



Marriage
Foundation

Reforming Family Law:

Why Marriage Foundation has been campaigning for full scale Family law reform since launch

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The laws and statutes which govern the formation and termination of stable, long term relationships and the consequences on their termination are no longer fit for purpose. This briefing sets out the background to some of the issues that are currently being raised and how our concern to champion marriage can be furthered by the reform of family law. Drawing on Sir Paul Coleridge's experience of how family law works (or doesn't work) in practice, gained over more than 40 years as a High Court Judge in the Family Court and as a family law specialist barrister, Marriage Foundation has always argued that reform is needed and should be subject to full public and parliamentary debate.

Key areas of family law such as the Matrimonial Causes Act are now nearly fifty years old and society has changed out of all recognition since it was enacted in the 1970s, with the exception of divorce rates which, [our research](#) shows, are now the same as 1975. Divorce rates peaked between the mid 1980s and mid 90s but couples now have a 38% lifetime risk of divorce. The big changes are fewer marriages, more cohabitation and greater instability. The UK now has the [highest rate of family instability](#) in the developed world, in particular among cohabiting couples with children under twelve. Nevertheless [married parents](#) still comprise 79.0% of all couples with dependent children in the UK.

A steady stream of cases has come before the courts raising concerns about such issues as the grounds for divorce, rights and remedies after divorce, recognition of pre-nups, heterosexual civil partnerships, and rights for cohabiting couples. The best evidence that it is time for the legislature to wake up and engage is whenever the Supreme Court or its predecessor, the House of Lords, finds itself frequently engaged in trying to update the law by filling gaps in legislation caused by the changing times in which we live.

There is a wealth of research and legal opinion on how family law should be reformed and it is essential that any reforms work well in practice and achieve their intended goals. Marriage Foundation believes that reform is overdue and that it should be subject to full public and parliamentary debate rather than continuing to be creeping judge-initiated reform. In supporting the case for reform our objectives are to:

- Promote [intentional commitment](#) which research unequivocally shows is the key to stability.

- Encourage people to work at relationships – both at the outset and in times of difficulty. Our research shows that unhappy [couples who stay together are as likely to be happy](#) ten years later as those who separate, and that most separation (both married and cohabiting) involves [low conflict relationships](#) where they are neither quarrelling a lot nor unhappy in the year before.
- Tackle the [marriage gap](#). Among mothers with children under five, 87% of the highest earners are married compared to 24% of the lowest earners. The latter are far more likely to experience the breakdown of their relationships. Family law reform should therefore not be solely concerned with those with assets to protect but should address the barriers to marriage faced by all sections of society. Among mothers with children under five, the proportion of [middle earners who are married has fallen faster](#) than any other income group. 84% of middle earning families with young children were still marrying in 1994 but only 59% were married in 2012, a fall of 25% over 18 years.
- But above all our concern is to address the levels and impact of the breakdown of relationships. The breakdown of relationships, whether married or not, and particularly those involving children, has devastating consequences for both adults and children which can last for decades. Whilst seeking to reduce the levels of breakdown it is also right to ameliorate in so far as it is possible the impact of the separation process. Here the way the legal process operates is often far from helpful.

No fault divorce

Recent debate has focused on the role of fault as well as new processes such as extending the ability to apply for divorces online. The Nuffield Foundation's [Finding Fault?](#) report provides an excellent summary of why the current approach to fault is not working. In reality, there is already divorce by consent or 'on demand', but masked by an often painful and sometimes destructive legal ritual. There is also no evidence from this study that the current law does protect marriage. Reform of the divorce law is long overdue. The 1996 reform, passed by Parliament but never implemented, is the best evidence that this was recognised over two decades ago. There is no reason at all why the 1996 legislation should not be the starting template for reform. It was very carefully considered and supported by the then Lord Chancellor (Lord Mackay of Clashfern) a very highly respected judge not noted for his anti-marriage or especially liberal views. It is miles better than what we currently have. In particular it encouraged careful thought and decision-making/planning before taking the life changing step of proceeding through to divorce.

