



The Law Reform Commission

*FAMILY LAW REFORM
(PART 1)- THE MATRIMONIAL CAUSES
LAW (2005 REVISION)*

DISCUSSION PAPER

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FAMILY LAW REFORM (PART 1)- THE MATRIMONIAL CAUSES LAW (2005 REVISION)

DISCUSSION PAPER

INTRODUCTION

1. In its first year of operation the Law Reform Commission agreed to undertake a review of the Matrimonial Causes Law, (“MCL”) the Affiliation Law and the Maintenance Law.
2. The project will commence with an examination of the Matrimonial Causes Law (2005 Revision). Preliminary research shows that that law is years behind similar legislation of countries such as Barbados, Jamaica, Australia and New Zealand.
3. The purpose of this discussion paper is to highlight the areas which the Commission believes are in need of reform and to seek the input of the public on such issues and any other issues which they may identify.
4. The MCL will be examined to determine whether it satisfies the “field of choice” criteria used by Law Reform Commissions in the UK, Scotland and Hong Kong in the evaluation of their legislation. These criteria were set by the UK Commission in 1966 in the report of their review of the Matrimonial Causes Act of 1965. In the report entitled “Reform of the Grounds of Divorce: the Field of Choice” (“the 1966 report”) which propelled the enactment of the Divorce Act of 1969 the UK Commission posited that a good divorce law should seek to achieve the following objectives-
 - (a) to buttress, rather than to undermine, the stability of marriage; and
 - (b) when a marriage has irretrievably broken down, to enable the empty shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation.
5. Does the MCL regulate matrimonial matters in a way which facilitates an easy settlement of those matters?

GROUND FOR DIVORCE

6. One of the distinct differences between the MCL and the legislation of the above-mentioned jurisdictions is that parties are still required in the Cayman Islands to provide fault-based grounds for divorce such as adultery, unreasonable behaviour and desertion.

7. Section 10 of the MCL provides that a decree of dissolution of marriage may be pronounced by the Court in respect of a marriage on the ground that since the celebration of the marriage-

- (a) the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
- (b) the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- (c) the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
- (d) the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to the decree being pronounced; or
- (e) the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

8. The Law further provides that if the ground is that of adultery a party to a marriage cannot apply for a divorce unless two years have passed since the celebration of the marriage. The exception to this is that the court, if it is satisfied that exceptional hardship is suffered by the petitioner, may grant leave for the petition to be presented within the two year period. Exceptional hardship is subjective and has to be considered in relation to the particular marriage.

9. Proving the ground of adultery can therefore be three-fold for some- in the case of a marriage of less than two years if the petitioner cannot satisfy the court that (a) adultery occurred (b) that it is intolerable to live with the respondent and (c) that it would be exceptional hardship if he or she continues to live with the respondent, then the petition will fail on this ground.

10. The above provisions contrast sharply for example with section 27 of the Family Law Act of Barbados which provides for the dissolution of marriage on the ground that the marriage has broken down irretrievably and the parties have been living separately and apart for a continuous period of 12 months immediately preceding the date of the filing of the application for dissolution of marriage. A decree of dissolution of marriage cannot be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed. This provision is based on a similar provision in the Australia Family Law Act, 1975. In Australia a petitioner need only satisfy the Court that he/she and his/her spouse have lived separately and apart for at least 12 months, and there is no reasonable likelihood of resuming married life.

11. In its 1966 Report in dealing with the “vices and virtues” of the legislation in force at the time (i.e. the Matrimonial Causes Act 1965) the UK Law Commission set out the main arguments for and against the retention of the need to prove a matrimonial offence as follows-¹

“Argument for retention of the matrimonial offence principle

- (a) Experience has shown that it works: that is to say, it enables some 35,000 divorces each year to be obtained reasonably cheaply and quickly and, in undefended cases, often with little embarrassment.
- (b) The court is presented with a clear issue to try: has a matrimonial offence been committed or has it not?
- (c) Because the issue is a clear one, solicitors are able to advise their clients with some confidence about their prospects of obtaining a divorce.
- (d) It is a just principle that it prevents a divorce being obtained against an unwilling party unless he or she committed a grave fault towards the other party. To allow an innocent person to be divorced against his or her will might not only offend the public’s sense of justice but could frequently cause financial hardship to an innocent dependent wife and to the children.
- (e) By laying down the circumstances in which an individual has the right to ask for his marriage to be dissolved the law provides an external buttress to the stability of marriages and deters the setting up of illicit unions, because those who contemplate such unions know that there can be no certainty of their being able to marry and have legitimate children.
- (f) It is right that the choice whether to terminate a marriage or not should rest with the wronged party.

Against retention of the matrimonial offence principle

- (a) In the majority of divorce proceedings both parties are at fault in varying degrees. The idea that marriages break up because one party has committed an offence against the other is unreal.
- (b) The issues tried by the court are superficial; in consequence the court never gets at the root of the trouble in the marriage. The commission of a matrimonial offence normally follows the breakdown of the marriage and is not the cause of it. In a happy marriage the parties rarely commit adultery; even if they do, divorce proceedings are unlikely to follow unless the marriage has already broken up. Nor does one spouse desert the other for three years unless the marriage has failed. Cruelty, no doubt, is sometimes the cause of the breakdown but it is more than a symptom of it; sexual demands, for example, may be regarded as excessive and cruel only because the marriage has already failed.

¹ Paras 24 and 25 ante

- (c) Since the commission of a matrimonial offence must be proved in what is in form hostile litigation, one spouse must be branded as guilty. This leads to unnecessary bitterness and frequently has harmful effects on the children, who may well love both parents. In most cases both parties want a divorce without rancour. Instead the law requires them, their advisers and the judge to take part in what begins as an elaborate parade of hostility, but may well end by causing real hostility.
- (d) All this brings the law and the whole administration of justice into disrepute, and encourages the giving of hypocritical evidence at best and perjury at the worst. Sometimes the alleged offence has not been committed at all; for example, the voluntary separation of the husband and wife may be dressed up to look like desertion, or evidence may be supplied from which the court will infer adultery which in fact has not taken place. In other cases adultery has been committed only in order to provide grounds for a divorce.
- (e) Obstacles are placed in the way of reconciliation since the parties have to remain at arm's length and their legal advisers have to ensure that they do nothing which, if attempted reconciliation should fail, would prejudice their chances of obtaining matrimonial relief. While recent modifications in the law relating to condonation and collusion have improved the position somewhat, a law based on matrimonial offence cannot but inhibit attempts at reconciliation.
- (f) Although the present system often causes little embarrassment in undefended cases, in those that are contested- especially those based on cruelty- the embarrassment and distress of the parties are frequently acute. Such cases may last for days. Even in undefended cases, which constitute some 93 per cent of the total, few petitioners remain unembarrassed and free from distress while testifying in public to the matrimonial offences of someone they once loved, or while confessing, as they have to do in about one-third of all cases, that they have themselves committed adultery.
- (g) "We think it may be said that the law of divorce, as it at present exists, is indeed weighted in favour of the least scrupulous, the least honourable and the least sensitive and that nobody who is ready to provide a ground of divorce, who is careful to avoid any suggestion of connivance or collusion and who has a co-operative spouse, has any difficulty in securing a dissolution of the marriage." -nine members of the Morton Commission in paragraph 70(v) of their Report.
- (h) Marriages which have irretrievably broken down are kept in being where the "innocent" party for one reason or another refuses to petition. The result is a large number of illicit unions which cannot be regularised and a still larger number of² children who cannot be legitimated. It would be in the

² Word omitted.

public interest to permit the guilty party to bring proceedings for divorce, thus enabling the union to be regularised and the children legitimated. It is to be expected that the “innocent” party, though not prepared to institute proceedings, would, in a large number of these cases, not oppose the grant of a decree if offered just financial terms and proper arrangements for the children.

- (i) The court’s task in cases in which it is asked to exercise its discretion is an embarrassing one which frequently has to be carried out without sufficient information. The discretion of the court, as we have shown, is almost invariably exercised in favour of the petitioner and it may be questioned whether it is in the public interest to refuse to grant a decree on the sole ground (i.e. in the absence of hardship to the respondent or the children) that the petitioner has blatantly disregarded his matrimonial obligations.”.

12. The UK Commission opined that the Matrimonial Causes Act 1965, with its insistence on guilt and innocence, tended to embitter relationships with particular damaging results to the children of the marriage, rather than to promote future harmony.

13. The Scottish Law Commission in 1988 in its discussion paper “The Ground for Divorce- Should the Law be changed?” argued that the retention of fault-based grounds may in some cases “be an unnecessary dredging up of incidents which would be best forgotten, an unnecessary emphasis on blame and recrimination and an unnecessary increase in bitterness and hostility”.

