applied in everyday divorces, relies almost exclusively on a subjective judgment in order to balance these competing considerations. Furthermore, in a bid to save State expenditure, this balance has, ostensibly, become too heavily weighted in favour of providing for the financially vulnerable spouse's needs. These findings will now be used to critically evaluate the current prioritisation granted to the need principle within everyday divorces.

Conclusion

This chapter has shown that the need principle is of crucial importance under the Fairness Model's approach to reallocating assets in everyday divorces. However, it has been recognised that despite the fact that need often acts as the sole guiding principle in such cases, there are no strict rules that fetter judicial discretion.

Furthermore, the judicial interpretation of the relevant statutory provisions reveals that the judiciary have interpreted the needs principle as providing them with considerable discretion to reallocate assets through the subjective lens of fairness. Whilst this interpretation can be praised for helping to avoid some of the inequities that occurred under the Ecclesiastical and Contractual Models of asset reallocation, the absence of any express guidance relating to the policies pursued via these

³⁰⁸ See e.g. *SA v PA (Pre-marital agreement: Compensation)* [2014] EWHC 392 (Fam) (Mostyn J)

statutory considerations prevents the finding that the need principle is a transparent construct. Flexibility, through the application of judicial discretion, reigns supreme.

This has resulted in the judiciary pursuing a model of asset reallocation in everyday cases which is based on a laudable objective; fairness. However, the task of balancing the statutory considerations as well as the other relevant principles and objectives, remains a highly subjective method of pursuing this elusive objective. Accordingly, an evaluation of the negative consequences that stem from this legal position will be the subject of the next chapter. Reform proposals will then be evaluated for the extent to which they are able to successfully balance the competing requirements of legal certainty and flexibility of application. This will lead to a conclusion as to which proposal provides the most appropriate balance, given the current context of the law.

Chapter Three: Criticisms of the Fairness Model's Use of the Need Principle

Synopsis

Now that the need principle's role under the Fairness Model has been recognised, this chapter will identify the prevailing criticisms of the law's current approach. Inevitably, this will begin by looking at the MCA given that many of the specific criticisms relating to the use of the need principle are symptomatic of broader problems within this piece of legislation.

This thesis will then assess the specific criticisms relating to the need principle. This chapter will attribute these criticisms to a number of influences, including the principle's historical development, its position under the current Fairness Model, the judicial interpretations applied to this principle and the current landscape in which the asset reallocation exercise operates within.

It will end with an assessment of the Law Commission's recent Report into this area. This section will question whether the recommendations raised in this Report provide a satisfactory response to the aforementioned criticisms. In turn, this will allow this thesis to improve upon the Law Commission's findings where it can be shown that they omitted to give satisfactory weight to any of the notable criticisms raised against this principle's current operation.

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Introduction

This chapter will analyse the problems with the judicial reliance on satisfying parties' needs when reallocating assets in the everyday divorce under the current Fairness Model. The focus will be on uncovering the causes and extent of the criticisms that surrounds the needs principles operation in this context. Thus, the negative consequences that these criticisms will have on all litigants will be evaluated. The focus of this chapter will remain on everyday divorces, given the importance the needs principle holds in such cases. However, reference will also be made to big money cases, in order to present a comprehensive evaluation of this principle's contemporary use.

This thesis has already concluded that owing to the absence of a Parliamentary response to the absence of legal guidance in this area, the senior judiciary have become the leading authority as to the law's application and development. This has occurred through various judicial interpretations of the legislative provisions. Therefore, this chapter will also identify the deficiencies that have developed as a result of the law's incremental development through judicial precedent. When consolidated with the aforementioned criticisms of the law, this thesis will provide a comprehensive assessment of the legal deficiencies that justify some means of reform. The most appropriate response to these legal deficiencies will then be analysed in Chapter Four.

It must be noted from the beginning that this chapter aims to provide its evaluation with careful reference to the current context of the law. Thus, it will be shown that, given the recent legal aid cuts,³⁰⁹ the difficulties facing parties involved in such litigation have been emphasised. This is because, with the removal of public funding for legal representation in private family law disputes, professional legal advice and judicial adjudication is now an unaffordable luxury for most of these cases. This leaves many to settle out of court, with little guidance as to how to allocate assets. Accordingly, the law must respond to the fact that, now more than ever, uncertainties within the law have the potential to prevent a fair division of the assets.

³⁰⁹ Following the introduction of LASPO 2012.

The chapter will conclude with an evaluation of the Law Commission's most recent report into this area of law.³¹⁰ This will draw upon the understanding of the role that the need principle has assumed under the Fairness Model, developed in previous chapters. It will accordingly question whether this Report provides a satisfactory recommendation for reform given the criticisms of the law that are now to be identified.

Overarching Problems with the Matrimonial Causes Act 1973

In order for this chapter to provide a comprehensive evaluation of the need principle, as it is applied in everyday divorces, it is important to firstly recognise some of the deficiencies with the leading statute, which governs the operation of judicial discretion in this area. This is because the deficiencies surrounding the need principle are largely symptomatic of two more general problems with the leading statute governing asset reallocation on divorce. The following sections intend to identify these two statutory criticisms. In an attempt to provide a response to these problems, the Law Commission produced an in-depth Report, following a public consultation, recommending the introduction of guidance as to the operation and parameters of this principle.³¹¹ Reference will be made to some aspects of this report in this section in order to support criticisms of the contemporary approach to asset reallocation on divorce. This Report's recommendations for reform will also be evaluated towards the end of this chapter.

i) Absence of a Clear Statutory Objective

The key statutory provisions relating to financial relief on divorce are contained within Part II of the MCA 1973. The majority of sections within this part of the statute are concerned with the types of orders which can be made by the judiciary on divorce. It also provides a number of matters that the judiciary must have regard to

³¹⁰ Law Commission (n 18).

³¹¹ *ibid.*

when making such orders on divorce.³¹² However, no attention is paid to outlining a specific objective to be achieved, or the ‘financial position which is to be restored’, when making such financial orders on divorce.³¹³ As Chapter Two has shown, the only way to extrapolate the objectives of the financial reallocation process from the statute is to do so through implication. Therefore, one has to look at the matters which the courts are required to consider and, drawing upon contemporary judicial interpretation of these subsections, form a conclusion as to why such matters are included as considerations.³¹⁴

A similar uncertainty that arises from the key statutory provisions is the absence of any guidance as to the weight to be attributed to the various statutory considerations. This naturally has key significance when understanding the weight to be attributed to the need principle. Whilst need is one of the statutory factors to be considered, it must be questioned whether there is any theoretical justification for it assuming such a prominent role in the asset division process on divorce.³¹⁵

ii) Absence of a Hierarchy of the Statutory Considerations

As noted in Chapter Two, section 25 MCA 1973 provides a number of considerations judges must have reference to when reallocating assets on divorce. However, despite needs provision often being the primary and sole consideration in the search for a fair division in everyday divorces, the courts have consistently emphasised that there is no hierarchy governing the order in which the statutory considerations are to be applied.³¹⁶ This fact was identified by the House of Lords in *Piglowska v Piglowski* where Lord Hoffmann stated that the weight attributable to each consideration ‘must depend upon the facts of the particular case’.³¹⁷

³¹² See, MCA 1973, s.25.

³¹³ Gray (n 58) 318.

³¹⁴ As was undertaken in Chapter Two.

³¹⁵ See MCA 1973, s.25(2)(b).

³¹⁶ *White* (n 5) [36] (Lord Nicholls); *Miller; McFarlane* (n 7) [144] (Baroness Hale).

³¹⁷ (1999) 1 WLR 1360, 1370 (Lord Hoffmann).

This reliance on judicial discretion as a means of attributing weight to the variety of statutory considerations, fails to provide an accessible formula for litigants. Thus, it has been rightly recognised that ‘the assessment of needs is essentially an exercise of judgment and discretion’.³¹⁸ This is a relatively inaccessible form of law for all litigants, especially those who are self-represented, who may struggle to find, interpret and apply the relevant judicial dicta.

Consequences of these Legislative Omissions

As has been demonstrated, the need principle is of paramount significance in the majority of divorces, yet there remains no clear statutory definition or objective guiding its application. Consequently, practitioners who are engaged with applying the principle on a daily basis have stated that, ‘to say that the uncertainty is concerning is an understatement’.³¹⁹ Similarly, Eekelaar has noted that the discretionary-based approach of section 25 allows for a variety of justifiable orders to be made.³²⁰

This absence of a clear statutory objective or a hierarchy of the statutory considerations has led the Law Commission to state that, ‘[a] member of the public reading section 25 of the Matrimonial Causes Act 1973... [will] not know what they are supposed to achieve’.³²¹ This is because the statutory considerations may justify entirely different applications of judicial discretion.³²² Consequently, when self-ordering their finances on divorce, litigants may fail to reach a consensus as to how much weight to attribute to the need principle in order to ensure that their self-ordered settlement reflects a fair division of the available assets.³²³ This prevents litigants from gaining a precise understanding as to their likely entitlements, thereby, promoting further unnecessary adversarial and costly litigation. This is clearly

³¹⁸ Alexander Chandler, “What is the Measure of Maintenance?” How does the court quantify spousal periodical payments? (*Family Law Week*, 2009) <<http://www.familylawweek.co.uk/site.aspx?i=ed33597>> accessed 12 Jan 2015.

³¹⁹ Marshall (n 201) 324.

³²⁰ J Eekelaar, ‘Should Section 25 be Reformed?’ [1998] Fam Law 469, 470

³²¹ Law Commission (n 18) para 3.4.

³²² Cf MCA 1973, s.25(2)(b) and s.25A.

³²³ As is required for a judge to endorse their agreement; MCA 1973, s.33A,

incompatible with the Ministry of Justice's policy objectives to reduce court delays and promote disputes to be resolved outside of court.³²⁴

Instead, if a clear statutory objective of the reallocation exercise was enunciated, all litigants would be provided with a clearer understanding of the rationales justifying the division of their assets on divorce. The Law Commission has supported this argument, stating that such an objective could provide litigants with 'an indication of the outcome that they should be aiming for'.³²⁵ This could enable litigants to calculate with greater accuracy the duration and amount of an award that is likely to be justified through the court's application of the need principle. Consequently, as spouses will have a greater understanding of the brackets of their likely entitlements, there would be a reduced likelihood of proceedings being escalated to court adjudication,

However, as the law stands, such an objective does not exist to guide the application of the need principle in everyday divorces. Consequently, the need principle's operation in such divorces can be subject to a number of criticisms. Identifying the most prominent deficiencies that surround the principle's operation will form the central focus of the remainder of this chapter. It will be shown that many of the deficiencies surrounding the need principle's current operation can be directly attributed to the above omissions within the MCA 1973.

³²⁴ See, Ministry Of Justice, 'Making the family justice system more effective' (14 June 2013) <<https://www.gov.uk/government/policies/making-the-family-justice-system-more-effective>> accessed 30 July 2014.

³²⁵ Law Commission (n 18) para 1.27.

Needs Provision on Divorce: A Flawed Principle

As Chapter Two has shown, judicial developments over the past decade have attempted to ‘formulate guidelines that would facilitate the settlement of ancillary relief cases generally’.³²⁶ However, the judicial development of the law has been greatly criticised and many view this area of law as a source of great confusion.³²⁷ Consequently, in everyday divorces, where the need principle is paramount, litigants are unaware as to how the judiciary will apply this principle when dividing their assets. With this in mind, this thesis will turn to examine those criticisms that relate directly to the need principle. Thus, this section will identify and evaluate those aspects of needs provision in which legal developments have failed to produce satisfactory results. This will help support arguments for reform that will be raised in Chapter Four.

i) Judicial Embellishment: Generous Interpretation of Needs

The precise parameters of the needs principle remains an area of great contention. This has occurred following some members of the judiciary applying an expanded interpretation of this principle. More specifically, there is a divergence of approach as to whether the principle demands provision for ‘strict’ needs or ‘needs generously interpreted’.³²⁸ This latter term has been used in cases involving considerable assets as a justification for a substantial award on the basis of needs. For example, in *McCartney v Mills McCartney* the sharing principle was subsumed within this concept of the wife's needs, and after a short marriage she received an award of £16.5 million.³²⁹ Similarly, as discussed above, some cases have absorbed the principle of compensation into a generous assessment of needs.³³⁰

³²⁶ Masson, Bailey-Harris and Probert, (n 36) 365.

³²⁷ See e.g. S Davis, ‘Equal Sharing: A Judicial Gloss Too Far?’ [2008] Fam. Law 428; J Eekelaar, ‘Miller v Miller: The Decent into Chaos’ (2005) 35 Fam. Law 870.

³²⁸ See, *Miller; McFarlane* [2006] UKHL 24 [144] (Baroness Hale).

³²⁹ [2008] EWHC 401 (Fam), [2008] 1 FLR 1508.

³³⁰ See *VB v JP* [2008] EWHC 112 (Fam); [2008] 1 FLR 742.

This expansion of the needs principle has no statutory recognition and has received criticism from some members of the judiciary. Ward LJ stated that:

Confusion will be avoided if resort is had to the precise language of the statute, not... upon need always having to be 'generously interpreted'.³³¹

This criticism rightly recognises that this expansion detracts from the principle's transparency and, thus, the widening militates against the formation of a predictable principle that is capable of comprehension by those litigating in everyday divorces. The press reported comments of Thorpe LJ during a recent high net worth case, *Davies v Davies*³³², can be seen to reflect a more appropriate recognition of the need principle, namely, 'any mention of needs is completely inappropriate in a case of this scale' and 'we only mention needs when there isn't a lot to go around'.³³³

There are two main problems that stem from this expansion of the needs principle. Firstly, it permits judges to justify any award with the rubberstamp of 'needs generously interpreted'. As shown in Chapter Two, the needs principle is often the only principle guiding judicial discretion in an everyday divorce. Therefore, to allow the judiciary to interpret the principle expansively at will, without reference to external legal authority, ultimately allows for a completely unfettered exercise of discretion. As Chandler has noted, 'like the overarching aim of "fairness", "generosity" is a subjective and elusive concept that provides no quantifiable guidance as to the court's proper approach'.³³⁴ Consequently, it precludes litigants in person and practitioners from making an accurate assessment as to the awards that can be expected on the basis of needs. This may lead to further litigation and the negative consequences associated with this in the context of divorce proceedings. Therefore, if the Government wants to achieve its aim to 'discourage unnecessary and

³³¹ *Robson* (n 170) [43] (Ward LJ).

³³² [2012] EWCA Civ 1641.

³³³ 'Wives who divorce wealthy husbands can't expect big payouts, judge warns' *The Telegraph* (London, 9 Nov 2012) <<http://www.telegraph.co.uk/news/uknews/law-and-order/9666927/Wives-who-divorce-wealthy-husbands-cant-expect-big-payouts-judge-warns.html>> accessed 8th November 2014.

³³⁴ Chandler (n 318).

adversarial litigation at public expense' they would be well advised to clarify the boundaries of the asset reallocation process in everyday divorce cases.³³⁵

The second problem that stems from this judicial embellishment is the incidental effect it is having in everyday cases. In *Charman v Charman (No 4)* Sir Mark Potter P stated:

It is clear that, when the result suggested by the needs principle is an award of property greater than the result suggested by the sharing principle, the former result should in principle prevail.³³⁶

However, it is apparent that in everyday divorces concerned with limited divisible assets, a 'generous' interpretation of needs will frequently justify an award greater than that proposed through the sharing principle. Whilst, a 'generous' interpretation of needs has generally been reserved for those cases deemed to have sufficient assets for this purpose, there remains no guidance as to the threshold for this expanded principle to bite. Undoubtedly, this is likely to lead to inflated expectations as to entitlements on the basis of needs.

Furthermore, in the context of everyday divorces, this expanded interpretation arguably represents an unacceptable judicial gloss on the governing statute. It was in *McFarlane v McFarlane* that the judiciary recognised that the rationales of fairness, 'should not be given a free standing life, interpretation or application as if they were themselves part of the statute rather than descriptions of the approach to the reasoning to be used in applying the statute to achieve a fair result.'³³⁷ This has led some academics to claim that, 'needs (s.25(2)(b)) cannot, as a matter of law, dominate the exercise'.³³⁸ However, if needs are to be 'generously interpreted' in everyday divorces, then such provision is likely to dominate the Fairness Model's approach to an even greater degree than it already does.³³⁹ Therefore, this judicial expansion of

³³⁵ Ministry of Justice, 'Reform of Legal Aid In England and Wales: Government Response' (Cm 8072, 2011) 4.

³³⁶ *Charman* (n 6) [73] (Sir Mark Potter P).

³³⁷ *McFarlane* (n 242) [112] (Charles J)

³³⁸ Masson, Bailey-Harris and Probert,(n 36) 357.

³³⁹ As shown in Chapter Two.

the principle should be rejected on the grounds that it is a judicial development that unacceptably interferes with the operation of the governing statute and the legislative intent that is inherent within its provisions.

Thus, it is argued that this expanded concept of needs ‘generously interpreted’ should have no applicability to everyday divorces, where the judiciary are already struggling ‘to stretch modest finite resources so far as possible to meet [a strict interpretation] of the parties’ needs’.³⁴⁰ This will prevent unrealistic expectations and preclude litigants from mistakenly relying on this expanded principle when calculating their needs in cases where it is wholly inapplicable.

ii) Outdated Statutory Considerations: Standard of Living (s.25(2)(c))

Another criticism of the modern interpretation and application of the need principle looks to the historical development of the principle. When assessing parties’ needs on divorce, a key statutory consideration is the parties’ former standard of living.³⁴¹ As Chapter One demonstrated, this has been an important consideration when calculating maintenance, long before the introduction of the MCA 1973. However, it will now be argued that no-one should be entitled to a sustained standard of living after divorce, as this consideration is no longer justified, given current understandings of marriage. Furthermore, it will be recognised that this consideration is incompatible with the trend of modern divorce law.