Rights and remedies post divorce

The current legislative framework is the Matrimonial Causes Act 1973 which was informed by a Royal Commission in the 1950's. Traditionally a wife (and it was normally a wife) could expect, after marriage, support for the rest of her life unless she had independent means of support. Underlying this tricky issue is society's view of the role of women (and increasingly men too) and the extent to which each should be entitled to depend on the other financially post divorce. This in turn raises the question about the extent to which marriage should carry with it life-long obligations and how those

obligations vary as circumstances change. In other does the age old notion of the “meal ticket for life” still apply?

As the statute law has not kept pace the Courts have over and over, tried to fill the gap. This has led to a patchwork of very erudite and but complicated decisions which have tried to reflect the perceived change in society’s views in this area. But they are based on the anecdotal, professional or personal experience of the judge/tribunal making the decision not research or parliamentary consideration.

The other mischief is that extensive anecdotal evidence would illustrate that the attitude of the courts depends on a post code lottery and, around the country, the extent to which life-long obligations are imposed varies hugely. In short you are much more likely to get life time support in the South than the North of England. This simply cannot be right or fair.

It is precisely this lack of clarity and certainty which has led to the high profile cases in the Supreme Court where women have come back for more, years after separation and divorce, relying on the principal that once married you have certain inalienable rights which endure for ever if you don’t remarry. Is this right in 2017? What should the underlying principles now be? They should not all be designed by the views of judges however erudite.

Fundamental to this is how the law should interact with the ideal of marriage as an indissoluble bond and the reality of lived relationships. In what ways does the law influence behaviour, or serve a communicative function? Or is family law best understood as managing a reality shaped by other deeper forces? Our concern is to uphold the gold standard in ways that make it attainable for all and to promote the behaviour that research shows makes a difference: making a decision, being committed, developing skills and capability, working though problems (with help where needed), setting and reinforcing social norms, fulfilling responsibilities when things go wrong, and seeking always to maintain the safe, secure and nurturing relationships on which children depend.

Pre-nups: thinking about the future.

There are people who wish to make agreements about would happen in the event of separation before marrying – hence the term pre-nup. This may be because there are significant disparities in wealth, or ownership of family businesses, or obligations to children from previous relationships to protect. The law in this area is currently “Judge made” (Radmacher) and is very difficult for the lay person to comprehend. It was the culmination of many cases over the last thirty years and a simple set of principles and rules in a new statute is now needed.

Lord Wilson of Culworth in a speech given to the University of Bristol Law Society in March this year reviewing the whole state of financial remedies post-divorce said this on the subject of pre-nups:

“If you decide to get married, to what extent should you be allowed to opt out of its normal legal consequences? Marriage is a public status, conferred by the state; it is still surrounded by various pre-conditions; and it is attended by various economic benefits.....One view is that in those circumstances parties should not be able to opt for marriage-lite, in which the law’s verdict about the extent of their obligations on divorce in the light of all the circumstances which have arisen is overridden by what they chose to agree many years earlier. I wonder however whether by modern

standards that is too patronising. Does it make our law inappropriately intrusive into personal adult arrangements? My own view is that we have reached the stage in which, if acting with appropriate care and understanding, parties should be allowed to elect the sort of marriage which they want."

Creeping recognition of pre-nups in case law shouldn't preclude proper parliamentary consideration of the issues. And these are not necessarily straightforward. Encouraging people to anticipate breakdown, or to make commitment more provisional with easier get out clauses, may not be beneficial. People may unadvisedly relinquish rights or fail to anticipate future circumstances. It is therefore essential that proposals for reform are carefully considered and based on the best available evidence. But not acting may mean that people shy away from any commitment at all and have no ready mechanisms to address legitimate concerns.

We believe that couples should be encouraged to make careful decisions about their future together before they cohabit. We also suggest there is a strong case for giving couples choices and not necessarily just having the state designed model. Pre-nups should enable couples to have the marriage they want. They require crucial decision making at the appropriate time - before and leading up to the marriage. They lead to informed decision making and responsible choices...and this leads to solid commitment. **So let each and every couple be encouraged to think about, and then decide, what fits for them.**

Heterosexual civil partnerships

Marriage Foundation will always seek to challenge the false perceptions of marriage that create unwarranted barriers. Marriage need not be religious. It means different things to different people and the cultural norms and practices of marriage have changed drastically. It does not, of itself, presume roles or relationships. You can already make of marriage what you will. So there is a case for saying heterosexual civil partnerships are simply unnecessary. But there is also a case for allowing people to make the forms of legally recognised commitment they want.

