

FAMILY LAW AND THE INSTITUTION OF MARRIAGE

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ABOUT THE SPEAKER

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The Family Law Consortium was England's first practice in 1995 to combine solicitors, mediators and counsellors, providing a range of services for family law clients. It has 7 law partners and 6 other lawyers, of whom 9 are also mediators, and all of whom are family law specialists. In addition, and as crucial members of the practice, it has 2 counsellors and psycho-therapists who are also mediators. It is a s29 mediation provider and franchised by the Legal Services Commission for family law and family mediation. It offers a preliminary interview to clients or couples to help them decide which of the services are most appropriate. It also provides a practice management consultancy for family law and family mediation practices. It provides occasional seminars on new developments in family law as they affect practice and family relationships, with the emphasis on encouraging conciliatory, holistic and cost effective approaches and attitudes. More details can be found at www.tflc.co.uk which has recently been voted one of the 2 top English law firm web sites for specialist practices.

The practice embraces many life views and ethical outlooks, which come together in the combined approach to family law issues as set out above. However the views expressed in this paper are personal to the writer and not necessarily shared by all members of the practice.

Family Law and the Institution of Marriage

Introduction

This paper examines areas where aspects of Family Law, wider than the divorce law itself, affect and may have adverse implications upon the respect for and upon the state of the institution of marriage in today's societies. The paper argues that often innocently and unintentionally, although sometimes perhaps reckless as to the consequences, laws laid down by national legislatures, judicial interpretation of laws and/or international conventions have fulfilled their direct intended purpose but have also diminished the respect for marriage. This is both specifically for those parties directly affected by the application of laws and generally across society by the awareness of these laws. As a consequence, the paper argues, there should constantly be a reflection back, in the formulation and interpretation of any law, on the impact on the institution of marriage.

The institution of marriage has stood the test of time. This paper is not an apologetics for marriage. However no-one can be blind to the fact that the nature of the institution has changed throughout history, sometimes quite dramatically so! For anyone concerned with law reform or the application of the law on macro society, an understanding of not only the history of divorce but also the history of marriage law and marriage is fundamental. Certainly in England it has sadly too often been an inglorious picture of state avarice (tax on marriage!), ecclesiastical corruption, headstrong young passion and protection of the propertied wealth of the older generation. But it has also been one of genuine, altruistic and faithful commitment to married life in what, essentially, has been the heart and foundation of the individual and corporate life in our societies.

In many of our societies now, there are a significant number in their younger, "pre-marriage" years or older who cohabit. Many statistics show still that cohabitation is often a pre-cursor to marriage itself. But also there is some cohabitation as alternatives to marriage. This paper does not seek to deal with such couples. Save for one element, the reform or status of cohabitation law is not dealt with here. Such heterosexual couples have (with only a few exceptions) chosen to cohabit as an alternative to marriage. It is not for our state laws to impose on them elements referable to the institution of marriage. However for those who have embraced marriage (and they still represent a high number of long term heterosexual relationships), they are entitled to expect that any laws that subsequently apply to them will continue that support for the institution. Indeed many might be surprised at their point of wedding that subsequent laws which might apply to them in the sad event of the relationship ending might have the effect of detracting and distancing them from the institution that they were that moment embracing and might once again wish to embrace.

Whilst the writer would himself want fully to support and encourage the institution of marriage, this paper is posited on the basis that laws should not, at least, detract from, discourage, prejudice or denigrate marriage in the eyes of the general population or those affected by relationship breakdown.

This paper does not follow, alas, an exhaustive worldwide tour of all jurisdictions (although any grants gratefully received!). However simply through day-to-day practice as a family lawyer with a substantial international caseload, and the opportunity to attend conferences of the International Academy of Matrimonial Lawyers, International Bar Association and others, it has become clear that, in different ways, various state laws are, on divorce and its consequences, detracting from or denigrating the respect for the institution of marriage. This paper is written specifically from an English perspective, but to illustrate issues that should be considered in each jurisdiction.