As identified in Chapter One, the initial recognition of this consideration on divorce stemmed from the ‘indivisible spiritual unity’ that resulted from marriage.³⁴² Therefore, the financial obligations that were created on marriage were considered equally indissoluble under the Ecclesiastic Model of asset reallocation on divorce. Recognition of the ‘standard of living’ consideration was continued by the secular courts when providing expectation damages for the innocent spouse, following a breach of the civil contract of matrimony:

³⁴⁰ *Miller; McFarlane* (n 7) [12] (Lord Nicholls).

³⁴¹ MCA 1973, s.25(2)(c). See *Charman (No 4)* (n 6) [70] (Sir Mark Potter P).

³⁴² *Gray* (n 58) 284.

[W]here the breaking up of the family life has been caused by the fault of the respondent, the Court... ought to place the petitioner and the children in... the same position as if the marriage had not been broken up.³⁴³

However, currently marriage is dissoluble on the basis that it has ‘broken down irretrievably’, and the statutory clean break provisions signal that there is legislative support for the ending of perennial financial obligations on divorce.³⁴⁴ Therefore, it is apparent that marriage is no longer viewed as an indissoluble sacrament. Nor is marriage viewed as a contract giving rise to a right to damages on divorce.³⁴⁵

As the previous chapters have concluded, the need principle has been developed with the intention of protecting vulnerable spouses. It was not developed with the intention of entitling parties to a sustained standard of living beyond divorce.³⁴⁶ Thus, the justifications for maintaining spousal standards of living are no longer legally relevant; having been based on the historic Ecclesiastic or Contractual Models of asset reallocation. Hence, attempting to provide a sustained standard of living should no longer be justified through recourse to the need principle.

Miles has also disagreed with the use of this consideration as, ‘the marital standard of living [is] too slippery a concept’.³⁴⁷ This subsection requires the judge to look at all aspects of the parties’ lives which is an inevitably subjective assessment. Therefore, it places excessive reliance upon judicial discretion to determine the *standard* of living and the needs that stem from this standard. Equally, it should be recognised that in the context of everyday divorces, this subsection will give litigants an excuse to pursue an award that is generally unobtainable. This is because, as noted in Chapter Two, ‘the assets that had sustained a particular standard of living for one household [are] usually insufficient to sustain that level for two households’.³⁴⁸

³⁴³ See, *Hartopp* (n 91) 72 (Gorrell Barnes J).

³⁴⁴ See MCA 1973, ss.1(1), s.25A.

³⁴⁵ Nevertheless, there remains a body of academics who continue to argue that marriage should be viewed as a contract; see, Gregg Temple, ‘Freedom of Contract and Intimate Relationships’ (1985) 8 *Harv JL & Pub Pol’y* 121.

³⁴⁶ Despite it often having this effect in practice.

³⁴⁷ Law Commission (n 18) para. 3.43.

³⁴⁸ Probert (n 36) 192.

Baroness Deech has argued that this consideration should have limited weight as, ‘no one should be entitled to a standard of living for all time depending on whom they marry’.³⁴⁹ Similarly, members of the judiciary have remarked, ‘it was wholly unrealistic to expect to go on living at the rate at which she perceived she was living’.³⁵⁰ Nevertheless, Baroness Deech views this consideration as contributing to such expectations, as she argues that the current law dissuades women from careers, prompting them to ‘find a footballer’.³⁵¹

An argument may be made in a case involving a child arrangement order stipulating that the child will spend time residing with both parents,³⁵² that the standard of living should remain the same between the houses on the basis of the need to avoid detrimental disruption to a child’s wellbeing.³⁵³ However, it is submitted that it is only as an extension of the section 25(1) MCA 1973 duty to protect a child’s welfare needs that the previous standard of living should continue to be attributed any weight.

Recognition of these points would help to rein in interpretations of the need principle, thereby making it a more accessible term for all litigants to apply. The potential to remove this statutory consideration from the asset reallocation process will be evaluated in Chapter Four.

iii) Inconsistency with the Clean Break Policy

Some academics have criticised the continued provision for needs after divorce from a theoretical perspective. As Chapter One has shown, the general theoretical direction of recent divorce reforms have increasingly reflected the acceptability of both divorce

³⁴⁹ Law Commission (n 18) para. 3.43.

³⁵⁰ *McCartney* (n 199) [168] (Bennett J).

³⁵¹ See, Rosa Silverman, ‘Divorce Laws Should be Tougher on Women, Says Top Female Peer’ *The Telegraph* (London, 31 December 2014) <<http://www.telegraph.co.uk/news/uknews/law-and-order/11318734/Divorce-laws-tell-women-just-marry-a-footballer-says-expert.html>> accessed 10 February 2015.

³⁵² See Children Act 1989 s.8(1), as amended by Children and Families Act 2014 s.12.

³⁵³ This would be keeping in line with the current first consideration under MCA 1973, s.25(1).

and the termination of financial ties between ex-spouses. Many view continued adherence to the need principle as inconsistent with this trend.

As recognised above, the common law maintenance obligation was ‘formulated in the shadow of religious dogma which asserted that marriage constituted an indivisible spiritual unity’.³⁵⁴ Accordingly, in a secular society where the law has moved away from the Ecclesiastic Model of asset reallocation and divorce is both socially and legally permitted, such theological considerations should now be considered inappropriate. Instead, the modern divorce law was ‘designed precisely to allow the parties in a broken marriage to make a fresh start in life’.³⁵⁵

It was a result of arguments, such as Gray’s, gaining traction that led to the introduction of section 25A(2) into the MCA 1973.³⁵⁶ Section 25A(2) requires that the judiciary consider how long it should take for the financially dependent spouse to ‘adjust without undue hardship to the termination of his or her financial dependence on the other party’ when making a periodical payment order.³⁵⁷ However, it has been suggested that this subsection is directed towards ending dependency but ‘does not apply with the same force’ when periodical payment orders are made in attempt to reach a fair result.³⁵⁸ Thus, it is apparent that the Fairness Model of asset reallocation gives priority to achieving fairness over an attempt to realise a clean break. Again this reaffirms this thesis’ view that the law governing asset reallocation on divorce be classified as pursuing a Fairness Model.

Thus, it is apparent that any conflict between the theoretical requirement to bring financial obligations between spouses to a swift end and judicial notions of fairness is inevitably solved by giving primary appreciation to the ‘goal of overall fairness’.³⁵⁹ Therefore, the weight attributed to both need provision and granting a clean break is entirely dependent on the exercise of an extensive judicial discretion. Yet again, there is an absence of accessible information guiding litigants as to the likely weight that is

³⁵⁴ Gray (n 58) 284.

³⁵⁵ *ibid* 317.

³⁵⁶ *Via Matrimonial and Family Proceedings Act 1984*, s.3.

³⁵⁷ *MCA 1973*, s.25A.

³⁵⁸ *Probert* (n 170) 215.

³⁵⁹ *White* (n 5) [11] (Lord Nicholls).

to be attributed to this consideration. Given the rise of cases settled out of court, there is now an increased desire for a transparent, structured approach to the judicial balancing exercise. Therefore, any proposal for reform will have to provide a structured response as to how balance the clean break policy with the need to protect vulnerable spouses.

iv) Senior Court Adjudication only Utilised in ‘Big Money’ Cases

A pragmatic criticism has been levelled at the use of incremental case law as a means of developing the need principle. Owing to the costs involved, it is the minority of divorce proceedings that ever rely upon court adjudication to determine how assets are to be reallocated.³⁶⁰ It is both impossible and inappropriate for parties to spend thousands of pounds on legal costs and trial adjudication in everyday divorces, where only limited assets are available for division.

This point is further reinforced when one considers the financial costs required for cases to reach appellate, precedent-setting courts. Consequently, the senior courts, whose statutory interpretations lead to guidance for the lower courts, are more likely to adjudicate on cases involving substantial assets. Therefore, such judicially developed law is only directly applicable to divorces with similar circumstances. Comparatively, in everyday divorces, the only guidance provided in relation to the appropriate application of the need principle, stems from infrequent *obiter dicta*.³⁶¹ This has left a dearth of guidance as to how limited assets should be split, despite the fact that, ‘those needs cases are probably in even greater need of guidance from the higher courts than are the big money cases’.³⁶²

³⁶⁰ In 2011, while 115,189 divorces were finalised, only 33,497 cases were disposed of. See, Ministry of Justice, ‘Court Statistics (Quarterly) January to March 2014 (*Ministry of Justice Statistics Bulletin*, 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321352/court-statistics-jan-mar-2014.pdf> accessed 20 April 2015.

³⁶¹ E.g. see, *Cordle* (n 214) [34] (Thorpe LJ).

³⁶² D Hodson, ‘The Miller’s Wife and the Breadwinner: Lessons for Lawyers in Daily Practice’ (*Family Law Week*, 2006) <<http://www.familylawweek.co.uk/site.aspx?i=ed2036>> accessed 15 January 2015.

Chapter Two has already shown that the sparse *obiter* comments that are relevant to everyday divorces have established that the need principle will be the primary, if not only, consideration when reallocating assets in such cases.³⁶³ However, the existing case law has left a notable absence of express, detailed, senior judicial scrutiny of the precise application of this principle in everyday divorces. As exemplified in Chapter Two, an understanding of the constituent elements and policies justifying and guiding the likely application of this principle, can only be identified through a careful examination of the case law.

v) Uncertain Relationship between Need and other Judicial Principles

In the face of the aforementioned legislative omissions, the judiciary have consistently attempted to declare both the existence of an overriding objective of the asset reallocation process on divorce,³⁶⁴ as well as to announce some of the constituent principles required to obtain it.³⁶⁵ However, the interaction between these principles has not always been clear, as the senior judiciary have recognised that ‘there can be no invariable rule on this’.³⁶⁶ Consequently, the search to expose and explain such underlying principles has been compared to:

[a] frenzied butterfly hunter in a tropical jungle trying to entrap a rare and elusive butterfly using a net full of holes. As soon as it appears to have been caught it escapes again and the pursuit continues.³⁶⁷

Furthermore, as noted above, the fact that senior court adjudication is only obtainable where there are substantial assets worth fighting over, means that those judicially enunciated guiding principles have arisen in relation to such cases. Therefore, their applicability to everyday divorces has been described as ‘not tested in the law

³⁶³ See, *Miller; McFarlane* (n 7) [12] (Lord Nicholls).

³⁶⁴ *White* (n 5) [1] (Lord Nicholls); ‘the outcome on these matters, whether by agreement or court order, should be fair’.

³⁶⁵ *Charman (No 4)* (n 6) [124] (Sir Mark Potter P); ‘the property consequences of divorce are to be regulated by the principles of needs, compensation and sharing’.

³⁶⁶ *Miller; McFarlane* (n 7) [29] (Lord Nicholls).

³⁶⁷ *Charman v Charman (No 2)* [2006] EWHC 1879 (Fam) [111] (Coleridge J).

reports... [leaving us] to speculate about how the principles are, and should be, applied to more “normal” families’.³⁶⁸

Nevertheless, this section will attempt to draw some conclusions regarding the relationships between the principles of need and that of compensation and sharing, when drawn upon in everyday divorces. This will be with a view to understanding when the principles apply and how this could be clarified for litigants, particularly those who are self represented.

a) Needs and Compensation

As noted in Chapter Two, the extent to which these principles remain separate is a contentious issue. From the moment these two principles were introduced, Lord Nicholls recognised the similarities between them. In particular, he warned that they ‘often overlap in practice, so double-counting has to be avoided’.³⁶⁹ Thus, there has been a move towards recognising that:

[i]n cases other than big money cases, where... the wife has plainly sacrificed her own earning capacity, compensation will rarely be amenable to consideration as a separate element... compensation is best dealt with by a generous assessment of her continuing needs.³⁷⁰

This view that compensation should be subsumed into a more generous assessment of need has been supported by the Law Commission. In their most recent Report on *Matrimonial Property, Needs and Agreements*, it was suggested that, ‘compensation may simply make explicit what has always been regarded as an element of need, that is, making provision, on divorce, for the long-term financial consequences of the marriage’.³⁷¹ However, this amalgamation has not received universal acceptance from

³⁶⁸ J Miles ‘Charman v Charman (No 4) [2007] EWCA Civ 503 – Making Sense of Need, Compensation and Equal Sharing after Miller; McFarlane’ (2008) 20 CFLQ 378, 378.

³⁶⁹ *Miller; McFarlane* (n 7) [12] (Lord Nicholls).

³⁷⁰ *VB* (n 330) [59] (Sir Mark Potter P).

³⁷¹ Law Commission (n 18) para 2.38.

within the judiciary, and if it is to be accepted, the above criticisms regarding applying a generous interpretation to the need principle would be amplified.

In *McFarlane v McFarlane*, Charles J noted that, ‘the compensation principle is fully in play’.³⁷² He justified the principle’s continued relevance on the basis that it ‘provides an additional and helpful basis of reasoning for a spouse to continue to share in the earning resource of the other spouse after the end of the marriage’.³⁷³ However, this reasoning could equally be raised in justification for a wider understanding of the need principle. Therefore, he fails to justify the retention of compensation as a stand-alone principle.

Further criticism of the compensation principle has come from the dictum of Mostyn J, in *SA v PA (Pre-Marital Agreement: Compensation)*.³⁷⁴ Whilst this case was concerned with the division of substantial assets, Mostyn J outlined five separate reasons to support his belief that the principle of compensation is always ‘extremely problematic and challenging both conceptually and legally’.³⁷⁵ Notably, he stated that, ‘it is hard to identify any case where compensation has been separately reflected as a premium or additional element [to the principle of needs]’.³⁷⁶ This again suggests that compensation should be subsumed within the need principle. Whilst he went on to accept that he was bound by the House of Lords in *Miller; McFarlane*, he attempted to limit the separate application of the principle of compensation to such a small category of cases as to make it almost irrelevant.³⁷⁷ It remains to be seen whether his constraints will receive judicial favour.

Consequently, the extent to which compensation continues to exist as a separate principle remains uncertain and requires clarification. It appears that the Law Commission are advocating the absorption of the policy justifying the compensation principle into a generous interpretation of needs, in an attempt to pay better

³⁷² *McFarlane (No 2)* (n 242) [121] (Charles J).

³⁷³ *ibid* [122] (Charles J).

³⁷⁴ [2014] EWHC 392 (Fam).

³⁷⁵ *ibid* [24] (Mostyn J).

³⁷⁶ *ibid* [35] (Mostyn J).

³⁷⁷ *ibid* [36] (Mostyn J).

recognition to the trend occurring within the case law.³⁷⁸ However, even if this development received statutory recognition, it would fail to provide assistance for litigants when providing for needs on divorce. Instead, it would merely become another facet of needs to accommodate, leading to further subjective questions regarding how generous the provision of needs should be. Equally, by subsuming further considerations into the principle of needs, the practitioner's role of providing a likely bracket of outcome, becomes more difficult. Clearly, some form of authoritative guidance is required in order to clarify the policy considerations that are relevant to the need principle. The precise content and most appropriate form of such guidance or rules will be the subject of evaluation within Chapter Four.

b) Needs and Sharing

The policy behind the sharing principle was introduced into the law via a crosscheck against discrimination, following *White v White*.³⁷⁹ This facet of fairness requires an equal division of the matrimonial assets, 'unless some other good reason is shown to do otherwise'.³⁸⁰ On the interaction of these divergent principles, the court has appeared to advocate a starting point of equal sharing, before modifying this sum on the basis of need.³⁸¹ This approach intends to 'bypass ultimately irrelevant argument[s] about "need", however that concept is defined and assessed'.³⁸² Whilst this structure may help to prevent unnecessary litigation in big money cases, it has been criticised when applied to everyday cases on the basis that, 'the fact that the parties' needs will be determinative may make notionally starting at 50:50 appear pointless'.³⁸³ It may also place the burden of justifying a departure from the sharing principle on the party with the greatest need.

However, unprincipled psychological considerations have been found to exist which effect the parties' bargaining positions when reallocating asset on divorce. Davis *et al* found that the belief that the family's financial resources belong to the breadwinner

³⁷⁸ E.g. see, *VB* (n 330) [59] (Potter P).

³⁷⁹ *White* (n 5).

³⁸⁰ *ibid* [150] (Lord Nicholls).

³⁸¹ See, *Charman (No 4)* (n 6) [77 (c)] (Sir Mark Potter P).

³⁸² *Miles* (n 368) 386.

³⁸³ *ibid*.

had a strong psychological influence on both parties during mediation proceedings.³⁸⁴ Furthermore, Fehlberg found that '[e]ven amongst couples with a philosophy of sharing, a sense of "ownership", or entitlement, is associated with having earned the money'.³⁸⁵

The order of applying the need and sharing principles raised in *White* can thus be supported on the basis that this notional starting point helps to avoid such psychological influences from affecting the parties' expectations of entitlement. Specifically, it helps to avoid the stigma that the courts are 'giving' to one spouse 'property which "belongs" to the former'.³⁸⁶ Therefore, this order of applying these two principles can be praised as it helps to militate against this unprincipled psychological influence unduly affecting a parties' bargaining position. However, a rule or legal presumption to this effect does not exist, and it remains entirely within judicial discretion to disregard this principle when ordering provision for need. Chapter Four will evaluate the possibility of enacting such a rule or presumption, requiring the equal sharing of asset on divorce.

vi) Needs Principle's Failure to Protect Vulnerable Spouses

The final criticism of the modern need principle relates to the principle's failure to achieve the objective that the judiciary have implicitly attributed to it. As has been established in Chapter Two, when the need principle is analysed through the lens of the statute, with reference to subsequent judicial commentary, it becomes apparent that the need principle is intended to protect financially vulnerable spouses from suffering unfair financial consequences on divorce. However, there exists much socio-economic research to suggest that this is not being achieved.³⁸⁷ For example, when looking at the British Household Panel Survey, Fisher and Lowe noted that

³⁸⁴ Davis, Cretney and Collins (n 27) 144.

