

CONSORTIUM ASSER - UCL
Association momentanée

R.C. Schimmelpennincklaan, 20-22
2517 JN DEN HAAG
Nederland

Collège Thomas More
Place Montesquieu, 2, box 5
B - 1348 LOUVAIN-LA NEUVE
Belgique

COMMISSION EUROPÉENNE
General Direction Justice and Home Affairs
Unit A3 Judicial Cooperation in civil matters
JAI/A3/2001/03

**STUDY ON MATRIMONIAL PROPERTY REGIMES
AND THE PROPERTY OF UNMARRIED COUPLES
IN PRIVATE INTERNATIONAL LAW AND INTERNAL LAW**

**NATIONAL REPORT
UNITED KINGDOM
ENGLAND**

Chris CLARKSON
University of Leicester

Jonathan HILL
University of Bristol

Mark THOMPSON
University of Leicester

TMC Asser Instituut
Tel 00 31 (0)70 34 20 300
Fax 00 31 (0)70 34 20 359
consultancy@asser.nl

Département de droit international UCL
Tél. 00 32 (0)10 47 47 73
Fax 00 32 (0)10 47 86 14
verwilghen@int.ucl.ac.be

TABLE OF CONTENTS

Table of Contents	2
Introduction	4
Chapter 1	5
Matrimonial Property. Internal Law	5
1.1 General Issues	5
1.1.1 Sources.....	5
1.1.2 Historic development	5
1.1.3 Matrimonial property regime.....	5
1.1.4 Secondary regimes.....	6
1.2 Types of Regimes	6
1.2.1 Comments as to the 'matrimonial property regime'	6
1.2.2 Matrimonial property regime provided by law (statutory regimes)	10
1.2.3 Marital settlements (contractual regimes)	10
1.3 Change of Matrimonial Property Regimes	11
1.4 Publication of the Regime	11
1.5 Administration of Estates.....	12
1.5.1 Under the regime provided by law (statutory regime)	12
1.5.2 Under marital settlements (contractual regimes).....	12
1.5.3 Contracts between spouses during marriage	12
1.6 Dissolution, Liquidation and Division of the Matrimonial Property Regime	12
1.6.1 Following dissolution of the marital bond (divorce...)	12
1.6.2 Following the death of one of the spouses	14
1.7 Other Remarks	15
Chapter 2.....	16
Matrimonial Property. Private International Law	16
2.1 General Remarks	16
2.1.1 Sources.....	16
2.1.2 Historic development	16
2.1.3 General notions of private international law	16
2.1.4 General problems of private international law	17
2.2 International Jurisdiction over Matrimonial Property Issues	18
2.2.1 The general rules on international jurisdiction as applied to matrimonial property regimes	18
2.2.2 Rules on international jurisdiction particular to matrimonial property law issues	19
2.3 Law Applicable to the Matrimonial Property Regime.....	21
2.3.1 Determination of the law applicable to the matrimonial property regime.....	21
2.3.2 Scope of the law applicable to the matrimonial property regime.....	26
2.3.3 Law applicable in case of changes in the matrimonial property regime.....	28
2.3.4 Law applicable to the publication of the matrimonial property regime	29
2.4 Recognition and Enforcement of foreign Court Decisions and 'Public' acts in respect of Matrimonial Property Regimes	29
2.4.1 The general rules on the effectiveness of foreign 'public' acts and court decisions as applied in the area of matrimonial property regimes	29
2.4.2 Rules on the effectiveness of foreign 'public' and private acts and court decisions specific to the area of matrimonial property regimes	31
2.4.3 Practical significance of the rules set out under 2.4.1-2.4.2.....	32
2.5 Other Remarks	32
Chapter 3.....	33
Unmarried Couples. Internal law	33
3.1 Sources of the Law on Unmarried Couples	33
3.1.1 (& 2) Description of the general legislative sources	33
3.1.3 Description of any reforms of the law carried out in your country	33
3.2 Historic Development of the Law on Unmarried Couples	33
3.3 The Legal Character of Relations other than Traditional Marriage	33
3.3.1 The concept of 'legal' marriage	33
3.3.2 The marriage of fact	33
3.3.3 Partnership registration	34
3.3.4 Contract to cohabit	34

3.3.5	Any other type of relation accepted by the internal legal system which is other than ‘legal’ marriage	34
3.4	Property in Relations other than Traditional Marriage	34
3.5	Property Issues in case of Separation of Unmarried Couples	35
3.5.1	The separation of the couple	35
3.5.2	The effects of the separation upon the property of the members	35
3.5.3	Effects of the separation with regard to third parties	35
3.6	Property Issues in case a Member of the Unmarried Couple Dies	35
3.6.1	In relation to the surviving member	35
3.6.2	In relation to third parties	36
3.7	Other Remarks	36
Chapter 4		37
Unmarried Couples. Private International Law		37
4.1	General Issues of p.i.l.	37
4.1.1	Public policy. Characterization.	37
4.1.2	Recognition of the relation between an unmarried couple	38
4.1.3	Admissibility of the ‘celebration’ of a same sex ‘marriage’ (or other relation).	38
4.2	International Jurisdiction	38
4.2.1	Separation of unmarried couples. International jurisdiction	38
4.2.2	Property aspects of the separation. International jurisdiction	38
4.2.3	Relation between 4.2.1 and 4.2.2	38
4.3	Applicable Law	38
4.3.1	Determination of the law applicable to the property regime	38
4.3.2	Scope of the applicable law	39
4.3.3	Applicable law and changes of the property regime	40
4.3.4	Law applicable to publication of the property regime of an unmarried couple	40
4.4	Recognition and Enforcement of foreign court Decisions and ‘Public’ acts in respect of Property of Unmarried Couples	40
4.4.1	The general rules on the effectiveness of foreign ‘public’ acts and court decisions as applied in the area of property of unmarried couples	40
4.4.2	Rules on the effectiveness of foreign ‘public’ and private acts and court decisions specific to the area of property of unmarried couples	41
4.4.3	Practical significance of the rules set out under 4.4.1-4.4.2	41
4.5	Various Matters	41
Annexes		42
Statutes and Bills		42
Cases		42
Books		42

INTRODUCTION

The object of this report is to present an outline on the central features of the private international law rules relating to matrimonial property in England and Wales. In the United Kingdom there are several distinct legal systems: England and Wales, (one legal territory, referred to hereafter simply as England), Scotland, Northern Island and the Channel Islands. While the laws of Northern Island and the Channel Islands are basically not dissimilar from English law, the law of Scotland is markedly different. This report only covers the laws of England.

The report follows the general scheme suggested in the directions to National Experts. However, as there are no primary and secondary property regimes in England, some adaptation of the suggested scheme has been necessary.

CHAPTER 1

MATRIMONIAL PROPERTY. INTERNAL LAW

1.1 GENERAL ISSUES

1.1.1 Sources

1.1.1.1 General legislative sources

The main statute is the Matrimonial Causes Act 1973 dealing with the distribution of property on divorce.

1.1.1.2 Principal court decisions

The leading case is now *White v White*.¹

1.1.1.3 Potential law reforms

None

1.1.2 Historic development

1.1.2.1 Stages of the historic development

Until 1882 a married woman could not own land in her own right, the husband being the sole owner of the family property. This incapacity was removed by the Married Woman's Property Act 1882.

1.1.2.2 Actual situation

Since then each spouse owns his/her property separately (subject to below) but on divorce the court has a discretion as to the distribution of such properties (see below at 1.6.1.3).

1.1.3 Matrimonial property regime

Unlike most of Continental Europe, there is no primary and secondary matrimonial property regime. Indeed there is no 'matrimonial property regime' as understood in Continental Europe. There are no proprietary consequences flowing from the fact of marriage at all. Each spouse owns his/her property separately. Income continues to belong to the person who earns it and prima facie property belongs to the person whose money was used for the purchase of the property. Property can be transferred from one spouse to another in the same way as between strangers.

However, while the act of marriage has no effect upon the ownership of property and the rules concerning ownership (legal and equitable) of the family home are the same irrespective of whether the parties are married or not, there are nevertheless numerous statutory provisions dealing with the property relations between married persons (for example maintenance obligations, pension rights etc) which are mandatory for all spouses. Whether these various provisions can in truth be said to amount to a 'matrimonial property regime' is a moot point. Nevertheless, for the purpose of this report these provisions, combined with the rules for discretionary distribution of property on divorce and the rules concerning distribution of property on the death of one of the spouses, will be referred to as the 'matrimonial property regime'. These various provisions will be outlined at 1.2.

¹ [2000] 2 FLR 981.

1.1.4 Secondary regimes

As indicated above, there are no secondary regimes available in England. The only 'regime' is outlined below at 1.2.

1.1.4.1 Existence or not of special rules on matrimonial property regimes

None

1.1.4.2 Notion of 'matrimonial property regime'

None as such but see below at 1.2.

1.1.4.3 Legal 'matrimonial property' regime

None

1.1.4.4 Marriage contracts.

Prenuptial contracts (at least between persons domiciled in England) are, for certain purposes, largely void and unenforceable (see 1.2.3.2). There is, however, mounting pressure for the law to recognize such contracts either as binding contracts or, at least, as an important consideration in the exercise of the court's discretionary powers on divorce. (See further 1.2.3.2)

1.1.4.5 Specific matrimonial property regimes regulated by law that can be chosen by the parties

None

1.1.4.6 Whether the matrimonial property regime can change or not during marriage

For English domiciliaries (at least) the 'property regime' cannot change. Whether a change of domicile can effect such a change is discussed at 2.3.3.1.