It consists of relatively disjointed illustrations. This is inevitable. Given that there is, presumably, no deliberate antipathy towards the institution of marriage in the lawmakers or law appliers, then it is to be expected that it is in separate examples that the mischief occurs. If only one or two instances then it might be not be an issue. However the paper suggests that many national laws have, perhaps

inadvertently, allowed and permitted elements to arise which taken in their totality has had the impact of working against the continued respect for marriage.

Alimony: to remarry or to cohabit?

For many divorced individuals as recipients of spousal maintenance or alimony, perhaps the starkest choice is the impact of remarriage on maintenance. Nor is this an impact that affects merely one individual. It affects obviously the recipient's intended fiancé, any children of that relationship or of their respective families, and the wider families involved. At heart is the very simple issue: "If I remarry, I lose my alimony. If I cohabit, the maintenance order stays alive".

This paper does not argue against maintenance ending on remarriage. However it is in the alternative (continuation on cohabitation) in which the respect for marriage is invariably threatened. In a significant number of jurisdictions, the sheer act of cohabitation does not, in itself, end or even (as this paper recommends) temporarily halt the obligation to pay alimony. The consequence is that a good number of recipients of alimony cohabit rather than remarry simply to avoid the termination of their maintenance. We are creating social change in family life by the back door of avoidance of an aspect of family law.

The reasons are entirely appreciated. A potentially high maintenance order would be ended by remarriage which new marriage might end fairly quickly with perhaps a fairly minor maintenance obligation ensuing, particularly if the new spouse was not as wealthy as the first. Why risk it? Inevitably those divorced have more cynicism than those first married. Why should the second relationship be more permanent than the first? In a culture in which cohabitation is sometimes seen as a trial run at marriage, then does there not make some sense to cohabit first?

Whilst these are undoubtedly mitigating factors, the reality is that many now cohabit instead of remarrying to avoid termination of maintenance payments.

Predictably this has been challenged in a number of countries. In England it was particularly illustrated by a case of Atkinson (1988) 2 FLR 353. The wife was in receipt of spousal maintenance of £6,000 pa, a moderately good sum in the mid 80s. She cohabited with a gardener, a man of modest means. The husband in several repeated applications to the court argued either that the maintenance should come to an end automatically on cohabitation alternatively that it should be suspended during cohabitation. There was evidence that they had decided not to marry because of the loss of the spousal maintenance. The English courts said that cohabitation was in the form of income to the recipient, akin to employment. If her cohabitant was of sufficient wealth whereby he was able to support and provide for her to such an extent that she no longer "needed" spousal maintenance, then the maintenance would be reduced to a nominal/notional level. If the cohabitant was not able to provide so that she was still not able to adjust to the end of the marriage relationship and, with it, financial independence, the obligation of the former husband continued. Cohabitation not as an alternative to marriage but as an alternative to employment!

In a somewhat bizarre case which took this even further, Fisher (1989) 1 FLR 423, the wife said that she was unable to work, and thus obtain self-sufficiency from maintenance, because she had given birth to a child from another man (who promptly disappeared) and had to stay at home to look after this child. The court held that this was a valid reason so that the husband found himself not only with a maintenance obligation to support a former wife who could not work but also one who was undertaking her quite correct responsibilities as a mother, but to a child conceived after their relationship had irretrievably broken down and to another man.

In turn this presents difficulties for the family lawyer. In England, it is cynically observed that the working classes cohabit by living together and the middle classes "stay over". The latter maintain their separate homes and residences, often with their children of teenage years still there, but frequently cohabit, at

each other's respective homes, for some of the week, for holidays and similar. If the test is not that of cohabitation but of financial support, then it becomes even more difficult to observe and test.

Whilst capital provision on divorce, even if to be paid in the future such as pension sharing or proceeds of future sale of a business, is often now based on contribution during a marriage, spousal support and alimony is invariably based on short/medium term needs to adjust to the end of the marriage. It continues (whilst fair and just) the financial dependency inherent in the marriage commitment.