³⁸⁵ Belinda Fehlberg, 'With All My Worldly Goods I Thee Endow?: The Partnership Theme In Australian Matrimonial Property Law' (2005) 19 IJLPF 176, 189.

³⁸⁶ *Miller; McFarlane* (n 7) [9] (Lord Nicholls).

³⁸⁷ See J Westaway and S McKay, *Women's Financial Assets and Debts* (The Fawcett Society, 2007); W Sigle-Rushton, 'Great Britain: "Things Can Only Get Better..."', in HJ Andre and D Hummelsheim (eds), *When Marriage Ends*, (Edward Elgar; Davis 2009).

following divorce, ‘the income of men increases by about 23%, whilst that of women falls substantially; 31%, after controlling for household size’.³⁸⁸

These figures may be explained with reference to women’s biological position as the child-bearer, combined with social expectations relating to motherhood. This generally results in the wife giving up her employment and forgoing ‘investment in her own career’, in order to care for the children and home.³⁸⁹ Furthermore, on divorce, ‘mothers overwhelmingly retain physical custody of their children’, which, inevitably interferes with any hopes of continued labour force participation.³⁹⁰ As a result, ‘the vast majority of divorced women [are] in a financially more precarious position than their former husbands’.³⁹¹ Various socio-economic studies into the financial effects of divorce have consistently reiterated this conclusion.³⁹²

Accordingly, it is apparent that the need principle is failing to pay sufficient respect to the non-financial contributions of such care-givers. Thus, any reform proposal should demonstrate an astute awareness ‘that marriage is about teamwork, sharing and equality’.³⁹³ Chapter Four will turn to assess the most appropriate means through which the law could attempt to implement these principles into practice in the everyday divorce. It is argued that the recognition of these principles may lead to a fairer division, by paying heed to the context in which marital investments and sacrifices occur.

This thesis has now evaluated the specific criticisms relating to the contemporary application of the needs principle. It will now turn to assess the implications of these criticisms. This will involve questioning whether the aforementioned legal deficiencies are being overstated. It will conclude with a statement as to whether legal reform can be justified.

³⁸⁸ H Fisher and H Low, ‘Who wins, who loses and who recovers from divorce?’ in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets: An Inter-disciplinary Study*. (Hart Publishing 2009) 288.

³⁸⁹ ES Beninger and JW Smith, ‘Career Opportunity Costs: A Factor in Spousal Support Determination’ (1982) 16 Fam L.Q. 201, 207.

³⁹⁰ J Carbone, ‘Feminism, Gender and the Consequences of Divorce’ in M Freeman (eds), *Divorce: Where Next?* (Dartmouth Publishing Company 1996) 181.

³⁹¹ *ibid* 182.

³⁹² For example see, J Westaway and S McKay (n 387); Sigle-Rushton (n 387).

³⁹³ Starnes (n 51) 278.

Consequences of these Inadequacies

Given the law's current reliance on judicial discretion, it has been criticised on the grounds that there are limited obstacles to prevent a judge basing their judgments on the 'diversity of community views'.³⁹⁴ This point has been recognised by Bailey-Harris, who has argued that:

...the pattern of the law's development fails to please. It is impossible to predict when an articulated statutory principle will be seized upon in a judgment, or when a new sub-principle will be invented, or when the search for principle will simply be disclaimed.³⁹⁵

On the other hand, Lord Hoffmann has argued that despite the fact that many of the decisions in these proceedings may rest on 'value judgments on which reasonable people may differ... [this is] an acceptable price to pay for the flexibility of the discretion conferred by the Act of 1973'.³⁹⁶ Similarly, Dowding has argued that the primary advantage of this system is that it allows the judiciary to 'tailor the arrangements to the very specific circumstances of the individual family', thereby, promoting the Fairness Model.³⁹⁷

These arguments represent counter-positions in the discretion-transparency debate. This was described by Bailey-Harris *et al.* as:

[t]he difficulty of steering between the Scylla of too wide a discretion vested in the courts (inevitably involving a high degree of diversity in judicial application, unpredictability of outcome and high costs in cases involving protracted litigation, as well as difficulties for practitioners in offering advice to clients) and the Charybdis of too-rigid a statutory formulation of principle (potentially productive both of injustice

³⁹⁴ Chandler (n 318)

³⁹⁵ R Bailey-Harris, 'The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales' (2005) 19 IJLPF 229, 240.

³⁹⁶ See *Pigłowska* (n 317) 785 (Lord Hoffmann).

³⁹⁷ S. Dowding, 'Self-determination or Judicial Imposition? Translating the Theory into Practice' in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets: An Inter-disciplinary Study* (Hart Publishing 2009) 222.

in the individual case and of increased litigation in rebuttal or by way of exception).³⁹⁸

Unsurprisingly, Lord Hoffmann, as a senior appellate judge, showed great trust in the ability of the judiciary to reach a fair decision, without the need for express lucid objectives or definitions to fetter the judiciary from applying their own value judgments. Alternatively, Bailey-Harris et al recognise the uncertainty that arises through this method of judging. Similarly, Eekelaar has pointed to evidence, which shows the difficulty that practitioners have when attempting to assess the outcomes of cases.³⁹⁹ Consequently, given the same facts, two judges may justifiably come to two differing conclusions. This is a worrying position of the law as it fails to inform litigants of their likely entitlements. Therefore, it is likely to deter settlements as both parties may see a potential benefit to be gained from court adjudication, particularly with reference to their personal interpretations of a 'fair' reallocation.

Furthermore, in the context of the need principle, Diduck has argued that, 'while solicitors may be able to see a broad trend in the law toward meeting needs, details in the way in which needs would be assessed and met remain variable and indeterminate'.⁴⁰⁰ Thus, even where parties have the benefit of legal representation, this is not to preclude unfounded expectations as to the level of provision that is justified on the basis of the need principle. This suggests that steps should be taken to assist both practitioners and litigants to develop a coherent understanding of the extent of entitlement to needs-provision on divorce.

However, Hitchings's study into family law practitioners came to an alternative conclusion. Of note, she found that there was a 'definite preference amongst practitioners for dealing with certain courts... [which was] based on predictability and knowledge/experience of judicial approaches within that court'.⁴⁰¹ She cited this as being a 'classic example' of Galanter's 'repeat player' concept; where the rules are

³⁹⁸ Masson, Bailey-Harris and Probert (n 36) 326.

³⁹⁹ Eekelaar, (n 320) 470.

⁴⁰⁰ A Diduck, 'Dividing the Family Assets' in Selater and Piper (eds), *Undercurrents of Divorce* (Ashgate Dartmouth 1999) 211.

⁴⁰¹ Hitchings (n 12) 199.

learnt through experience.⁴⁰² Therefore, whilst judicial approaches may vary, the mantra “know thy judge” proves to be an essential non-[legal] influence on the ancillary relief process’ and reflects the fact that there exists a ‘certain amount of consistency when it comes to judicial approaches in a certain area’.⁴⁰³ This led to Hitchings’ overarching conclusion; ‘in the everyday case where needs dominate... advice given to clients is pretty consistent, subject to local court culture and the practicalities of the individual case’.⁴⁰⁴ This view has been supported by Dowding who has argued that, ‘competent lawyers should be able to assess within a reasonable band the likely award for the client even within the bounds of a discretionary system’.⁴⁰⁵ Thus, these academics view the law as sufficiently clear, in order for practitioners to be able to give a client a reasonable expectation as to what they will receive.

However, whilst this conclusion mitigates from the claim that the law is highly uncertain in the everyday case involving ‘competent’ practitioners who are aware of the approaches taken by local judges, it fails to prevent the argument that the law is in need of clarification. This conclusion is a result of the increasing numbers of litigants who are proceeding to court or reaching out-of-court settlements without legal representation or knowledge, following the legal aid cuts recognised above. As the Law Commission has noted, ‘it is not realistic to insist that lack of clarity about financial needs is acceptable because the term is well understood by lawyers’.⁴⁰⁶ Therefore, a strong conclusion can be drawn justifying reform that would help clarify this area of law.

Another consequence of the pervasive uncertainty was recently recognised by the Law Commission, who noted that there are ‘significant differences in the way the law is applied, both between individual judges and between different areas of the country’.⁴⁰⁷ This point has been supported by research undertaken by the law firm

⁴⁰² See M Galanter, ‘Why the “Have’s” Come Out Ahead: Speculations on the Limits of Legal Change’ (1979) 9 *Law and Society Review* 95.

⁴⁰³ Hitchings (n 12) 203.

⁴⁰⁴ *Ibid* 204.

⁴⁰⁵ Dowding (n 397) 222.

⁴⁰⁶ Law Commission (n 18) para 1.26.

⁴⁰⁷ *ibid* para 3.5.

Pannone.⁴⁰⁸ Regional variation could promote undesirable forum-shopping. It also suggests the law is failing to adequately pursue a Fairness Model of asset reallocation as ‘an important aspect of fairness is that like cases should be treated alike’.⁴⁰⁹ This is further evidence that reform aimed at promoting consistency, through limiting judicial discretion, would support the claim that the law reflects a Fairness Model of asset reallocation.

An alternative argument that requires recognition is the view that there may also be positive implications that arise out of a lack of certainty. This was recognised by Dowding who claimed that, ‘the lack of absolute certainty as to the outcome of any final hearing provides a powerful incentive to the parties to reach an agreement rather than risk a result which may be to the liking of neither’.⁴¹⁰ However, this argument fails to recognise the often determined and bitter context that divorce occurs within. It also offends against the common sense notion that parties are more likely to reach a settlement when they have a sound understanding as to what a judge is likely to deem a fair allocation of the assets. Furthermore, this argument has no weight in everyday divorces where limited assets deem their applicability for court adjudication null. In such cases, the court process can be considered an unnecessarily costly device by which to split the limited assets. Therefore, in the context of the everyday divorce, the demands of a certain application of the need principle prevail.

As a result of the above criticisms, the Law Commission produced a report evaluating this area of the law, particularly the precise meaning of the ‘financial needs’ principle.⁴¹¹ This Report is the final area of legal development that requires evaluation. It will be questioned whether the report adequately recognised the above criticisms, and the extent to which they provided an appropriate response to them in their recommendations for reform.

⁴⁰⁸ See, ‘Divorcing Wives Find City Courts More Generous, According to Pannone’s Research’ (*Family Law Week*, 2 May 2015)

<<http://www.familylawweek.co.uk/site.aspx?i=ed113533>> accessed 12 January 2015.

⁴⁰⁹ *Miller; McFarlane* (n 7) [6] (Lord Nicholls).

⁴¹⁰ Dowding (n 397) 227.

⁴¹¹ Law Commission (n 18).

Evaluating the Law Commission's Response

The Law Commission's project *Matrimonial Property, Needs and Agreements* resulted in a targeted review of the law relating to asset reallocation on divorce. The project involved a supplementary consultation that was undertaken in September 2012 which was widespread and well-received by a range of academics, practitioners and professional legal bodies.⁴¹² Their responses were analysed in order to inform the conclusions of the final report which was published on the 27th February 2014.⁴¹³ Whilst this Report covered a number of legal areas, for the purposes of this thesis, focus will be on evaluating their recommendations regarding 'financial needs'.⁴¹⁴

The project's express aim was to respond to 'the lack of transparency in the law relating to needs... and [the] inconsistency in the application of the law'.⁴¹⁵ To this end, the project resulted in a number of concluding recommendations. Notably, it advocated the introduction of non-statutory guidance aimed at clarifying the meaning of 'financial needs'.⁴¹⁶ It was hoped that this guidance 'would ensure that the law is applied consistently by the courts and... give people without legal representation access to a clear statement of their responsibilities and the objective of a transition to independence that a financial settlement should achieve'.⁴¹⁷ The Law Commission recommended that the 'guidance could be "translated" into a less technical and much shorter document aimed both at non-legally-qualified mediators and at litigants in person'.⁴¹⁸

This makes it apparent that whilst the Law Commission clearly had an acute awareness of the lack of transparency of the law,⁴¹⁹ they failed to recommend a substantive change of law; instead advocating non-binding guidance with its roots outside of the leading statute. Thus, the Law Commission failed to recommend a

⁴¹² Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No. 208, 2012).

⁴¹³ Law Commission (n 18).

⁴¹⁴ Their chosen way of referring to the need principle.

⁴¹⁵ Law Commission (n 18) para 3.60.

⁴¹⁶ *ibid* paras 3.75-3.78.

⁴¹⁷ *ibid* para 1.25.

⁴¹⁸ *ibid* para 3.77.

⁴¹⁹ As well as some of the implications.

departure from the current discretion-dominated contemporary framework and as a result maintained reliance on the need principle in everyday divorces.

Instead, the Law Commission recommended expanding the importance of the need principle through its implementation as a safeguard against unjust contracts, in the event that the Government approve another of the Law Commission's recommendations; the introduction of so-called 'qualifying nuptial agreements' into law.⁴²⁰ If this recommendation is to be implemented, then there will be an increased need for couples to have a sound understanding of what this principle encompasses. Without this, couples cannot be certain that their nuptial agreements will be able to adequately satisfy this safeguard. The likely effect of raising the need principle to the position of such a safeguard largely remains speculative and goes beyond the remit of this thesis. However, it is important to recognise that if insufficient action is taken to ameliorate the current uncertainties that surround the need principle, the possibility of introducing 'qualifying nuptial agreements' that help to remove the need for court adjudication, is likely to be heavily undermined.

In a bid to increase certainty, the Law Commission did engage in some detail as to the likely objective to be pursued and relevant considerations when providing for needs on divorce. They concluded that the most appropriate objective to be pursued when reallocating assets on the basis of need:

[S]hould be to enable a transition to independence, to the extent that that is possible in light of the choices made within the marriage, the length of the marriage, the marital standard of living, the parties' expectation of a home, and the continued shared responsibilities (importantly, childcare) in the future.⁴²¹

This objective was recognised as a response to the 'merger over time that inevitably takes place during a marriage or civil partnership'.⁴²² Whilst, ostensibly, enabling a 'transition to independence' as an objective of the asset reallocation exercise can be praised, the Law Commission's failure to advocate for a substantive change to the law

⁴²⁰Law Commission (n 18) para 5.68.

⁴²¹ *ibid* para 3.67.

⁴²² *ibid* para 3.10.

can be criticised. For one, this objective reflects an amalgamation of competing policy considerations and fails to offer litigants a clear understanding as to a likely level of entitlement. Furthermore, the retention of the ‘standard of living’ consideration lacks justification given the move away from the Ecclesiastic and Contractual Models of asset reallocation, where it had been a prominent, guiding feature. Given that the newly proposed objective intends to promote the severing of financial obligations on divorce, it seems incompatible with this subjective ‘standard of living’ consideration. The retention of this consideration also reflects the fact that the Law Commission failed to adequately recognise the problems in the current law that stems from the incompatibility between modern need provision and the realisation of a clean break. Further guidance is required as to how to balance these competing policies.

A second difficulty with the Law Commission’s proposed objective is the effect that the ‘choices made within the marriage’ and the ‘expectation of a home’ considerations have when calculating entitlement. These are inevitably highly uncertain considerations that will likely promote contention and stand in the way of consistent applications of judicial discretion. This makes it apparent that the Law Commission’s recommendations are wholly misconceived, given their aim to respond to ‘the lack of transparency in the law and the fact that practice is not wholly consistent’.⁴²³ It remains to be seen whether the proposed guidance will be sufficient to offer a transparent means of amalgamating these variable considerations into an accessible guide for litigants; particularly those lacking legal representation.

As the above sections have demonstrated, a number of criticisms surround the principle of needs and the asset reallocation process as a whole. The consequential uncertainty is a potent criticism given the current climate of austerity and the rise of litigants in person. Furthermore, it has been shown that, whilst the Law Commission have recognised the lack of transparency and consistency in judicial application that is present in the law governing asset reallocation, they failed to provide an appropriate recommendation that will induce transparency and move the law away from its current reliance on discretionary assessments. Providing a response to this

⁴²³ *ibid* para 3.3.

uncertainty will provide a guide in the forthcoming evaluation of the prevailing proposals for legal reform.

Conclusions

This chapter has focused on the criticisms surrounding the current utilisation of the need principle within the asset reallocation process on divorce. It has also traced these deficiencies to more general problems with the applicable statutory provisions.⁴²⁴ It should now be evident that in the context of the everyday divorce, the priority recourse that the judiciary continue to pay to the need principle under the Fairness Model is arguably inappropriate.

It is apparent that the recent legal aid cuts have exposed the legal framework to much stronger criticisms given its inaccessibility for many litigants. These condemnations are now aggravatingly present within everyday divorces, where court adjudication and now legal representation have become unrealistic and unobtainable sources of authority. Thus, litigants in person have wholly insufficient guidance when interpreting and applying the need principle within the context of the current Fairness Model. Furthermore, questions regarding the continued appropriateness of the need principle's existence have arisen. These difficulties have occurred due to the uncertainties that surround the policy justifying need provision, as well as claims that the principle continues to pay adherence to outdated considerations and is incompatible with the current trend of divorce law.

This chapter has also concluded that whilst the Law Commission did recognise a number of the pressing criticisms regarding the current law, they failed to recommend substantial reform; deferring the task of producing guidance to another body. It is with recognition of their findings that this thesis will now turn to assess more significant proposals for reform. In order to be justified, any such proposal will inevitably have to provide a sound response to the criticisms outlined in this chapter.

⁴²⁴ Contained within the MCA 1973.

