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Community of Property - the logical response to Miller and McFarlane?

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Abstract

The House of Lords decision in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 edges us closer to a community of property approach to ancillary relief on divorce where assets exceed needs.

Drawing on an empirical project funded by the Nuffield Foundation, this paper will consider whether discretion has had its day and should be replaced by a formal community of property regime in England and Wales.

Community of Property - the logical response to *Miller* and *McFarlane*?

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Introduction

The beginning of the 21st century has been a turbulent time in the previously quiet world of financial provision following divorce in England and Wales. Marriage is typically an economic as well as an emotional relationship involving financial dependency or inter-dependency, especially where there are children. One spouse will often make financial sacrifices by giving up their job or taking part-time work in order to care for children or elderly relatives; or perhaps to fit in with the demands of the other spouse's career for the benefit of the family as a whole. English family law has recognised this and among its traditional functions has been the need to protect the more dependant, weaker economic spouse (typically but not always the wife) when relationships break down. However, unlike the position in other European jurisdictions where marriage by law creates a shared 'community of property', traditionally this protection did not (either during the marriage or on divorce) extend to granting the dependent wife an automatic and equal share in family assets which had principally been earned or purchased by the breadwinning husband. Rather, a wife¹ would, only on divorce and at the court's discretion,

¹ Note that although the typical situation where the husband is the family's main breadwinner and the wife is the main homemaker and primary carer of any children is depicted throughout this piece, orders for financial provision on divorce can be made in favour of or against either spouse and the statutory provisions are intended to be gender-neutral.

be awarded a sum sufficient to meet her 'reasonable requirements',² judged in the context of the family's standard of living and other statutory criteria.³

In two radical decisions, *White v White*⁴ (hereafter *White*) in 2001 and *Miller v Miller; McFarlane v McFarlane*⁵ (hereafter *Miller; McFarlane*) in 2006, the House of Lords has now, in recognition of new notions of 'fairness', revolutionised the approach of the courts to financial provision on divorce in two particular ways. First it has declared that financial contributions should not 'trump' non-financial contributions to the welfare of the family when deciding how assets should be divided following divorce, as to do so is discriminatory. Second, it has introduced a principle of equal sharing of family assets which according to some commentators amounts to a judicially created system of deferred community of property previously unknown to English law.⁶

Drawing on an empirical project funded by the Nuffield Foundation, this article will consider whether discretion has had its day and should be replaced by a formal community of property regime in England and Wales.

Family property, marriage and divorce -The English context

In England and Wales, couple relationships, including entering a marriage or registering a same-sex civil partnership, have no direct or immediate effect on either partner's property which continues, during the relationship, to be owned separately by each partner unless specifically purchased jointly. However, this does not mean that on divorce each party leaves with their own property in tact plus a share

² See *Dart v Dart* [1996] 2 FLR 286.

³ These are set out in s25 Matrimonial Causes Act 1973.

⁴ [2001] 1 AC 596.

⁵ [2006] UKHL 24.

⁶ See S. Cretney, 'Community of property imposed by judicial decision' (2003) 119 *LQR* 349.

of anything jointly owned. Rather, Part II of the Matrimonial Causes Act 1973 provides that both spouses' property is in principle available for redistribution at the discretion of the court. The court has power on divorce to make orders for periodical maintenance payments out of income, for lump sums, property adjustment orders and settlements of property which it does according to a list of statutory criteria contained in s25 of the 1973 Act. These are very broad and include - all the circumstances of the case; the standard of living during the marriage; the age of the parties and duration of the marriage; the parties' respective current and future income, assets, needs and resources, as well as financial and non-financial contributions made and likely to be made to the welfare of the family by each of the parties and finally conduct it would be inequitable to disregard. There is no overarching statutory principle⁷ guiding the application of criteria other than the direction that the welfare of any children of the family must be the court's first consideration. There is also a duty to consider whether it is possible to achieve a 'clean break' between the parties.⁸ In *White*, the House of Lords attempted to fill the vacuum by interpreting s25 so as to include an overall goal of 'fairness.' According to District Judge Roger Bird, the approach of the courts before *White* was to meet the housing needs of the primary carer and the children and then the other reasonable needs of the both parties if possible. Once these were met, then in his view there was 'no justification for further adjustment by the court.'⁹ In *Dart v Dart*¹⁰ in 1996, the Court of Appeal had rejected the notion that there was any principle of equal division even of assets acquired by joint efforts – rather a wife's claim was limited to a ceiling of her

⁷ The original guidance – the minimal loss principle - was that the court had a duty to place each of the parties as nearly as possible in the position they would have been in if the marriage had not broken down. This was repealed in 1984 as it was impracticable.