The adverse impact on propensity to remarry, and the encouragement to cohabitation of this law, is so great that cohabitation, in itself, should result in a suspension of maintenance obligations either to be reviewed if/when that relationship breaks down alternatively to come to an end after a period of years of cohabitation. Anything less encourages cohabitation, increases the number of children born in cohabitation not marriage, and discourages marriage.

Term Orders

One of the worldwide trends in family law over recent years has been for an increasing number of jurisdictions to have maintenance orders for a specific term, rather than lifelong and subject only to review based on continuing need, obligations towards self sufficiency, remarriage etc. This trend started in those jurisdictions which had substantial and sophisticated welfare benefit structures so that "poverty" would not ensue if maintenance ended after a few years of divorce. Other, less socially welfare conscious jurisdictions have embraced it for a number of other reasons.

Some countries, including England, have embraced the psychological benefit of clean breaks whereby maintenance orders did not continue indefinitely. Parties were encouraged to attempt self sufficiency. Term orders, with ultimately the prospect of an extension of the term if self sufficiency had proved impossible despite all best efforts, have been quite frequently made since the Matrimonial and Family Proceedings Act 1984. (Very exceptionally, it is possible to include a total bar (section 28 Matrimonial Causes Act 1973) on further extensions but courts are wary because of the sheer difficulty of looking into the crystal ball for the future, especially where there are dependent children and/or women in mid-late 40s or older who have been out of the job market for many years.)

However after the initial rush of enthusiasm in the 80s for clean break orders of various kinds, the realisation in England in the 90s was that it has been much more difficult than anticipated for some women to adjust to the end of financial marriage dependency. Whilst many women have been able to obtain part-time, often anti social hours, employment, it has often been at a level lower than the standard of the marriage. Thus has been presented a clean break picture of men, sometimes on second marriages, continuing well in their careers, and their former wives, perhaps now with their children soon to leave home, in much more reduced circumstances and now without continuing maintenance.

Modern marriage requires and receives much of some of its members by way of sacrifice, prejudice and commitment. For many women in the professions or management and commerce, it is difficulty fully to go back to the previous career track of 10-15 years before, even if in the intervening period some paid work has been undertaken. Increasingly judgements around the world are now recognising this implicit, even explicit, prejudice to women in marriage (see later). This is not to denigrate marriage but simply to recognise the sacrifices and commitments that marriage entails, which in turn should be recognised and respected if the relationship should end.

Fixed Term maintenance does not always recognise this. Apart from those fairly rare cases in which the capital is so substantial that it can provide capitalisation of maintenance requirements or capital in excess of basic needs, the reality is that continuing spousal maintenance is often the only provision and compensation for the (income) hardships resulting from the commitment and prejudice to the marriage relationship. To make this for a fixed non extendable period of years, perhaps five or so, is simply to

abuse the sacrifice and commitment of married couples, invariably the woman, to the institution of marriage including often the agreement by the parties that one would give up their career to look after home and children.

In short, why would any woman ever do it? It is an unconscionable agreement. It is born in the heat of love, trust and passion. It is not giving respect to the commitments so faithfully and lovingly made, in a public ceremony, at the point of marriage. To adopt principles that lie in our civil courts, the husband should be estopped from paying short term maintenance and support, having encouraged his wife to make long term commitments and prejudice.

Given that this is a relatively recent trend over the past 10-20 years in many jurisdictions, it is feared that its impact may not yet fully be felt. Could this be one reason why some professional women in their late 20s and 30s are choosing to cohabit rather than marry? Could this be one reason why some women, some anecdotally against their preferred judgement, return quickly to the workplace after childbirth in order to pursue their careers? When looking at career choices, can the statistical breakdown of marriage be ignored? How does this work against the preferred inclinations of many couples?

This paper does not argue against term orders which are extendable in the subsequent discretion of the court. This can encourage unreasonably reluctant spouses back into the workplace, sometimes with therapeutically beneficial results. It is the non extendable, either by court order or more usually by statute, which causes the injustice.