Accordingly, Chapter Four's evaluation of the potential responses to these deficiencies will have the intention of promoting a straightforward, clear process for litigants as a central objective guiding and justifying its conclusions. This will inevitably require a discussion as to the correct balance to be reached between the grant of judicial discretion and the implementation of rules to guide the application of this discretion. These reform proposals will also be evaluated for their ability to protect financially vulnerable spouses on divorce, given that this is the implicit objective behind the contemporary need principle. Thus, any proposal that advocates the removal of the need principle will clearly need to introduce some other means of ensuring that this objective is not overlooked.

Chapter Four: Responding to the Shortfalls of Modern Needs Provision

Synopsis

Building upon the findings of previous chapters, this chapter aims to assess some of the prevailing proposals that can be raised in a bid to reform the current model governing asset reallocation in everyday divorces. To this end it shall assess the Government's response to the Law Commission's recommendations, as well as three further proposals for reform. These proposals reflect a mix of approaches; one being the framework used in many other jurisdictions, one being a Bill working its way through the House of Lords and the final being an amalgamation of a number of other proposals.

Each of these proposals will be evaluated individually in order to assess the balance they reach between discretionary judgments and strict rules when responding to the aforementioned criticisms of the Fairness Model. This chapter will also assess whether the proposals are compatible with modern societal views and the legal landscape within which it operates. It will conclude with the finding that the final of these proposals represents the most appropriate path for reforming the current framework's model; namely replacing the focus on needs with a Presumptive Entitlement Model of asset reallocation.

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Introduction

After identifying key criticisms in this area of law, this final chapter will evaluate and propose various suggestions for reform. As the core focus of this thesis has been to assess the application of the need principle in the context of everyday divorces, this chapter's focus will remain on evaluating the effects of these proposals on this class of cases.

The starting point of this chapter's evaluation of the various proposals for reform will focus on assessing the Government's response to the Law Commission's recent recommendations. Three alternative proposals, each at varying points of implementation, will then be examined. The particular proposals that have been chosen for evaluation within this chapter represent a range of responses to the lack of transparency innate within the approach taken by the courts under the current Fairness Model. They also all reflect, to some degree, support for the current trend of the law governing asset reallocation, whereby, marriage is increasingly being viewed as a partnership of equals, giving rise to entitlements to the 'fruits of the marital partnership'.⁴²⁵

These proposals for reform will also be evaluated for their compatibility with the current legal framework. Thus, reform proposals will be assessed for the extent to which they are likely to increase the accessibility of the law, given the Government's recent changes to funding for family law adjudication. Accessibility here refers to the extent to which litigants will be able to comprehend and apply the law to their unique circumstances.⁴²⁶

However, before these critical evaluations can occur, this thesis will attempt to identify the existence of a broad spectrum onto which various asset reallocation regimes can be mapped. This spectrum differentiates those regimes governed by flexible discretion and those that favour the certainty inherent in strict rules governing reallocation. Clearly, the current Fairness Model of asset reallocation falls within the

⁴²⁵ See, Diduck (n 171) 7.

⁴²⁶ Thereby reducing the areas of contention which encourage recourse to full-scale court adjudication.

first category. This section will also analyse some of the benefits that stand to be gained from modifying the current model.

Discretion v Rules: Reaching the Right Balance

A key area of contention, when advocating reform of this area of law, is the balance between basing the law on rules or judicial discretion. It is clear from Chapter Two and Three that the need principle, as applied under the current Fairness Model, is heavily based on the use of judicial discretion. However, due to the need for the asset reallocation process to be able to retain an element of certainty whilst remaining flexible, Schneider has argued that there should not be ‘a choice between discretion and rules, but rather a choice between different mixes of discretion and rules’.⁴²⁷ Both are important, and an appropriate compromise needs to be struck. This section intends to outline why the model governing asset reallocation must strike such a balance, drawing upon the conclusions of previous chapters.

The advantage of basing the law on discretion is that it empowers judges with ‘the ability to tailor the [financial] arrangements to the very specific circumstances of the individual family’.⁴²⁸ Consequently, the current legal framework, as explored in Chapter Two, has been praised on the basis that it offers the judiciary ‘the scope to devise a bespoke solution for each couple, appropriate to their individual needs’.⁴²⁹ It also allows the judiciary ‘to respond expeditiously to society's evolving preferences and practices’.⁴³⁰ This is particularly beneficial in the context of the asset reallocation process on divorce, as moral views regarding marriage and divorce have changed considerably⁴³¹ and spouses increasingly ‘organise and conduct their family lives in a burgeoning and bewildering variety of ways’.⁴³² Discretion also allows the law to react, adapt and develop. Consequently, discretion has been described as a ‘central

⁴²⁷ Schneider (n 41) 49.

⁴²⁸ Dowding (n 397) 221.

⁴²⁹ E Cooke, A Barlow, T Callus, *Community of Property: A Regime for England and Wales?* (The Nuffield Foundation, Policy Press 2006) 2.

⁴³⁰ Carl E Schneider, ‘The Tension Between Rules and Discretion in Family Law: A Report and Reflection’ (1993) 27 *Family Law For The Next Century* 229, 235.

⁴³¹ For evidence of this, see Chapter One.

⁴³² Schneider (n 430) 234.

and inevitable part of the legal order' due to its ability to 'attain broad legislative purposes'.⁴³³ Thus, the flexibility that is provided through discretion allows the judiciary to draw upon a range of legal principles and attribute varying degrees of weight to the factual circumstances of the case. Unsurprisingly, flexibility and the ability to reach nuanced decisions, has generally been seen as 'the leading positive argument for discretion' based systems of asset reallocation.⁴³⁴

However, as shown in Chapter Three, the MCA 1973's reliance on judicial discretion, as a means of developing the law and the relevant legal principles, has failed to increase the transparency surrounding the asset reallocation process.⁴³⁵ Consequently, it has been suggested that '12 judges applying the same principles to the same case may produce 12 different answers'.⁴³⁶ This is evident in the current law when one considers the fact that there have been considerable differences in interpretations applied to the need principle.⁴³⁷ The uncertain results of court adjudication and the subsequent lack of predictability are perhaps the most obvious criticisms of using broad judicial discretion.

There have also been inconsistent rulings, as discretion permits judges the freedom 'to take into account a wide array of information, which may be of questionable accuracy, reliability, or relevance'.⁴³⁸ As Chapter Two has shown, whilst broad patterns of judicial discretion may be discerned, this has not fettered the approach taken by any particular judge. This clearly militates from the realisation of the overarching objective, as, 'an important aspect of fairness is that like cases should be treated alike'.⁴³⁹ Accordingly, it must be recognised that, a 'broad discretionary jurisdiction... will not be satisfactory unless exercised with a reasonable degree of consistency'.⁴⁴⁰ This suggests that the law may benefit from being placed on more structured, rule-based foundations.

⁴³³ Keith Hawkins, *The Uses of Discretion* (Clarendon Press 1992) 11.

⁴³⁴ Schneider (n 430) 235.

⁴³⁵ Hawkins (n 433) 12.

⁴³⁶ Dowding (n 397) 221.

⁴³⁷ See Hale's expansive interpretation; *Miller; McFarlane* (n 7) [144] (Baroness Hale).

⁴³⁸ Hawkins (n 433) 16.

⁴³⁹ *Miller; McFarlane* (n 7) [6] (Lord Nicholls).

⁴⁴⁰ *White* (n 5) [58] (Lord Cooke).

The potential introduction of new rules into the asset reallocation process has been supported on the basis that ‘rules seem likelier than discretion to inform people what the law is and what courts will do... [being] relatively accessible to prospective litigants’, thereby, helping to dispel ‘unreasonable expectations’.⁴⁴¹ Thus, rule-based law has the potential to save time and ‘litigants may feel that a decision based observably on rules is at least not arbitrary and discriminatory’.⁴⁴² These are important requirements in order to reduce costs, promote early settlement and provide litigants with ‘the sense that they have been treated fairly’.⁴⁴³ Rules have also been praised as they arguably ‘contribute to the legitimacy of a decision’ as they stem from the legislature as opposed to unelected judges.⁴⁴⁴ Nevertheless, as Chapter Three has shown, the Law Commission failed to support the introduction of any such prescriptive fetters.⁴⁴⁵

Equally, a system of asset reallocation based entirely on rules suffers from a number of disadvantages; which, can be expressed in the negative form of the advantages gained through permitting discretion. Hence, a system based on rules fails to allow the law to react, adapt and develop in the same way as a system based on discretion. Discretion remains ‘necessary where no satisfactory rule can be written’.⁴⁴⁶ This is because ‘predictable outcomes are insufficient... unless they are also sound’.⁴⁴⁷ Thus, the law’s current reliance on discretion, as evidenced in Chapter Two, can be praised for recognising the need for flexibility in order to prevent inequitable results.

Nevertheless, as Chapter Three concluded, within the current law governing asset reallocation on divorce, the balance is weighted too heavily in favour of discretion. Arguably, the approach in England and Wales should involve ‘limited discretion being exercised against the background of reasonable certainty’.⁴⁴⁸ With reference to

⁴⁴¹ Schneider (n 430) 237, 240.

⁴⁴² *ibid.*

⁴⁴³ Schneider (n 41) 74.

⁴⁴⁴ *ibid* 69.

⁴⁴⁵ See, Law Commission (n 18).

⁴⁴⁶ Schneider (n 430) 235.

⁴⁴⁷ American Law Institute, ‘Principles of the Law of Family Dissolution: Analysis and Recommendations’ (2001) 8 *Duke Journal of Gender Law and Policy* 1, 1.

⁴⁴⁸ A Greensmith, ‘Let’s Play Ancillary Relief’ (2007) 37 *Fam Law* 203, 203.

the findings of the previous chapters, this thesis shall now suggest a means of implementing this balance into practice.

Realigning the Balance

This thesis has identified that some means of reform is necessary in order for the law to respond to the context it operates within whilst, simultaneously, finding the appropriate balance between the competing requirements of fairness. To this end, it is suggested that the law should move away from using needs as a guiding principle. Rather, this thesis suggests that the asset reallocation exercise should pay increasing respect to the understanding that marriage is a ‘partnership of equals’ and that in order to achieve this, steps need to be taken away from the need principle’s entrenching of dependence.

The ‘partnership’ understanding of marriage is supported as it arguably ‘depicts marriage as a social and economic unit of equals... that approaches the issue of property alteration in terms of commitment to equality and to sharing implicit in the notion of marriage as a joining of lives’.⁴⁴⁹ Thus, this understanding of marriage will assist to preclude connotations of dependence through ‘acknowledging that the applicant is *entitled* to at least half of the assets, and not merely a “needy supplicant”’.⁴⁵⁰ It is posited that this will help increase the protection currently afforded to financially vulnerable spouses. Furthermore, it is suggested that this view of marriage could be translated so as to offer a more objective means of calculating entitlement on divorce, thereby, reducing the need for legal representation and court adjudication.⁴⁵¹ Finally, it is suggested that this understanding of marriage is compatible with contemporary egalitarian views of gender and liberalised societal views of marriage.

Accordingly, the remainder of this chapter will offer three proposals for reform which reemphasise this understanding of marriage, whilst downplaying the dominance

⁴⁴⁹ Fehlberg (n 385) 177-178.

⁴⁵⁰ Sonia Harris-Short and Joanna Miles, *Family Law: Text Cases and Materials* (2nd edn, OUP 2011) 477.

⁴⁵¹ Through requiring an equal division of the matrimonial assets.

currently attributed to the needs principle. Each of these proposals will offer a means by which the current model can be aligned with a more rule-based approach. However, before this thesis turns to evaluate these three proposals, it will briefly assess the Government's response to the Law Commission's recent reform recommendations. This will endow an amount of legitimacy onto reform proposals that attempt to move the law in a similar direction. Any criticisms of this response will also justify why the forthcoming proposals have deviated from this route.

The Government's Response to the Law Commission's Recommendations

Following the consultation process and the publication of the Law Commission's recommendations, the Ministry of Justice have requested that the Family Justice Council take forward the Law Commission's recommendation to produce guidance in order to clarify the law surrounding need provision on divorce.⁴⁵² This guidance has yet to be released, so a step-by-step analysis is not yet possible. Nor is it appropriate to conclude that such guidance will be an adequate substitution for the lack of senior court adjudication that is currently applicable to everyday divorces.

It is appropriate to recognise that the body tasked with developing this guidance is composed mostly of lawyers and judges. However, 'many consider lawyers are arguably part of the problem'.⁴⁵³ Furthermore, this organisation 'is far less constitutionally accountable [and] less amenable to media and political scrutiny'.⁴⁵⁴ Thus, the Law Commission's solution to the law's deficiencies is to place further reliance upon a body that have caused many of these problems. Whilst the legislature has relied on recourse to the judiciary over the past forty years, recent reductions in family law legal aid justifies more substantive reforms in the name of certainty. This was indeed recognised by the Law Commission who recommended that in the long-

⁴⁵² Ministry Of Justice, 'Divorce Myths to be Dispelled' (17 April 2014) <http://lawcommission.justice.gov.uk/docs/lc343_matrimonial_property_government_initial_response.pdf> accessed 3 July 2014

⁴⁵³ D Hodson, 'Law Commission for England and Wales: Reform Proposals' (*International Family Law Blog*, 2014) <<http://www.iflg.uk.com/database/the-law-commission-proposals-binding-marital-agreements-but-a-missed-opportunity-for-much-needed-fundamental-law-reform>> accessed 25 October.

⁴⁵⁴ *ibid.*

term, the ‘Government support the formation of a working group... to work on the possible development of a formula to generate ranges of outcomes for spousal support’.⁴⁵⁵ However, proactive steps in this direction have yet to be taken.

Thus, the forthcoming reform suggestions must offer means of implementing certainty into the law, in order to guide litigants as to the requirements of the Fairness Model when reallocating assets in everyday divorces. This will aid in the promotion of out-of-court settlements by giving spouses an idea of the entitlements that stem from the partnership. It should also be noted that the Law Commission’s ‘transition to independence’ objective is accepted within all of the forthcoming proposals. However, varying weight is given to the importance of severing matrimonial obligations, as well as the need to protect financially vulnerable spouse. It is finding the correct balance between these objectives that arguably holds the key to that overriding requirement of fairness and, in turn, will help to identify the most appropriate reform proposal that the Government should adopt.

Proposal 1) Community of Property

If the discretionary current system reflects one approach to the asset reallocation exercise, the alternative is a community of property regime.⁴⁵⁶ These regimes can be differentiated on the basis that they ‘provide for a rule-based sharing of property when the community is dissolved by divorce or death’.⁴⁵⁷ In its most extensive form, this regime stipulates that on marriage spouses assets are completely pooled, with each earning a fifty per cent entitlement to that pool on divorce. In this way certainty is prioritised as objective rules guide the reallocation process. Accordingly, the opportunities for subjective exercises of judicial discretion are minimised. Such a regime is currently applied in the Netherlands.

In recognition of the inappropriateness of relying on property rules to reallocate assets on divorce, such regimes often ‘provide for a primary, obligatory regime from which

⁴⁵⁵ Law Commission (n 18) para 3.159.

⁴⁵⁶ As currently govern the asset reallocation process on divorce in many countries e.g. France, Netherlands and Sweden.

⁴⁵⁷ Cooke, Barlow and Callus (n 429) 1.

no derogation can be made'.⁴⁵⁸ These default primary regimes are often then supplemented by a secondary regime which may offer steps spouses can take in order to preclude the application of the primary regime.⁴⁵⁹

This section will assess whether current provision for needs should be replaced with the introduction of a community of property regime, which would offer a minimum level of protection for spouses on divorce. The introduction of such a rule based structure of entitlement would be likely to lead to increased certainty when assessing the likely effects of the law's application, but would the benefits outweigh the disadvantages? Before this assessment can occur, an initial question must be assessed; does the current approach to need provision already encapsulate a primary community of property regime?

Do we already have a community of property regime?

A number of academics have suggested, to varying degrees, that the law relating to asset reallocation already reflects a 'community of property approach to ancillary relief on divorce'.⁴⁶⁰ Most notably, Cretney has argued for over a decade that following the introduction of the yardstick of equality by the House of Lords in *White*,⁴⁶¹ and the subordination of 'special contributions'⁴⁶² by the Court of Appeal in *Lambert v Lambert*,⁴⁶³ the courts have effectively introduced 'into English law a regime of community of property (albeit only deferred community) limited to acquisitions'.⁴⁶⁴ 'Acquisitions' is the term Cretney uses to describe the class of assets that were *acquired* following the creation of the legal union. He classifies the legal framework as reflecting a *deferred* community regime, as property remains separately held throughout the duration of the marriage with the community regime arising at

⁴⁵⁸ *ibid* 2.

⁴⁵⁹ Eg, in France couples are free to stipulate through contract the financial consequences of their divorce.

⁴⁶⁰ A Barlow, 'Community of Property – the logical response to Miller and McFarlane?' (2007) 39 *Bracton LJ* 19,19.

⁴⁶¹ *White* (n 5).

⁴⁶² As a means of proving a disproportionate entitlement to the divisible assets on divorce.

⁴⁶³ [2002] EWCA Civ 1685, [2003] Fam 103. Later endorsed by the House of Lords in *Miller; McFarlane* (n 7) [68] (Lord Nicholls).

⁴⁶⁴ S Cretney, 'A Community of Property System Imposed by Judicial Decision' (2003) 119 *LQR* 349, 349.

the point of divorce. However, on divorce the judiciary are granted such broad ranging powers to reallocate assets, so as to undermine and override any application of proprietary rights. Therefore, in Cretney's opinion, the effect of the current discretionary-based system is to preclude the applicability of proprietary rights between spouses on divorce.