⁸ S25A states that 'it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.'

⁹ R. Bird, 'Ancillary Relief Outcomes' [2000] *Fam Law* 831.

¹⁰ [1996] 2 FLR 286.

'reasonable requirements', which were calculated in the context of the standard of living during the marriage.

In *White*, the House of Lords in considering what 'fairness' entailed took a different view. It decided it must involve a principle of non-discrimination as between breadwinners and homemakers, alongside a move towards equal sharing. The division of assets (but not income) was in each case to be measured against 'a yardstick of equality', and equality should only be departed from where it could be justified. Lord Nicholls set out the radical new thinking:¹¹

If, in their different spheres, each 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.

The Whites were farmers and had had a 33 year marriage. Mrs White had worked as an equal partner alongside Mr White in their multi-million pound farming business as well as having cared for their three children and undertaken the homemaking role. Despite this, and the new rhetoric, she received 40% of the assets which was more than her 'reasonable requirements' but less than an equal share, on the basis that some of the farmland had been inherited by Mr White alone and this constituted a reason to depart from equality. There followed a number of cases in which the grounds for departing from equality were explored. In *Cowan v Cowan*¹² equality was departed from where a 'stellar' contribution to the family assets had been made by in this case Mr Cowan, the inventor of the drawstring dustbin bag. However, the later case of *Lambert v Lambert*¹³ confirmed that merely being a very good businessman would not justify such a

¹¹ [2006] UKHL 24 at 605.

¹² [2001] 2 FCR 332.

¹³ [2002] 3 FCR 673.

departure from equality as this would be to readmit discrimination by the backdoor. In *Lambert* the Court of Appeal found that the extensive capital assets should be divided equally between the spouses who had performed very different roles within the marriage. The Court of Appeal emphasised the importance of non-discrimination citing with approval the equality approach taken in an earlier High Court decision where:

The husband's role was the more glamorous, interesting and exciting one. The wife's involved the more mundane daily round of the consistent carer. That was the way that the parties to this marriage chose, between themselves, to organise the overall matrimonial division of labour. How can it be said fairly, at the end of the day, that one role was more useful or valuable (let alone special or outstanding) than the other in terms of the overall benefit to the marriage partnership or to the family?¹⁴

As Eekelaar¹⁵ observed, post-*White* there was a move away from the language of a welfare-style dependency construction of a wife's needs or reasonable requirements towards a new entitlement basis, with entitlement having been earned through the non-financial contributions of home-making and childcare. In some senses this meant that English law had developed a greater resonance with the community of property approach in that a spouse gains post-*Lambert* a prima facie equal share in the family assets as of right.

Fairness as objectively judged by the court is still the primary goal in financial provision cases and does not always justify an equal division of assets. It has still to be achieved by weighing up in any case the substantive criteria contained in s25. How such an elusive concept should be construed by the courts was developed further by the House of Lords in *Miller; McFarlane*. This involved two very different

¹⁴ Per Thorpe LJ in *Lambert v Lambert* [2002] EWCA Civ 1685 at para. 22 citing Coleridge J in *G v G* at that time unreported.

¹⁵ J. Eekelaar, 'Back to basics and forward into the Unknown' [2001] *Fam Law* 30.

cases which the House of Lords heard together and provided an opportunity to attempt to clarify the principles governing this area of law. Their conclusion was that there are three strands of fairness which the court has to address. These are needs, compensation and equal sharing. Thus in addition to addressing the parties' needs as stipulated in s25 Matrimonial Causes Act 1973, and to applying the yardstick of equality to sharing assets in a non-discriminatory way in order to achieve fairness as set out in *White*, the House of Lords stipulated that a third rationale for making a financial provision award on divorce was compensation for 'relationship-generated disadvantage'.¹⁶ Whilst overlapping with need, this aims to achieve fairness by compensating for loss suffered by undertaking homemaking and childcare within marriage at the expense say of a spouse's labour market value.