14. Pursuant to the UK Law Commission Report, the Divorce Reform Act of 1969 was enacted and provides one ground of divorce- irretrievable breakdown. It has been argued however that to say that there is one ground of divorce in the UK is misleading as, in order to prove irretrievable breakdown, certain “facts” must be proved- adultery, intolerable behaviour and desertion and two facts based on separation- two years with consent and five years.³

15. After the enactment of the Divorce Act of 1969 it was reported that divorces increased dramatically. The UK Commission was of the view however that the change was due to the fact that divorce became more affordable because there was a more simplified procedure. The second reason given was that alternatives to the fault grounds were now available as persons were no longer required to prove offence as long as they could prove separation.

16. The MCL combines both fault-based grounds as well as the separation periods as exist under English law.

17. It is noteworthy that notwithstanding the fact that more must be proven to the court in the Cayman Islands than in Australia, Barbados or Jamaica, the divorce rate in Cayman is substantially higher in Cayman than in those jurisdictions.

³ Scottish Law Commission

18. In the five year period 2005-2009 examined in the Cayman Islands there was an average of 219 divorces per year in a population of about 52,000. The numbers are as follows-

- 2005-200
- 2006-222
- 2007-229
- 2008-215
- 2009-232.

19. This amounts to 4.21 divorces per 1000. In statistics found⁴ this rate was outnumbered only by Puerto Rico 4.47 per 1000 and the United States which headed the list at 4.95. Canada was at 2.46 while the closest Caribbean country was Barbados at 1.21. Jamaica ranked far behind on the list at 0.38.

20. The separation periods under the MCL of two and five years have been found in other jurisdictions to be too long. In the Scottish Law Commission's discussion paper of 1988 it was argued that a person who has to wait two years or five years, if the other party does not consent, may be tempted to resort to a divorce for behaviour. Further, such long periods prolong the period when the parties are separated in fact but unable to regulate their position properly in law. In the UK in 2008 for all divorces granted to an individual (rather than jointly to both) behaviour was the common reason for divorce.⁵

21. The Scottish Commission recommended the deletion of desertion as a ground and that a period of separation for one year plus the party's consent to divorce or separation for two years be substituted instead. This recommendation was accepted and the Family Law (Scotland) Act of 2006 reduced the separation periods for divorce with consent to one year (previously two years) and without consent (previously five years).

22. Connected with this is the issue of time limits for presenting a petition of divorce. Section 10 of the MCL prohibits the presentation of a petition in the case of adultery, without the leave of the court, within two years of the celebration of marriage. The rationale for a restriction period has been that a restriction "is a useful safeguard against irresponsible or trial marriages and a valuable external buttress to the stability of marriages during the difficult first years"⁶. It has been argued however that the law should not stand in the way of a marriage which is no longer viable and that "the law should not try to attain the aspiration of making marriages work or last; to do so is in the nature of trying to close the stable door after the horse has bolted."⁷

23. The UK in the MC Act 1973 reduced its initial time restriction from three years to one year. The restriction is an absolute one unlike the previous law which had allowed

⁴ www.nationmaster.com. The sources on international divorce rates however conflict- for example note divorce rates at divorcemag.com.

⁵ Office for National Statistics, UK

⁶ 1988 Law. Com. No.116- "Time restrictions on Presentation of Divorce and Nullity Provisions"

⁷ *idem*

divorce in less than three years in cases of exceptional hardship and exceptional depravity. Cayman does not have the second exception and the test for the first exception is a subjective one i.e. the court must consider the effect of the alleged conduct on the particular petitioner regardless of how the same conduct would affect the reasonable petitioner.

24. In Jamaica there is a general time restriction of two years but the court may, upon application, grant leave for a petition to be presented before the two year period has passed if it is satisfied that one of the parties has, with the assistance of an approved marriage counsellor, attempted a reconciliation and there are special circumstances that would justify the hearing of the petition.

25. It has been argued that the main effect of a time restriction is to delay rather than prevent divorce. The Hong Kong Law Commission noted that this is borne out in the comparison between the divorce statistics in the England and Wales and those of Scotland which has never had a time restriction. The comparison revealed that even though the rates of divorce in the first three years in England and Wales were lower than those of Scotland during that period, in the further and subsequent years the rates increased rapidly and by the seventh year the rates were almost equal. The Hong Kong Commission concluded that the Scottish experience seems to suggest that “contrary to what one might expect, that large scale resort to divorce immediately after marriage is not a necessary or probable consequence of the absence of a restriction or time bar on divorce.”⁸

26. Issues to be considered under this part include whether the MCL should be changed to provide for the granting of divorce in a way similar to Australia i.e. one ground of divorce “irretrievable breakdown” with a separation period. Also, should the law be reformed to change the time restriction on presenting a petition for divorce? Should there be a shorter period similar to the one year in England and Wales, or should there be no restriction at all?

PROMOTION OF RECONCILIATION

27. While a good divorce law should ensure that an empty shell of a marriage is dissolved with minimum bitterness and humiliation it should also not undermine the stability of marriage. “A good divorce law can and should ensure that divorce is not so easy that the parties are under no inducement to make a success of their marriage and overcome temporary difficulties.”⁹ For example, section 22 of the Family Law Act of Barbados provides that in the exercise of its jurisdiction under the Act or any enactment, the court shall have regard to the need to preserve and protect the institution of marriage as the union of a man and a woman, to the exclusion of all others, voluntarily entered into for life.

⁸ Hong Kong Law Commission Report, (Topic 29) 1992 “Grounds for Divorce and the Time Restriction on Petitions for Divorce within Three Years of Marriage”

⁹ UK Commission, the 1966 report

28. One of the main features of modern family law legislation is provision for counselling and reconciliation. The MCL does not have provisions similar to those of jurisdictions such as Barbados, Jamaica, Australia and Canada relating to marital counselling and reconciliation. In Jamaica for example section 11 of the Matrimonial Causes Act provides that where proceedings for dissolution of marriage have been instituted by a party to a marriage the Court shall give consideration to the possibility of a reconciliation of the parties. If, in such proceedings, it appears at any time to the Court from the evidence or the attitude of the parties, or of either of them, that there is a reasonable possibility of such a reconciliation the Court may take any or all of the following steps-

- (a) adjourn the proceedings to afford the parties an opportunity to consider a reconciliation;
- (b) interview the parties in chambers with or without counsel, as the Court thinks proper, with a view to effecting a reconciliation;
- (c) if the Court thinks it desirable to do so, nominate an approved marriage counsellor to assist those parties in considering a reconciliation.

29. If, after an adjournment has taken place either of the parties requests that the hearing be proceeded with, the Court shall resume the hearing as soon as practicable.

30. Section 12 provides that where in any proceedings under the Act the Court is of the opinion that counselling may assist the parties to a marriage to improve their relationship to each other and to any relevant child, the Court may advise the parties to attend upon an approved marriage counsellor and, if the Court thinks it desirable to do so, adjourn such proceedings to enable the attendance.

31. The Family Law Act of Barbados goes further and places attorneys under a duty to promote reconciliation. Section 13 provides that in all matters in issue between the parties to a marriage that are likely to become or are the subject of proceedings, every attorney-at-law representing a party in those proceedings shall give consideration, from time to time, to the possibility of a reconciliation of the parties; and every such attorney-at-law shall-

- (a) ensure that the party for whom he is acting is aware of the facilities that exist for promoting a reconciliation; and
- (b) take such steps as in the opinion of the attorney-at-law may assist in promoting a reconciliation.

32. Further, an attorney-at-law who is acting for a party and applies to the court to have set down for hearing any matter in issue under this Act, or any other Act, or any other Act relating to the custody or guardianship of minors, shall certify on the application that he or she has carried out his duties under section 13.

33. In recommending reform in 1966 the UK Commission noted that in the UK at the time a disproportionate amount of public money was spent on dissolving marriages in comparison with the small sum spent on marriage guidance and conciliation.

34. The Family Law Act of Australia provides that a court exercising jurisdiction in proceedings for a divorce order or financial proceedings instituted by a party to a subsisting marriage must consider the possibility of a reconciliation between the parties to the marriage. If, during the proceedings, the court considers, from the evidence in the proceedings or the attitude of the parties to the marriage, that there is a reasonable possibility of a reconciliation between the parties, the court may adjourn the proceedings to give the parties the opportunity to consider a reconciliation.

35. If the court adjourns the proceedings it must advise the parties to attend family counselling or use the services of another appropriate person or organisation. However, before advising the parties, the court must consider seeking the advice of a family consultant about the services appropriate to the parties' needs. If, after an adjournment, either of the parties requests that the proceedings resume, the court must resume the proceedings as soon as practicable.

36. It has been argued that conciliation provisions are a waste of time and resources as by the time a petition has reached a hearing stage, chances of reconciliation are remote.¹⁰ However statistics were provided by the UK Commission in its 1988 Commission report "Facing the Future: A discussion paper on the ground for divorce" that showed that the fall-off rates between petition and decree absolute for the period 1980-85 were 15%, figures which suggest evidence of post-petition reconciliation.

