

# Is the end of London being the divorce capital of the World in sight?

12 SEPTEMBER 2012

Suzanne Todd

PARTNER | UK

CATEGORY:

[BLOG](#)

The Supplementary Consultation Paper published on 11 September 2012 by the Law Commission looks at the concept of 'needs' and the meaning of 'matrimonial property' in the context of divorce law in England and Wales. The original remit of the Law Commission project, which began in 2009, was to research and consult on marital property agreements. A consultation paper was published in January 2011. However, in February this year, the government decided to extend the Law Commission's remit to include a consideration of the concept of 'needs' and the meaning of the term 'matrimonial property'. The paper published yesterday contains 130 pages on those two topics alone. It is a comprehensive consideration of the issues and genuinely thought provoking but whether it will succeed in narrowing the issues is questionable. The questions the paper raises reveal a level of complexity in family law in England and Wales that will undoubtedly need to be given further consideration.

**Needs** The Law Commission's paper is clear that the current law on 'needs' is ripe for reform. It concludes that the current law 'lacks principle', it is 'inaccessible, creates uncertainty and gives rise to dissatisfaction with the level of awards'. Although the report acknowledges that family lawyers may understand what is meant by the concept, as legal funding is cut and individuals represent themselves more and more, further clarity is required to provide guidance so that everyone can begin to understand what their entitlement and responsibility following divorce might be. At the moment no legal definition of 'needs' exists and the Law Commission suggests a framework is required. Perhaps the most striking point raised in this report is the suggestion that (depending on what 'needs' are) 'needs' may not be sufficient justification to give rise to a meal ticket for life ie: lifelong spousal maintenance. Perhaps the 'needs' generated at the end of a relationship do not stretch that far? But where do they end and how should they be calculated? This remains to be seen. The Law Commission doesn't reach any conclusions at this stage but instead raises a raft of suggestions on how needs might be calculated: (1) a compensatory basis — so needs are only met if they are generated by the relationship (2) unravelling the 'merger' over time — so there would be income sharing proportionate to the length of time of the marriage (3) a formulaic approach — two options are put forward for consideration, one American and one Canadian, which both seek to recognise and compensate for the loss of interdependence brought about by marriage (4) a focus on encouraging independence. It is the formulaic approach which has hit the broadsheets. However 'needs' are calculated it is clear that the reasoning behind awarding joint lives spousal maintenance has now come into serious question.

**Non-Matrimonial Property** The second strand of the consultation paper focuses on the definition of 'non-matrimonial property', a concept first introduced in the cases of Miller and McFarlane in 2006. Once needs had been met, a distinction was drawn between matrimonial property (being property and assets acquired during the marriage through common endeavour) and non-matrimonial property (such as those brought into the marriage or acquired by inheritance or gift). Since then recognition of 'non-matrimonial property' has developed through case law alone and the Courts have approached the issues in a variety of ways. The Law Commission paper asks for clarity, which is welcomed. Should the treatment of non-matrimonial property continue to be discretionary or are rules required to govern how such property is to be treated? Of course, the questions raised aren't that straightforward. Can a spouse keep their business property separate? Should post — separation bonuses be included? What about the family home, is that always matrimonial property even if it has been inherited? The issues raised in this consultation paper are wide ranging and in some ways the complexity of this paper supports the discretionary approach that is currently in place. Clarity is no doubt needed but it's a big task. Watch this space.

# Authors

Suzanne Todd

PARTNER | LONDON

Divorce and family

 +44 20 7597 6164

 [suzanne.todd@withersworldwide.com](mailto:suzanne.todd@withersworldwide.com)