In the case of *McFarlane*, the wife had given up her career as a successful city solicitor in order to care for the parties' three children during a 19 year marriage, whereas her husband's career had flourished. This was clearly a case for compensation over and above her needs, so the court found, notwithstanding the fact that s25 Matrimonial Causes Act 1973 makes no mention of compensation. Furthermore, where necessary, compensation could be awarded out of income as maintenance, not just from capital assets.

Miller, in contrast, involved a childless marriage of less than two years between a multi-millionaire and a professional woman who gave up her £85,000 p.a. job on marriage in order to take on the role of homemaker. The divorce granted on grounds of the husband's adultery allowed Mrs Miller to be awarded £5 million of the husband's total worth estimated at £32 million. It was accepted here that she had not suffered very much relationship-generated disadvantage, but she had been used to an extremely high standard of living during the marriage and much of the wealth had been generated during the

¹⁶ See judgment of Baroness Hale [2006] UKHL 24 at para. 140.

marriage, albeit by the husband's efforts. The court nonetheless firmly rejected the earlier approach of placing the parties back into the financial position they were in before the marriage but did indicate that the parties' assets should be divided into 'matrimonial and non-matrimonial' assets¹⁷, which again is a distinction which chimes with the community of property approach. Broadly, it was stated that the matrimonial assets would be automatically available for equal sharing on divorce but that the division of the non-matrimonial assets would depend on other factors such as the length of the marriage, whether or not it was inherited and the extent of the parties' respective needs and other financial resources. The House of Lords also rejected the Court of Appeal's approach in *Miller* that Mrs Miller should be compensated financially for her husband's bad conduct in having an affair which had thwarted her legitimate expectation of the continuation of the marriage, except insofar as her loss of their affluent standard of living could be taken into account. Only 'obvious and gross' conduct would affect the financial award, however unfair this might seem to those involved. Mrs Miller did not get an equal share of the total assets after a two year marriage, but she did get much more than her 'reasonable requirements.'

Unfortunately, in approving the global award of the Court of Appeal, the House of Lords did not set out how exactly they had shared out the matrimonial and non-matrimonial assets to arrive at the appropriateness of £5 million.

This latest authority has therefore reinforced the principle of non-discrimination between breadwinner and homemaker/childcarer. In addition, although both *Miller and McFarlane* were clearly both so-called 'big-money' cases, the House of Lords did consider the application of the new principles in lower asset cases where assets do not exceed the parties' needs. Here, it was made clear that all assets should first be applied to meeting the parties' and children's needs.

¹⁷ It should be noted that the Law Lords did not agree a definition of which assets were included in which category and indeed Baroness Hale preferred to contrast 'family and non-family assets'.

In these situations, an equal division of assets might discriminate against the non-breadwinning spouse, and so a bigger award exceeding 50 per cent of the total assets whether matrimonial or non-matrimonial may be appropriate for the spouse who will continue to be the primary carer of the children to ensure that their and the children's housing needs were met.¹⁸

As can be seen, the very wide discretion afforded the courts makes likely outcomes difficult to predict in this field despite the House of Lords' best efforts to clarify the principles. Furthermore, any pre-nuptial agreement made in order to protect a spouse's property is not necessarily enforceable on divorce.¹⁹ Both of these issues are in stark contrast to the position in European community of property jurisdictions.

Family Property, marriage and divorce – the European context

In a 'community of property' system, on marriage or civil partnership, unless or until a couple specifically and formally agree otherwise, each spouse's relevant property (as defined by law in each jurisdiction) and all post-marriage debt becomes jointly owned and on divorce must be shared (almost always equally) between them.²⁰ This effect on property may be either immediate (taking effect on marriage) or deferred (taking effect on divorce or death), and may extend to all or just some of the parties' assets, depending on the rules of the jurisdiction.

¹⁸ Per Lord Nicholls [2006] UKHL 24 at para. 12 - 14.

¹⁹ The courts have vacillated in their approach to pre-nuptial agreements. Whilst at one time they were considered contrary to public policy and still cannot oust the jurisdiction of the court, they should now be had regard to as one of the circumstances of the case and may be enforced where entered into freely and not immediately prior to the wedding and where the parties have had independent legal advice. See *K v K (Ancillary Relief: Pre-nuptial Agreement)* [2002] Fam Law 877.