Nevertheless, Cretney does submit that such division only occurs after 'sufficient provision had been made for "needs"'.⁴⁶⁵ Therefore, in the context of everyday divorces, need remains the paramount principle. Furthermore, the yardstick of equality was only ever intended to be applied as a 'check', not as a rule.⁴⁶⁶ When these facts are considered in tandem with the reality that 'our system is still overladen with a large amount of discretion', it becomes apparent that it makes little sense to describe the English system as operating a community of property regime.⁴⁶⁷

However, it is apparent that the senior judiciary have been influenced by community of property reasoning, particularly in *White*.⁴⁶⁸ This has prompted some academics to claim that 'development of a community system by the courts rather than by the legislature is arguably causing considerable uncertainty'.⁴⁶⁹ Therefore, it will still be questioned whether the introduction of some form of a community regime would clarify the law, thereby, improving on the current needs-based approach.

The Introduction of a Community of Acquests Regime

Whilst this thesis does not intend to go into the details of the multitude of variations that a community regime could take, it will evaluate some of the benefits and criticisms that would result from the introduction of a 'community of acquests' regime into English and Welsh law. This form of community of property has been chosen as it is, at least ostensibly, the least radical community approach that could replace the current law. This is the case as it is the community regime with the most

⁴⁶⁵ *ibid* 350.

⁴⁶⁶ See, *White* (n 5) [25] (Lord Nicholls).

⁴⁶⁷ Barlow (n 460) 35.

⁴⁶⁸ *White* (n 5).

⁴⁶⁹ Cooke, Barlow and Callus (n 429) 2.

restricted scope.⁴⁷⁰ It dictates that ‘any property bought to the marriage remains the property of the spouse who originally owned it; while (almost) all property acquired during the marriage is shared’.⁴⁷¹ This distinction is made on the basis that it is more difficult to justify an entitlement to those assets accrued by a spouse’s individual efforts prior to the marriage.⁴⁷²

As Chapter One has established, this area of law has been developed with reference to contemporary understandings of marriage. Requiring parties to share their acquired property equally on divorce would ‘indicate that the relationship was viewed as a partnership, with each party having an equal entitlement to the assets’.⁴⁷³ Kevin Gray has supported this view that the concept of ‘matrimonial partnership’ should be the conceptual basis on which the law views the legal relationship and divides its assets. Gray has suggested that ‘a norm of equality... translates the concept of matrimonial partnership into unequivocal legal terms’.⁴⁷⁴ Such an approach has been praised as the origins of any rule entitling an equal division of the assets:

[A]re to be found in the same ethic which sustains modern commitments to democracy and equality... Each adult’s contribution should be regarded as being of equal value, entitling equal economic rewards.⁴⁷⁵

Similarly, it has been stated that recognising spousal contributions as equal ‘promotes the view that support on divorce is not a gift bestowed through the discretion of the court, but rather is a just and equitable redistribution of resources’.⁴⁷⁶ In this way, a community regime may provide a means of providing increased respect to the value of care-giving and household contributions, thereby, representing a means of precluding disproportionate or unfair financial consequences from resulting on divorce.⁴⁷⁷ Whilst an equal division of the available assets may exclude conduct

⁴⁷⁰ Limited in the sense of the assets it applies to.

⁴⁷¹ Freedman (n 152) 21.

⁴⁷² See, *Rossi v Rossi* [2006] EWHC 1482 [10] (Nicholas Mostyn QC).

⁴⁷³ Probert (n 170) 179.

⁴⁷⁴ Gray (n 58) 95.

⁴⁷⁵ Eekelaar and Maclean (n 53) 46.

⁴⁷⁶ Diduck and Orton (n 294) 700.

⁴⁷⁷ As continues to occur under the current needs based approach; Fisher and Low (n 388).

considerations,⁴⁷⁸ it is predicated on the assumption that in the vast majority of divorces the parties to the marriage contributed equally to the family unit, and to start from any other point would be to place an obstacle in the way of reaching a fair allocation of the assets. Thus, the introduction of such a rule, *prima facie*, pays increased respect to the contributions of the care-giving spouse, by automatically giving rise to an entitlement to ‘an equal share of the fruits of the marriage’.⁴⁷⁹

Introducing the equal division of matrimonial assets as the rule could also make, ‘it unnecessary to resort to court proceedings in every case of dispute’.⁴⁸⁰ This approach can be praised for making interpretation and application of the law an easier job for litigants as, ‘the calculation of the sharable value of their property would, in many instances, be no more difficult than the completion of an annual [tax] return’.⁴⁸¹ Similarly, such an approach has also been supported for having ‘the merit of certainty’ by fettering judicial discretion, thereby, reducing the likelihood of adversarial and expensive litigation.⁴⁸² Such an approach would also increase the likelihood that consensual out-of-court settlements, reached without legal advice, would satisfy the requirements of fairness.

Arguably, this reform suggestion also represents a move towards a ‘sensible’ approach, which pays better respect to the entitlements of the parties to the marriage.⁴⁸³ Similarly, Gray has recognised that this approach better accords with the trend of family law towards permitting a clean break on divorce.⁴⁸⁴ This is achieved by removing the subjective considerations inherent in the current law’s recourse to the need principle in everyday divorces, instead placing increased reliance on the grant of objective lump-sum orders.

Nevertheless, the introduction of such a rule has also received criticism from a range of academics. Firstly, it has been doubted whether it could be applied to everyday

⁴⁷⁸ Which is out of line with community sentiment; see, J Herring, ‘Connecting Contact’ in A Bainham *et al.* (eds), *Children and their Families*. (Hart Publishing 2003).

⁴⁷⁹ Jana Singer, ‘Divorce Reform and Gender Justice’ (1989) 67 N.C.L.Rev 1103, 1114.

⁴⁸⁰ *ibid* 1114.

⁴⁸¹ Gray (n 58) 338.

⁴⁸² Michael Freeman, *Understanding Family Law* (1st edn, Sweet & Maxwell 2007) 152.

⁴⁸³ Miles (n 368) 382.

⁴⁸⁴ Gray (n 58). Also see Chapter Two.

divorces with minimal assets or debts, as it is not flexible enough to accommodate the range of circumstances and special needs that come before the court.⁴⁸⁵ Thus, its application may be unlikely to provide adequate protection for financially vulnerable spouses in everyday divorces. This is because, in the majority of cases, the ‘resources that [have been] used to support one household will not easily stretch to two’.⁴⁸⁶ Seemingly, the only way to tailor financial arrangements in such cases is reliance upon judicial discretion.⁴⁸⁷ However, to permit this would arguably undermine the certainty justifying the introduction of this reform proposal.

Furthermore, the results reached through a community regime’s application may be particularly devastating in everyday divorces, given the fact that there are insufficient opportunities for spouses to contest the result reached.⁴⁸⁸ Thus, it is apparent that such a rule-driven regime has the potential to excessively interfere with the discretionary assessments of fairness, held to be of fundamental importance when protecting financially vulnerable spouses under the current model of asset reallocation.

Such an approach also fails to account for ‘household composition’ following the divorce.⁴⁸⁹ Thus, the problems with this regime are exacerbated when ‘it is appreciated that it is most likely that any children of the marriage will remain with the wife after divorce’.⁴⁹⁰ Furthermore, in the majority of cases it is the wife who forgoes employment in order to fulfil the childcare responsibilities.⁴⁹¹ An equal division of the post-marriage, acquired assets in these circumstances would allow the husband to keep his complete earnings, whilst leaving the wife to stretch half the families’ assets to cover her own and her children’s needs.⁴⁹² Consequently, in many cases, the care-giving wife will ‘still not [be] on an economic par with [her husband], even if granted

⁴⁸⁵ Freeman (n 482) 152.

⁴⁸⁶ Law Commission (n 18) para 1.3.

⁴⁸⁷ Which may order the appropriate figure of entitlement to be enforced through reasonable instalments. The payment of lump sum orders in this manner is currently possible under MCA 1973, s.22A(5).

⁴⁸⁸ Given the absence of legal aid available for such hearings.

⁴⁸⁹ Eekelaar and Maclean (n 53) 47.

⁴⁹⁰ *ibid* 47.

⁴⁹¹ The ONS found that when looking at couples with a dependent child, where only one partner was employed, it was over six and a half times more likely that it would be the father in employment than the mother. See, Office for National Statistics, ‘Families in the Labour Market 2014’

<http://www.ons.gov.uk/ons/dcp171776_388440.pdf> accessed 28 August 2015.

⁴⁹² Albeit on top of any support garnered through the Child Support Agency.

half of the assets of the marriage'.⁴⁹³ This is because '[t]he equal division between adults is not, therefore, an equal division between all family members'.⁴⁹⁴ Thus, to replace the current need principle with such a community regime would often fail to protect the financially vulnerable spouse.⁴⁹⁵ This is due to the limited ability that this regime has to deviate from the automatic entitlement it grants.

An entitlement to an equal division of the acquired assets also fails to consider the parties' future earning potentials and the need for transitional payments before the care-giving spouse is able to re-enter the workplace. These criticisms point to the incompatibility of this regime with the current overriding objective of achieving a fair division of the assets. It would replace a focus on needs with a static division of the assets that is incapable of providing a nuanced response to the diverse factual circumstances that can be present on divorce. Clearly, this would flip the current position so that the law would be placing excessive reliance on prescriptive rules, which would provide limited opportunities for derogation.

It is for these reasons that even a modest community of property regime is deemed unfit to replace the approach taken under the Fairness Model in the context of everyday divorces. Whilst its attempts to pay respect to the matrimonial partnership and induce a clean break can be praised, it is often too absolute in its division, with limited opportunities for discretionary deviation from its application. Such regimes often fail to recognise that 'the transition to independence should not be sudden... [and] in a significant number of cases independence is not possible'.⁴⁹⁶ Instead, further judicial discretion is necessary in order for the law to be able to respond to modern conceptions of fairness.

Accordingly, it is argued that in the light of the findings from previous chapters the furthest the law should go in order to increase certainty should be the introduction of guiding presumptions. This would provide spouses with an idea of the likely allocation to be awarded, whilst not precluding judges from overruling such

⁴⁹³ Frantz and Dagan (n 280) 105.

⁴⁹⁴ Eekelaar and Maclean (n 53) 47.

⁴⁹⁵ Due to its failure to make reallocation with reference to the policies currently pursued via the need and compensation principles.

⁴⁹⁶ Law Commission (n 18) paras 3.66-7.

presumptions if they were to lead to significant unfairness. A means of implementing such a reallocation-guiding presumption will be raised shortly. However, before this presumption-based approach is assessed, one final reform proposal that is currently working its way through the House of Lords will be evaluated.

Proposal 2) Baroness Deech's Private Members Bill

This proposal involves reconceptualising need provision. In an attempt to 'reintroduce transparency, democracy and understandability into an area of law which has moved a very long way from its statutory basis', Baroness Deech introduced a Private Members' Bill into the House of Lords.⁴⁹⁷ Deech rightly recognised that '[t]he leading judgments in the field inevitably arise from big money cases that go to appeal... and their pontifications are not necessarily helpful for low-income families'.⁴⁹⁸ In the same debate, she also rightly recognised that reform was 'urgent because legal aid has been removed from this area of the law'.⁴⁹⁹ These statements make it apparent that a key policy behind this Bill is to further certainty in low-asset, or, everyday divorces, thereby, responding to many of the current criticisms of the law outlined in Chapter Three.

It is Deech's opinion that, 'some certainty about the way to split assets may be more important than total fairness'.⁵⁰⁰ This section assesses the extent to which her proposed Bill would promote certainty at the expense of fairness when governing asset reallocation in everyday divorces, and whether this can be justified. It will also question whether this Bill contains a more principled, objective basis to govern the provision of needs in these cases and ameliorate the criticisms concerning the current law outlined in Chapter Three.

⁴⁹⁷ Baroness Deech, HL Deb 27 June 2014, cols 1490. See, <<http://services.parliament.uk/bills/2015-16/divorce.html>>, for the latest information on this Bill's progress through Parliament.

⁴⁹⁸ *ibid* cols 1491.

⁴⁹⁹ *ibid* cols 1490.

⁵⁰⁰ Baroness Deech, 'What's a Woman Worth?' (2009) 39 *Fam Law* 1115, 1121.

Content of the Divorce (Financial Provision) Bill [HL] 2015-16

A number of quite radical changes of law are contained within Deech's Private Members' Bill, and it largely calls for an overhaul of the governing statutory provisions within this area.⁵⁰¹ Whilst an entire thesis could be centred on assessing the various provisions contained within this Bill, the forthcoming section intends to focus on those reform proposals that are likely to modify the current operation of the need principle within everyday divorces.

Marriage as a Partnership

Rather than relying on long-term periodic payment orders in order to provide for spousal needs in everyday divorces, Deech's Bill attempts to reach a fair reallocation through an equal division of those assets, which are classified as 'matrimonial property'.⁵⁰² This term essentially encompasses property that was acquired following the inception of the legal relationship 'otherwise than by gift, inheritance or succession from a third party'.⁵⁰³ Consequently, all those assets that were accumulated during the marriage are presumed to be the fruits of the parties' combined labours, giving them an equal entitlement to the spoils.⁵⁰⁴

This approach can be praised on the basis that it largely prevents the judiciary from entertaining arguments from high-earning husbands relying on their 'special contribution' in order to justify their entitlement to an increased proportion of the assets.⁵⁰⁵ Furthermore, it may help to clarify the approach to be taken when reallocating inherited wealth, which remains an area of contention, even following the attention it was paid by Ward LJ in *Robson*.⁵⁰⁶ Whilst conduct remains a consideration under the new Draft Bill, it is now only relevant where the conduct has

⁵⁰¹ Contained within MCA 1973, Part II.

⁵⁰² Divorce (Financial Provision) HL Bill (2015-16) 56, cl.4.

⁵⁰³ *ibid*, cl.2(1). For the full statutory meaning of this term consult cl.2 more generally.

⁵⁰⁴ Classifying assets in this manner is similar to a community of acquests regime. However, it relies on presumptions, rather than rules.

⁵⁰⁵ Such arguments, although infrequently successful, are currently fully permissible as a result of MCA 1973, s.25(2)(f). For an example see *Charman (No 4)* (n 6).

⁵⁰⁶ *Robson* (n 170) (Ward LJ). This is due to the fact that the allocation of such assets remains subject to a judicial evaluation of fairness.

either ‘adversely affected the financial resources’, or, ‘it would be manifestly inequitable to leave the conduct out of account’.⁵⁰⁷ Whilst this confinement of the conduct consideration is minimal, it can be praised for elucidating and codifying the circumstances in which this consideration will justify an unequal division of the net matrimonial assets.

Furthermore, this approach may have the effect of reversing a problematic psychological influence that has been recognised to play a factor in many current financial hearings. This is the criticism that the current system impliedly supports the view that the assets are the property of the breadwinner, with the care-giving spouse having to provide justification in order to receive a share.⁵⁰⁸ If there is a presumption in favour of equal division, then the onus is on the party who is arguing otherwise to persuade the judge.

Thus, this approach towards classifying assets as ‘matrimonial property’ can be seen as a positive step towards increasing certainty. It would help to avoid some of the uncertainties present in the House of Lords decision *Miller; McFarlane*, regarding the appropriate classification of assets.⁵⁰⁹ Furthermore, a presumption in favour of dividing the net value of such assets can be praised for helping to prevent financially vulnerable spouses from suffering a disproportionate financial detriment on divorce.

Matrimonial Property & Maintenance

Deech’s Bill also intends to replace MCA 1973 section 25(2),⁵¹⁰ and introduce a statutory, temporal cap on the grant of periodic payment orders. Whilst this cap was originally intended to preclude periodic payment orders being made for a period beyond three years, it has subsequently been softened. It is now contained within clause 5(1)(c) of the most recent draft of the proposed Bill, which states:

⁵⁰⁷ See, Divorce (Financial Provision) HL Bill (2015-16) 56, cl.6.

⁵⁰⁸ See, Davis, Cretney and Collins (n 27) 144.

⁵⁰⁹ Cf. the dictums of Lord Nicholls and Baroness Hale, when discussing the appropriate means by which to classify assets for reallocation; *Miller; McFarlane* (n 7) [21]-[25] (Lord Nicholls); [157]-[153] (Baroness Hale).

⁵¹⁰ Divorce (Financial Provision) HL Bill (2015-16) 56, cl.1(1).

[A] party who has been dependent to a substantial degree on the financial support of the other party should be awarded such periodical payments as is reasonable to enable that party to adjust to the loss of that support on divorce *over a period of not more than five years* from the date of the decree of divorce.⁵¹¹

This statutory provision is a result of Deech's view that the current law is too heavily weighted in favour of care-giving wives, and is unfairly 'punishing men and trying to limit the welfare liability of the state by making them pay'.⁵¹² Deech makes this argument despite the aforementioned socio-economic research that has found that divorce has a disproportionate impact on the financial standing of wives.⁵¹³ Nevertheless, if her view is accepted, then the current law is being too heavily influenced by a policy objective that Chapter Two has already deemed to encourage unfair results; saving state expenditure.⁵¹⁴

It is apparent that Deech's Bill represents an attempt to bring the statutory foundations of the law governing asset reallocation in line with the 'trend to get former couples towards a clean break... by expecting each to stand financially on their own feet where at all possible'.⁵¹⁵ This trend has developed 'as a means of incentivising a party who hasn't traditionally worked to retrain and find work at the risk of having no monthly income'.⁵¹⁶ This policy is supported within Deech's proposed Bill through a clause directing the judiciary to consider 'any intention of [the applicant] party to undertake a course of education or training' when making financial reallocation on divorce.⁵¹⁷ This recognition of the importance of rehabilitative payments can be praised for supporting the financially vulnerable spouse's long-term self-sufficiency.

⁵¹¹ *ibid* cl.5(1)(c) (emphasis added).

⁵¹² Baroness Deech, 'What's a Woman Worth?' (2009) 39 *Fam Law* 1115, 1121.

⁵¹³ Fisher and Low (n 388).

⁵¹⁴ Chapter Two has already evidenced that the legislature have considered this to be an important policy in this area.

⁵¹⁵ 'Maintenance: Each to His or Her Own' (*Cambridge Family Law Practice*, 22 April 2015)

<<http://www.cflp.co.uk/maintenance-each-to-his-or-her-own/>> accessed 10 June 2015.