1.1.4.7 Particularities of the national system

None

1.2 TYPES OF REGIMES

1.2.1 Comments as to the 'matrimonial property regime'

1.2.1.1 Presentation of the whole of the law regulating the fundamental rights and duties of spouses

About two-thirds of homes in England and Wales are owner-occupied.² There are specific rules relating to property rights in the matrimonial home. These rules are, however, not linked to the fact of marriage but apply to all persons sharing accommodation in property. However, as the matrimonial home is typically the most valuable asset to married persons, these rules will be considered here as part of the 'matrimonial property regime' – even though, and this must be stressed at the outset, they are of little practical importance on divorce (when most proprietary issues between spouses are resolved) because the court has a complete discretion with regard to property matters.

After consideration of the legal position relating to the matrimonial home, the remainder of this section is devoted to the distinctive rules that apply only to married couples.

² ONS, *Living in Britain 1998* (2000, London: Stationary Office).

(i) *The matrimonial home*

Under English law it is necessary to distinguish legal ownership from equitable ownership. The legal owner of land (this includes houses and apartments) is the person who is registered as the owner of the land or, in the case of unregistered land, the person into whose name the property (or lease) was conveyed. Land can be conveyed only by deed.³ It is becoming increasingly common for land to be jointly registered or conveyed to both spouses. In such cases, in the absence of a stipulation to the contrary, the property will normally (but not inevitably) be regarded as jointly owned by the married couple.

However, in those cases where only one spouse is the legal owner, equity may declare that he or she holds the land on trust for the other spouse (either in whole or in part). This other spouse will have an equitable interest in the property.

Such a trust may be express or implied. An express trust must be evidenced in writing⁴ and must specify the respective shares of the spouses.

An implied trust can be created in several ways. First, there may be a resulting trust. Where one spouse contributes to the purchase price of the home put into the other's name, there is a presumption that the contributing spouse is entitled to a share in the home proportionate to the extent of the contribution. This presumption may be rebutted if it can be shown that the contribution was intended as a gift to the other. (There is still an old presumption, known as the presumption of advancement, that a contribution by a husband amounts to a gift to the wife thus depriving him of any beneficial interest. This presumption is now rarely applied because in modern conditions there will usually be evidence of a contrary intention to rebut the presumption.⁵)

Secondly, a constructive trust may be found if both parties intended that ownership be shared and the applicant has suffered a detriment in reliance on that shared intention.⁶ The common intention may be established by evidence of discussions to that effect between the spouses. In *Lloyd's Bank v Rosset*⁷ it was stated that this agreement should be at the time of purchase of the property or 'exceptionally at some later date', but subsequent cases have shown an increasing willingness to find such agreements subsequent to the purchase of the property. In the absence of an express agreement a common intention can be inferred from a direct⁸ contribution to the purchase of the house or mortgage instalment repayments. Detrimental reliance must also be established. Contributions to mortgage instalments will normally suffice to constitute this. In other cases it must be established that the applicant engaged in conduct that he or she 'could not reasonably have been expected to embark unless she was to have an interest in the house'.⁹ This gives the courts considerable discretion particularly in cases where the detrimental reliance claimed is decorating and/or improving property.

In constructive trust cases, once it has been established that a spouse has some beneficial interest, the courts have a further broad discretion to determine the extent of that interest by 'undertak[ing] a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and disadvantages'¹⁰ –

³ Law of Property Act 1925, s 52. Where title is registered a change in legal ownership requires a change in the register.

⁴ Law of Property Act 1925, s 53(1)(b).

⁵ Cretney, *Family Law* (London: Sweet and Maxwell, 2000), p 145.

⁶ *Lloyds Bank v Rosset* [1991] 1 AC 107.

⁷ *Ibid.*

⁸ In *Le Foe v Le Foe* [2001] 2 FLR 970 an indirect contribution to the purchase price was held to suffice to enable a spouse to acquire a beneficial interest in the home. See MP Thompson, 'An Holistic Approach to Home Ownership' [2002] Conv 273.

⁹ *Grant v Edwards* [1986] Ch 638.

¹⁰ *Midland Bank v Cooke* [1995] 2 FLR 915.

although there is an increasing tendency in such cases to find that the parties intended the property to be shared equally.

Also, (but very similar to a constructive trust), there is the doctrine of *proprietary estoppels* which is of particular importance where one spouse moves into a home owned by the other. If the applicant believes that he or she is to be given an interest in the property and acts to his or her detriment in reliance on this belief and the other spouse knows of or encourages this belief, then the applicant may acquire an equitable interest in the property. The court again has a considerable discretion in this regard being guided by the crucial principle of ‘conceivability’¹¹ or fairness. Again, once an interest has been established, the courts have a broad discretion to determine the extent of that interest.

Finally, it is relevant to mention section 37 of the Matrimonial Proceedings and Property Act 1970 which allows a spouse (or fiancé – but not an unmarried cohabitant) to claim an interest in property if he or she has made a substantial contribution to the improvement of the property. The share received will normally reflect the extent to which the improvements have increased the value of the property.¹² This statutory provision is only rarely invoked, as such improvements will normally give rise to a constructive trust or a proprietary estoppels claim.

It should be emphasized that all the above rules are, in cases of divorce, subject to the courts’ overriding discretionary powers to divide or transfer property between the spouses in order to achieve a fair outcome (see 1.6.1.3). Nevertheless, the above rules are of considerable importance to cases affecting claims by third parties, as the creditor of one spouse will generally not be permitted to enforce rights against property beneficially owned by the other spouse. This is particularly important in providing protection against repossession by a mortgage. A spouse with an equitable interest in a house when in actual occupation of it has an overriding interest; in certain cases, as against that spouse, a mortgage is not entitled to possession.¹³ These rules are also of importance in cases of bankruptcy by one spouse, as the other spouse’s property does not vest in the trustee in bankruptcy. Finally, these rules can be important in certain cases where the marriage is terminated by death (see 1.6.2 below).

(ii) *Personal (moveable) property*

The general rule under the English system of separation of property is that income belongs to the person who earns it and inherited property belongs to the inheritee. In the same way personal property belongs to the person whose money was used for the purchase unless there is evidence that it was intended as a gift for the other spouse.

While this is the formal position, much personal property is, in effect, jointly owned. Where the spouses have a joint bank or building society account, they will normally both have a joint interest in the whole fund and will be regarded as joint owners of any property purchased from that fund for their joint use. If an account is in one spouse’s name only, the courts can still examine whether the fund was used by the spouses jointly. Any savings made from a housekeeping allowance provided by the husband belongs to the husband and wife in equal shares.¹⁴ Further, an express trust can be created in transactions involving money or other personal property (without the formal requirements necessary in transactions involving land) if it is shown that there is an intention to create a trust.¹⁵ Equally, resulting or constructive trusts can be created in respect of personal property.

¹¹ *Gillet v Holt* [2000] FCR 705.

¹² *Re Nicholson* [1974] 1 WLR 476.

¹³ *Williams & Glyn’s Bank Ltd v Boland* [1981] AC 487.

¹⁴ Married Woman’s Property Act 1964, s 1.

¹⁵ *Rowe v Rowe* [1999] 2 FLR 787.

Whether gifts from third parties belong to the spouses jointly or not depends on the intentions of the donor.

1.2.1.2 Obligations to contribute to the costs and expenses of the household; property reserved for the household.

There are no general rules obliging a spouse to contribute to the costs and expenses of the household. However, spouses are under an obligation to provide reasonable maintenance to each other and to children of the family. Under section 2 of the Domestic Proceedings and Matrimonial Causes Act 1978 a spouse may apply to a magistrates' court for periodical payments orders and lump sum orders for less than £1000 if the other spouse has failed to provide reasonable maintenance for the applicant or has failed to provide, or make a proper contribution towards, reasonable maintenance for any child of the family. Similar orders without any financial limit may be made by the High Court or County Court under section 27 of the Matrimonial Causes Act 1973.

Where an occupation order in respect of the matrimonial home has been made (see below at 1.2.1.3), an additional order may be made obliging a spouse to repair and maintain the property, make rent payments or mortgage repayments or other outgoings.¹⁶ Further, the order may grant either party the possession or use of furniture and other contents and oblige either party to take reasonable care of these.

On bankruptcy all of the bankrupt's property automatically vests in the trustee in bankruptcy. However, the following are specifically excluded: 'such clothing, bedding, furniture, household equipment and provisions as are necessary for meeting the basic domestic needs of the bankrupt and his family.'¹⁷

1.2.1.3 Legal position of the marital residence, the marital home, housing of the family

The rules concerning property rights (legal and equitable) in the matrimonial home are discussed above at 1.2.1.1. This section addresses the rights of the spouses to occupy the matrimonial home.

A spouse who has an interest (legal or equitable) in the matrimonial home has a right to occupy the home. If a spouse has no such interest he or she may still have a right to occupy the home by virtue of having 'matrimonial home rights' under the Family Law Act 1996. 'Matrimonial home rights' vest only in spouses (not unmarried cohabitants) who do not have any legal interest in the matrimonial home.¹⁸ The property must have been, or been intended by the spouses to be, their matrimonial home.¹⁹ Such a spouse has a right not to be evicted from the property by the other spouse without a court order and a right, if not in occupation, to enter and occupy the home.²⁰ Orders obtained in such cases are termed 'occupation orders'.²¹ While such an order can be applied for in any case where there is a dispute over property, in practice they are most commonly used to exclude a spouse in cases of domestic violence.