²⁰ The only exceptions are other parts of the UK and Ireland.

What this also means is that on divorce, property (and debt) is either shared between the parties in accordance with the agreement made opting out of the community of property regime at the time of their marriage/partnership registration; or the assets which are legally defined as 'community property' are shared equally (almost without exception) between the parties. Either way, the terms on which the property is divided are clear and there can be no dispute about this, however substantively unfair it may seem at the point of divorce to either party when considering their contributions to the relationship or their post-divorce needs. In Europe, the certainty of clearly knowing what is "yours", "mine" or "ours" throughout the course of the relationship, from beginning to end under the default community regime which applies, and the ability for the parties to opt out if that does not seem appropriate is seen as the priority and the certainty itself is seen as equating with fairness. Periodical maintenance payments are the only way in which relationship generated needs can be addressed and are dealt with quite separately from the division of capital assets in Europe.

Lessons from Europe?

From an English perspective, the idea of such certainty rather than endless discretion and uncertainty holds some attraction. Yet would it be right to abandon substantive fairness as the court's guiding principle? In order better to gauge public opinion in England and Wales and to consider what community of property might have to offer this jurisdiction, a collaborative socio-legal empirical research project funded by the Nuffield Foundation²¹ was undertaken to find out more about the way different types of community of property

²¹ The project was conducted with colleagues from Reading University. The full project findings are reported in E. Cooke, A. Barlow and T. Callus, *Community of Property: A Regime for England and Wales?*, 2006, Bristol: Policy Press.

regime operate in practice and to explore how attractive this might be to people in Britain.²²

The first stage of the research involved a series of semi-structured interviews with 30 family law notaries and lawyers in France, The Netherlands and Sweden. Ten were selected from each jurisdiction for their specialisation either in matrimonial regime advice or divorce law. These three jurisdictions were chosen as they broadly represent the range of community systems in Europe. The Netherlands operates a full immediate community system, embracing all assets whether acquired before or after the marriage or registered partnership (both of which are open to same- and different-sex couples), and thus subject to contracting out, all assets, effectively become jointly owned. The overall impression gained from notaries and family lawyers in The Netherlands was one of broad satisfaction with the system, and of a feeling that its all-embracing nature has the tremendous advantage of simplicity. The sharing of post-marriage debt was viewed as an acceptable quid pro quo for the sharing of assets.

France on the other hand operates a different form of immediate community on marriage, embracing only after-acquired property. In France we gained a rather more negative view of the practicalities of community of property from our sample of notaries and lawyers. In particular, while post-marriage debt-sharing was a fully accepted part of the immediate community regime, people in general were reported to be unaware of the need to take advice about opting-out of the default regime in appropriate situations.

Sweden, though, in common with the other Scandinavian jurisdictions, offers a deferred community of property regime. This means that only on divorce or death does the equal sharing of community assets take effect and unlike in The Netherlands or France

²² The research proposal was formulated prior to the Civil Partnership Act 2004 and thus did not specifically consider same-sex civil partners in England and Wales. It did look at how cohabiting couples were treated in community of property regimes but that is beyond the scope of this article.

there is provision in short marriages of less than five years to depart from equal division where it appears unjust to the owner of the majority of assets.²³ Here the highest level of perceived client satisfaction among lawyers was found.

In considering the suitability of an immediate community of property regime for England and Wales, it was concluded from this first phase of the study that the automatic sharing of debt under such a system was unlikely to be appropriate and there might well be an ideological problem with an immediate community system. Whilst its original rationale was to protect women, by giving them an automatic share in the family's wealth to compensate for their inability to feather the nest because they were sitting on it, this sits uneasily nowadays with the independence of women. This has led Scandinavian jurisdictions to move to deferred community systems where the spouses continue to own their own property separately during the marriage but it is shared on divorce.

The Swedish system of deferred community perhaps has more resonance with the English system, already described as a judicially created system of deferred community of property after the *White* decision,²⁴ and which is perhaps even more apt after the recent suggested distinction in the House of Lords between 'matrimonial assets' automatically shared on divorce and 'non-matrimonial assets' which are less likely to be redistributed on divorce.²⁵ Those EU nationals who live and thus often own property in a member state other than their own are also presented with difficulties arising out of a conflict of laws, particularly at the point of divorce. This has put harmonisation of family law within Europe on the agenda of the

²³ Swedish Marriage Code, chapter 12 and guidance in the *Codes Travaux Préparatoires*, 1986/87: I pp. 184-190.