In the way that countries make provision for spouses after divorce is thus shown the respect, or too often the lack of respect, that societies in fact give to commitments and sacrifices made during the marriage itself.

This paper argues that the full commitment and sacrifice by married spouses must be fully and publicly recognised in post divorce provision, and in many cases this can rarely be in fixed term non-extendable maintenance orders.

When is a marriage?

Is marriage to be judged in a qualitative or quantitative sense? Is it a marriage even though it may last only a few months or is there a certain bare minimum?

This has been thrown into international consideration (well, OK, media articles!) by the knowledge that, apparently, Tom Cruise and Nicole Kidman agreed in a pre marriage settlement to maintenance on divorce only arising after ten years of marriage. Did it last for 9½ years or 10?! It is reported that by virtue of having issued a petition before the tenth anniversary, there was no obligation to pay maintenance. The impact has been that lawyers in other jurisdictions have been asked by clients if they will get alimony given their own marriage lasted only 8 years. Such is the globalisation of family law trends!

What does this say about the essence of marriage. Is it something that starts after ten years, a period of time which in England is regarded as a long marriage?

After only a year or so of marriage, some spouses have made irretrievable commitments and prejudices for their future life because of the marriage. After ten years, some spouses are still living independent financial lives. Marriage cannot suddenly take on an extra realm of greater responsibilities after a period of years.

English case law is full of higher court decisions in which, after only a short marriage, it has been clear that one party had an entitlement based on fairness and contribution. State legislatures and judicial decisions should ensure that there is not a message given that marriage in fact only starts after a

number of years of cohabitation. Marriage starts at the date of the wedding. Commitments start, in many cases, very soon thereafter.

Every one is equal but some spouses are more equal than others

From the 1980s onwards, there was increasing awareness that there was implicit in marriage a discrimination against women because of her moving out of the workplace with the man being often (but increasingly less so) the main income earner and therefore being in a much more advantageous position on divorce settlements. But this discrimination was very different from the expectation of many couples who now regarded themselves as equal partners albeit with different roles. How could the old, traditional outcomes in law on divorce adapt to the expectation of equality? Some jurisdictions moved quickly to a rebuttable presumption of equality. Some moved less quickly!

In any event, should it be equalisation of assets or substantial equality i.e. real equality of outcome in the light of effect of marriage on the financial and other positions of spouses? Initially there was the radical Canadian decision of Moge v Moge 99 DLR 456. In Australia there was Waters v Jurek (1995) 2 Fam LR 196. Where was England? The initial nod was SRJ v DWJ (1999) 2 FLR 176 in which Hale J said graphically: "The cock can feather the nest because he does not have to spend most of his time sitting on it."

For many years in English financial provision law, the party that made the financial contribution, invariably the breadwinner husband, would do better in cases where there was a material amount of assets. His obligation was to pay the wife's reasonable requirements, but no more. The wife nevertheless may have made a substantial and prejudicial commitment to the marriage, and have been an excellent homemaker, mother and supportive wife and yet have sometimes a miniscule share of the overall family finances.

We then had the House of Lords case of White (2000) 2 FLR 981 which has fortunately in England removed this classic marriage discrimination. (For more details of the case and of post White cases see www.tflc.co.uk/fwwhite) The comments of Lord Nichols are instructive.

But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles.

Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day.

But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering the parties' contributions.

If, in their different spheres, each [spouse] contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.

In making an order, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence

of discrimination.

Today there is greater awareness of the value of non-financial contributions to the welfare of the family. There is greater awareness of the extent to which one spouse's business success, achieved by much sustained hard work over many years, may have been made possible or enhanced by the family contribution of the other spouse, a contribution which also required much sustained hard work over many years. There is increased recognition that, by being at home and having and looking after young children, a wife may lose for ever the opportunity to acquire and develop her own money-earning qualifications and skills

White is a watershed decision in English finance law on divorce. However it may also prove to be a watershed as far as respect for non-discriminatory marriage commitment, of all forms, is concerned.