1.2.1.4 Professional occupation of one of the spouses

Not relevant

¹⁶ Family Law Act 1996, section 40.

¹⁷ Insolvency Act 1986, s 283(2).

¹⁸ Family Law Act 1996, s 30(1).

¹⁹ Family Law Act 1996, s 30(7).

²⁰ Family law Act 1996, s 30(2).

²¹ Family Law Act 1996, s 33.

1.2.1.5 Opening of bank accounts or safe deposit boxes

These may be opened jointly or separately by the spouses. If joint, either party may operate the account or open the box. If separate, only that spouse may operate the account or open the box. As to the ownership if monies held in accounts, see 1.2.1.1 above.

1.2.1.6 Representation by the spouses, e.g. for domestic purposes

Both spouses have full contractual capacity and for contractual/representational purposes each is a separate person.

1.2.1.7 Protection against acts of one of the spouses which may endanger the family property

It is necessary to distinguish here the matrimonial home from the personal property of the spouses.

(i) *Matrimonial home*

If the spouses are legal owners, the consent of both is required before any transaction affecting the property can be made.

If only one spouse is the legal owner and the other has either a beneficial interest or no interest (legal or equitable), the latter may register a notice (with registered land) or a Class F land charge under the Land Charges Act 1972.²²(with unregistered land) if that spouse has a right of occupation under the Family Law Act 1996.

If there has been no such registration, a spouse who becomes aware that the legal owner is about to dispose of, or otherwise deal with, the property may obtain an injunction to prevent such dealing.

If the property has been dealt with by the legal owner without the knowledge of the beneficial co-owner, any beneficial interest of the latter may be protected against particular types of purchasers.²³

(ii) *Personal property*

With regard to jointly owned personal property, an injunction can be obtained or, if the property has already been sold, proceedings can be brought against the selling spouse for recovery of half the proceeds of the sale.

1.2.2 Matrimonial property regime provided by law (statutory regimes)

Not applicable

1.2.3 Marital settlements (contractual regimes)

1.2.3.1 Description of the contents of well defined matrimonial property regimes

None

1.2.3.2 Marriage contracts:

(i) *Premarital contracts*

Premarital contracts by parties seeking to regulate their proprietary relations during marriage or seeking to determine proprietary consequences in the event of divorce have

²² S 2(7).

²³ *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487.

traditionally been regarded as void on public policy grounds.²⁴ This is certainly the case for parties domiciled in England at the date of the marriage. (The legal position with regard to foreign premarital contracts is discussed at 2.3.1.1)

Equally, such contracts have traditionally been regarded as irrelevant to the exercise of the courts' discretionary powers on divorce under section 25 of the Matrimonial Causes Act 1973 (see 1.6.1.3). There are, however, dicta in *S v S (Divorce: Staying Proceedings)*²⁵ suggesting that in certain circumstances the existence of such a contract could be a relevant consideration for at least some purposes – although it is likely that this would only apply where the parties are domiciled abroad at the time of contracting and marriage. Following *White v White*²⁶ it is theoretically possible, depending on the circumstances, for the terms of such a contract to be taken into account but this would be subject to the overriding yardstick of equality (see 1.6.1.3). Accordingly, a premarital contract providing for complete separation of property would be unlikely to be given weight (unless, possibly, the marriage was of very short duration). More weight would be likely to be attached to a premarital contract providing terms amounting to a form of community of property.

Hearsay evidence from solicitors²⁷ suggests that more persons are entering into premarital agreements and in 1998 the Government published proposals considering the enforcement of premarital agreements in certain circumstances.²⁸ The Solicitors Family Law Association has published guidance on drawing up such agreements²⁹ – even though they will not necessarily be enforced by the courts.

(ii) *Separation agreements*

Section 34(1) of the Matrimonial Causes Act 1973 provides that spouses may enter into a binding separation or maintenance agreement dealing with 'financial arrangements'. Such agreements are only enforceable if the normal requirements of contract law have been satisfied: in particular, the spouses must intend to create legal relations.

Any such contract can, on the application of a spouse, be altered by the courts and any provision attempting to oust the court's jurisdiction is void. Section 35(2) permits a court to alter any such agreement if there has been a change of circumstances or if proper financial arrangements for any child of the family have not been made.

Such contracts, which are normally made when parties are separating and pending court proceedings (normally divorce), have now become rare.³⁰

1.3 CHANGE OF MATRIMONIAL PROPERTY REGIMES

Not applicable (at least for English domiciliaries)

1.4 PUBLICATION OF THE REGIME

Not applicable

²⁴ Because such a contract undermines the concept of marriage as a life-long union (*N v N (Jurisdiction: Pre Nuptial Agreement)* [1999] 2 FLR 745.

²⁵ [1997] 2 FLR 100.

²⁶ [2000] 2 FLR 981.

²⁷ Bruce, 'Premarital Agreements Following *White v White*' [2001] Fam Law 304.

²⁸ Home Office, *Supporting Families* (1998).

²⁹ SFLA, *Precedents for Separation Agreements and Premarital Agreements* (2nd ed, 2001).

³⁰ Cretney, *op cit*, p 117; Lowe and Douglas, *Bromley's Family Law* (9th ed, 1998, London: Butterworths) p 751.

1.5 ADMINISTRATION OF ESTATES

1.5.1 Under the regime provided by law (statutory regime)

1.5.1.1 Management of private, personal, community or separated property

Each spouse has power to manage the property owned by him or her. Spouses must act jointly in respect of jointly owned property.

1.5.2 Under marital settlements (contractual regimes)

Not applicable.

1.5.3 Contracts between spouses during marriage

Contracts between spouses are permitted if, as is the case with all contracts in English law, the parties intend to enter into legal relations (intend the contract to be legally enforceable). If the parties are cohabiting at the time of the agreement, there is a presumption that they do not intend to be legally bound.³¹

1.5.3.1 Sales between spouses: admitted

1.5.3.2 Gifts between spouses: admitted

1.5.3.3 Companies (firms, partnerships) between spouses: admitted

1.5.3.4 Employment contracts between spouses: admitted

1.6 DISSOLUTION, LIQUIDATION AND DIVISION OF THE MATRIMONIAL PROPERTY REGIME

1.6.1 Following dissolution of the marital bond (divorce...)

1.6.1.1 Proof of ownership. Determination of goods which are to be divided.

There is a duty on both husband and wife (and their lawyers) to make a full and frank disclosure of all assets. All income and assets must be set out in an affidavit filed with the court. The court has the power to order disclosure of relevant documents.³²

1.6.1.2 Methods for division (by consent, judicial)

Consent order: Spouses are encouraged to reach agreement as to property and financial disputes. Such an agreement is normally incorporated into a draft court order which must be presented to the court and, if approved, this consent order is decisive. The spouses cannot exclude the jurisdiction of the court.³³ The court must consider the contents of the agreement. It is not a rubber-stamp process but, equally, the court is not obliged to engage in extensive investigation.³⁴ Particularly where the spouses have received independent legal advice, there is a tendency to uphold the agreement. In all other cases it is for the court to conduct an investigation and exercise discretion in the manner indicated below.

³¹ *Balfour v Balfour* [1919] 2 KB 571; *Gould v Gould* [1970] 1 QB 275.

³² See generally Family Proceedings Rules 1999, SI 1999/3491.

³³ Matrimonial Causes Act 1973, s 34(1).

³⁴ *Harris v Manahan* [1997] 1 FLR 205.

1.6.1.3 Discretion over income and assets of divorcing spouses

Under section 25 of the Matrimonial Causes Act 1973 the court has wide discretionary powers over all the property of the husband and wife. Any of the following orders can be made: periodical payments orders (formerly termed ‘maintenance’), lump sums, orders in relation to pensions and property adjustment orders (the transfer, settlement or sale of any of the spouses’ property).

In exercising this discretion, section 25(1) specifies that ‘first consideration’ is to be given to the welfare of any child of the family under the age of 18. Section 25A(1) obliges the court to consider the appropriateness of a ‘clean break’ (an order whereby no continuing support is given to a spouse).

Section 25(2) provides that, in exercising its discretionary powers, the court should have regard to a list of matters (not listed in any hierarchical order³⁵) such as ‘the income, earning capacity, property and other financial resources’ of each spouse, ‘the financial needs, obligations and responsibilities’ of each spouse at the time of divorce and in the future, ‘the standard of living enjoyed by the family before the breakdown of the marriage’, the age of the parties and duration of the marriage, contributions to the welfare of the family etc.³⁶

The leading case governing the exercise of this discretion is the House of Lords’ decision in *White v White*.³⁷ The objective is ‘to achieve a fair outcome’. All the circumstances of the case must be taken into account with no discrimination between the husband and wife in their respective roles (no bias in favour of money-earner and against the homemaker and child-carer). While Lord Nicholls in *White v White* stated that there is no ‘presumption’ of equal division, he nevertheless stressed that in exercising the discretion: ‘a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so.’³⁸ In previous cases emphasis had been placed on the ‘financial needs’ and ‘reasonable requirements’ of the claimant. In *White v White* it was held that this test would allow discrimination to ‘creep in by the back door’. All the factors listed in section 25, including ‘the available pool of resources’ (particularly important in ‘big money cases’), are to be weighed and then checked ‘against the yardstick of equal division’. It is not necessary to engage in a detailed investigation of the proprietary interests of the spouses. In ordinary cases it makes no difference that some property might have been brought into the marriage by one spouse or been inherited, obtained by gift or as a beneficiary under a trust by one spouse. However, in certain cases this could be a factor that could be taken into account with its importance depending on the facts of the particular case.