37. In order to assist in reconciliation or to ease emotional and other issues which may arise with divorce, the Australian Family Law Act provides for family counselling as well as family dispute resolution. "Family dispute resolution" is a process (other than a judicial process) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other and in which the practitioner is independent of all of the parties involved in the process. "Family counselling" is a process in which a family counsellor helps one or more persons to deal with personal and interpersonal issues in relation to marriage or one or more persons (including children) who are affected, or likely to be affected, by separation or divorce to deal with either or both personal and interpersonal issues and issues relating to the care of children.

38. In considering counselling and other mediation provisions, the time when such services should be provided needs to be carefully considered. The UK Commission in its 1988 report above noted that the conciliation provisions in the Matrimonial Causes Act may not have the required success as the system of starting proceedings first and having to give evidence of fault may deter parties from seeking reconciliation. The Commission noted-

¹⁰ *ibid*

“First, the need to prove a fact, particularly if behavior is used, can force the petitioner into an entrenched and hostile position from the outset. If the marriage has not broken down already, the allegations made may alienate the respondent to such an extent that irretrievable breakdown then occurs. Secondly, once the petition is filed the divorce may be obtained relatively quickly with little opportunity for reflection..... Thirdly, some spouses may be unable to find alternative accommodation or rearrange the occupation of their existing home unless they are divorced. Some, perhaps especially wives, may therefore be driven to divorce simply in order to achieve a separation, any chance however small of reconciliation after a cooling-off period is lost. Finally, any time limit on the period during which the parties may live together after a fact has arisen can cause difficulties for a spouse who is genuinely ambivalent about ending the marriage.”.

39. The Commission considered whether the only appropriate way to ensure that parties do seek counselling would be to make the grant of the decree absolute conditional upon their doing so. This was rejected however as being counter-productive and perhaps could lead to an ineffective use of resources. According to the Commission “evidence presented.....in 1966 that attempts at reconciliation were rarely successful unless they were voluntarily sought seems applicable today.”¹¹. They were however of the view that conciliation and mediation would be more helpful in resolving family matters especially those relating to arrangements for children and financial and property arrangements.

40. A proactive approach to counselling could be the answer. Promoting family and marriage counselling could be an effective way to allow parties to refrain from acting precipitously in petitioning for divorce.

41. The issue to be considered is whether the divorce rates could be reduced in the Cayman Islands if parties are legally required to undergo counselling or mediation? Should parties who may be at the end of their tether in their relationship be forced to go through such a process? Should such services be funded by the government?

PROTECTION OF THE INTERESTS OF CHILDREN

42. One of the field of choice criteria is that a good divorce law should protect the interests of the children by ensuring that when a marriage comes to an end children should be spared embarrassment and humiliation. A good divorce law should “not merely bury the marriage but do so with decency and dignity and in a way which will encourage harmonious relationships between the parties and their children in the future”.¹² A law which promotes bitterness between parents cannot be in the best interests of the children as the adversarial nature of the proceedings is likely to urge children to take sides.

¹¹ *ibid*

¹² 1966 UK Law Commission Report ante

43. The MCL does satisfy these criteria to some extent as it provides that the court shall not grant a decree until it is satisfied that provision has been made for the custody and care of all the children of the marriage. The Children Law of 2003 amended the MCL by providing a new section 13 of the Law. That section provides that in any proceedings for a decree of divorce or nullity of marriage, or a decree of judicial separation, the court shall consider-

- (a) whether there are any children of the marriage to whom this section applies; and
- (b) where there are any such children, whether (in the light of the arrangements which have been, or are proposed to be, made for their upbringing and welfare) it should exercise any of its powers under the Children Law, 2003 with respect to any of them.

44. Where, in any case to which section 13 applies, it appears to the court that-

- (a) the circumstances of the case require it, or are likely to require it, to exercise any of its powers under the Children Law, 2003 with respect to any child of the marriage;
- (b) it is not in a position to exercise that power or (as the case may be) those powers without giving further consideration to the case; and
- (c) there are exceptional circumstances which make it desirable in the interests of the child that the court should give a direction under this section,

it may direct that the decree of divorce or nullity is not to be made absolute, or that the decree of judicial separation is not to be granted, until the court orders otherwise.

45. This section applies to any child of the marriage who has not reached the age of sixteen years at the date when the court considers the case in accordance with the requirements of this section and to any child of the marriage who has reached that age at that date and in relation to whom the court directs that this section should apply.

46. To date however this section has not been brought into force as the Cayman Islands awaits the commencement of the Children Law.

47. Section 19 of the MCL also provides that in dealing with all ancillary matters arising under the Law, the court shall have regard first of all to the best interests of any children of the marriage.

48. Section 43 of the Australian Family Law Act reinforces the rights of the child by providing that the Family Court shall, in the exercise of its jurisdiction under the Act have regard to the need to protect the rights of children and to promote their welfare. The Act also goes on to direct the court on how to determine the best interests of a child. The primary considerations are-

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

49. Additional considerations include the following-

- (a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;
- (b) the nature of the relationship of the child with each of the child's parents; and other persons (including any grandparent or other relative of the child);
- (c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent; and
- (d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from either of his or her parents or any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living.

50. In relation to the protection of children in Barbados, section 22 of the Family Law Act mandates the court in exercising its jurisdiction to have regard to-

- (a) the need to give the widest possible protection and assistance to the family as the natural and fundamental unit of society, particularly while it is responsible for the care and education of dependent children;
- (b) the need to protect the rights of children and to promote their welfare; and
- (c) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage.

51. It is suggested that the MCL could be improved by expressly setting out similar principles. The Law should also be amended to change the definition of child to correlate with that under the Children and Youth Justice Laws. A child is defined under those laws as a person under the age of eighteen while the MCL deals primarily with children under the age of sixteen.

RECOGNITION OF COMMON LAW UNIONS BETWEEN MEN AND WOMEN

52. Should the MCL recognise common law unions between a man and a woman in the same way as Australia, Barbados and other jurisdictions?

53. A “union other than marriage” or “union” is defined under Part V of the Family Law Act of Barbados as the relationship that is established when a man and a woman who, not being married to each other, have cohabited continuously for a period of 5 years

or more and have so cohabited within the year immediately preceding the institution of the proceedings. Under the Act “matrimonial causes” include-

- (a) proceedings between parties to such a union in respect of the maintenance of the parties;
- (b) the custody guardianship or maintenance of, or access to a child of such a union;
- (c) the approval by the court of a cohabitation or separation agreement or of the revocation of such an approval or of the registration of such an agreement; or
- (d) an order or injunction in circumstances arising out of their relationship.

54. Like many other countries many of the family arrangements in the Cayman Islands comprise common law unions and the Commission is seeking the input as to whether we should protect the parties and children of such families in the same way we protect parties of a formal marriage.

55. According to statistics provided by the Economics and Statistics Office in May 2009, of the population aged 15 years and over in 2007 10.6 per cent of such populations were in common law unions while 47.8 per cent were legally married. Do the numbers sufficiently justify the regulation of the breakdown of such unions?

56. In the 1966 UK Law Commission report the Commission considered the regulation of these types of unions but focused on the fact that the children of such unions would continue to be disadvantaged if such unions were not legally recognised and that the sting of illegitimacy would remain if nothing was done.

57. The Cayman Islands in 2003 enacted the Status of Children Law abolishing illegitimacy and amended the Succession Law thereby by abolishing the difference between the succession rights of children of a marriage and children of a union other than marriage. Thus the issue of the legitimacy of children is no longer a legal concern.

58. There is however no legislation which deals with the regulation of financial matters upon the breakdown of a long term union. For example how is a partner who has for 15 years been supported by the other as he or she may have been the homemaker to be protected when there is a breakdown?

59. Section 50 of the Family Law Act of Barbados provides, for example, that a party to union other than marriage is liable to maintain the other party. In considering such liability the same matters which are considered in the case of the maintenance of a legally wedded spouse applies, such as age, income and the financial needs and obligations of each of the parties. That Act also recognises cohabitation agreements which may be registered thereunder.

60. In New South Wales under the Property (Relationships) Act 1984 parties to domestic and de facto relationships may apply to the court for declarations of interests in property and to determine other financial matters.

61. Should a new matrimonial law in the Islands provide for the regulation of such unions and what should be the extent of regulation?

DIVORCE PROCEEDINGS

62. Section 11(5) of the MCL provides that the Court shall postpone pronouncement of a decree until it is satisfied that provision has been made for the custody and care of all the children of the marriage and that no application for any order for settlement of marital property, financial provision, periodic payments, damages or costs remains outstanding.

63. It has been argued however that section 11(5) can leave parties in limbo for protracted periods of time where one party makes it difficult to settle issues such as financial provision.