If there is demand there should be legislation to accommodate this sector of the population. Why? Again it comes back to commitment and decision making. Civil Partnerships contain almost all of the good ingredients of marriage; decision making and commitment. As with pre-nups, they would recognise the right of couples to have a committed relationship which meets their own bespoke needs and requirements and its termination would trigger financial consequences. We should not get too hung up on terminology. It is the processes of relationship formation and the work and skills to sustain them which matter. Civil partnerships are thus infinitely preferable to unthinking and risky cohabitation.

But it is better to do so on principle rather than, as the current campaign does, take a human rights approach to adopt the current same sex legislation which is a copy-cat of out of date marriage and divorce laws. Instead there should be a new and simple civil registration process and a simple termination process without the need to have special ground to end it. And then a range of enforceable rights similar to divorce. The courts would be more than equipped to deal with such hybrid legal arrangements.

Cohabitants rights

This is another very important area and a hot topic for a very long time. The underlying issue for Parliament is whether the state should impose obligations on two individuals who have not formalised their relationship within a legal “wrapper” of some kind. Should the state intervene to protect, for example, women who have had children when they do not have any of the legal and financial protections inherent in marriage and divorce? There are very strong views on both sides of the argument.

Only Parliament can properly decide. But whichever side of the argument you are on, it is an area of central importance to our domestic law arrangements because unmarried cohabitation now embraces three million people and their children.

Once again the courts have tried to fill the gap by extending the concept of child support within the child maintenance rights found in the Children Act 1989 schedule 1. They have also employed the age old concept of the constructive trust to give individuals, in appropriate cases, a share in a house used for the cohabitation. But again this is a very complex and somewhat dishonest legal route, of benefit only to lawyers. And outcomes are very unpredictable and dependant on local judicial interpretation.

We need a principled debate and a decision as to whether rights are imposed or, alternatively whether couples should make their own decision about what suits them and then “opt in” to the one that is most suitable: marriage, with or without a prenup; simple civil partnership, with or without a “pre-nup”; or nothing at all.

Extending the range of possibilities could lead to couples thinking and making informed decisions about their future and what suited them. This would have a highly beneficial effect on levels of commitment and, we believe, lead to a reduction in the levels of family breakdown. But it is essential that the legal recognition of cohabitant rights goes not incentivise unintentional “sliding” into relationships. The myth the marriage is “just a piece of paper” and that there is such a thing as “common-law marriage” has been perniciously dangerous, giving people false security, and reducing the felt need to establish clear mutual commitment.

Family law reform – promoting commitment and intentionality

The concept of commitment is key explanatory factor in understanding different levels of relationship stability. More specifically, it is the lack of a proper decision making process before the question of children arises which injects instability into the arrangement at a time of maximum stress and when it is most required. On the other hand, couples who make a joint decision to commit to one another for the rest of their lives (in a marriage or similar arrangement) alters the psychology of their relationship. They become a publicly acknowledged unit. These decisions and acts (an engagement, marriage/the wedding) lead to a different level of commitment and directly explain the difference in outcomes.

It follows therefore that a modern reform of family law structures and processes needs to encourage careful decision making and commitment by whatever route and discourage, except after the most careful consideration, separation and divorce. Out of date legal processes and policies which create

an impression that it is expensive to get into and out of marriage and there is no reasonable and sensible way out if things fail, do not encourage sensible and responsible decision making. Conversely if couples can be pointed towards making careful decisions about their long term future before embarking on the stressful business of being a parent this must surely lead to greater stability and so be good for them, their children and so ultimately, us all. Similarly if couples can be helped to appreciate that to mend rather than end their relationships benefits everyone especially their children we would begin to make real progress.

This whole area of law is desperately in need of root and branch review and reform by a non-partisan body or commission to reflect what we as a society want as possible legal arrangements to back the multiplicity of couple relationships. The refusal of Government and MPs to put in place an alternative to the 1996 Act now 21 years on is both pusillanimous and a total abnegation of duty.