²⁴ Cretney, 2003, op cit note 5.

²⁵ See *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24 per Lord Nicholls. Baroness Hale refers confusingly to family assets and non-family assets.

European Commission²⁶. How well or ill would this sit with people's perceptions of fairness on divorce in Britain?

To explore this, the second phase of the study involved 75 interviews with a purposive sample of men and women drawn in equal measure from our three study areas Reading, Swansea and Liverpool. These represented high-cost, mid-range and low-cost housing markets in England and Wales as it was felt that the value of the family home and the ability to re-house both partners following divorce may affect people's views. Whilst this was not a nationally representative sample, the sample was purposively selected from a random sampling frame to reflect a whole spectrum of respondents balanced between different socio-economic groups, age, gender, relationship status/experience in order to access a wide range of views. Using a "grounded theory",²⁷ approach we were interested in particular in how our respondents considered financial matters *ought* to be regulated on divorce. A mixture of direct attitudinal questions and vignettes married and divorcing couples with and without children were used in this context.

Project Findings

Our first line of inquiry was to consider the issue of the automatic sharing of debt in an immediate community of property regime as in France or The Netherlands.

We looked at identical situations for a married couple with and without children in which the husband contracted a large debt for the purchase of a yacht. We asked our interviewees whether or not his creditors should be able to satisfy the debt using the whole of the equity of the shared family home which was jointly owned and whether or not they should be able to access his wife's earnings.

²⁶ See <http://europa.eu.int/search/search.s97.vts>.

²⁷ Glasyer, BG and Strauss, AL (1967) *The Discovery of Grounded Theory*, Chicago; Aldine de Gruyter.

Where the scenario couples had no children, only, thirteen of the 73 respondents who answered this question thought that the wife's earnings should be available to the husband's creditors, as they would in an immediate community system. There was even greater resistance to the wife's share of the jointly owned home being available to satisfy the debt, with some taking the view that the husband's share should also be protected from creditors because it was a family home. There was therefore a clear rejection of the liability consequences of an immediate community system.

We then went on to consider views on automatic joint ownership of assets including the home, which the Law Commission of England and Wales had recommended some 30 years ago,²⁸ but which had never been implemented.

We found support, in a small rather than an overwhelming majority, for the idea in the abstract that marriage should entail automatic joint ownership of property with 50 agreeing but 21 of whom had conditions or reservations such as the non-owning spouse making a contribution, or relating to the length of the marriage. A very similar majority (49 to 22) was in favour of automatic joint ownership of earnings, and a smaller one (45 to 28 with some qualified agreement) in favour of automatic joint ownership of the family home. Views were evenly divided as to whether or not an inheritance should be automatically (that is, by law rather than by choice) shared with one's spouse.

A majority of those who were initially against shared ownership changed their view when asked, again in the abstract, whether or not their views would differ if the couple had children. In doing so, most seemed to refer to the family home rather than to earnings, and many gave one or both of two reasons for their change of view. One common reason was in order to safeguard a home for the children;

²⁸ Law Commission 1973. First Report on Family Property: A New Approach Law Com no. 52 HMSO, London; Law Commission 1978. Third Report on Family Property: The Matrimonial Home Co-ownership and Occupation Rights) and Household Goods) Law Com no. 86 HMSO, London.

and the other was to ensure that the children would eventually inherit some or all of the family home. However, neither of these is actually particularly relevant in assessing whether or not automatic joint ownership is an appropriate reform of English law and the project concluded again that there were not strong enough reasons to go down this route. Keeping a roof over the children's heads can be and is commonly achieved in English family law by other means;²⁹ and the jurisdiction's commitment to freedom of testamentary disposition makes safe-guarding inheritance for children a matter of individual choice. Added to this are the practical difficulties allied to our conveyancing and Land Registration system that make it very problematic to effectively introduce legal joint ownership at the point of marriage or civil partnership registration without some great technological advances in successfully joining up computerised public record systems. Automatic beneficial joint ownership would be possible but would not achieve the ends the interview sample seemed keen to see and would have the disadvantage of shrouding home ownership in uncertainty, not something which mortgagees would wish to see.