64. As indicated at paragraph 46 while section 13 of the Law is still not in force, it will provide when it commences that the court may direct that the decree of divorce or nullity not be made absolute if it appears to the court that the interests of the child are not resolved.

65. While section 13 is similar to provisions in other jurisdictions there have been calls for the change in how divorce proceedings are dealt with in that at present a difficult party can ensure that under section 11 divorce proceedings run for years without determination.

66. It has been suggested that we should reform the MCL to provide, like some jurisdictions for example in Canada and Hong Kong, for the severing of the divorce from the corollary relief sought, in order that a summary judgment of divorce may be granted to the parties even before corollary matters have been dealt with by the court.

67. In Canada a divorce judgment granted pursuant to the Divorce Act, 1985, becomes effective 31 days after it is granted. This change removed the two-stage procedure (decrees *nisi* and absolute) required under the 1968 Act. The court may abridge the 31 day period in special circumstances, if the parties agree and undertake not to appeal the judgment. Certificates of divorce are generally not made available until the 31 day period has expired.

68. Under the Hong Kong Matrimonial Causes Ordinance a court may proceed in either of two ways in the grant of an absolute where-

- (a) the respondent to a petition for divorce in which the petitioner alleges that the parties have lived apart for a continuous period of at least 1 year immediately preceding the petition for divorce and the respondent consents to a decree being granted;

- (b) the respondent has applied to the court under this section for it to consider the financial position of the respondent after the divorce; and
- (c) a decree nisi of divorce has been granted on the petition and the court holds that the only fact on which the petitioner is entitled to rely in support of his petition is that mentioned above.

69. The court hearing an application by the respondent considers-

- (a) all the circumstances, including the age, health, conduct, earning capacity financial resources and financial obligations of each of the parties; and
- (b) the financial position of the respondent as, having regard to the divorce, it is likely to be after the death of the petitioner should the petitioner die first.

70. However the court may, if it thinks fit, proceed without observing the requirements above if it appears that there are circumstances making it desirable that the decree should be made absolute without delay and the court has obtained a satisfactory undertaking from the petitioner that he will make such financial provision for the respondent as the court may approve.

71. The Law Reform Commission of Hong Kong notes that this was the approach taken in the case of *Lau Chu v Lau Tang Su Ping*¹³ where the petitioner husband wished to marry his girlfriend of 9 years. His assets were calculated at \$175 million and the court held that even though the amount of the financial provision to be made for the respondent had yet to be fixed, the petitioner had made out a case for accelerating the making of a decree absolute and his undertaking to make financial provision was sufficient to allow the decree to be granted.

72. The UK Matrimonial Proceedings Act 1973 contains similar provisions under section 10.

73. In Australia under the Family Law Act a divorce order and financial matters which do not relate to children may be dealt with separately. Section 55 of the Act provides that a divorce order takes effect by force of section 55 at the expiration of a period of one month from the making of the order or from the making of an order under section 55A whichever is the later.

74. Section 55A deals with a divorce order where there are children and it is provided that a divorce order in relation to a marriage does not take effect unless the court has, by order, declared that it is satisfied that there are no children of the marriage who have not attained 18 years of age or that the only children of the marriage who have not attained 18 years of age are the children specified in the order and that-

- (a) proper arrangements in all the circumstances have been made for the care, welfare and development of those children; or

¹³ [1989] 2 HKLR 470

- (b) there are circumstances by reason of which the divorce order should take effect even though the court is not satisfied that such arrangements have been made.

75. In providing that a decree can be made absolute prior to the settlement of financial arrangements in certain cases the above jurisdictions have sought to ensure that their divorce legislation strives to end irreconcilable martial relationships with as little distress as possible. While a good divorce law should ensure that the economically weaker spouse is dealt with in a fair and just manner it should not permit either party to unnecessarily prolong divorce proceedings.

76. Would any injustice arise if the law in the Cayman Islands was reformed in similar terms as the UK or Hong Kong to permit the grant of summary divorces where there are no children and the hearing of some financial arrangements after a divorce has been granted?

FINANCIAL RELIEF IN CAYMAN ISLANDS AFTER SEPARATION OR DIVORCE IN ANOTHER JURISDICTION

77. The local case of *Wheeler v Wheeler*¹⁴ brought into focus the fact that the Grand Court unlike the court in the UK has no power to grant ancillary relief to foreign decrees. This power was given to the UK court in 1984 by the Matrimonial and Family Proceedings Act 1984 (“the 1984 Act”). Section 12 (1) of that Act provides as follows-

(1) Where-

- (a) a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of judicial or other proceedings in an overseas country, and
- (b) the divorce, annulment or legal separation is entitled to be recognised as valid in England and Wales,

either party to the marriage may apply to the court in the manner prescribed by rules of court for an order for financial relief under this Part of this Act.”.

78. In *Wheeler v Wheeler* the applicant applied for an order recognizing his divorce in the United States from his wife, the respondent, and for the dismissal of his wife’s petition in the Grand Court. The wife, a foreign national ordinarily resident in the Cayman Islands, petitioned for divorce and obtained an interim maintenance order. Having failed successfully to challenge the court’s jurisdiction to hear the petition the husband himself filed a petition for divorce in North Carolina, where the parties were domiciled. Although the wife was represented in those proceedings, she had only limited means to defend the petition. Upon incorrect advice that the Grand Court had jurisdiction to make financial provision pursuant to a foreign divorce, she made no application for ancillary relief to the North Carolina court.

¹⁴ 1997 CILR 362

79. The husband's petition was granted and the North Carolina proceedings were discontinued upon his application. He later applied to re-open those proceedings to allow his wife the opportunity to apply for the redistribution of matrimonial property, in response to her claims in the Cayman proceedings that he had acted unfairly, but she declined to make an application, since her right to apply for maintenance had been lost.

80. The husband then applied to the Grand Court as a US national domiciled in North Carolina for the recognition of his divorce under the Matrimonial Causes Law, s.7(1). He submitted, inter alia, that the court had no jurisdiction to make orders for financial provision pursuant to a foreign divorce decree since its powers were limited by s.15 of the Grand Court Law (1995 Revision) to ordering ancillary relief pursuant to a decree granted under the Matrimonial Causes Law. Moreover, since the wife's divorce petition would be struck out if the court recognised the North Carolina divorce, her interim maintenance order would expire, in accordance with section 19(c) of the Matrimonial Causes Law and the court would be able to make no further orders for financial provision.

81. The Grand Court rejected the husband's application and upheld the wife's petition that the North Carolina divorce should not be recognised on public policy grounds under the Matrimonial Causes Law, section 7 (1), since her husband's petition there had been designed to deprive her of her right to financial provision under Cayman law and to force her into expensive litigation in two jurisdictions at the same time—and the net effect of recognition would be that she would receive nothing. The Grand Court however noted that if it had been willing to recognise the North Carolina divorce, it would not have been able to make orders for financial provision for the wife, since under the Grand Court Law (1995 Revision), section 15, its jurisdiction to grant ancillary relief was limited to that under the Matrimonial Causes Law. Moreover, if it had been willing to recognise the foreign divorce, the court would not have been able to stay its own interim maintenance order pending future financial provision, since it was clear from section 19(c) of the Matrimonial Causes Law that it could only make such an order pending the outcome of proceedings under that Law, and an order of the Grand Court could not have subsisted once the wife's petition had been struck out by it.

82. As Chief Justice Smellie noted in *Wheeler v Wheeler* the mischief which the 1984 Act intended to cure was exemplified by *Quazi v. Quazi*¹⁵, where the wife in England was left without financial provision upon the recognition of a talaq divorce proceeding taken by the husband in Pakistan. That mischief- addressed by the courts in their call for legislative reform- was the cause of the Law Commission's recommendations to Parliament which led to the reform in section 12 of the 1984 Act.

83. The situation remains in the Caymans Islands that if the court recognises a divorce decree of another jurisdiction and no financial provision has been made for an economically weaker party who is need of such provision the court still has no power to

¹⁵ [1980] A.C. 744

order maintenance for a party who is resident in the Cayman Islands. In the Cayman Islands where there are over 100 nationalities, where divorces can be obtained in countries as far afield as Brunei, South Africa or Uganda involving persons who are domiciled or resident in the Cayman Islands, it is important that the law be reformed to grant the courts such powers.

ANCILLARY ORDERS

84. In considering comments on the MCL it has been recommended that the Commission consider the implementation of clean break provisions similar to those under sections 25A and 28(1) of the UK MCA 1973. Since 1984 the MC Act of the UK has provided a way of ensuring that certain parties are able to make a clean financial break from each other when the decree nisi has been granted. Once a clean break is made the court will not hear any further claims that the spouses have for the duration of the parties' lives and even after the death of one or other of the ex-spouses.

85. Section 25A provides that where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers relating to the grant of an order dealing with financial provisions, 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.