⁵¹⁶ Jordan Constable, 'No Meal Ticket For Life' (*Stowe Family Law*, 2 May 2015)

<<http://www.marilynstowe.co.uk/2015/05/02/no-meal-ticket-for-life-by-jordan-constable/>> accessed 5 June 2015. See also, *Wright* (n 252).

⁵¹⁷ Divorce (Financial Provision) HL Bill (2015-16) 56, cl.5(4)(c).

This aspect of her proposal is positive in providing a logical process in order to accommodate the clean break's elevation to the position of a guiding policy or objective of the asset reallocation process. This helps to respond to the law's current position where the consideration of this policy rests entirely on the exercise of judicial discretion. Arguably, it also offers an initial step to ameliorating the MCA 1973, which was criticised in Chapter Three for lacking both an objective and guidance, in order to fetter exercises of judicial discretion.

Nevertheless, Chapter Two has already recognised the difficulties inherent in upholding the clean break objective as a guiding policy within the asset reallocation process. Thus, it should be no surprise that the imposition of such a temporal cap on periodical payment orders has not received universal support. For one, members of the judiciary have long warned of the discrimination that could occur through achieving 'a clean break... at the expense of fairness'.⁵¹⁸ Sanders has similarly stated, albeit with reference to a previous draft of the Bill's provisions, that:

Arbitrarily limiting such an award to three years risks creating real financial hardship and... is highly likely to be discriminatory, as women are still more likely to make economic sacrifices during the marriage for the benefit of the family.⁵¹⁹

This argument should certainly be discomfoting to any advocate of Deech's Bill, particularly in the light of everyday divorces where there are minimal assets for division and one spouse has often left the workplace in order to care for the children. In such circumstances, it seems that maintenance for five years may still be considered inadequate support. Therefore, limiting periodic payments between spouses to a period of five years has the potential to greatly disadvantage financially vulnerable spouses.

⁵¹⁸ *Miller; McFarlane* (n 7) [120] (Lord Hope).

⁵¹⁹ Charlotte Sanders, 'Are spousal periodical payments for life or just for Christmas?' (*Family Law*, 25 February 2015) <http://www.familylaw.co.uk/news_and_comment/are-spousal-periodical-payments-for-life-of-just-for-christmas#.Vaem2EbgBx9> accessed 25 May 2015.

However, the Draft Bill has recently been amended, in recognition of the impossibility of realising a clean break in all cases. It now concedes that this temporal cap can be disregarded, if,

the court is satisfied that there is no other means of making provision for a party to the marriage and that that party would otherwise be likely to suffer serious financial hardship as a result.⁵²⁰

This clause's reliance upon a judicial evaluation of 'serious financial hardship' arguably undermines the certainty that this section intends to introduce. Nevertheless, it can be considered a necessary amendment in order to protect vulnerable spouses in everyday divorces where there are insufficient available assets to prevent this hardship. Consequently, the recent amendments to the Draft Bill have greatly increased the likelihood of it receiving Royal Assent, as it now specifically aims to prevent serious financial hardship from arising on divorce, thereby, importing the policy justifying modern needs provision whilst rejecting the unfair policy of saving state expenditure.

Further Problems with Baroness Deech's Bill

Whilst the aim of this Bill's implementation is to increase transparency, there are a number of provisions within the proposed Bill that appear to mitigate this objective's realisation. Firstly, the effect of clause 5(2) is to require the court to 'take into account' 'any advantage or disadvantage whether incurred before or during the marriage' as well as, 'contributions made before or during the marriage, including indirect and non-financial contributions' when granting a periodical payment order.⁵²¹ Clearly, this will rely upon an extremely subjective judgment requiring an arguably impossible evaluation of the parties' contributions. Furthermore the courts are directed to have regard to 'all the other circumstances of the cases'.⁵²² Arguably, such an open-ended statutory provision has no place in a statute that is attempting to

⁵²⁰ Divorce (Financial Provision) HL Bill (2015-16) 56, cl.5(4)(c).

⁵²¹ *ibid* 56, cl.5(2).

⁵²² *ibid* cl.5(4)(f).

introduce certainty into the law.⁵²³ The effects of this clause could be construed as permitting a judge to take any aspect of the divorcing spouses' circumstances into account and accord it arbitrary weight.

Finally, it must be noted that Deech's Bill also requires the court to 'have regard to – the needs and resources of the parties'.⁵²⁴ However, with the retention of this consideration comes uncertainty as to how it is to be reconciled with the new rule-laden regime of asset reallocation. Can financial needs justify an entitlement to non-matrimonial assets?⁵²⁵ Or does it merely weigh in favour of an unequal share of the net matrimonial assets? The inclusion of this principle, without an explanation as to its continued relevance, again fails to induce confidence in the ability of this statute to respond to the criticisms of the current law's operation in everyday divorces as identified in previous chapters.

Ultimately, it can be concluded that the above reform suggestion can be praised for its intention to introduce transparency into the law whilst precluding long-standing financial obligations between divorced spouses. However, it is doubted whether this Bill would in fact introduce certainty, given the open-ended nature of the considerations that judges must have regard to when reallocating assets. It also fails to explain how it plans to amalgamate these reform proposals with its continued reference to need provision. Consequently, it fails to prevent the judiciary from continuing to rely wholly on the need principle. For these reasons the above Bill fails to inject sufficient certainty into the law in order to present itself as an attractive option for reform.

Furthermore, it is argued that the reasoning behind the imposition of the temporal cap is misguided. This argument is based on the fact that Baroness Deech believes that the current law promotes women to 'find a footballer' and rely on his income as a meal ticket for life.⁵²⁶ However, this thesis argues that footballers' 'WAGs' are not a

⁵²³ To allow this would be to allow judicial discretion to reign supreme; in a similar way it currently does when the validity of a pre-nuptial agreement is in question; see, *Radmacher v Granatino* [2010] UKSC 42.

⁵²⁴ Divorce (Financial Provision) HL Bill (2015-16) 56, cl.5(4)(e).

⁵²⁵ Cf. *Charman (No 4)* (n 6); *Jones v Jones* [2011] EWCA Civ 41.

⁵²⁶ See, *Silverman* (n 351).

leading problem in this area of law concerned with everyday divorces. Instead, the leading problem concerns implementing a transparent asset reallocation regime in everyday divorces, that is capable of being applied by litigants without the need for external legal representation and contentious court adjudication.

Having indicated in previous chapters that certainty is a key requirement of the asset reallocation process, the next proposal intends to offer an alternative way in which that value could be better introduced into the law, without unnecessarily inhibiting the judiciary's power to protect vulnerable spouses and order a fair allocation of assets. Rather than incorporating a temporal cap, this proposal relies on the duration of the marriage to produce presumptions which will help guide a fair capital reallocation and duration of periodic payment orders. Crucially for this thesis such presumptions will guide the reallocation process with reference to entitlements as opposed to needs.

Proposal 3) Duration Guided Presumptions

This section will identify and evaluate what this thesis considers the most appropriate means of reform in order to respond to the criticisms of the current law⁵²⁷ and pay respect to the view of marriage as a partnership of equals. It intends to amend the current framework so that in everyday divorces, awards are made on the basis of 'entitlement' and not need. This change is in a bid to avoid connotations of dependence, whilst paying increasing respect to non-financial contributions.⁵²⁸ To this end, the forthcoming proposal amalgamates various reform suggestions. In particular, Eekelaar's duration-based approach to asset reallocation will be identified, as much inspiration has been drawn from his work in this area.⁵²⁹ This proposal also incorporates elements of Deech's Bill, and the approach it takes to asset classification.⁵³⁰

⁵²⁷ Outlined in Chapter Three

⁵²⁸ Modifying legal language in order to change perceptions is by no means a novel method of legal evolution. For example, see Children and Families Act 2014, s.12(1) which relabelled 'contact' and 'residence' orders 'child arrangements' orders. This was in a bid to reemphasise that the child is the centre of such proceedings.

⁵²⁹ See, J Eekelaar (n 189); J Eekelaar, 'Property and Financial Settlement on Divorce – Sharing and Compensating' (2006) 36 Fam Law 754.

⁵³⁰ See, Divorce (Financial Provision) HL Bill (2015-16) 56, cl.2.

In short, this proposal suggests a number of statutory amendments that will change the way that the asset reallocation process is approached in all divorces.⁵³¹ Firstly, a new objective for the MCA 1973 will be introduced namely ensuring that each party receives their entitlement to the fruits of the partnership. Reaching this objective will be guided by three statutory presumptions, the first of which intends to introduce a presumption in favour of an equal division of ‘marital’ assets.⁵³² The other two draw upon the duration of the relationship in order to produce a percentage-based presumption of entitlement. It is also recommended that the statutory amendment should outline the broad circumstances where a departure from the presumptions can be justified. When evaluating these justifications and the extent to which they justify such a departure, the courts will be permitted to continue to refer to section 25, albeit with some minor amendments.

It is as a result of these statutory amendments that this proposal’s implementation is sufficiently distinctive that its implementation would justify a rebranding of the current model of asset reallocation. Thus, this proposal can be classified as introducing a Presumptive Entitlement Model of asset reallocation.

As will be identified and evaluated, this proposal will statutorily classify some assets as ‘marital’ and others as ‘separate’, when calculating presumptive entitlement. However, it should be noted from the outset that this proposal does not advocate realigning the law with a community of property. Nevertheless, it is conceded that this proposal will have the effect of moving the law in the direction of a *presumed* community regime. However, the presumptions that it intends to introduce are only applied and scrutinised on divorce. Thus, this proposal does not grant spouses any entitlements or proprietary interests in the property owned by their spouse, prior to this date.⁵³³

It will also be shown that this proposal furthers in part some of the recommendations advocated by the Law Commission, in their most recent Report on *Matrimonial*

⁵³¹ Nevertheless, the forthcoming evaluation of its contents will occur with reference to its likely effect in everyday divorce proceedings.

⁵³² The precise meaning of this term will be identified shortly.

⁵³³ Thereby, precluding the conclusion that it *de jure* introduces a community of property regime.

Property, Needs and Agreements.⁵³⁴ In particular, it responds to the Report's call for clarity when reallocating assets in everyday divorces.⁵³⁵ However, a more progressive stance is taken to reforming the current framework, given the Law Commission's failure to adequately recognise and respond to some of the deficiencies of the current law; as were identified in Chapter Three.

Now that this thesis has outlined the broad content of this proposal, it will turn to assess the likely form of the statutory amendments to the MCA 1973 required in order to implement its various elements. The particular elements will then be turned to individually in order to examine them in greater detail.

Effect on Statute

The first amendment that requires implementation is the new objective of asset reallocation, outlined above. The concept of fairness will still be drawn upon under this new objective; however, within this modified form. The statute should then turn to outline how assets are to be classified when approaching the asset reallocation process. The next section would be directed towards outlining the three presumptions that provide the initial guide in the search for a fair entitlement. This will lead on to a section outlining the reasons for justifying a departure from these presumptions. This section should also include an express obligation on the judiciary to articulate their reasons for holding that the result obtained through application of the presumptions did not reflect a fair entitlement.

Once the judiciary have established a sufficiently pressing reason for departing from the result reached through the presumptions, they would then be required to grant such financial orders that are compatible with the new statutory objective. It is at this point that the judiciary should be directed to have regard to the considerations currently contained within section 25 of the MCA 1973. However, a key amendment is the removal of section 25(2)(c), the marital 'standard of living' consideration, for the reasons identified in Chapter Three. Instead, this proposal's presumptions will

⁵³⁴ Law Commission (n 18).

⁵³⁵ *Ibid* para 3.60.

offer a more objective way of calculating the parties' entitlements, which, similarly to the standard of living consideration, will vary with reference to the available assets for division. This will limit judicial discretion in relation to such matters, which as noted in previous chapters constitutes a highly subjective area of the current law.

The final statutory amendment that this proposal requires in order to be fully implemented relates to a procedural amendment. In particular, it is recommended that it should be possible to make an application for court adjudication, in order to determine a specific issue or question that has arisen. This is because such applications are likely to be considerably quicker and cheaper than full hearings. It is hoped that this will lead to a decrease in cases pursuing final hearings, allowing a judge to quickly determine a specific matter of contention. However, the parameter of this procedural amendment go beyond the remit of this thesis. Nevertheless, a number of examples as to when such applications could assist litigants will be identified.

As the basic framework of this proposal has now been presented, this thesis will turn to an evaluation of its individual contents. Before the details of this reform suggestion are evaluated, this thesis will defend this proposal's reliance upon using the duration of the relationship as a guide to a fair entitlement. This section will be presented first as this proposal draws upon the relationship's duration as a determinative factor when providing its presumptive starting points.

Use of Duration as a Guide to Entitlement

The key distinguishing feature of this proposal is its reliance upon the relationship's duration as an objective consideration, in order to provide litigants with an understanding as to their presumed entitlements. Thus, assets would continue to be held separately, but, over time, spouses would develop a claim to the assets held by the other spouse. Eekelaar, who has openly supported the use of the relationship's duration as a guide to entitlement, has justified this approach on the basis that:

[d]uration of marriage is an excellent proxy for measuring a number of factors which are important in achieving a ‘fair’ outcome. They include: the degree of commitment to a relationship; the value of contributions made to it, which is not susceptible to straightforward economic measurement; and the extent of disadvantage undergone on separation.⁵³⁶

This statement makes it apparent that tying reallocation to duration would not require a complete overhaul of the current Fairness Model of asset reallocation; as the final step would remain recourse to judicial conceptions of fairness.⁵³⁷ However, the requirements by which to achieve fairness are modified. In particular, the concept of entitlement is suggested as a replacement to the current need principle. Accordingly, this proposal’s implementation requires a number of statutory amendments, as the House of Lords have recognised that judicially developed presumptions:

would go beyond the permissible bounds of interpretation of section 25...Whether there should be such a presumption in England and Wales, and in respect of what assets, is a matter for Parliament.⁵³⁸

Thus, although this proposal impliedly supports a Fairness Model of asset reallocation as giving effect to entitlement is intended to produce a fair distribution of assets; it is sufficiently distinguished from the current framework’s approach, so as to require legislative intervention. Recognising this proposal in statute will also help to ensure consistency in judicial approaches.

This thesis will now provide an analysis of the various individual aspects of this reform proposal. The first aspect of this proposal reflects a response to an uncertainty prevalent in the current law; what is the objective of granting financial orders on divorce?

⁵³⁶ Eekelaar (n 529) 756.

⁵³⁷ Furthermore, a number of factors, generally tied to the relationship’s duration, make it increasingly unfair to fence off non-matrimonial property from reallocation; see, *K v L* [2011] EWCA Civ 550 [18] (Wilson LJ).

⁵³⁸ *White* (n 5) [27] (Lord Nicholls).

Unpacking the Proposal's Constituent Elements:

The Objective to be Pursued

The first criticism of the MCA 1973 that was identified in Chapter Three was the fact that it contains no objective.⁵³⁹ However, this proposal intends to incorporate such an objective into this statute. This will assist the judiciary to apply the law consistently and litigants to develop a coherent understanding of what the law is directed towards achieving.

The proposal intends to realign the financial consequences of marriage with an understanding of this institution being a 'partnership of equals'. It does not desire to deviate from the objective currently pursued by the judiciary; the grant of a fair division of the assets. However, it has a modified understanding of the requirements of fairness and the need for certainty. Accordingly, financial orders are to be granted on the basis of entitlement rather than need, with a presumptive starting point provided. An example of the form that this guiding objective should take is as follows:

'The court's role when reallocating assets on divorce is to ensure that parties receive their entitlement to the fruits of the matrimonial partnership and that such provision is fair.'

It is argued that the change in language, from need to entitlement, will prevent the breadwinner from feeling that they are being unjustifiably denied a clean break.⁵⁴⁰ This is because it arguably presents a less contentious way of justifying asset reallocation; with financial orders being granted on the basis that a spouse is *entitled* to such assets, as opposed to granting them on the basis that the spouse *needs* them.⁵⁴¹ Furthermore, it is argued that this change of language will promote self-ordering that involve clean break settlements, as, granting financial orders on the basis of

⁵³⁹ The last time that such a statutory objective existed, was prior to the enactment of the Matrimonial and Family Proceedings Act 1984.

⁵⁴⁰ As occurs through modern need provision, which justifies reallocation that is far in excess of a layman's interpretation of 'needs'.

⁵⁴¹ For example, can it be said that a spouse 'needs' a house? In many situations it arguably makes greater sense to claim that a spouse is 'entitled' to a house.

entitlement has a more objective end goal than the seemingly endless obligation to provide for the financially vulnerable spouse's needs.⁵⁴²

Finally, this change in language will also remove the concept of needs 'generously interpreted'.⁵⁴³ The removal of this term will limit the scope of judicial discretion. It will also have the effect of preventing breadwinners from perceiving themselves as being unfairly burdened with an expansive interpretation of their previous obligation to provide for former spouses' need. Conversely, its removal will help to preclude any expectations that entitlements may be 'generously interpreted'. Thus, it is apparent that a number of arguments can be made supporting the view that the language of this new objective will help to elucidate the law's operation, thereby deterring litigants from pursuing full-scale court adjudication.

The following presumptions will then provide a percentage-based framework in order to guide both the judiciary and litigants when approaching this search for a fair entitlement. However, before these presumptions can be discussed, it is necessary to recognise a further aspect of this proposal, namely, the method by which it classifies assets for division.

Asset Classification

The second proposed statutory amendment concerns asset classification. Under this proposal, classifying assets will be the first step in the reallocation process. Once completed, it will provide litigants with an understanding as to which assets the presumptions are to be applied.