It should be emphasized that while equality is the yardstick, judicial discretion in relation to any of the section 25 factors enables a court to depart from equality of division and reported cases since *White v White* indicate that wives are seldom being awarded 50 per cent of the value of the assets.³⁹ In *White v White* itself the wife was awarded 40 per cent (based on the illiquidity of the assets and the husband’s father’s contribution to the marriage). In *Cowan v Cowan*⁴⁰ the wife was awarded 38 per cent of the assets, the unequal award being justified by the husband’s exceptional contribution to the family business by way of ‘entrepreneurial flair, inventiveness and hard work’.

It should also be pointed out that the *White* principles are difficult to apply in the more common ‘small money cases’. Where there are insufficient assets to satisfy the needs of both

³⁵ *White v White*[2000] 2 FLR 981.

³⁶ See Appendix for the full list set out in s 25.

³⁷ [2000] 2 FLR 981.

³⁸ At p 989.

³⁹ Da Costa, ‘The Continuing Impact of *White*’ [2001] Fam Law 742.

⁴⁰ [2001] 2 FLR 192.

spouses on divorce, it is more common for judges to use the section 25 criteria to justify a departure from the yardstick of equality and for awards to be based more on the needs of the parties.⁴¹ It should also be borne in mind that in more than 50 per cent of all divorces, once matters of child support have been resolved, there is insufficient money left and no order dealing with the parties' finances and property is made.⁴²

The importance of *White* in the field of matrimonial jurisdiction is clear. In the past England was an attractive forum for wealthy husbands seeking divorce. It has been predicted that after *White* forum shopping by wives in England will become more attractive.⁴³

1.6.1.4 Competent authorities (public notaries, judicial authorities)

Courts only.

1.6.2 Following the death of one of the spouses

The suggested structure is inappropriate for English law. Accordingly, the following structure has been adopted.

1.6.2.1 Matrimonial home

In cases where the parties own the property as beneficial joint tenants, the beneficial interest of the deceased spouse passes automatically to the surviving spouse irrespective of any will made by the deceased. If, however, the parties have severed their equitable joint tenancy (because, say, the marriage has broken down), the normal rules of testate and intestate succession apply to the deceased's severed share of the property.

Any beneficial interest a deceased spouse may have acquired in the home, whether by an express or implied trust, will form part of the estate of that spouse on death.

1.6.2.2 Intestate succession

If a spouse dies without leaving a will disposing of all his/her property, the surviving spouse is entitled to the 'personal chattels' (moveable property) and to a statutory legacy: £125,000 and a life interest in the balance of the estate if the deceased left children and £200,000 and half the estate absolutely if there are no children but the deceased left certain specified close relatives. If there are no children or other specified close relatives, the surviving spouse succeeds to the whole estate.

1.6.2.3 Testate succession

In English law there is complete freedom of testation. A spouse may completely or partially disinherit the surviving spouse who has no right to any fixed portion of the estate. However, such a disinherited spouse may apply for family provision.

1.6.2.4 Family provision

Under the Inheritance (Provision for Family and Dependents) Act 1975 a surviving spouse who has been disinherited can apply to the courts for family provision. In such cases if the court concludes that the will or intestacy does not make reasonable financial provision for the surviving spouse, it can direct that reasonable provision (in the form of periodical income payments, payment of a lump sum, transfer of property etc.) be made for the surviving spouse out of the deceased's

⁴¹ Da Costa, 'The Continuing Impact of *White*' [2001] Fam Law 742.

⁴² Barton and Bissett-Johnson, 'The Declining Number of Ancillary Relief Orders' [2000] Fam Law 94.

⁴³ Duckworth and Hodson, '*White v White* – Bringing Section 25 back to the People' [2001] Fam Law 24 at 29.

estate. The test for reasonable provision is not what is merely required for maintenance⁴⁴ (as is the position with unmarried dependents) but rather what the surviving spouse might have expected to receive on divorce.⁴⁵

1.7 OTHER REMARKS

None

⁴⁴ Inheritance (Provision for Family and Dependents) Act 1975, s 1(2)(a).

⁴⁵ *Moody v Stevenson* [1992] Ch 486.

CHAPTER 2

MATRIMONIAL PROPERTY. PRIVATE INTERNATIONAL LAW

2.1 GENERAL REMARKS

2.1.1 Sources

2.1.1.1 Principal international sources (Conventions)

None

2.1.1.2 Principal statutory sources.

Matrimonial Causes Act 1973; Inheritance (Provision for Family and Dependents) Act 1975.

2.1.1.3 Principal sources in case law and in customary law.

See text

2.1.1.4 Principal reforms of the law which are currently considered

None

2.1.2 Historic development

In order to understand the present law, it is important to bear in mind three factors:

(i) Before 1882 married women were unable to own certain properties (particularly land) which explains the practice of wealthy families entering into marriage settlements in favour of such women (see 2.3.1.1). Since 1882 marriage settlements have become of decreasing importance and are now rare.

(ii) Until 1974⁴⁶ married women had a domicile of dependence on their husbands (whether or not they lived together).

(iii) As the power of the courts to grant financial relief on divorce increased over the last century (culminating in the Matrimonial Causes Act 1973), with all such orders being governed by English law (ie no choice of law rules applied), so did the importance of the conflict of law rules on matrimonial property diminish. This explains why most of the judicial authorities in matrimonial property cases are from the end of the nineteenth century and the beginning of the twentieth century.

2.1.3 General notions of private international law

2.1.3.1 Problems of characterisation (classification)

With a few notable exceptions,⁴⁷ English courts classify all issues according to the *lex fori* (English law). So, whether an issue relates to matrimonial property or, say, succession is decided by English law. The only specific area where classification has presented a problem of relevance to this report concerns the English rule that a testator's will is revoked by a subsequent marriage. In *Re*

⁴⁶ When the Domicile and Matrimonial Proceedings Act 1973 came into force.

⁴⁷ *Re Maldonado's Estate* [1954] P 223; *Re Cohn* [1945] Ch 5.

*Martin*⁴⁸ it was held that this issue was to be classified as a matter of matrimonial property and not succession. The application of this decision today has been criticized and it has been suggested that the question whether a will is revoked by subsequent marriage should now be reclassified as a separate conflicts category governed by the law of the testator's domicile at the date of the marriage.⁴⁹

2.1.3.2 Renvoi

The doctrine of renvoi is part of English law but has largely fallen out of favour and is seldom applied. It has never been applied to the issue of matrimonial property per se.⁵⁰ However, there are academic arguments and some judicial authority⁵¹ that renvoi should apply to cases involving title to immovable property and similar, though weaker, arguments that it should be applied to cases involving title to movables.⁵²

2.1.3.3 Notion of public policy ('ordre public')

It is well established that English courts will not recognize or enforce a right or legal relationship under a foreign law or recognize or enforce a foreign judgment if it would be contrary to the fundamental public policy of English law. This doctrine, which is generally used very restrictively, has never been applied in the context of matrimonial property. However, it was used by the Canadian court in *Vladi v Vladi*⁵³ where it was held that the application of Iranian matrimonial property law would be contrary to public policy because it was unfair to women. This issue is less likely to arise in England as most matrimonial property disputes are resolved on divorce by the application of the English judge's discretionary powers.

2.1.3.4 Fraud

The issue of fraud can arise when denying recognition to a foreign judgment (see 2.4.1.1).

2.1.4 General problems of private international law

2.1.4.1 Connecting factors

The two most important connecting factors in this context are domicile and habitual residence.

Domicile: Every person must have one (and only one) domicile. Domicile means 'legal home' and can be acquired by every sane person⁵⁴ over the age by 16 by a combination of factum (voluntary physical presence in the country as an inhabitant⁵⁵) and animus (an intention to remain in that country for an unlimited period of time). If a person intends to leave the country on the happening of a 'clearly foreseen and reasonably anticipated contingency',⁵⁶ such as the end of a job, the requisite animus will be lacking and a domicile will not be acquired. As a result people who

⁴⁸ [1900] P 211.

⁴⁹ Dicey and Morris, *The Conflict of Laws* (13th ed, 2000, London: Sweet & Maxwell) p 43.

⁵⁰ It has been applied in a Canadian case: *Vladi v Vladi* (1987) 39 DLR (4th) 563.

⁵¹ *Re Ross* [1930] 1 Ch 377.

⁵² Dicey & Morris, *op cit*, p 74. This point was left open in *Winkworth v Christie, Manson and Woods Ltd* [1980] Ch 496 at 514.

⁵³ (1987) 39 DLR (4th) 563.

⁵⁴ Before the Domicile and Matrimonial Proceedings Act 1973, a married woman had a domicile of dependence on her husband. This former rule is of importance in analysing the choice of law rules relating to matrimonial property.

⁵⁵ *IRC v Duchess of Portland* [1982] Ch 314.

⁵⁶ *Re Fuld's Estate (No 3)* [1968] P 675.

have been resident in a country for many years might not be domiciled there.⁵⁷ If a person loses a domicile (by leaving the country without the intention of returning) but does not satisfy the test for the acquisition of a new domicile, their domicile of origin (the domicile assigned to a person at birth on the basis of parentage) revives and becomes the operative domicile.