86. It is further provided that where the court decides in such a case to make periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall consider whether it would be appropriate to require those payments to be made or secured only for such term as would, in the opinion of the court, be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.

87. Where on or after the grant of a decree of divorce or nullity of marriage an application is made by a party to the marriage for periodical payments or secured periodical payments order in his or her favour, then, if the court considers that no continuing obligation should be imposed on either party to make or secure periodical payments in favour of the other, the court may dismiss the application with a direction that the applicant shall not be entitled to make any further application in relation to that marriage for an order under section 23 of the Act which deals with financial provisions.

88. It should be noted that this type of financial settlement relates only to the finances of the parties. Future financial provision for children cannot be finalised in this way.

89. These provisions may best be used with cases involving childless couples and couples with children over the age of 18 to make a clean break and to terminate a marriage with minimum bitterness and distress.

90. The provisions are not suitable in every circumstance and would not be used where for example one spouse's earning capacity is non-existent or significantly lower than the other's.

91. The MCL could be further enhanced by provisions similar to those set out in section 25 of the UK MCA Act. That section details the matters which should be taken into account by the court in determining financial matters. These include the following-

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) 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;
- (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it; and
- (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

92. While these may be matters which are generally taken into account by the courts in the Cayman Islands it is submitted that the MC Law should expressly provide for these.

93. Another provision of the UK MCA which is of note is section 37 which empowers the court, upon application, to make a restraining or freezing order to prevent one spouse from disposing of assets and to make a setting aside or unscrambling orders where the disposition has already taken place. While the court has the inherent jurisdiction to issue an injunction in such cases the approach in section 37 provides an uncomplicated process of dealing with the unwanted disposition of assets.

94. Section 37 provides, *inter alia*, that where proceedings for financial relief are brought by one person against another, the court may, on the application of the first-mentioned person if it is satisfied that the other party to the proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the

claim. Also, if the court is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, it may make an order setting aside the disposition.

95. Any disposition made by the other party to the proceedings for financial relief in question (whether before or after the commencement of those proceedings) is a reviewable disposition for the purposes of section 37 unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant's claim for financial relief.

96. Sections 20 and 21 of the MCL empower the court at the time of pronouncing a decree to, inter alia, make orders for the disposition of the matrimonial property, including the matrimonial home. It has been suggested that any new law dealing with these matters should, in the interests of certainty in the law, give a definition of matrimonial property and matrimonial home. It should also expressly provide for how the matrimonial home will be dealt with upon the dissolution of a marriage.

97. For example, in Scotland, "matrimonial home" is defined in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 as any house, caravan, houseboat or other structure which has been provided or has been made available by one or both of the spouses as, or has become, a family residence and includes any garden or other ground or building attached to, and usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure; but does not include a residence provided or made available by one spouse for that spouse to reside in, whether with any child of the family or not, separately from the other spouse.

98. In Jamaica under the Family Property (Rights of Spouses) Act, 2003 "family home" is defined to mean the dwelling-house that is owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household.

99. In the UK where a married couple jointly owns the matrimonial home, both have the right to remain in the property unless the court makes an exclusion order. Various orders can be made to achieve this-

- transfer to one party's sole ownership;
- a Deferred Interest Order granted by the court- there is the right for one of the parties to occupy the matrimonial home up to an agreed point in time, such as the children are independent. It will be agreed who will pay what bills;
- a Mesher Order granted by the court- in this case usually the wife is allowed to remain in the property rent free, and the sale of the matrimonial home is postponed until the children are 17 years of age;

- a Martin Order granted by the court- the wife or husband remains in the property for the remainder of their life or until a "trigger" event occurs such as remarriage or a voluntary decision to leave the property.

100. The New Zealand Property Rights Act 1976 is particularly instructive in this area as it sets out in detail how the division of matrimonial property is to be achieved upon dissolution or separation. Property is divided into two categories- relationship property and separate property. Section 8 of the Act provides that 'relationship property' consists, inter alia, of the family home whenever acquired; the family chattels whenever acquired; all property owned jointly or in common in equal shares by the husband and the wife or by the partners and all property owned by either spouse or partner immediately before their marriage, civil union, or de facto relationship began, if-

- (a) the property was acquired in contemplation of the marriage, civil union, or de facto relationship; and
- (b) the property was intended for the common use or common benefit of both spouses or partners.

101. Section 9 provides, inter alia, that all property of either spouse or partner that is not relationship property is separate property. In accordance with the Act, relationship property must be divided equally, with certain specified exceptions. Each of the spouses or partners is entitled to share equally in the family home, the family chattels and any other relationship property. The "family home" is defined as including the dwelling house that either or both of the spouses or partners use habitually or from time to time as the only or principal family residence, together with any land, buildings, or improvements appurtenant to that dwelling house and used wholly or principally for the purposes of the household.

102. If the family home has been sold, each spouse or partner is entitled to share equally in the proceeds of the sale as if they were in the family home, if the following conditions are satisfied-

- (a) either spouse or partner or both of them have sold the family home with the intention of applying all or part of the proceeds of the sale towards the acquisition of another home as a family home;
- (b) that home has not been acquired; and
- (c) at the date of the application to the Court, not more than 2 years have elapsed since the date when those proceeds were received or became payable, whichever is the later.

103. The Act provides that if the Court considers that there are extraordinary circumstances that make equal sharing of property or money repugnant to justice, the share of each spouse or partner in that property or money is to be determined in accordance with the contribution of each spouse to the marriage. The court may also deviate from equal division if the marriage has been of a short duration.

104. In the Cayman Islands the court is guided in making an order under the MCL by common law precedents which provide for a variety of matters similar to the above to be taken into account in the division of property. For example, in the case of *W v W*¹⁶ the parties were divorced in the Grand Court which made an order for division of the matrimonial property. The parties had been married for over 20 years and had 2 children. The husband carried on a business selling household goods and appliances, which he had started before the marriage and he had purchased its premises. The wife had briefly worked as a sales clerk for the business, whose assets included moneys on deposit, stock, some handling equipment and a debt owed by the husband on a loan account. The moneys on deposit had been partly raised from the re-mortgaging of matrimonial property and insurance receipts in respect of hurricane damage to that property and were used as a source for the family's expenditure. The loan from the capital assets of the company had been authorised to cover the parties' matrimonial expenses and the husband's medical costs. The profitable continuation of the business was doubtful and therefore it had no value as a trading concern.

105. The parties also had various other properties and chattels which, when making an order for ancillary relief under the MCL, the Grand Court (Levers, J.) declared to be matrimonial assets which were to be sold and the proceeds divided equally between the parties. The court determined, however, that the husband's retail business was not a matrimonial asset and so would not be considered in the division. It considered the length of the parties' marriage but ruled that, because the husband had commenced the business and run it on his own and since the wife had not contributed to its enhancement nor was its sale required to meet her needs, she would be entitled to no part of its value.

106. On appeal, the wife submitted that the court erred (a) in identifying the husband's business as a non-matrimonial asset; and (b) in failing to account for it in the property adjustment order made in relation to the rest of their assets. The Court of Appeal held, ordering that account be taken of some of the assets of the business in the ancillary relief order, that the approach of the Grand Court had been incorrect in identifying the husband's business as a non-matrimonial asset when dealing with the order for ancillary relief, pursuant to section 20 of the MCL. The court had not had proper regard to the applicable principles when dealing with property brought into the marriage by one of the parties. The factors to be considered depended upon the length of the marriage, with fairness requiring in a short marriage that a party should not normally be entitled to a share of such property. In a longer marriage, the court would have to consider the nature and value of the property, the circumstances in which it was acquired and how the parties organised their financial affairs. Consequently, as this was not a short marriage (being over 20 years), the Grand Court should have considered the source of the various assets owned by the husband's business and the way in which the parties had treated those assets during the marriage when determining whether the business was a matrimonial asset.

¹⁶2009 CILR 255

107. The above case shows clearly why it would be beneficial to all concerned i.e. the litigants, advocates and the courts if any new law expressly codifies the matters to be taken into account by the court in the identifying of matrimonial assets and their division.

DAMAGES FOR ADULTERY

108. Section 17 of the MCL provides that where either party to a divorce alleges that the other party has committed adultery the person with whom the adultery is alleged to have been committed may be joined in the suit as a co-respondent. This person may be ordered by the court under section 18 to pay damages as well as costs of the suit.

109. Such provisions have been seen as anachronistic in some jurisdictions and have been abolished for example in the UK, Barbados and Jamaica. It may be argued that these provisions promote bitterness in the termination of the marriage and the issue to be considered is whether they should be retained in a modern law.