On balance, it was concluded that whilst it would have been a very useful reform in the 1960s or 1970s when unlike today the matrimonial home was commonly placed in the sole name of the husband rather than joint names,³⁰ it is not one where the gains outweigh the drawbacks at this moment in time. Would a Swedish-style deferred community of property regime have more to offer England and Wales and how would it be viewed?

We explored deferred community of property by developing the vignettes for a married couple who had each been together for seven

²⁹ Section 25 of the Matrimonial Causes Act 1973, and Schedule 1 of the Children Act 1989, both give ample scope for the settlement of property, typically until children leave home, as in *Mesher v Mesher & Hall* [1980] 1 All ER 126, CA.

³⁰ The case of *Gissing v Gissing* [1971] 3 WLR 255 is an illustration of the hardship caused to wives as a result of this before the court first had power to redistribute capital assets on divorce under the Matrimonial Proceedings and Property Act 1970.

years, both worked with the husband earning significantly more and where the family home had been purchased by the husband subject to mortgage prior to the marriage. We asked what the outcome should be with regard to the family home if the relationship broke down, first where the couple had no children, and second where they had two children aged 6 and 4 and we specified options reflecting possible legal outcomes.

Where there were no children, just under half (34) thought that the house should be sold and the proceeds divided equally in line with the idea of deferred community of property. Interestingly, though, even though this was a marriage, the majority (37) thought the home should be divided according to contribution and not equally. Thus there is some ambivalence about the extent to which marriage itself without any direct financial contribution to property and where there were no children should trigger an equal division. This is perhaps in tune with some of the hostile public reaction to the childless Mrs Miller being awarded a significant share of her breadwinning husband's assets.

However, in exploring views where our couples had children, we found a marked consensus in favour of deferred community with an equal sharing of assets. However, the majority of these respondents indicated that the provision of a home for the children and their carer should take precedence over all other considerations, with most people agreeing that the wife and children should be able to stay in the home until the children reached 18 before the proceeds of sale of the home were divided equally between the former spouses. This typifies the responses:

“I think she should be allowed to stay in the house until the children are older and then the property sold.

Q: And in what sort of shares?

A: Again, I think it should be an equal split.

Q: And why do you feel that?

A: Because she's had the major responsibility of bringing up the children."³¹

Our analysis showed that those who dissented from the majority view were all divorced or former cohabitant men who felt that the financial contribution should determine how the home was disposed of and as the husband had owned the home prior to the relationship the wife should have no interest in it.

Does community of property have anything to offer England and Wales?

Let us now consider this in the light of the research findings explored above.

Do we have it already?

First it can be seen that whilst England and Wales has moved towards a deferred community of property approach due to the yardstick of equality in *White* and the new distinction between matrimonial and non-matrimonial assets in *Miller; McFarlane*, this is not a true community of property regime. There are many factors which make this clear. First, such an approach as we have only applies where assets exceed needs, it is not universal. Further, our system is still over-laden with a large amount of discretion far exceeding anything available even in the Swedish model and we deal with capital and maintenance redistribution together, using a needs-based rationale, again unheard of in any European community regime where capital and maintenance are completely separate issues and only the latter is guided by need. As for equal sharing, for most English and Welsh divorcing couples equal division does not happen as there are many reasons to depart from equality. For Swedish couples it is the norm, which may be departed from only where the

³¹ Interview L23, female married 51-60.

marriage is short. What is more, in England and Wales there is no agreed definition of matrimonial assets and it is not possible to opt out of the community regime, both essential features of community that are lacking, at least for the present.

Could/should England and Wales have a community regime?

The next question is therefore whether a formal community regime would be useful to our jurisdiction given the criticisms of the discretionary system we have. Let us consider the advantages and disadvantages.

Summary of attractions of deferred community of property.

- Such a regime would reflect the approach in *Miller* and *McFarlane* of identifying 'matrimonial assets', but would put it on a statutory footing. We would then know exactly which assets were 'yours', or 'mine' or 'ours'.

- Equal division has an instinctive appeal in the popular imagination as a 'fair' solution, particularly where there are children.

- Deferred community could achieve greater simplicity and certainty and could promote agreement or mediation rather than litigation in financial disputes on relationship breakdown;

- Certainty might be the new fairness, given that uncertainty is viewed as unjust.