Habitual residence: A person may have no⁵⁸ or more than one⁵⁹ habitual residence. It is acquired by a combination of residence and settled intention. It cannot be acquired within a few days⁶⁰ but only after an ‘appreciable period of time’.⁶¹ However, this test is relatively easily satisfied as it has been stated that ‘a month can be an appreciable period of time’.⁶² The length of time needed to be spent in the country depends upon the degree of settled purpose. This settled intention must be to remain in the country ‘as part of the settled order of [a person’s] life for the time being’.⁶³ Unlike the animus requirement for domicile, this test is fairly easily satisfied. For example, studying in a country for a year⁶⁴ or going to a country for three months to resolve matrimonial difficulties⁶⁵ has both sufficed to satisfy the test.

2.1.4.2 Problems encountered in states with multiple legal systems

For private international law purposes, England and Wales, Scotland and Northern Ireland are three separate legal territories and it is necessary to determine whether a person is domiciled or habitually resident in the specific legal territory. There are some special provisions (for example, reciprocal enforcement arrangements) dealing with jurisdiction and recognition of judgments as between these legal territories.

2.2 INTERNATIONAL JURISDICTION OVER MATRIMONIAL PROPERTY ISSUES

2.2.1 The general rules on international jurisdiction as applied to matrimonial property regimes

Matters relating to matrimonial property (other than maintenance) are excluded from the scope of Council Regulation (EC) No 44/2001.⁶⁶ Jurisdiction in matrimonial property matters can arise in one of five ways:

- (a) divorce proceedings;
- (b) maintenance orders;
- (c) financial relief after a foreign divorce;
- (d) succession to property; or
- (e) disputes as to title to property during the marriage.

⁵⁷ In *IRC v Bullock* [1976] 3 All ER 353 a man resided with his wife for 44 years in England but was held not to be domiciled here because he intended to return to Canada if his wife died before him.

⁵⁸ *Al Habtoor v Fotheringham* [2000] 1 FLR 951.

⁵⁹ *Ikimi v Ikimi* [2001] 2 FCR 385.

⁶⁰ In *Nessa v Chief Adjudication Officer* [1999] 2 FLR 1116 it was held that habitual residence could not be acquired within four days even though there was evidence that the person intended to remain permanently.

⁶¹ *Re J* [1990] 2 AC 562 at 578.

⁶² *Nessa v Chief Adjudication Officer* [1999] 2 FLR 1116 approving *Re F (Child Abduction)* [1992] 1 FLR 548 at 555.

⁶³ *Re B (Abduction)(No 2)* [1993] 1 FLR 993 at 995.

⁶⁴ *Kapur v Kapur* [1984] FLR 920.

⁶⁵ *Re B (Abduction) (No 2)* [1993] 1 FLR 993

⁶⁶ Art 1, OJ 2001 L12/1.

2.2.2 Rules on international jurisdiction particular to matrimonial property law issues

2.2.2.2 – 2.2.2.4 have no relevance to English law. 2.2.2.1 and 2.2.2.5 will be dealt with following the categorization adopted above at 2.2.1.

(a) *divorce*

Section 5(2) of the Domicile and Matrimonial Proceedings Act 1973, as amended,⁶⁷ provides that an English court has jurisdiction to entertain proceedings for divorce and legal separation if

(a) the court has jurisdiction under Council Regulation (EC) No 1347/2000 (commonly known as the Brussels II Regulation), or

(b) no court of a Member State has jurisdiction under the Brussels II Regulation and either of the parties to the marriage is domiciled in England and Wales on the date when the proceedings are begun.⁶⁸

The jurisdictional rules set out in Chapter 2 of the Brussels II Regulation are common to all Member States and so will not be repeated in the report. Despite the wording of section 5(2)(b) (either of the parties domiciled in England and Wales), if the respondent is domiciled in England and Wales the Regulation rules must be applied.⁶⁹ This means, in practical terms, that section 5(2)(b) is only applicable where the applicant spouse is domiciled in England *and* the respondent spouse is not habitually resident in a Member State nor a national of a Member State (other than the UK or Ireland) nor domiciled in the UK or Ireland.

The English court has power to stay divorce etc proceedings. The power to stay proceedings under the Brussels II Regulation will not be rehearsed in this report. In cases where proceedings are pending in a foreign court other than one of the Member States of the European Union a stay of proceedings may be obligatory or discretionary:

Obligatory stays: the English court is bound to order a stay of divorce proceedings if divorce or nullity proceedings are continuing in another jurisdiction in the British Isles with which the parties have a defined connection.⁷⁰

Discretionary stays: English proceedings may be stayed if it appears to the court that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in the other jurisdiction to be disposed of before further steps are taken in England.⁷¹ This had been interpreted to mean the an action can be stayed if the factors connecting the case to the foreign court make that court a clearly more appropriate forum for the trial of the action – unless there are circumstances by reason of which justice requires that the stay should not be granted.⁷² Additionally, the English court has an inherent common law power to stay an action (in cases not falling within the Brussels II Regulation), even if there are no proceedings pending abroad, on the basis of *forum non conveniens*.⁷³

⁶⁷ European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001 (SI 2001/310).

⁶⁸ S 5(3) contains similar provisions for jurisdiction in nullity proceedings but additionally affords jurisdiction where either of the parties has died, and at death either was domiciled in England and Wales or had been habitually resident here for the preceding year.

⁶⁹ Art 7.

⁷⁰ Domicile and Matrimonial Proceedings Act 1973, s 5(6); Sch 1, paras 3(2) and 8.

⁷¹ *Ibid*, Sch 1, para 9(1).

⁷² *De Dampierre v De Dampierre* [1988] AC 92; *S v S* [1997] 1 WLR 1200.

⁷³ *T v T* [1995] 2 FLR 660.

(b) *maintenance orders*

The High Court has power to order periodic payments, lump sum payments or make a property adjustment order transferring property from one spouse to another when a spouse has failed to provide reasonable maintenance.⁷⁴ Jurisdiction may be assumed either under the Brussels I Regulation or, if that is not applicable, under traditional English jurisdiction rules.⁷⁵

(c) *financial relief after a foreign divorce*

The English court when recognizing a foreign divorce has power to make any order that it could make when granting an English divorce etc (for example, periodic payments orders, lump sum orders and property adjustments orders).⁷⁶ The Brussels I Regulation applies here⁷⁷ and takes precedence over the jurisdictional rules laid down in the 1984 Act. In cases where the Brussels I Regulation does not apply, section 15(1) of the Matrimonial and Family Proceedings Act 1984 provides that the English court has jurisdiction to make such an order if either of the parties was domiciled in England at the date of the application or at the date of the foreign decree, or if either of the parties was habitually resident in England for one year immediately preceding either of those dates, or if either or both of the parties had at the date of the application a beneficial interest in a former matrimonial home in England.

(d) *succession*

The High Court has jurisdiction to determine the succession to the property of a deceased only if there is a properly constituted representative of the estate before the court.⁷⁸ Such a grant of representation can be made in respect of the property of any deceased person wherever domiciled. While there need not be any property in England, the power to make the grant is discretionary and where there is no property in England there will need to be special circumstances before a grant will be made⁷⁹: for example, because it is required by a foreign court.

An application for family provision can only be made in respect of the estate of a deceased person who dies domiciled in England and Wales.⁸⁰ If the deceased was not domiciled in England and Wales at the date of death no application can be made even though the deceased left immovable property in England.⁸¹

(e) *disputes as to title to property during marriage*

Normally, such disputes will occur on the breakdown of the marriage and the spouses will invoke the court's powers to make a property adjustment order under section 24 of the Matrimonial Causes Act 1973 (see 1.6.1.3). However, there are additional special provisions relating to property disputes during a marriage.

Under section 17 of the Married Woman's Property Act 1882 where there is a dispute 'as to the title to or possession of property' either spouse may apply to the High Court or a county court for 'such order with respect to the property in dispute ... as [the judge] thinks fit'. Only orders as to

⁷⁴ Magistrates' courts are also given powers to make financial provision for a spouse or child of the family.

⁷⁵ Because maintenance is only of marginal importance to this report, these jurisdictional rules are not set out in the body of this report but can be found in the Appendix (an extract from the author's book, Clarkson and Hill, *Jaffey on the Conflict of Laws* (1997, London: Butterworths).

⁷⁶ Matrimonial and Family Proceedings Act 1984, Part III.

⁷⁷ Respondent voluntarily appeared before the English courts or is domiciled (in Brussels I sense) in England or another Member State; art 23 probably does apply here: see Clarkson and Hill, *op cit*, p.407.

⁷⁸ Dicey and Morris, *op cit*, Rule 129, p 1023.

⁷⁹ Administration of Estates Act 1925, ss 22-25.

⁸⁰ Inheritance (Provision for Family and Dependents) Act 1975, s1(1).

⁸¹ See generally, Miller, 'The International Dimension in Family Provision' [2001] IFL 135.

title or possession may be made. There is no power under this section to vary title or transfer interests in property.⁸² The court can make an order with respect to all property, movable or immovable whether situated in England or abroad.⁸³ This includes orders in relation to foreign land if there is an equity between the parties⁸⁴ but such an order will not be made if it would be ineffective in the foreign country and the court has no means of enforcing it against the defendant.⁸⁵

Under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 a person who is a trustee of land or who has an interest in property subject to a trust of land may seek an order declaring ‘the nature and extent of a person’s interest in property subject to a trust’.