110. Our research shows that in the United States seven states still retain similar damages i.e. damages for the alienation of affection. In one recent case in North Carolina a woman was awarded \$US9 million in damages from her husband's mistress for damages to her feelings, for alienating her husband's affections. It is alleged that more than 200 alienation actions are filed every year in North Carolina.¹⁷

111. The right to damages was historically first given to husbands. Women originally had no such right to claim damages as at the time when the law was fixed a married woman had no right to property and any claim for damages would have passed automatically to her husband. The basis for the right is not clear although it has been posited that the law may be based on the injury to the husband in the dishonour of his bed, the alienation of the wife's affections, the destruction of the husband's domestic comfort and the suspicion cast upon the legitimacy of his off spring.¹⁸

112. Modern supporters of this type of claim argue that the need to uphold the sanctity of marriage vows should be enforced by some kind of formal legal sanction for violation of marital promises. Such a right to damages it is posited provides an effective deterrence of rampant extramarital affairs by means of the threat of monetary damages.

113. Critics argue that for example in North Carolina the lawsuits are filed by revenge-seeking spouses of wealthy people and that the continued existence of such suits is an obsolete method of legislating morality. Critics also say that the laws do not fulfil their purpose of protecting martial relationships, inequitably punish only one of the two guilty parties and serve as an excuse for forced settlements.

114. In Australia the right to damages was first extended to wives under the 1959 Matrimonial Causes Act, but was subsequently abolished by the Family Law Act of 1975. In New Zealand the right to claim damages for adultery was abolished by the

¹⁷ "Alienation of affection and Criminal Conversation"- Rosen Law Firm

¹⁸ Fraser, Husband and Wife (2nd ed.; 1878)

Domestic Actions Act of 1975 and in the UK the damages for adultery were abolished by the Law Reform (Miscellaneous Provisions) Act of 1970. A court may however make an order awarding costs against a co-respondent in exercise of its general statutory powers to award costs. It is however not necessary in the UK to name the 'co-respondent' and many lawyers advise against doing so as it may cause unnecessary delay and additional expense if the co-respondent contests the petition.

115. This cause of action has been abolished in Alberta, British Columbia, Saskatchewan and Manitoba and it is argued that it is probably on shaky legal grounds elsewhere in Canada given the Charter of Rights and Freedoms.

116. The issue to be considered is whether this cause of action has any place in our law. One writer noted¹⁹ that "the notion that damages should be available against a third party is nonsensical as it suggests that the spouse in question has no free choice in his or her own departure".

PRE-NUPTIAL AGREEMENTS

117. Until recently pre-nuptial agreements have only limited acceptance in many courts of the Commonwealth. A refusal to recognise them is based on couples having a duty to stay together and the principle that marriage is for life.

118. However the UK Law Commission in its 2006 consultation paper "*Cohabitation: The Financial Consequences of Relationship Breakdown*" noted that in the UK-

"Pre-nuptial agreements are now held to be one of the factors which should be taken into account when a judge considers an application for ancillary relief. Recent cases, notably those dealing with short marriages, have given pre-nuptial agreements quite substantial weight in shaping the relief granted, provided that the spouse seeking to depart from the agreement had understood it, had been properly advised as to its terms and had not been put under pressure by the other party to sign it."

119. In the 2008 Privy Council case of *MacLeod v MacLeod*²⁰ Baroness Hale reviewed the law on the validity and effect of separation and maintenance agreements and concluded that:

"The Board takes the view that it is not open to them to reverse the long standing rule that ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense." She went on: "In the Board's view the difficult issue of the validity and effect of ante-nuptial agreements is more appropriate to legislative rather than judicial development."

120. The post-nuptial agreement, however, was different:

¹⁹ Phillips "Damages for Adultery" (1980) HKLJ 54

²⁰ *Privy Council Appeal No 89 of 2007*

"Post-nuptial agreements, however, are very different from pre-nuptial agreements. The couple is now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry. There is nothing to stop a couple entering into contractual financial arrangements governing their life together, as this couple did as part of their 2002 agreement."

121. However, in 2009, the Court of Appeal in the UK case of *Radmacher v Granatino*²¹ agreed with the lawyers of the appellant that the traditional view that pre-nuptial agreements are contrary to public policy because they undermine marriage is outdated.

122. In that case Katrin Radmacher, a 40-year-old paper industry heiress with a fortune of at least 55 million pounds (\$US82 million), and French investment banker Nicolas Granatino married in 1998. They had two children and separated eight years later. He was awarded almost 6 million pounds in a divorce settlement. But the Court of Appeal slashed Granatino's payment, ruling that he had promised in a pre-nuptial agreement not to make a claim on his wife's fortune. The court held that a judge should give due weight to the marital property regime into which a couple entered so as to legitimately exercise the very wide discretion conferred on judges to achieve fairness between the parties to ancillary relief proceedings.

123. Thorpe LJ said that, contrary to Baroness Hale of Richmond's views of the policy issues relating to ante-nuptial contracts in her speech in the judgment of the Privy Council in *Macleod v Macleod*, due respect for adult autonomy suggested that, subject to proper safeguards, a carefully fashioned contract should be available as an alternative to the stress, anxieties and expense of a submission to the width of the judicial discretion. That was because: (i) any provision that sought to oust the jurisdiction of the court would always be void but severable; (ii) any contract would be voidable if it breached proper safeguards or vitiated under general principles of the law of contract; and (iii) any contract would be subject to the review of a judge exercising his duty under s 25 of the Matrimonial Causes Act 1973 if asserted to be manifestly unfair to one of the contracting parties.

124. Further reasons were: (i) in so far as the rule that such contracts were void survived, it seemed to be increasingly unrealistic and reflected the laws and morals of earlier generations. It did not sufficiently recognise the rights of autonomous adults to govern their future financial relationship by agreement in an age when marriage was not generally regarded as a sacrament and divorce was a statistical commonplace. (ii) As a society the United Kingdom should be seeking to reduce and not to maintain rules of law that divided it from the majority of the member states of Europe. (iii) Europe apart, the United Kingdom was in danger of isolation in the wider common law world if it did not give greater force and effect to ante-nuptial contracts.

²¹ [2009] WLR (D) 227

125. The court continued its ruling by stating that despite the judge giving the appearance of considering the ante-nuptial agreement as a factor, the overall impression was of a negligible resulting discount. Her discretion was exercised sufficiently erroneously for some or all of the order to be set aside. A discount for the ante-nuptial agreement was logically achieved by limiting the enjoyment of the elements of the award to the years of the husband's parenting responsibility for the two children. The major funds were to be provided for him in his role as father rather than as former husband.

126. On appeal by the husband to the Supreme Court²² the court upheld the Court of Appeal's decision and found that it was correct to conclude that there were no factors which rendered it unfair to hold the husband to the agreement. The court found that there was no compensation factor as the husband's decision to abandon his career in the city was not motivated by the demands of his family but reflected his own preference. Fairness did not entitle him to a portion of his wife's wealth, received from her family independently of the marriage, when he had agreed he should not be so entitled when he married her.

127. Baroness Hale gave a strong dissenting judgment. She stated that "Above all, perhaps, the court hearing a particular case can all too easily lose sight of the fact that, unlike a separation agreement, the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually although by no means invariably she – would otherwise be entitled."²³

128. Post judgment comments included warnings by bishops that the decision undermines marriage and lawyers saying that judges have usurped the rights of Parliament and elected MPs to make the law.²⁴

129. The Australian Family Law Act recognises financial agreements made before during and after marriage. Section 90B (1) of the Act provides that if-

- (a) people who are contemplating entering into a marriage with each other make a written agreement with respect to any of the matters mentioned in subsection (2); and
- (b) at the time of the making of the agreement, the people are not the spouse parties to any other binding agreement with respect to any of those matters; and
- (c) the agreement is expressed to be made under this section,

the agreement is a financial agreement. Parties may make the financial agreement with one or more other persons.

²² The issues on appeal to the Supreme Court were whether the Court of Appeal erred in finding that pre-nuptial contracts ought to be given decisive weight, where entered into freely by both parties, in an assessment under section 25 of the Matrimonial Causes Act 1973; whether the Court of Appeal decision amounted to impermissible judicial legislation, in contravention of the decision of the Privy Council in *MacLeod v MacLeod (Isle of Man)* [2008] UKPC 64.

²³ The UK Law Commission published a consultation paper on this topic on 11th January 2011.

²⁴ Daily Mail, 21 October 2010

130. The matters which a financial agreement can address are how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties at the time when the agreement is made, or at a later time and before divorce, is to be dealt with; the maintenance of either of the spouse parties during the marriage, after divorce or both during the marriage and after divorce.

131. A financial agreement may also contain matters incidental or ancillary to those mentioned above and other matters. A financial agreement may terminate a previous financial agreement (however made) if all of the parties to the previous agreement are parties to the new agreement.