However, might we risk going out of the frying pan into the fire?

Summary of drawbacks of deferred community of property

- Deferred community is an entitlement-based rather than a needs-based redistribution of assets, which may cause financial hardship particularly due to its lack of flexibility.
- A deferred community regime with a principled egalitarian approach could lose sight of the children's welfare and might be achieved at the expense of meeting children's housing needs, which the interview sample were clear should not be the case.

Where does the balance lie?

This, of course, was a big issue for the research project and our data as seen above send conflicting messages. It was attempted to build a model of deferred community of property which incorporated need.³² However, whilst this worked well at the top end of the asset scale, it did not improve upon the current system at the lower end and reluctantly it was felt it could not be pursued further to any good effect.

A major reason identified for the difficulties of adapting to a community regime lies in the British housing market. This country is heavily committed to owner-occupation, and rented accommodation is hard to find and either expensive and/or poor quality in the private and social housing sectors. Most people require capital in some form to meet their need for a home.

Traditionally, the European housing market has been rather different. Far more people rent, and therefore meet their housing needs out of income. In that environment, a system which divides capital without reference to needs, while responding to needs through maintenance awards, makes far more sense.³³

³² See Cooke et al, 2006, op cit n 21.

³³ Available figures from 1999 show that in the UK only 10% of households rent compared to 36% in Germany, 21% in France, 17% in The Netherlands and 16% in Sweden – see further A. Oswald, 'The Housing Market and Europe's

Conclusion

In practical terms, it seems it would be very difficult to introduce any formal principle of equal division of assets on divorce for any except the very rich, without abandoning meeting both parties' housing needs and those of the children as the principal priority guiding financial provision on divorce. Thus unless and until it is possible to adequately deal with need exclusively from income, there are no obvious advantages to introducing a classical model deferred community regime despite the attractions of the Swedish system. Before reaching a final conclusion on this, however, the New Zealand model should be further investigated were England and Wales ever to seriously consider the introduction of community of property as it is a jurisdiction which recently moved from a discretionary system similar to that of England and Wales to a Community of Property regime.³⁴ It manages to combine a principle of equal sharing with elements of need or at least compensation-based discretion,³⁵ although it, too,

Unemployment', Warwick University, 1999 available at <http://www2.warwick.ac.uk/fac/soc/economics/staff/faculty/oswald/homesnt.pdf>. Owner occupation rates in 2001 were 43% Germany, 63% France, 53% The Netherlands, 60% Sweden compared to 71% in the UK (see further ESRC Society Today Fact Sheet on Housing in the UK, 2005 available at <http://www.esrcsocietytoday.ac.uk/ESRCInfoCentre/facts/UK/index43.aspx?ComponentId=12642&SourcePageId=14975>). This means that there is greater cultural acceptance of renting in other European jurisdictions which combines with lower average house prices. Thus at the lower end of the income and asset scale, more people accept the need to rent whereas in the UK this is resisted due to the very high pressured and generally rising owner occupation housing market, where the family home is also a financial investment for the future. We have therefore proportionately more owner occupiers who become financially stretched on divorce.

³⁴ See New Zealand's Property (Relationships) Act 1996 as amended.

³⁵ The Property (Relationships) Act 1996 as amended has equal sharing as a starting principle but subject to a large number of exceptions. These include separate rules for short marriages (ss14 & 14A); a discretion where equal sharing of community assets would be repugnant to justice to share assets according to contributions to the relationship (s13); and a claim for compensation paid from separate property over and above the equal share of community assets in order to alleviate economic disparity but only where one party's income and standard of living is likely to be significantly higher than the others and this is attributable to the division of functions during the relationship (s15). Note that again 'needs' other than compensation are met out of maintenance awards out of income alone (s 64 Family Proceedings Act 1980) but that it is possible to allow the parent with care to remain in the family home with the children (ss 26, 26A, 33(d) Property (Relationships) Act 1976).

has been subject to criticism.³⁶ For the time being, though, it seems those getting divorced in Britain will continue to have a far less clear idea of their post-divorce entitlement than their European counterparts, although they may at least cling on to the hope that the eventual outcome will be fair.

³⁶ See J. Miles, 'Principles or Pragmatism in Ancillary Relief; the virtues of flirting with academic theories and other jurisdictions.' 19 (2005) IJLF 242.