The jurisdiction for both these provisions and indeed any other civil action brought by the parties in relation to matrimonial property is governed by the English traditional jurisdictional rules. Under these rules the English court has jurisdiction if the defendant is present in England at the time or service of the claim form or has submitted to the jurisdiction of the English court. Alternatively, a claim form may be served abroad if one of the heads of CPR 6.20⁸⁶ has been satisfied the most likely to be of application here being that the defendant is domiciled in England⁸⁷ or that the whole subject matter of a claim relates to property located within the jurisdiction⁸⁸ or for certain claims about trusts.⁸⁹

If jurisdiction is invoked on the ground of the defendant’s presence in the jurisdiction, the court has a discretion to stay the action on forum non conveniens grounds. Under CPR 6.20 a claim form can only be served abroad if the English court is satisfied that England is the forum conveniens for the resolution of the dispute.⁹⁰

2.3 LAW APPLICABLE TO THE MATRIMONIAL PROPERTY REGIME

2.3.1 Determination of the law applicable to the matrimonial property regime

2.3.1.1 In case spouses have entered into a marriage contract

While such contracts are normally express, there are older authorities that where parties marry under a system providing for community of property, in the absence of an express marriage contract, the parties will be deemed to have entered into a tacit contract.⁹¹

It should be stressed at the outset that the legal status of ‘marriage contracts’ is somewhat uncertain in modern English law. It is clear that a prenuptial contract between English domiciliaries purporting to oust the jurisdiction of the English courts is not legally enforceable as being contrary to public policy.⁹² Prenuptial contracts entered into by foreign domiciliaries have on numerous occasions been given effect to in cases of succession (see below). Effect would also be given to such contracts in any property dispute during the subsistence of the marriage.

⁸² *Pettit v Pettit* [1970] AC 777.

⁸³ For example, in *In re Bettinson’s Question* [1956] Ch 67 a regime of community of property between the spouses under Californian law was recognized and given effect to.

⁸⁴ Dicey and Morris, *op cit*, p 946; Cheshire and North, *Private International Law* (13th ed, 1999, London: Butterworths) p 380.

⁸⁵ *Razelos v Razelos (No 2)* [1970] 1 WLR 392.

⁸⁶ The Civil Procedure Rules 1998 superseded the Rules of the Supreme Court: CPR 6.20 replaced (with amendments) RSC Order 11, r 1(1).

⁸⁷ CPR 6.20(1).

⁸⁸ CPR 6.20 (10).

⁸⁹ CPR 6.20 (11) and (14).

⁹⁰ *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460.

⁹¹ *de Nicols v Curlier* [1900] AC 21; *Chiwell v Carlyon* (1987) 14 SC (Cape of Good Hope), discussed in Cheshire and North, *op cit*, pp 1023-1014.

⁹² See 1.2.3.2

However, in most cases where the English courts are dealing with the assets of spouses, namely, in divorce proceedings and, to a lesser extent, applications for family provision on the death of a spouse, the court has a broad discretion (see 1.6.1.3). In exercising this discretion the courts tend to pay little attention to the fact that the spouses might have entered into a prenuptial contract regulating the proprietary consequences of their marriage. For example, in *F v F*⁹³ the husband and wife were German domiciliaries who married in Germany having drawn up a German antenuptial contract. The parties moved to England where the husband later petitioned for divorce. In an application by the wife for maintenance pending suit, the husband sought to rely on the German antenuptial contract, the effect of which would have been to provide the wife with a sum restricted to the equivalent of the pension of a German judge (the wife was a law graduate). This argument was dismissed by Thorpe J, who was not even prepared to hear expert evidence on the effect of such a contract under German law on the basis that:

In this jurisdiction [prenuptial contracts] must be of very limited significance. The rights and responsibilities of those whose financial affairs are regulated by statute cannot be much influenced by contractual terms which were devised for the control and limitation of standards that are intended to be of universal application throughout our society.⁹⁴

Admittedly in a non-proprietary context, a more promising tone was adopted in *S v S*⁹⁵ where it was stated (obiter) that as prenuptial contracts were regarded as legally enforceable in the United States and in the European Community, ‘there will come a case’ where they will ‘prove influential or even crucial’.

As mentioned above, in different contexts, for example, succession not involving family provision or in proceedings brought by a third party against a spouse effect can be given to a prenuptial contract. The cases discussed below at 2.3.1.1.1 all concern ‘marriage settlements’. Before 1882 married women were not entitled to own certain property in their own right unless it was ‘settled’ on them for their own use in which case it became separate property free from the husband’s control: ‘This explains the traditional habit of the English upper classes of making settlements on the marriage of their daughters’.⁹⁶ This also explains why almost all the cases traditionally discussed in relation to marriage contracts are ones where the marriage took place before 1882. However, such marriage settlements, while rare, are still permitted and there is no reason to suppose that the various rules developed in relation to their validity would not be applied to more general prenuptial contracts.

Even with regard to these ‘marriage settlements’ it should be borne in mind that section 21(2)(c) of the Matrimonial Causes Act 1973 provides that the court has a discretion to vary the terms of any settlement.

2.3.1.1.1

Main choice-of-law rules

The validity and effect of a marriage contract is governed by the law governing the contract. The Rome Convention on the Law Applicable to Contractual Obligations, implemented by the Contracts (Applicable Law) Act 1990, is not applicable because article 1(2)(b) excludes contractual obligations relating to ‘rights in property arising out of a matrimonial relationship’. Accordingly, the common law rules are applicable.

Under these, a contract is governed by its proper law. This law may be chosen, expressly or impliedly, by the parties. Failing this, the proper law of a contract is the law with which the

⁹³ [1995] 2 FLR 45

⁹⁴ At 66.

⁹⁵ [1997] 1 WLR 1200.

⁹⁶ Dicey and Morris, *op cit*, p 1066.

contract is most closely connected. The factors used to establish the law of closest connection will, of course, not be the same as in commercial contracts. In particular, the law of the matrimonial domicile will often be the most important factor in the ascertainment of the proper law. Indeed, it has been stated that there is a 'presumption' in favour of the law of the matrimonial domicile⁹⁷ (see 2.3.1.2.1). In *Duke of Marlborough v A-G*⁹⁸ at the time of the marriage the wife was domiciled in New York and the husband in England. The proper law of a marriage settlement by which the wife's father, also domiciled in New York, settled American investments was held to be English law. The important factors were that England was the intended matrimonial domicile, the settlement was drafted in English form, it included phrases which had significance only in relation to English law, and provision was made for an application to be made to the English court under the Infant Settlement Act 1855 (as the wife was a minor).

However, even if the law of the matrimonial domicile presumptively indicates the proper law, it is a presumption that can be rebutted by other factors and circumstances. For example, in *Re Bankes*⁹⁹ an Italian domiciliary married an English domiciled woman. The parties settled in Italy after the marriage. By a contract in English form made in Italy before the marriage, the wife settled property she owned in England, and property she might acquire after the marriage, on certain trusts. The question arose whether certain legacies to the wife were subject to the settlement. The wife contended that the settlement was governed by Italian law, by which it was invalid, as it violated the legal order of succession. It was held, however, that English law was the proper law. The presumption in favour of Italian law, as the law of the matrimonial domicile, was rebutted in view of the English form of the contract, the fact that it was valid by English law, and that the property was English and owned by a woman who, at the time of the contract, was domiciled in England.

While the proper law can be taken to govern most issues affecting marriage contracts, the following warrant separate mention:

(i) *capacity*: Although the point is not settled, it is possible that a person's capacity to make a marriage contract is governed by the law of his or her domicile at the date of the marriage, rather than the proper law of the contract.¹⁰⁰ However, if by the law of the domicile at the date of the marriage a contract made by a minor is invalid unless ratified after reaching majority, then the power to ratify it (or revoke such ratification) will be governed by the law of the person's domicile at the date of the purported ratification (or revocation).¹⁰¹

(ii) *formal validity*: A marriage contract will be formally valid if it complies with the formal requirements of either the proper law of the contract¹⁰² or the law of the country where it was made.¹⁰³

2.3.1.1.2

General problems of choice-of-law: public policy; classification, etc.

The only potential problem is that of classification caused by the interaction of succession and matrimonial property rules. However, any unfairness that could arise here can be corrected under the Inheritance (Provision for Family and Dependents) Act 1975.

⁹⁷ Cheshire and North, *op cit*, p 1029.

⁹⁸ [1945] Ch 78.

⁹⁹ [1902] 2 Ch 333.

¹⁰⁰ Clarkson and Hill, *op cit*, p 464. The contrary view is taken by Dicey and Morris, *op cit*, p 1076-1078 and by Cheshire and North, *op cit*, p 1025.

¹⁰¹ *Cooper v Cooper* (1888) 13 App Cas 88; *Viditz v O'Hagan* [1900] 2 Ch 87. See also *Re Cooke's Trusts* (1887) 56 LJ Ch 637.

¹⁰² *Van Grutten v Digby* (1862) 31 Beav 561.

¹⁰³ *Guépratte v Young* (1951) 4 De G & Sm 217.

2.3.1.1.3

Particular problems of the marriage contract: scope of a choice-of-law provision

Express choice of law: The parties are free to choose the applicable law by an express clause in the contract. In *Re Fitzgerald*¹⁰⁴ it was stated that the general choice of law rule, ‘yields to an express stipulation that some other law shall apply’. There is no reason in principle why the parties should not be able to choose a specified type of matrimonial property regime of a certain state.

Implicit choice of law: In the absence of an express choice of law, the prescribed law of the matrimonial domicile could be construed as an implied choice of law.

Dépeçage: There is no reason in principle why this should not be possible.

2.3.1.2 The spouses have not entered into a marriage contract

2.3.1.2.1

Main choice-of-law rules

It is (perhaps) necessary to distinguish choice of law rules relating to movables from those relating to immovables.