Post White and now Cowan (2001) 2 FLR 192, it is accepted that there is a need for finance law reform. But what? There is a lack of consensus amongst family law professionals about the jurisprudence and philosophy for divorce provision. In turn, is this due to a lack of consistency of jurisprudence and philosophy of what is marriage? Has White in fact exposed more than just shortcomings in finance law?

No reconciliation please, we're Europeans

Brussels II (more properly Brussels Convention of 1998 on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters) was introduced across 14 European states on 1st March 2001. It brings identical divorce jurisdiction for all of these countries. More details at www.tflc.co.uk/fupdates.

More perniciously, it introduces a new law for forum shopping whereby the first party to issue proceedings guarantees that that will be the country in which the divorce (and probably financial matters) are resolved. As financial outcomes can vary so dramatically across Europe, there is a huge advantage in being the first to issue and thereby secure the beneficial jurisdiction for oneself.

It is surely impossible to contemplate that the Euro civil servants, when drafting Brussels II, took no account of the implications for prospects of saving saveable marriages. As with too many elements of Brussels II, the implications in practice for families would seem to have been ignored and warnings disregarded.

Any party contemplating marriage breakdown in EU will now immediately issue in their favourable jurisdiction in order to secure it. If there is the prospect of a reconciliation, most spouses will nevertheless issue, especially if there is a significant difference between the outcomes in the various possible jurisdictions in Europe. If a party thinks that their spouse may be having an affair, but which affair might be susceptible to being ended, will they then attempt to discuss reconciliation (and warn their spouse!) or issue proceedings first? What chance then a reconciliation after the issue of a tactical petition?

Incidentally it causes problems with family lawyers who, genuinely believing their client has a real prospect of saving their saveable marriage, nevertheless finds themselves issuing a petition. We do it as the client instructs. But for many of us, we do so with real misgivings and ethical unhappiness.

Invariably the party issuing first will be the one who has made the break to the marriage, and who in turn may invariably be the "guilty" party or at least the party initiating the formal break up. Brussels II has given pre-eminence to the party that wants to bring an end to the relationship and causes direct prejudice to the party who seeks a reconciliation to save saveable marriage. It is difficult to contemplate any other piece of legislation which flies so far and so furiously in the face of attempts at reconciliation and saving saveable marriages.

Will you take this lawful cohabitant, to have and to hold, for better or for worse?

As previously mentioned, a trend across many western jurisdictions has been the incidence of cohabitation either pre marriage or as an alternative to marriage. With it has come pressure (understandably often from the same sex community without the opportunity to marry and then use divorce provision laws) for reform of cohabitants rights. This has often been to the extent of parity with rights of marrieds. Some jurisdictions have given equivalent rights. Some have provided a “half way house” entitlement. Some have given entitlements based on contributions, commitments and prejudice, rather than fact of cohabitation itself. Some e.g. England, still have unsatisfactory laws based on non family law principles for want of an agreed rationale for a new law.

The writer prefers a cohabitation law which provides redress, compensation or provision based on commitment, prejudice and sacrifices to a relationship. Such is fair and just. But not based on cohabitation per se. However, the paper argues and as many married couples believe, cohabitation is not marriage and should not be treated as marriage. It is not the same. Many cohabitants do not believe it is the same or indeed want it to be the same. The start of the different relationships is not the same, and certainly the cost of starting one is not the same as the other – the average cost in England of weddings is now about £14,000! Ending the two sorts of relationship is not the same. Statistics clearly show their durations are very different.

Most fundamentally, treating cohabitation as the same as marriage carries the risk of devaluing marriage, respect for marriage and the inclination to marry. Save in issues of domestic abuse and children law, cohabitation should not be treated in law as the same nor, in the eyes of the public, be perceived as being treated as the same as marriage.