132. Pre-nuptial agreements are also recognised by family law legislation in Canada. The Family Law Act of Ontario provides for marriage contracts under section 52. It is provided that two persons who are married to each other or intend to marry may enter into an agreement in which they agree on their respective rights and obligations under the marriage or on separation, on the annulment or dissolution of the marriage or on death, including ownership in or division of property; support obligations; the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and any other matter in the settlement of their affairs. However a provision in a marriage contract purporting to limit a spouse's rights in relation to a matrimonial home is unenforceable.

133. In British Columbia, section 61 of the Family Relations Act defines a marriage agreement as an agreement entered into by a man and a woman before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for management of family assets or other property during marriage, or ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage. A marriage agreement, or an amendment or rescission of a marriage agreement, must be in writing, signed by both spouses, and witnessed by one or more other persons. In accordance with the Act, a marriage agreement or other written agreement between spouses entered into on or after June 4, 1986 may provide that, despite the Canada Pension Plan, there be no division of unadjusted pensionable earnings under that Act.

134. The courts in Canada have given strong recognition to pre-nuptial agreements and have emphasised independent legal advice, adequate disclosure and clarity of intent of the parties.²⁵ This recognition is shown for example in the BC case *Hartsborne v Hartsborne*²⁶. In that case the parties who had one child together married in 1989, a second marriage for both, and a second child was born later that year. Nine years later, they separated. From the time of the birth of their first child, the respondent wife withdrew from the practice of law to remain at home to raise the children. The appellant husband, also a lawyer, had made it clear to the respondent prior to the marriage that he

²⁵ ante

²⁶ (2004) 1 S.C.R. 550

would never again allow a division of his property. He had brought assets worth approximately \$1.6 million into the marriage, including his law practice, while the respondent entered the relationship with no assets and heavily in debt. On the day of the wedding, the appellant insisted that the respondent sign a marriage agreement that rendered the parties separate as to property, but with a provision that the respondent would be entitled to a 3 percent interest in the matrimonial home for each year that the parties were married up to a maximum of 49 percent. The parties obtained independent legal advice and the respondent was advised that the agreement was grossly unfair. She nevertheless signed the agreement with a few amendments, including a clause confirming her right to spousal support. Pursuant to the agreement, the respondent was entitled to property valued at \$280,000 on separation, while the appellant was entitled to property worth \$1.2 million.

135. In divorce proceedings, the trial judge concluded that the agreement was unfair and ordered a reapportionment on a 60/40 basis in favour of the appellant of most of the family assets including the appellant's law practice. Each party was held to be entitled to a half interest in the matrimonial home and contents. In addition, the appellant was ordered to pay spousal support. This judgment was upheld by the Court of Appeal but the Supreme Court of Canada allowed the appeal against the decision of the court below. The Supreme Court held as follows-

“The primary policy objective guiding the court's role in division of assets on marital breakdown in British Columbia is fairness. The FRA explicitly recognises marriage agreements as a mechanism to govern a division of property upon the dissolution of marriage. To be enforceable, however, any such agreement must operate fairly at the time of distribution. If it does not, judicial reapportionment of property will be available to achieve fairness. Although the statutory scheme in British Columbia sets a lower threshold for judicial intervention than the schemes in the other provinces, courts should respect private arrangements that spouses make for the division of their property on the breakdown of their relationship particularly where the agreement in question was negotiated with independent legal advice. Individuals may choose to structure their affairs in a number of different ways and courts should be reluctant to second-guess the arrangement on which they reasonably expected to rely.

Marital cases must reconcile respect for the parties' intent, on the one hand, and the assurance of an equitable result, on the other. There is no “hard and fast” rule regarding the deference to be afforded to marriage agreements as compared to separation agreements. The court must determine whether the marriage agreement is substantively fair when the application for reapportionment is made.”

136. In Jamaica since 2003 pre-nuptial agreements have been regulated by the Family Property (Rights of Spouses) Act, 2003. Section 10 of that Act provides, *inter alia*, that spouses or two persons in contemplation of their marriage to each other or of cohabiting may, for the purpose of contracting out of the provisions of the Act, make such

agreement with respect to the ownership and division of their property (including future property) as they think fit. An agreement may-

- (a) define the share of the property or any part thereof to which each spouse shall be entitled upon separation, dissolution of marriage or termination of cohabitation; or
- (b) provide for the calculation of such share and the method by which property or part thereof may be divided.

137. The Act requires that each party to an agreement shall obtain independent legal advice before signing the agreement and the legal advisor shall certify that the implications of the agreement have been explained to the person obtaining the advice. Such an agreement is unenforceable in any case where for example the Court is satisfied that it would be unjust to give effect to the agreement. The Court has jurisdiction to enquire into any agreement and may, in any proceedings under the Act or on an application made for the purpose, declare that the agreement shall have effect in whole or in part or for any particular purpose if it is satisfied that noncompliance with the Act has not materially prejudiced the interests of a party to the agreement.

138. In deciding whether it would be unjust to give effect to an agreement, the Court has regard to-

- (a) the provisions of the agreement;
- (b) the time that has elapsed since the agreement was made;
- (c) whether, in light of the circumstances existing at the time the agreement was made, the agreement is unfair or unreasonable;
- (d) whether any changes in circumstances since the agreement was made (whether or not such changes were contemplated by the parties) render the agreement unfair or unreasonable; and
- (e) any other matter which it considers relevant to any proceedings.

139. Persons who may need a pre-nuptial include²⁷ parties with estate plans or wills; parties entering a second marriage; parties who own significant assets or a business (whole or part) before marriage and parties who earn a significantly higher or lower income than their partners or who forego a career due to the relationship.

140. Journalist, Bel Mooney²⁸, in an article entitled “*One eye on the exit even as you walk up the aisle*” opined that “it is difficult to avoid concluding this is another nail in the coffin of old fashioned love, commitment and trust that were once the bedrocks of marriage. Or to feel anxious that in my lifetime this valuable (yet under-valued) institution will be reduced to a horse-trading deal watched over by predatory lawyers from the first kiss to the last hiss.”

²⁷ Heydary Hamilton; Heydary Samuel attorneys

²⁸ Daily Mail 21 October 2010

141. In Jamaica, notwithstanding the existence of legislative acceptance for the past seven years, many still view pre-nuptial agreements in a negative light. In a discussion of such agreements the Jamaican Observer²⁹ in an article entitled “*Pre-nuptial agreements: unromantic or just practical?*” the following arguments against the agreements were set forth as follows-

- “It shows a lack of trust - asking one partner to sign could mean a spouse does not trust the person and feels he/she is only in it for the money.
- It says you are expecting a break-up - Some feel that once you have separation in mind you will not give the relationship your 100 per cent as you feel you have nothing to lose.
- Persons do not need a contract as the basis of their relationship -It is argued that if you love someone you do not a contract to feel comfortable marrying them, and that if you refuse to marry then it means you have more faith in the contract than you do in your spouse.
- Not real love- Persons argue that real love is something that will last even if the marriage did not work out for some reason. Therefore, should separation take place, sharing assets should not be a problem.
- A tool to hold onto the partner- Many persons will stay in a relationship that is not working because they know if they walk away they will get nothing. One party may feel the urge to mistreat their spouse because they know they will stay no matter what since it would mean getting less than they presently have.”.

142. Does statutory recognition of pre-marital contracts reduce marriage to a horse trading deal? Do such agreements really show that there is distrust in the relationship? Or is this an over reaction to an acceptance of contracts which are now a part of modern life? What is wrong with giving effect to such contracts so long as the safe guards as are articulated by the Supreme Court of Canada above are in place?

143. The Commission is of the view that we should, in reforming the law, statutorily recognise and enforce pre-nuptial agreements with the necessary safeguards. It is argued that any new law which does so will be assisting in the termination of an empty shell of a marriage with “the maximum fairness and the minimum bitterness, distress and humiliation.” Do you agree?

ARTIFICIAL INSEMINATION

144. The Law Reform Commission has been asked to consider as part of this reform provisions relating to a child who is the product of artificial insemination. A child of the marriage who is covered by the MCL is defined as including any child under the age of sixteen years³⁰ who is the child, adopted or otherwise, of either party to such marriage or who has been brought up in the matrimonial home of the parties to such marriage as a member of their family.

²⁹ Article by Donna Hussey- Whyte, February 11, 2011

³⁰ See above re need to change age limit

145. It is submitted that that definition of a child of the marriage is sufficiently wide to cover any child including a child conceived by way of artificial insemination. The New South Wales Commission in 1986³¹ noted that this was the position also taken in Australia by Mr. Justice Asche of the Family Court of Australia in 1980 and 1983.² Mr. Justice Asche expressed the opinion that no legal complications arise out of artificial insemination because the resulting child is in all respects the child of the parties to a marriage.³ He noted however that “it is the use of donated semen that leads to complexity under the common law, for example in relation to the legal obligation to maintain a child, the rights of the child to be maintained, the inheritance of property by the child and from the child, the inclusion or exclusion of the child from the gifts in a will in favour of a testator’s “children”, and the stigma of illegitimacy in those jurisdictions that have retained the notion of illegitimacy.