(i) *Movables*

The traditional rule is that the effect of the marriage on movable property is governed by the law of the husband’s domicile at the date of the marriage.¹⁰⁵ At the time this rule was established, the wife took the husband’s domicile on marriage, so her domicile necessarily became the same as his at the date of the marriage. So, if at the time of the marriage the husband were domiciled in England, where the regime is separation of property, while the wife was domiciled in a country where community of property prevailed, then under this rule the English system would apply.

However, it is unlikely that this traditional rule in favour of the husband’s law at the date of the marriage would be upheld today. There are two reasons for making this claim.¹⁰⁶ First, this traditional rule was established at a time when, on marriage, a woman necessarily acquired a domicile of dependence on her husband. Since the Domicile and Matrimonial Proceedings Act 1973 this is no longer the case and so, when the parties are domiciled in different countries at the date of the marriage, there is no reason to favour the husband’s law. Indeed, adherence to the traditional rule could well be contrary to the European Convention on Human Rights.¹⁰⁷ Secondly, there has long been authority that the application of the husband’s domicile at the date of the marriage was no more than a presumption, which, in clear cases, can be rebutted in favour of the matrimonial domicile, which is largely synonymous with the intended matrimonial home. The main authority for this is *Re Egerton’s Will Trusts*.¹⁰⁸ A man domiciled in England married a woman domiciled in France; the parties intended to settle in France, but they did not in fact move there until two years after the marriage. On the husband’s death, the wife contended that the marriage had been in community of property under French law, the law of the intended matrimonial home. It was held that the marriage was governed by English law as the law of the husband’s domicile at the time of the marriage. Roxburgh J, however, accepted that in exceptional cases some law other than that of

¹⁰⁴ [1904] 1 Ch 573 at 587.

¹⁰⁵ *Re Martin* [1900] P 211.

¹⁰⁶ It should also be borne in mind that the traditional rule developed at a time when married women were unable to own many properties in their own right, making application of the husband’s law logical at that time.

¹⁰⁷ Art 14 and art 1 of the Protocol.

¹⁰⁸ [1956] Ch 593.

the husband's domicile might govern as the result of the agreement of the parties, either express or inferred from their conduct. If the spouses set up their domicile in a new country immediately after the marriage, an agreement that their proprietary rights should be governed by the law of that country might be inferred, but would not necessarily be so. That would depend on the circumstances. In the present case, although the parties intended to settle in France, there was no evidence that they had intended the effects of the marriage on their property to be governed by French law and, accordingly, the basic presumption in favour of the law of the husband's domicile at the date of the marriage applied.

Given the changed circumstances today and the strong support given to the matrimonial domicile concept for this purpose by the most influential conflicts commentators in England,¹⁰⁹ it is likely that where the parties are domiciled in separate countries, the applicable law will be that of the country with which the parties and the marriage have the closest connection. The exception established in *Re Egerton's Will Trusts* will become a general choice of law rule in favour of the law of the 'matrimonial domicile'.

(ii) *immovables*

There is some controversy here as to whether the law of the matrimonial domicile (or the law of the husband's domicile at the date of the marriage) is displaced by the *lex situs* as the governing law. In *Welch v Tennent*¹¹⁰ the House of Lords, on appeal from Scotland, held that the *lex situs* governed. In this case the husband and wife were domiciled in Scotland. After the marriage the wife sold land which she owned in England and paid the proceeds to her husband. She later claimed she was entitled under Scottish law to reclaim these proceeds. It was held, however, that the rights of the spouses in relation to immovable property were governed by English law as the *lex situs*. Accordingly, the husband was allowed to keep the proceeds.

On the other hand, in *Re De Nicols*¹¹¹ a French couple, having married in France, came to England and purchased property here. It was held that this property was subject to the community of property regime of French law and was not subject to English law, the *lex situs*. Academic commentators favour this latter approach so as to avoid an estate being 'juridically fragmented'.¹¹² If a couple own immovable property in several countries, each property could be subject to different matrimonial property regimes. If an English couple were to purchase a holiday home in France or Spain, it would hardly be in accordance with their reasonable expectations that such property be held in community of property. Although the precise basis of the decision is unclear, the decision in *Chiwel v Carlyon*¹¹³ provides support for the application of the law of the matrimonial domicile. In this case a husband and wife married under the South African regime of community of property and later acquired land in England. It was concluded that the rights in this property were to be governed by South African law and not by English law as the *lex situs*.

One way of reconciling the above authorities (although a less satisfactory solution than applying the law of the matrimonial domicile) would be to draw a distinction between foreign immovables and immovables in England. *Welch v Tennent* would be consistent with the general rule that so far as foreign immovables are concerned, the governing law should be the *lex situs*. However, as regards immovables situated in England (which was the situation in both *Re De Nicols*

¹⁰⁹ Dicey and Morris, *op cit*, p 1066.

¹¹⁰ [1891] AC 639.

¹¹¹ [1900] 2 Ch 410.

¹¹² Dicey and Morris, *op cit*, p 1073.

¹¹³ (1897) 14 SC 61 (Cape of Good Hope). See Cheshire and North, *op cit*, p 1025. Both this case and *Re Nicols* can be explained on the basis that there was an implied contract regulating the proprietary regime (see 2.3.1.1).

and *Chiwell v Carlyon*) there seems no reason why the law of the matrimonial domicile should not govern, so long as the kinds of interests provided for by that law are not prohibited by English law.

2.3.1.2.2

Problems in applying the choice-of-law rules

Apart from the uncertainty surrounding the above choice of law rules the only issue from the listed matters that could cause a problem is the potential difficulty of classifying a problem as matrimonial property or succession. This is most likely to present a problem in the case of persons married in community of property who then acquire English domiciles and die here. Depending on the classification adopted the survivor will get either more or less than they would have received had the opposite classification been adopted.¹¹⁴

2.3.2 Scope of the law applicable to the matrimonial property regime

2.3.2.1 During marriage

2.3.2.1.1

Matters governed by the law which is applicable to the matrimonial property regime

The law governing the matrimonial property regime determines the composition of the estate, powers to dispose of and to administer the estate and the validity of the marriage contract as indicated above. Where the governing law is English law, it must be recalled that there is no 'estate' and the rules outlined in Chapter 1 apply.

2.3.2.1.2

Matters governed by another law

While the law governing the matrimonial property regime deals with a wide range of issues, there are exceptions (mentioned at 2.3.1.1.1) relating to capacity to enter into, and formal validity of, marriage contracts.

However, it is critically important to remember that, irrespective of the law governing the matrimonial property regime and irrespective of the domicile of the parties, an English court applies only English law to all matters of maintenance, financial provision and property distribution on divorce, legal separation or annulment, to financial relief after a foreign divorce etc and, finally, to applications for family provision on the death of one of the spouses. These matters are, of course, of greater practical importance to most married persons than relatively abstract questions of who owns what (although this can be important in relation to claims brought by third parties).

2.3.2.1.3

Matters of which it is disputed by which law they are governed

The matters listed are not disputed:

(i) contracts: the applicable law of the contract

(ii) maintenance: English law

(iii) pension rights: During the subsistence of the marriage issues relating to non-state pension rights will be governed by the applicable law of the contract. On divorce, the court has a duty to consider the pension position of the parties¹¹⁵ and can make one of several orders, the most important of which is pension-sharing.¹¹⁶ Such an order gives a spouse the right to require the

¹¹⁴ See further Clarkson and Hill, *op cit*, p 467.

¹¹⁵ Matrimonial Causes Act 1973, s 25B.

¹¹⁶ Introduced by the Welfare Reform and Pensions Act 1999, Sch 3, which amended the Matrimonial Causes Act 1973.

pension scheme manager or trustee to credit him/her with a portion of the fund which can be left in the pension fund or reinvested in a different pension elsewhere. Such an order may be made irrespective of the domicile of the spouses. However, such an order in relation to a foreign pension fund will need to be recognized and enforced in the foreign country.

(iv) life insurance policies: applicable law of contract

2.3.2.2 At the time of dissolution of marriage

2.3.2.2.1

Dissolution during the life of spouses.

As seen above (1.6.1.3), the court has a broad discretion on dissolution of the marriage. 'Guilt' as a ground for divorce is not relevant to financial issues. However, in extreme cases, the conduct of the parties can be taken into account if it would 'be inequitable to disregard it'.¹¹⁷

2.3.2.2.2

Dissolution upon the death of one of the spouses.

(i) *testate succession*

This is governed by the law of the testator's domicile at the date of death. Accordingly, if a testator dies domiciled in a country under whose law the surviving spouse is entitled to, say, half the property, effect would be given to this and the will would only be valid with respect to the deceased's share of the property. If the testator dies domiciled in England (having been married under a system of community of property), much depends on whether the doctrine of mutability or immutability applies (see 2.3.3.1). If the doctrine of mutability applies, the testator is free to dispose of all his/her property as is seen fit (but the survivor may apply for family provision). If the doctrine of immutability applies, the deceased is only free to dispose of his/her share of the property.

(ii) *intestate succession*

Intestate succession to movables is governed by the law of the deceased's domicile at death. Intestate succession to immovables is governed by the *lex situs*. Effect would be given to the law of such country, including its rules on matrimonial property insofar as they were relevant to determine the deceased's estate. If the deceased died domiciled in England (having married under a system of community of property) then, assuming the doctrine of immutability applies, the intestacy rules should only be applicable to the deceased's share of the matrimonial property.

(iii) *family provision*

Provided the deceased died domiciled in England and Wales, the surviving spouse can apply for family provision. As the court has a broad discretion, it can take into account the fact that the surviving spouse already has property vested in him/her as a consequence of being married under a system of community of property. The author is unaware of any judicial authority on this point.