Lifting our eyes above the horizons of our client files

As practising family lawyers, we have our eyes firmly on our clients’ files, their best interests, their claims and the law as it affects them. For too many lawyers, the wider impact of the law is a passing incidental. The law is the law. Some of us are concerned with the reform of the law where we see it working unfairness and injustice in our client cases. We work to improve the law, practice and procedure. But still it is in discrete elements of family law.

Marriage and married life is affected by more than family law. So many aspects of social policy and other areas of law impact on married family life. We see this as family lawyers but too often do not lift our eyes sufficiently above the parapet of the files to realise what we are seeing. The macro elements are beyond us.

Yet as family lawyers we have a distinctive, possibly unique, insight into our nation’s family life and the various forces at work on and in it, which support or detract. We need boldness to discern these trends and outside forces and then as a corps of family lawyers, to bring them to the attention of governments.

Perhaps a few extreme examples will highlight. Too often across history, nations have enforced male workers to leave families behind for sustained periods, at huge cost to family life. The Great Wall was built on destroyed families and the suffering created is still part of Chinese folk lore today. Apartheid used it as state policy to destroy the black community in their townships. Such policies are totally contrary to married life. Next, in areas of the Third World some diseases are still rampant and destroying families and family life. The “First” World is barely aware of the impact of AIDS on married family life in Africa yet whole families and communities have been destroyed by it. Ending it will restore community life. Finally in these random issues, some countries have adopted radical, “alternative” family policies. Communist Russia introduced one which recently ended without many grieving for its loss. Most obvious

now is China's one child policy, a perceived necessity given the population, yet already presenting real problems now and more to come for China's next generation (and thus for the rest of the world due to our globalisation). Such policies may be born out of crisis but need also to reflect on impact on family life and with it the life of the community now and for the coming generations.

In our western jurisdictions, we do not face such mega issues. Yet we face many social forces impacting on family life; changing cultural mores, effect of debts (to maintain lifestyles or just to survive), long working hours, influences of education and healthcare, media expectations etc. The list is long. Not least is the impact of the welfare benefit system as it affects the underclass in our society e.g. priority to accommodation to single parents, impact of claiming individual benefits; for many in this category the financial incentives to not marrying (as distinct to disguised cohabitation) are huge. Family lawyers as a corps should let their day to day experience on family breakdown be heard by government and by the wider society. We can improve our clients' marriages by identifying social forces and trends and then where necessary urging macro changes, beyond the confines of pure family law. We must lift our eyes above our client files and let our voices and experiences be heard.

Conclusion

The examples given in this paper are primarily referable to English family law. However as I have shared this paper with lawyers from other jurisdictions, the common response has been that other examples could have been given in many other countries. I do not believe that legislators and the judiciary have set out to make laws that are deliberately disadvantageous to the institution of marriage and which overtly disinclines the divorcing population from future respect for marriage, including considering the possibility of remarriage. Certainly politicians would not admit to such.

What I believe is much more likely is that with the emphasis and concentration on other elements of law and social policy, the impact of some laws and practices on the institution of marriage and respect for marriage has been disregarded or neglected, perhaps in some instances recklessly so. Most or all are retrievable and rectifiable.

In many of the countries presently considering divorce reform there is a commitment to saving saveable marriages, even a commitment to respect for the institution of marriage. In England, the Family Law Act 1996 which would have introduced, if implemented, no-fault divorce, set out in section 1 four general principals of the Act of which the first two were "(a) That the institution of marriage is to be supported" and "(b) The parties to a marriage which may have broken down are to be encouraged to take all practical steps, whether by marriage counselling or otherwise, to save the marriage"

At the very least, many legislatures and judiciary would say, publicly, that if one is not going specifically to promote and support marriage, nothing at least should be done to harm or destroy it or respect for it. However this in practice is what is occurring in many jurisdictions.

Has the time come now when, on considering any new element of law or application of law, there should be a statutory obligation to examine the impact upon the institution of marriage and the respect of family members for it? This effects today's adults, today's children who will marry or cohabit in the next generation and in turn their children. The issue must be urgently faced.

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