It is suggested that a slightly modified version of Deech's approach to classifying assets for reallocation should be incorporated into the existing law.⁵⁴⁴ This involves recognising a distinction between 'marital' and 'separate' property. Simply put, the

⁵⁴² Thus, this proposal realises that parties cannot expect a meal ticket for life, thereby, reining in their expectations on divorce.

⁵⁴³ See Chapter Three for the criticisms that were raised against this expanded interpretation of the need principle.

⁵⁴⁴ For the unmodified version see, Divorce (Financial Provision) HL Bill (2015-16) 56, cl.2.

former type would cover assets accumulated following the inception of the relationship, excluding gifts, inheritance or successions from a third party.⁵⁴⁵ Conversely, the latter class would cover assets that were owned by either of the parties prior to the relationship, as well as those assets excluded from the above class. Issues relating to assets accrued following separation will be returned to shortly.

With this first step in mind, this thesis will now turn to discuss the consequences of this classification process when calculating fair entitlements. This secondary stage occurs through the lens of the proposed presumptions.

Presumption 1: Equal Division of ‘Marital’ Assets

Given that this proposal is based on the view of marriage as a partnership of equals, it intends to introduce a presumption that the liquidated value of assets classified as ‘marital’ should be divided equally on divorce. It is an interest in the ‘separate’ class of assets that would accumulate with reference to the relationship’s duration.⁵⁴⁶ This method of reallocation is justified on the basis that financial orders should not be seen to be ‘a gift bestowed through the discretion of the court, but rather [should be viewed as] a just and equitable redistribution of resource’.⁵⁴⁷ This leads to the second presumption; how quickly should spouses accumulate an interest in the ‘separate’ class of assets?

Presumption 2: Durational Factor’s Influence on Separate Assets

It was Eekelaar’s suggestion that the requisite time necessary in order to earn ‘an equal share in each other’s assets’, should be equivalent to the time it takes for spouses to ‘achieve the core aim of (most) adult partnerships’, namely, child rearing.⁵⁴⁸ Thus, he estimated that after a relationship of 20 years, spouses should be presumed to share all of their assets equally.⁵⁴⁹

⁵⁴⁵ This is a reflection of the wording contained within, Divorce (Financial Provision) HL Bill (2015-16) 56, cl.2.

⁵⁴⁶ Due to the commitment to the matrimonial partnership that this reflects.

⁵⁴⁷ Diduck and Orton (n 294) 700.

⁵⁴⁸ Eekelaar (n 189) 556.

⁵⁴⁹ *ibid* 556.

If this estimation is to be accepted as the benchmark for deciding the requisite duration in order to give rise to a presumption of equal division of all the assets, then the “durational factor” (the rate by which the spouses earn a share in each other's property) would be 2.5 per cent per year.⁵⁵⁰ Eekelaar also suggested the imposition of a durational threshold in order for this durational factor to bite. He suggested that claims following the termination a relationship that lasted under three years should be excluded ‘so as to avoid having to make small adjustments in very short relationships’.⁵⁵¹ However, in such circumstances the presumption in favour of an equal division of the ‘marital’ assets would remain.

Presumption 3: Durational Factor’s Influence on Maintenance Entitlements

Finally, it is suggested that in order to produce further clarification, any maintenance obligations should be similarly quantified with reference to the ‘durational factor’⁵⁵² and the disparity in earnings. Thus, in a similar fashion to the above presumption guiding capital reallocation of the ‘separate’ class of assets, a share in the former spouses’ earning potential should be presumed to accumulate over the course of the relationship.⁵⁵³ It should also be recognised that ‘earning potential’ should be interpreted broadly to include pension entitlements.⁵⁵⁴

The grant of such maintenance-orientated periodical payment orders would then be capped temporally, again with reference to a presumption based on the duration of the relationship. It has been suggested that the temporal cap should be equivalent to half the duration of the marriage.

If the above figures are to be accepted as the foundations for the guiding maintenance presumption, then a care-giving wife of 10 years would be presumed to receive 25%

⁵⁵⁰ *ibid* 556.

⁵⁵¹ *ibid* 556.

⁵⁵² i.e. 2.5% a year.

⁵⁵³ i.e. for every year of marriage, the financially vulnerable spouse will be presumed to be entitled to 2.5% of the difference between the spouses’ earnings, taken holistically.

⁵⁵⁴ Given the fact that such equitable interests have increasingly come to represent a substantial proportion of the available assets. The understanding of these points was the impetus for the enactment of the Welfare Reform and Pensions Act 1999.

of the difference between her and her husband's net income for the next 5 years. This would be on top of any capital reallocation.⁵⁵⁵

The Effectiveness of these Presumptions in Light of the Current Legal Framework

It is suggested that these presumptions would help to avoid the criticism of the current law, examined in Chapter Three. Hence it would help to prevent diverging expectations of entitlement occurring, currently caused by the incompatibility between the contemporary framework's reliance on both the need principle and the clean break policy.⁵⁵⁶ As these presumptions will assist parties to understand the likely quantum and duration that a periodic payment order will be granted for, they will provide litigants with a greater understanding as to how long it will take for their entitlements to be realised. It will also help to prevent long-standing financial obligations that are inconsistent with the fundamental nature of modern divorces. Therefore, this thesis supports the view that these presumptions provide an adequate middle ground between protecting vulnerable spouses and preventing excessively long financial obligations on divorce. In this way they incorporate the competing policies behind the need principle and the clean break sections.

Furthermore, some of the difficulties that have arisen when applying the various judge made principles will be avoided. This is because it is posited that the above presumptions similarly encapsulate these principles. Clearly the presumption that 'marital' property should be divided equally supports the policy behind the sharing principle; albeit this principle is generally only raised in big-money cases. Comparatively, it is the duration-based presumptions that reflect the extent to which the 'need' and 'compensation' principles should influence the resulting quantification. This is due to the fact that these presumptions impliedly recognise and respect the fact that the duration of the marriage generally reflects both the likelihood of 'interdependence' and 'prospective economic disparity between the parties'.⁵⁵⁷ Accordingly, spouses gradually develop an entitlement to the assets held by the other

⁵⁵⁵ Which, following a marriage of this duration, would result in a presumption that the wife should receive 50% of the 'marital' assets and 25% of the husband's 'separate' assets.

⁵⁵⁶ Contained within MCA 1973, s.25A.

⁵⁵⁷ These were the justifications raised by the House of Lords for the need and compensation principles; see, *Miller; McFarlane* (n 7) [11], [13] (Lord Nicholls).

spouse, in order to preclude dependence and reflect an element of reimbursement for their domestic contributions. The main difference is that under this proposal these principles are given effect through the presumptions, rather than being drawn upon as meta-principles via subjective applications of judicial discretion, in a bid to interpret the key statutory provisions

A final criticism that was levelled against the need principle's operation in everyday divorces stems from the fact that there has been limited senior court guidance, outlining the principle's likely application in this context. Clearly, the presumptions would offer much needed general guidance for litigants when attempting to calculate their entitlements. However, an express statutory provision requiring the judiciary to outline their reasons for deviating from the result reached via application of the presumptions will enable a body of guidance to be incrementally developed and recorded. This will assist all those involved in such proceedings to predict the likely outcome.

Nevertheless, it is not suggested that these presumptions will always lead to a result that is compatible with the newly codified objective, or preclude competing arguments as to the appropriateness of their application. Thus, the next subject of discussion will be those situations or circumstances that justify a departure from these presumptions.

When Can the Presumptions Be Departed From?

It is recognised that whilst the proposal's presumptions provide a useful starting point, they should be 'departed from if some other factor becomes sufficiently compelling'.⁵⁵⁸ Thus, a number of necessary caveats need to be added to the above guidance in order that inequitable results are not enforced.

1) Fairness

⁵⁵⁸ Ekelaar (n 189) 556.

The most important reason that could justify a departure from the result reached by applying the presumptions is if the award suggested falls short of achieving the new statutory objective. Ultimately, this thesis concedes that the power must remain with the judiciary to deviate from any application of the above presumptions that would lead to inequity, or, in other words, fail to satisfy the overriding objective of achieving a fair division of the assets as seen through the lens of entitlements and not needs. Nevertheless, it is posited that if the above presumptions were given statutory recognition, then any departure from their result would require express justification. This would prevent the suggested reform proposals from being ignored in favour of a subjective judicial evaluation of fairness.⁵⁵⁹ It would also help to ensure consistency in judicial decision-making, thereby increasing the guidance available for litigants to everyday divorces.

It would be following an application for judicial adjudication on this matter of fairness that the courts would be required to have regard to the considerations contained within section 25. Thus, if the presiding judge deems that the statutory considerations point to a result that is different to that reached through the presumptions, it is open for that judge to grant whichever result most appropriately represents a fair entitlement. Any reasoning used to depart from the presumptions must be articulated.

An example of where fairness may justify diverging from the presumptions is in the situation where it is deemed appropriate to grant a financial order with the objective of enabling one spouse to return to employment. It is argued that, 'rehabilitative' payments may justify diverging from the above presumptions if they further the new objective.⁵⁶⁰ These payments may be considered appropriate in situations where one spouse has given up their employment in order to support the family unit. Such an order would be justified on the basis of fairness as it strikes an appropriate balance between protecting financially vulnerable spouses and precluding excessive support

⁵⁵⁹ Thus, precluding judges from failing to adapt to the new reforms by continuing to apply the current law.

⁵⁶⁰ i.e. orders that help the recipient spouse to re-enter the employment market. This could be achieved through granting a spouse sufficient assets to retrain or gain additional qualifications.

obligations following the divorce.⁵⁶¹ However, due to the difficulties inherent in requiring an older spouse to return to work and the likelihood that many younger spouses who have left work will continue to have child-care responsibilities, it will be in the minority of cases that such payments will be ordered.

2) Children of the Family

As Baroness Hale has recognised, ‘an equal partnership does not necessarily dictate an equal sharing of the assets... it may have to give way to the needs of... the children’.⁵⁶² Therefore, the duration-based presumptions should never preclude either parent from fulfilling the obligations that inherently arise from parenthood. This will reflect the consideration currently contained within MCA 1973 section 25(1), where the courts are directed to pay ‘first consideration’ to the ‘welfare’ of any ‘child of the family’. Thus, the courts should have a specific statutory direction to override any of the presumptions, to the extent that they fail to provide for the welfare needs of any of the children of the family.

Whilst the quantification of a child’s needs may not be an easy task for litigants, it is suggested that guidance could be produced through elaborating on the considerations contained within clause 6 of a previous Draft of Baroness Deech’s Private Members’ Bill.⁵⁶³ Although this proposed section has since been removed, it provides a good foundation on which to develop such guidance. Specifically, it identified six considerations relating to the welfare of the families’ children, which the courts must have regard to when reallocating assets.⁵⁶⁴ Nevertheless, the precise content of such guidance goes beyond the remit of this thesis.

⁵⁶¹ This is achieved through supporting the long-term goal of a ‘transition to independence’; see, Law Commission (n 18) paras 3.64, 3.67.

⁵⁶² See, *Miller; McFarlane* (n 7) [142] (Baroness Hale).

⁵⁶³ See, Divorce (Financial Provision) HL Bill (2013-14) 55/3, cl.6.

⁵⁶⁴ These considerations were: (a) any order for support for the child; (b) the need to provide suitable accommodation for the child; (c) the age and health of the child; (d) the educational, financial and other circumstances of the child; (e) the availability and cost of suitable childcare facilities, and; (f) the needs and resources of the parties.

Thus, once such a justification for departure has been recognised, the judiciary are permitted to refer to the statutory considerations contained within section 25,⁵⁶⁵ when calculating fair entitlements. Such recourse to these statutory considerations would be confined to cases where the courts have established that there are sufficiently pressing reasons to justify a departure from the result reached through the application of the presumptions. Thus, this provides a response to the second criticism raised against the MCA 1973: the fact that the statute has no hierarchy of its considerations. Whilst this proposal does not intend to restructure the section 25 statutory considerations on a hierarchical basis, it does intend to limit reliance on a judicial evaluation of these considerations. Therefore, whilst this criticism is not removed, it is confined to those cases where the presumptions are deemed unsuitable for application.

As the individual elements of this proposal have now been identified, the potential shortfalls of this proposal will be examined with a view to providing a response to these criticisms.

Evaluating the Proposal – Potential Problems and Responses

1) Date of Relationship's Commencement and End

In order to provide a comprehensive evaluation of this proposal, a number of aspects of this new framework must be further clarified. Firstly, the starting date for the accumulation of an entitlement to the other spouses' 'separate' property must be established. It seems that there are two points at which this could occur; the actual date of marriage, or when the parties start to cohabit. It is suggested that the most appropriate starting point would be whichever of these events occurred first. This is because both events are indicative of the requisite commitment to the relationship, in order for presumptive entitlements to begin to accumulate.⁵⁶⁶

⁵⁶⁵ As amended.

⁵⁶⁶ Of course, if parties cohabited and then separated, this marital asset reallocation regime would not apply.

It has also been described as ‘unreal and artificial to treat the periods differently’ where the relationship has moved ‘from cohabitation to marriage without any major alteration in the way the couple live’.⁵⁶⁷ Similarly, it is argued that to fail to recognise this pre-marital cohabitation period as accumulating to the relationship’s overall duration, would be to, ‘clash with the public attitudes and practices of many couples’.⁵⁶⁸ If there is any uncertainty, perhaps in the case of a couple living together before embarking on a relationship, this matter could be decided via a specific application for court adjudication on this matter.⁵⁶⁹

A similar issue is establishing when the duration-based accumulation period ends. It is suggested that this end point is triggered either on the date that one of the spouses move out of the matrimonial home, or, on the date that divorce proceedings are initiated.⁵⁷⁰ This is because both of these events represent the requisite intention to bring an end to the matrimonial partnership. Again recourse could be had to a specific application for judicial adjudication in uncertain circumstances due to the difficulties inherent in an attempt to formulate any such universal rule.

2) Post-separation Accruals

A further issue that may cause some difficulties is how to divide any such assets that are accrued following the separation of the spouses. This thesis intends to endorse the views of Sir Nicholas Mostyn QC raised in *Rossi v Rossi*⁵⁷¹ and subsequently built upon in *JL v SL*.⁵⁷² Whilst this thesis is unable to explore the intricate details of the enunciated approach to be taken to assets that could fall within this category, Mostyn’s approach will be briefly identified and supported.

Firstly, Mostyn suggests that in order for such assets to be classified as ‘non-matrimonial property’, or separate property under this proposal, they must:

⁵⁶⁷ *GR v RW* [2003] EWHC 611 [33] (Mostyn QC).

⁵⁶⁸ Harris-Short and Miles (n 450) 468.

⁵⁶⁹ As would be possible under the amended MCA 1973.

⁵⁷⁰ Via the submission of a completed D8 ‘Divorce/dissolution/(judicial) separation petition’.

⁵⁷¹ *Rossi* (n 472).

⁵⁷² [2015] EWHC 360 (Fam).

[b]e acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly assert an unascertained share.⁵⁷³

He went on to recognise that such property could still not be quarantined and that the ‘longer the marriage the more likely’ that such assets can be shared between the spouses.⁵⁷⁴ He then outlined a number of other relevant factors that judges were required to consider when exercising their discretion to share such assets.⁵⁷⁵

It is suggested that this approach could be continued, even following this proposal’s changes. This is because it places strong reliance on classifying assets and distributing them on the basis of duration, which has strong similarities with the approach taken under this proposal. The only area of divergence from Mostyn’s approach is from his statement that under short marriages such assets may be shared if ‘needs require this’.⁵⁷⁶ Due to this proposal’s desire to move away from the language and reliance on assessing needs, it is suggested that when judicial discretion is invoked into assessing such issues, the language of ‘entitlement’ should be the cornerstone.

Thus, it is conceded that judicial discretion must continue to govern these problems as and when they arise. This is because the diverse range of circumstances that could come before the court makes the creation of any rule or presumption designed to guide such discretion potentially greatly incommensurate. Therefore, the subjectivity inherent in judicial discretion must remain when considering arguments made in relation to such assets.

3) Breaks in the Relationship

Another potential problem to be considered is what would be the result of the relationship ending and then re-starting? It is suggested that if this is a clearly defined time, then it could be excluded from the duration of the relationship, but any gaps

⁵⁷³ *Rossi* (n 472) [24.3] (Mostyn QC)

⁵⁷⁴ *ibid* [24.6] (Mostyn QC)

⁵⁷⁵ *ibid* [24.7] (Mostyn QC)

⁵⁷⁶ *ibid* [24.6] (Mostyn QC)

should be bridged. Again, a specific application for judicial adjudication may be required in uncertain circumstances, for example, if a married couple separate and live apart for ten years but then recommence their relationship for a short period before divorcing. However, it requires reemphasising here that although a break in the relationship may adversely effect spousal entitlements, this should never interfere with spouses' support obligations regarding any children of the family.

4) Classifying Assets

A further issue that may potentially undermine this proposal's attempts to introduce certainty, is the difficulties and complexities that may emerge when classifying assets as either 'marital' or 'separate' property. This may be particularly problematic in cases where one spouse runs their own business, which forms the majority of their assets. In such situations, a beneficial interest may be placed on the profits of said business activities. However, if the parties are not willing to openly negotiate, judicial adjudication may be required, albeit with the effect of undermining attempts within this proposal to avoid judicial involvement.

Nevertheless, this proposal's means of classifying assets can draw implicit support from cases concerned with the contemporary search for fairness. In particular, when sitting as a Judge in the Family Division of the High Court, Mostyn QC has expressly recognised that classifying assets as non-matrimonial, or separate:

[R]epresents an unmatched contribution made by the party who brings it to the marriage justifying, particularly where the marriage is short, a denial of an entitlement to share equally in it by the other party.⁵⁷⁷

This dictum recognises the relevance of the marriage's duration when calculating entitlement. Therefore, classifying assets as 'separate' with a presumption that the other spouse accumulates an interest in this property over time, provides an appropriate balance between spouses' overriding proprietary claims and temporally-supported claims of entitlement to the partnership's assets. This dictum also shows us that the judiciary are already concerning themselves with classification when

⁵⁷⁷ *ibid* [10] (Nicholas Mostyn QC).

reallocating assets. This supports the view that this proposal's implementation would not be a complete overhaul of the current asset reallocation process.