146. In his May 1983 paper delivered at a conference at Monash University, Mr. Justice Asche suggested that the “existing” law in Australia at the time had no ready answer to the following questions-

- When donated sperm is used who is the resulting child’s father?
- When a man who has stored his sperm leaves a gift by will to his “children”, what is the entitlement of a child born some years after his death?
- How should the rights and obligations of parenthood be applied in such cases?
- How can paternity be proved?
- If a medical practitioner is involved, what is the extent of his duty of confidentiality and to whom is it owed?
- What are the respective rights and liabilities of donor, recipient and medical practitioner in a case where there is a defect in the reproductive tissue that leads to the appearance of disease or defect in a resulting child?
- What information should be placed on the birth register and what consequences flow from a registration containing false information?

147. In response the Australian Family Law Act now provides in section 60H that if a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the other intended parent) and either-

- (a) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or
- (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;

then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act, the child is the child of the woman and of

³¹ Report 49 (1986) - Artificial Conception: Human Artificial Insemination

the other intended parent; and if a person other than the woman and the other intended parent provided genetic material-the child is not the child of that person.

148. Further, if a child is born to a woman as a result of the carrying out of an artificial conception procedure and under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman then, whether or not the child is biologically a child of the woman, the child is her child for the purposes of the Act.

149. If a child is born to a woman as a result of the carrying out of an artificial conception procedure and under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man then, whether or not the child is biologically a child of the man, the child is his child for the purposes of the Act.

150. There are detailed legislative provisions in the UK defining who is a mother and father of a child in the cases of artificial insemination. In the case of children carried by women as the result of their artificial insemination before 1st November 1990, section 27 of the Family Law Reform Act of 1987 provides that where a child is born in England and Wales as the result of the artificial insemination of a woman who-

- (a) was at the time of the insemination a party to a marriage (being a marriage which had not at that time been dissolved or annulled); and
- (b) was artificially inseminated with the semen of some person other than the other party to that marriage,

then, unless it is proved to the satisfaction of any court by which the matter has to be determined that the other party to that marriage did not consent to the insemination, the child shall be treated in law as the child of the parties to that marriage and shall not be treated as the child of any person other than the parties to that marriage.

151. Sections 27 to 29 of the UK Human Fertilisation and Embryology Act 1990 are the provisions which regulate these matters since 1st November 1990.

152. Should the Cayman Islands legislate for the matters highlighted in this Part? Are the above matters of concern for families in the Cayman Islands?

DOMICILE AND JURISDICTION OF THE COURT IN MATRIMONIAL PROCEEDINGS

153. The issue of domicile has arisen in a number of cases in the Cayman Islands.

154. Section 2 of the MCL provides that “domicile” has the meaning ascribed to it, from time to time, in English Law. In the UK domicile is governed both by the common law and by the Domestic and Matrimonial Proceedings Act of 1973.

155. Section 5 of the MCL provides that the Grand Court has jurisdiction to entertain a suit where at the time of filing suit either party to the suit is domiciled in the Islands or, where the party filing suit is a female, she has been ordinarily resident in the Islands for at least two years immediately preceding the presentation of the petition. Thus a woman

need only prove ordinary residence while the male who wishes to file suit must prove domicile.

156. Under English law a person has a domicile of origin or a domicile of choice and the determination of domicile is a qualitative matter relating to the person whose domicile must be determined. A court will take into account various matters relating (but not exclusively) to residence, age and character of the person. For example, the Grand Court in *H v H*³² held that-

“the domicile of a person was, in general, the place where he had made his permanent home. A person could have only one domicile at a time, and whilst his domicile of origin was that received at birth, he could acquire a domicile of choice by actual residence in another country coupled with a genuine intention to reside there permanently. This was a question of fact, to be proved by strong evidence in each case, sufficient to satisfy the conscience of the court. Whilst no single factor was conclusive, the court would consider such evidence as declarations of intent, including those in documents or emails; that only occasional, short visits were made to the country of origin; the application for work permits over a continuous period; an application for key employee status; the purchase of a house or grave in the domicile of choice; and residence there for a continuous period of five years. Furthermore, that a person had entered the country illegally did not prevent his being domiciled there, nor did he lose that status if his residence became unlawful at a later date, although illegality might be evidence that he could not reasonably intend to stay indefinitely.”

157. The law of domicile has been criticised on the ground that the rules that determine domicile are artificial and create unhelpful legal distinctions. In the UK under section 5 of the Domicile and Matrimonial Causes Act 1973 the courts have jurisdiction to entertain proceedings for divorce or judicial separation if the court has jurisdiction under the Council Regulation.

158. The Council Regulation means Council Regulation (EC) No. 1347/2000 of 29th May 2000. Article 2 of that regulation provides that in matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the state in whose territory the spouses are habitually resident or the spouses were last habitually resident in so far as one of them still resides there or the respondent is habitually resident or, in the event of a joint application, either of the spouses is habitually resident.

159. The Article also provides that an applicant is habitually resident if he or she resided the relevant state for at least a year immediately before the application was made. An applicant may also be considered to be habitually resident if he or she resided there for at least six months immediately before the application was made and either is a national of the member state in question or, in the case of the United Kingdom and Ireland, has his domicile there.

³² 2007 CILR 135

160. The concept of habitual residence has also been criticised and one of the grounds is that as a legal concept it is undeveloped and a person can have more than one habitual residence. According to the Scottish Law Commission³³ “there is no broad agreement as to the degree of importance which is to be given to intention in determining whether residence is habitual nor is it clear how long residence must persist to become habitual.”.

161. Under the Divorce Act of Canada section 3 provides that a court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding. Section 2 of the Matrimonial Proceedings Act of Bermuda provides that the court shall have jurisdiction to entertain proceedings for divorce or judicial separation if either of the parties to the marriage is domiciled in Bermuda on the date when the proceedings are begun or was ordinarily resident in Bermuda throughout the period of one year ending with that date. In Barbados proceedings may be brought if either party at the date of filing is a citizen of Barbados, is domiciled there or is a permanent resident or immigrant of the Island. Similarly in Jamaica jurisdiction arises with nationality, citizenship or ordinary residence for a period of 12 months.

162. It is clear that the law regarding jurisdiction must be changed in light of the fact that there is a different criteria for male and female parties. The issue is what change should be made. Would ordinary residence for a period of one year be sufficient or should we base jurisdiction on the approach taken by countries such as the UK, a combination of nationality, domicile and residence?

SUMMARY OF ISSUES FOR CONSIDERATION

163. The Commission welcomes views on the following-

- A. Should the MCL be reformed to provide for one ground for divorce i.e. irretrievable breakdown or should the Cayman Islands continue to require parties to prove fault or separation?
- B. Would a single no-fault ground be more effective in reducing acrimonious divorces?
- C. If the grounds of separation should be retained, should they be shorter? If the periods should be shorter, what should they be?
- D. Could the divorce rates be reduced in the Cayman Islands if parties are legally required to undergo counselling or mediation? Should parties who may be at the end of their tether in their relationship be forced to go through such a process? Should such services be funded by the government?

³³ Law Com. No. 168- Private International Law: the Law of Domicile

- E. Does the Law sufficiently protect the interests of children in matrimonial proceedings?
- F. Should the Law recognise and regulate common law unions between men and women?
- G. Should the MCL be reformed in similar terms to the UK or Hong Kong to permit the grant of summary divorces where there are no children and the hearing of some financial arrangements after a divorce has been granted?
- H. Should the law be reformed to give the Grand Court power to grant ancillary relief to resident persons under decrees made in other jurisdictions?
- I. Should the Law be reformed to contain provisions similar to sections 25, 25A, 28 and 37 of the UK MC Act of 1973 as highlighted at paragraphs 85 to 106?
- J. If the ground of adultery is retained, should the right to claim damages for adultery be abolished? If the ground is retained should there be a time restriction on the commencement of a petition on the ground of adultery? Should the joinder of a co-respondent be continued?
- K. Should the Law be reformed to provide statutory recognition of pre-nuptial agreements?
- L. Should the Law be reformed to provide for children of the marriage who are the result of artificial insemination? Is this an issue for the Cayman Islands?
- M. Should the Law be reformed to widen the jurisdiction of the court to deal with petitions for divorce based on the domicile, nationality or residence of either of the parties?
- N. Are there any other areas of reform which should be considered? If so, what are they?

The Commission welcomes views on the matters discussed above and invites suggestions for other areas of reform of the MCL. Comments should be submitted in writing to the Director of the Law Reform Commission, 3rd Floor Anderson Square c/o Government Administration Building or sent by e-mail to Cheryl.Neblett@gov.ky.

Law Reform Commission
Friday, February 18, 2011