

What is Fairness? What is Justice? Family Law's Easter Question

David Hodson

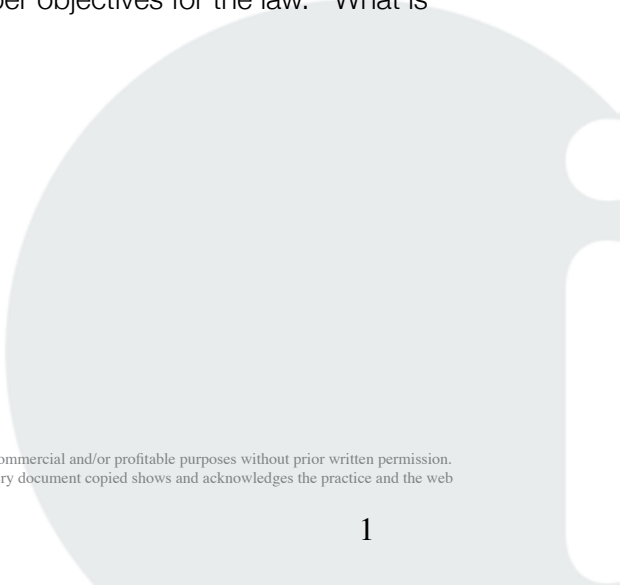
At Easter almost 2000 years ago, the question was asked: 'What is truth?'. This Easter time, family lawyers and mediators are being asked a no less profound question. 'What is fairness and justice?'. Specifically, how to resolve financial matters on marriage breakdown in a way that is fair and just. As explained at p 265 (below), the Government is proposing radical reform of ancillary relief law. The danger is too much concentration on binding pre-marriage agreements and 50:50 splits of assets. These are but outworkings of a system. The debate should first lie in ascertaining the ethical principles of fairness and justice and then applying them.

The Government proposes the court should 'exercise its powers so as to endeavour to do that which is fair and reasonable between the parties and any child of the family'. Such an Objectives clause is not new. In the Matrimonial Causes Act 1973 there was an overriding objective ('minimal loss objective') of putting the parties in the position as if the marriage had not broken down and each had properly discharged their financial obligations and responsibilities to the other. It was unworkable in practice and described as trying to put Humpty Dumpty together again. It was removed in the Matrimonial and Family Proceedings Act 1984 but not replaced!

If we are going to have a massive change in our ancillary relief law, let us not do so until we have resolved as a society what we want to accomplish on marriage breakdown. The 1973 objective proved quickly unworkable. Have the 1984 clean break provisions gone too far? Or are the therapeutic aspects of a fresh start so beneficial that it can entertain financial hardships to recipients by short-term provision? Is provision for 'needs' really the pinnacle of a fair outcome? Many clients are fed up with the delays, costs, and inherent divisiveness of the resolution system. When is a quick, relatively cheap and less contentious dispute resolution system more important than the legal purity of the fair outcome? Why search for the grail of justice when access to justice is at risk of being denied through legal aid and other changes?

Have our views of fairness become too formulaic and inflexible, and so failed to take account of different working and lifestyle patterns/expectations in ethnic, class, gender and age-groups, and cultures? Mediators are in a privileged position to see the individualised beliefs of justice and fairness~ that couples bring to resolve their disputes.

Are the sacrifices and commitments made in marriage, for example in child raising, being fairly dealt with on divorce? Divorce law should at least not discourage respect for marriage. So why do many cohabit post-divorce and turn their back on marriage?

The issues are huge and varied. However, we have a mega marriage break-down culture in the UK. All those affected deserve a full debate on what are the proper objectives for the law. 'What is fairness and justice?'.


DAVID HODSON
April (1999) Fam Law 1999