5) Impossibility of Imposing a Clean Break

A final issue that may undermine this proposal is the fact that reaching a clean break may not always be a quick process. Accordingly, it could be argued that the reliance placed upon a presumptive-cap on the duration and quantum of periodic payment orders fails to protect financially vulnerable parties to the extent that they are currently in everyday divorce proceedings. Thus, it is unacceptable to remove provision for needs. However, this argument is not accepted for a number of reasons.

Firstly, this proposal continues to allow the judiciary sufficient flexibility in order to prevent inequity from occurring. The new objective recognises that presumptive entitlements can be contested for their compatibility with fairness. Secondly, these presumptions provide financially vulnerable spouses with a much clearer understanding as to their likely entitlements. Thus, to deny either spouse their presumed entitlements would require pressing justification and judicial explanation. This will compel the judiciary to provide guidance as to the circumstances that deem the presumptions' application inappropriate.

Finally, its express qualification to safeguard and enforce the obligations of parenthood provides justification for the financially vulnerable, care-giving parent to receive a majority portion of the partnerships' assets. Hence, this proposal would allow the law to recognise that parenthood in itself gives rise to an enduring financial obligation, whereas marriage does not.⁵⁷⁸

The above section has provided a response to some of the potential problems and criticisms that this proposal may attract. This thesis will now turn to evaluate whether this proposal is compatible with the Law Commission's recent recommendations for reforming this area of law. If so, this will provide further support for this proposal's implementation.

⁵⁷⁸ Thus, reflecting the philosophy of the Child Support Act 1991. See s.1(1) of this statute which places a responsibility on parents to maintain their children.

The Proposal's Relationship with the Law Commission's Recommendations

It is suggested that this proposal aligns with some of the findings and recommendations made by the Law Commission within their most recent Report into this area of law.⁵⁷⁹ This Report recommended that need provision should be guided by the merger over time principle, with the objective of a 'transition to independence'.⁵⁸⁰ Thus, the Law Commission similarly recognised that the duration of the relationship is an important consideration that should heavily influence the result of the asset reallocation exercise.

The legal inception of the duration presumptions could be considered a transparent, pragmatic means of implementing this merger over time principle, by providing support to parties during the transition to independence.⁵⁸¹ This would be furthered through permitting rehabilitative payments that justify a departure from the aforementioned presumptions.⁵⁸² Nevertheless, this proposal differs from that of the Law Commission in a number of key ways.

Firstly, the introduction of clear guiding presumptions limiting the duration of provision would clearly reflect the transitional objective of independence. In contrast, the Law Commission was unwilling to recommend such limitations on provision due to its belief that 'any such recommendation would be highly contentious... [because] the transition to independence should not be sudden'.⁵⁸³ However, this thesis would suggest that the more contentious aspect of the asset reallocation exercise is the complete absence of guidance to assist litigants. Furthermore, this proposal does not preclude a judge from disregarding these presumptions when they are incompatible with the newly codified objective. Thus, the contentious aspects of this incentive towards independence are mitigated through allowing final recourse to judicial

⁵⁷⁹ Law Commission (n 18).

⁵⁸⁰ *ibid* paras 3.64.

⁵⁸¹ The level of such support being proportionate to the length of the relationship.

⁵⁸² Designed to enable that 'transition to independence'.

⁵⁸³ Law Commission (n 18) paras 3.65-66.

conceptions of fairness; now applied through the objective of giving effect to entitlements.

This proposal also differs from the Law Commission due to their reliance on considering the parties' previous standard of living, or expectations of a home when reallocating assets.⁵⁸⁴ It is argued that there are inherent difficulties in quantifying and giving legal effect to spouses' expectations on divorce. Furthermore, as shown in Chapter Three, marriage should not automatically give rise to a right to be indefinitely maintained at a sustained standard of living and that such a consideration is likely to be unobtainable within everyday divorces. Thus, for the sake of transparency and to prevent diverging expectations as to entitlement, it is suggested that these considerations should not be attributed weight under the new model of asset reallocation.

The final difference between the Law Commission's recommendations and this proposal is the change of language from need provision to entitlements that this thesis supports. This change of language is intended to help preclude the psychological influence where recipients of asset reallocation are seen as 'needy supplicant[s]'.⁵⁸⁵ This will help to ensure financially vulnerable spouses are protected on divorce, to the extent that they are entitled to receive such financial protection.⁵⁸⁶ This change of language can also draw implied support from some areas of feminist commentary. In particular, Diduck and Orton have claimed that financial orders on divorce should 'be seen as a right, expected and earned, rather than as a gift, act of benevolence or based on a notion of women's dependency on men'.⁵⁸⁷ Therefore, reallocation on the basis of entitlement helps to preclude notions of dependence.

It is also argued that making provision on the basis of entitlements will prevent the judiciary unfairly placing the obligation of 'social insurer' for the former-spouse on to the breadwinner.⁵⁸⁸ This will help to realign the current balance of fairness by ensuring the asset reallocation process is not influenced by external policy

⁵⁸⁴ See, Law Commission (n 18) para 1.27.

⁵⁸⁵ Harris-Short and Miles (n 450) 477.

⁵⁸⁶ Thus, reaching a balance between the competing faces of fairness.

⁵⁸⁷ Diduck and Orton, 'Equality (n 294) 687.

⁵⁸⁸ Gray (n 58) 327.

considerations.⁵⁸⁹ It also deserves recognition that the law governing asset reallocation on divorce is only one way of ensuring that spouses' 'needs' are satisfied. Accordingly, 'many of the problems with finding a fair law of ancillary relief are due to the fact that we live in a flawed society with gendered inequalities'.⁵⁹⁰ Thus, if spouses' needs are not satisfied through granting entitlements, it should arguably be an obligation for the State to make additional provision through social welfare payments.⁵⁹¹

The final way in which this proposal is in accordance with the Law Commission is due to their desire to prompt the production of guidance for all litigants, but especially for litigants in person. This is because, as stated above, one of the most pressing problems surrounding this area of law is the increasing numbers of litigants who have to forgo legal advice and apply a relatively inaccessible area of law to their unique factual circumstances. However, this proposal intends to go further than the production of non-statutory guidance, as recommended by the Law Commission, with its introduction of a statutory objective and guiding presumptions.

It is suggested that these developments will help to limit the numbers of cases pursuing court adjudication. This argument is made as 'settlement is more likely when the parties have similar expectations of the likely outcome of litigation'.⁵⁹² Parties are likely to have similar expectations, following this proposal's implementation, as the presumptions will provide litigants with a clearer understanding of the court's starting point.⁵⁹³ This will help to avoid excessive and unnecessary litigation expenditure, thereby incidentally assisting litigants in everyday divorces to provide for their own needs following their marriage's termination.

Thus, it can be concluded that this proposal has similar objectives to the Law Commission. However, the proposal advanced in this thesis offers more substantive steps for reform. Nevertheless, this proposal is not inconsistent with the Law

⁵⁸⁹ Identified in Chapter Two.

⁵⁹⁰ J Herring, *Family Law* (5th edn, Pearson Education Ltd 2011) 268.

⁵⁹¹ Gray (n 58) 324.

⁵⁹² American Law Institute (n 447) fn 36.

⁵⁹³ As well as the reasons that will lead to judges deviating from the result reached through the presumptions.

Commission's recommendations, as they expressly supported the 'development of a formula to generate ranges of outcomes for spousal support'.⁵⁹⁴ This proposal certainly offers a first step towards the development of such a formula, which is compatible with the trend of, likely, future legal reform.

Therefore, it should be apparent that this proposal's implementation would provide a fitting response to a number of the deficiencies that can be identified within the present framework governing asset reallocation in everyday divorces. Much of this amelioration is a result of limiting the areas that rely upon a subjective exercise of judicial discretion. Furthermore, it is largely compatible with the findings of the Law Commission's recent report in this area. It is for these reasons that this thesis believes that moving the law in the direction of a Presumptive Entitlement Model is the most appropriate path for legal reform.

Conclusion

This chapter has assessed some of the proposals that may offer a means of ameliorating the deficiencies present within the current model governing asset reallocation on divorce. Due to the recent austerity measures taken, proposals have been evaluated for the extent to which they can provide transparency and guidance for litigants in person. Put simply, this requires the law to be more accessible in order to enable litigants (who often lack legal representation) to apply the law to their factual circumstances. However, this evaluation has consistently recognised that the search for fairness should not be subordinated in a bid to induce certainty.⁵⁹⁵ Accordingly, the ideal reform proposal would enable such litigants to reach an expectation of entitlement that is consistent with judicial conceptions of fairness. This would prevent litigants from pursuing costly and arduous legal battles, thereby achieving the Government's aim to 'enable divorcing couples to dissolve their marriage efficiently and, wherever possible... without using the court'.⁵⁹⁶

⁵⁹⁴ Law Commission (n 18) para 3.159.

⁵⁹⁵ Instead recognising that an appropriate balance must be struck. This has been achieved through offering guidance to litigants whilst not precluding final recourse to judicial conceptions of fairness.

⁵⁹⁶ See, Family Justice Review Panel, 'Family Justice Review: Final Report' (*Ministry of Justice*, November 2011) 36

The chapter began by recognising two important guiding details, before embarking on its central focus. Firstly, it was observed that if we intend to continue to recognise fairness as a guiding objective, discretion is an inevitable requirement. Therefore, reform proposals would have to be evaluated for the extent to which they provide an appropriate balance between the competing requirements of flexibility and certainty. Secondly, it was suggested that the most appropriate way by which to pay respect to the competing ‘faces’ of fairness on divorce, was to recognise the foundation of marriage as being a ‘partnership of equals’ and thereby reallocating assets accordingly.⁵⁹⁷ This was intended to provide an objective starting point to the asset reallocation process, whilst also promoting reallocation with reference to the principle of entitlement rather than dependency. Thus, proposals were also evaluated for their compatibility with this understanding of marriage.

Consequently, after rejecting the Law Commission’s recommendation on the basis of its failure to advocate on behalf of substantive reform, three reform proposals were evaluated. The particular proposals were chosen for evaluation on the basis that they provide the most appropriate response to this thesis’ previous conclusions regarding the current law’s deficiencies. These proposals were also evaluated for their adherence to the objectives pursued via modern needs provision, namely, the extent to which these proposals are able to protect financially vulnerable spouses.

This chapter has unequivocally concluded that the final of these reform proposals should be implemented into law. This conclusion was reached on the basis that this proposal provided the most appropriate response to the law’s current shortfalls, whilst balancing the requirements of certainty with the need for the law to retain an element of flexibility in order to achieve fairness. Furthermore, it was argued that this proposal also offered an appropriate means of balancing the competing requirements of fairness.⁵⁹⁸ Thus, the supported proposal would offer a default position reflecting Ellman’s aspiration for the law to offer a ‘reasonably accessible and efficient

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf> accessed 21 July 2015.

⁵⁹⁷ *North* (n 274) [32] (Thorpe LJ).

⁵⁹⁸ By providing for entitlements, whilst offering a time limit as to when the obligations of marriage are presumed to end; balanced under the heading of fairness.

administration of rules that do little harm in themselves, and yield a crude approximation of fairness'.⁵⁹⁹

It was also recognised that the supported reform proposal is not advocating a complete overhaul of the law's current model of asset reallocation which intends to reach 'an outcome which is fair between the parties'.⁶⁰⁰ It continues to have final recourse to judicial concepts of fairness. However, it attempts to move away from this being the defining feature of primary recourse and accordingly, if this proposal was implemented, it would be appropriate to reclassify the law as reflecting a Presumptive Entitlement Model of asset reallocation.

Nevertheless, this proposal continues to reflect a sustainable middle ground between maintaining the flexibility inherent in judicial discretion, whilst providing firm presumptive guidance for capital and periodic payment reallocation. In the context of everyday divorces that often occur without recourse to court adjudication, this new model provides a more justifiable means of protecting financially vulnerable spouses than the contemporary law's reliance upon the need principle. Thus, this thesis has advocated in favour of a practical reform proposal, whose implementation could further the Law Commission's recommendations by providing litigants with accessible, legal presumptions to guide their personal search for fairness.

⁵⁹⁹ Ira Ellman, 'Why Making Family Law Is Hard' (2003) 35 *Ariz St LJ* 699, 714.

⁶⁰⁰ *Miller; McFarlane* (n 7) [6] (Lord Nicholls).

Conclusions

This thesis has evaluated the current model of asset reallocation, as applied in the context of everyday divorces. It has been identified that the need principle plays a central role in these cases and, accordingly, an evaluation of this principle has been the primary focus of this thesis.

In order to assess why the law has traditionally provided for needs on divorce this thesis began with a historical exploration, where the foundations of the modern need principle were extrapolated. It was concluded that facets of the current need principle have long received recognition as far back as when the dissolution of marriage was considered a matter for the ecclesiastical courts. Whilst provision for spousal needs have been consistently protected since this period, it was not until the 1970s that this principle was expressly codified in statute. This occurred contemporaneously with the inception of the Fairness Model of asset reallocation, which was developed both as a means of protecting financially vulnerable wives from the detrimental effects of divorce and in a bid to pay increasing respect to spousal entitlements. This initial investigation concluded that, as the asset reallocation has consistently evolved as a product of its time, this principle was developed in order to respond to broader inequalities that women have faced throughout past centuries.

Once the historical foundations of this principle were recognised, this thesis went on to assess the need principle's subsequent judicial development. This assessment's intention was to develop an understanding as to the role of the need principle within contemporary, everyday divorce litigation. Following an evaluation of the relevant case law and statutory provisions, this section identified the pivotal role that this principle currently plays in the context of the modern approach to asset reallocation; which was classified as pursuing a Fairness Model. This modern approach has been classified as such as it rejects guiding rules instead granting the judiciary a wide discretionary remit in a bid to ensure that the financial orders that are granted are 'fair both to the applicant in need and to the respondent who must pay'.⁶⁰¹

⁶⁰¹ *North* (n 274) [32] (Thorpe LJ).

This section was able to deduce the existence of some patterns guiding the judicial approach to these cases. However, the evaluation's conclusion recognised the inaccessibility of predicting the outcome of the current domestic model's application of the need principle in any given case. This finding was discerned on the basis of the difficulties present when identifying which statutory considerations, judicial principles or relevant policies would be drawn upon and attributed weight when reallocation was made on the basis of need.

Following this assessment of the need principle's current role in everyday divorces, this thesis then turned to a critical evaluation of the law governing the asset reallocation process in these cases. The initial focus of this evaluation was the relevant statutory provisions that are intended to guide the application of judicial discretion. This section confirmed the unsatisfactory absence of guidance that exists to govern this discretionary exercise. The unpredictability was also recognised to have become a particularly pressing issue following the recent austerity measures taken in this area, which have placed legal representation and court adjudication out of reach for many litigants to everyday divorces.

The evaluation then turned to identify six specific criticisms stemming from the need principle, when applied in this context. Many of these deficiencies were expressly attributed to this principle's convoluted historical foundations and subsequent development through judicial elaboration. Ultimately, it was concluded that this principle's current utilisation is no longer appropriate, particularly given the lack of guidance to provide litigants with an understanding as to the implications of this principle's application.

With an express intention to respond to these deficiencies, Chapter Four turned to assess some of the prevailing proposals that have been raised in a bid to modernise and ameliorate some of the deficiencies present within this area of law.⁶⁰² However, before this was undertaken, it was suggested that the wording of the need principle should be amended, so that the law would be directed towards ensuring that spouses

⁶⁰² Particularly given the fact that that this principle is now at odds with the current trend of divorce law which has increasingly recognised 'that the whole point of divorce is to sever the relationship of husband and wife'; see, Scottish Law Commission (n 298) 200.

receive their entitlements. Whilst the amended law would continue to protect vulnerable spouses,⁶⁰³ it was argued that the change of language would help to preclude the negative psychological influences that stem from granting financial orders on the basis of ‘need’.⁶⁰⁴ It was also suggested that this change of language would bring the law into closer compatibility with the understanding of marriage as a ‘partnership of equals’, which, in turn, would provide the law with an objective starting point to the asset reallocation process. To this end, three proposals were explored in order to assess which would strike a reasonable balance between the requirements of certainty and flexibility under the search for a fair reallocation.

This evaluation concluded with the finding that the third proposal, centred on the introduction of duration based presumptions of entitlement, provided the most appropriate option for reform. This conclusion was reached on the basis that this proposal would provide an objective starting point on which to ground protection for financially vulnerable spouses, whilst offering breadwinning spouses an understanding as to the extent of their continued support obligation following divorce. Thus, its attempts to introduce clarity into the asset reallocation process were directed towards avoiding the need for legal representation or protracted and expensive court adjudication.⁶⁰⁵

Through the implementation of a new objective as well as presumptions to guide the newly branded search for fair entitlements, the supported reform proposal is classified as replacing the current law’s Fairness Model with a new Presumptive Entitlement Model of asset reallocation.⁶⁰⁶ Whilst it is accepted that some may view this proposal as too radical a change to the current approach to asset reallocation on divorce, it is submitted that such progressive reform is required given the absence of substantial legislative intervention for over three decades, in an area so innately connected to contemporary social, moral and religious values.

⁶⁰³ As is the implicit objective of modern need provision.

⁶⁰⁴ By precluding connotations that one spouse is dependent upon the assets owned by their former spouse.

⁶⁰⁵ Although it accepts that this remains a necessary process in some cases in order to ensure that the overarching objective of fairness is not discarded.

⁶⁰⁶ However, fairness does remain; merely the opportunities for subjective applications of judicial discretion based on its application are limited.

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