¹¹⁷ Matrimonial Causes Act 1973, s 25(2)(g): for example, in *K v K Financial Provision: Conduct* [1990] 2 FLR 225 the fact that the wife assisted her depressed husband's attempt to commit suicide so that she could acquire his whole estate was taken into account.

2.3.3 Law applicable in case of changes in the matrimonial property regime

2.3.3.1 Modifications of the connecting factor

The question whether the proprietary regime fixed by the law of the matrimonial domicile at the time of the marriage will change if the parties subsequently change their domicile is a controversial issue. In English conflict of laws the question is usually framed using the following terminology: is the original regime mutable or immutable? Where the parties have entered into a premarital contract then, to the extent that it is recognised and given effect to, its terms will govern the proprietary relationship between the parties irrespective of any change of domicile during the subsistence of the marriage.

However, where there is no marriage contract the leading judicial authorities are ambiguous as to whether the doctrine of mutability or immutability applies. In *De Nicols v Curlier*¹¹⁸ the parties were both domiciled in France when they married there. Because they did not make any ante nuptial contract, they were deemed by French law to have agreed that their marriage should be in community of property. Subsequently they became domiciled in England, where the husband made a large fortune. On his death, the wife claimed to be entitled to half the estate by virtue of the community of property, so that the husband's will could operate only on the other half. It was held that the community of property continued despite the change of domicile.

While this case seems to suggest that the doctrine of immutability prevails, it has been argued that this is not necessarily so, because the basis of the decision was that by French law the parties were deemed to have agreed that their property should be held in community. As an express marriage contract will continue despite a change of domicile, unless and until the parties cancel or alter it by a subsequent valid contract, the position should be the same with an implied contract, as in *De Nicols v Curlier*. Therefore the original proprietary regime should continue despite a change of domicile.

Where the original matrimonial regime cannot be regarded as having been agreed between the parties, the case of *Lashley v Hog*¹¹⁹ provides some support for the doctrine of mutability. In this case the spouses, married while domiciled in England acquired new domiciles in Scotland. On the husband's death, the wife having predeceased him, it was claimed that the wife's estate was entitled to a third share of the husband's property under Scottish law. The House of Lords held that the wife's estate was so entitled, even though no such right existed under English law, the law of the matrimonial domicile at the time of the marriage. However, the better view¹²⁰ is that the basis of the decision was that the wife's claim to a third share under Scottish law was a right of succession, governed by Scottish law as the law of the deceased's domicile at his death. If so, it does not follow that the proprietary regime of the marriage changed when the parties became domiciled in Scotland.

Perhaps the best view¹²¹ is that where there is no express or implied ante nuptial contract, a common change of domicile by the spouses should not affect rights already acquired under the previous regime, but property acquired after the change of domicile should be governed by the regime determined by the new domicile. This change in matrimonial property regime should be permitted only where both spouses move to the new country and it is clear that the law of the new country is the law with which the parties and the marriage have the closest connection. In the case where one-spouse deserts the other and alone acquires a new domicile elsewhere, the nature of the proprietary regime should remain unaltered.

¹¹⁸ [1900] AC 21.

¹¹⁹ (1804) 4 Pat 581.

¹²⁰ Goldberg, 'The Assignment of Property on Marriage' (1970) 19 ICLQ 557 at 580-584; Cheshire and North, *op cit*, p 1020.

¹²¹ Cheshire and North, *op cit*, pp 1020-1021.

2.3.3.2 Modifications of the applicable law

This point has never arisen in England largely because of its irrelevance in any divorce etc proceedings. However, should the issue arise, general principle would suggest that only changes in the law which are retrospective should be regarded as affecting the matrimonial property regime.¹²²

2.3.3.3 Changes in the matrimonial property regime by consent of spouses

2.3.3.3.1

Conditions to be met for change of regime which is agreed between spouses.

Where the parties wish to alter their proprietary regime by contract, it is relatively clear that they should both be domiciled in a country that permits such a change of regime. In this respect it should not matter whether the initial regime was determined by contract or not. The point has never arisen but it is doubtful whether the law governing the initial determination of the proprietary regime must also permit a subsequent alteration.

2.3.3.3.2

Law governing the marriage contract which changes the anterior regime.

As with premarital contracts, post-marriage contracts will be governed by the proper law of the contract, with the same exceptions discussed above (2.3.1.2.2) in relation to capacity and formal validity.

2.3.3.4 Other possible changes in the matrimonial property regime

Not applicable

2.3.4 Law applicable to the publication of the matrimonial property regime

Not applicable

2.4 RECOGNITION AND ENFORCEMENT OF FOREIGN COURT DECISIONS AND 'PUBLIC' ACTS IN RESPECT OF MATRIMONIAL PROPERTY REGIMES

2.4.1 The general rules on the effectiveness of foreign 'public' acts and court decisions as applied in the area of matrimonial property regimes

2.4.1.1 Overview of sources and contents of these rules

The Brussels II Regulation has no application as it does not affect 'property consequences of the marriage, the maintenance obligation or any other ancillary measures'¹²³ While the Brussels I Regulation does not apply to the 'status or legal capacity of natural persons, [and] rights in property arising out of a matrimonial relationship'¹²⁴ the Regulation does apply to 'matters relating to maintenance'.¹²⁵

Section 51(5) of the Family Law Act 1986 provides that when an English court recognizes a foreign divorce etc. it is not required to recognize any maintenance or ancillary order made in the foreign proceedings. Accordingly, recognition of such judgments depends upon the traditional rules relating to recognition of foreign judgments – as would the recognition of any such judgments made in non-divorce proceedings. If such judgments can be varied by the foreign court they will lack the

¹²² By analogy with *Starkowski v A-G* [1854] AC 155.

¹²³ Council regulation (EC) No 44/2001, OJ 2001 L 12/1, recital 10.

¹²⁴ Art 1(1).

¹²⁵ Art 5(2).

common law requirement for finality which is necessary for enforcement. This is particularly likely with foreign maintenance orders and consequently several statutory regimes exist for the recognition and enforcement of foreign maintenance orders.

The general rules for recognition of foreign judgments are as follows:

(i) *judgments in personam*

Foreign judgments in personam will be recognised if the defendant was present in the foreign jurisdiction at the time of service of the claim form or if he or she submitted to the jurisdiction of the foreign court. The judgment must be final and conclusive and for a fixed sum of money. There are various defences to recognition and enforcement: (i) if the judgment was given in breach of the requirements of natural justice; (ii) if it was obtained by fraud; (iii) if its recognition would be in breach of public policy; (iv) if it is in conflict with an earlier English or foreign judgment; (v) if it was obtained in breach of a jurisdiction clause in favour of another forum.¹²⁶ There are also two statutory regimes, based on the common law, providing for recognition and enforcement of foreign judgments from countries to which the Act has been extended by Order in Council: Administration of Justice Act 1920 and Foreign Judgments (Reciprocal Enforcement) Act 1933.¹²⁷

(ii) *judgments in rem*

Such judgments will be recognized if it is a judgment affecting title to property situated in the country of the foreign court. A judgment affecting the title to, or the right to possession of, immovable property situated outside that country would not be recognised or enforced in England.¹²⁸

2.4.1.2 Their application in the area of matrimonial property regimes

In order for a foreign judgment in personam to be enforceable, it must be for a fixed sum of money, for example, that the husband pay the wife certain monies. However, if a 'mere arithmetical calculation is required for the ascertainment of the sum it will be treated as being ascertained'.¹²⁹ So, for example, if foreign court orders a husband to transfer the value of property to the wife, this value can be arithmetically determined and so the judgment will be capable of enforcement in England. If, however, there is an order requiring one party to transfer actual property to another, the judgment, while being in personam, is incapable of enforcement in England. This can be regarded as a gap in English law.

A foreign matrimonial property judgment will be in rem if it is one that merely determines the title to property.

It should be emphasized that much of the above is, in practical terms, unimportant. Most foreign matrimonial property orders are made pursuant to a divorce (or annulment or separation decree). In such cases the High Court may, when recognizing the foreign divorce, grant financial relief to either party who has not remarried.¹³⁰ However, no application can be made without the permission of the court which must be satisfied that there is a 'substantial ground'¹³¹ for making the application and that, having regard to all the circumstances of the case, it is appropriate for a

¹²⁶ See generally, Clarkson and Hill, *op cit*, pp 147-172.

¹²⁷ *Ibid*, pp 173-175.

¹²⁸ Dicey and Morris, *op cit*, Rule 40, pp 508-509.

¹²⁹ Dicey and Morris, *op cit*, p 476, citing *Beatty v Beatty* [1924] 1 KB 807.

¹³⁰ Matrimonial and Family Proceedings Act 1984, s 12.

¹³¹ Matrimonial and Family Proceedings Act 1984, s 13(1).

financial order to be made.¹³² The factors to be taken into account include the connections which the parties have with England and with the country where the decree was obtained or any other country; any financial benefit or relief the applicant is entitled to and is likely to receive under any agreement, foreign law or order of a foreign court; the availability of property in England in respect of which an order could be made; and the extent to which an English order is likely to be enforceable.¹³³

These provisions are not designed to permit an applicant to have ‘two bites at one cherry’¹³⁴ or to empower an English court to exercise jurisdiction to ‘second-guess’ the foreign court’s financial relief orders. In *Holmes v Holmes*¹³⁵ it was stressed that the English court should be slow to interfere with the orders of a court of competent jurisdiction and that the criteria of appropriateness laid down in the *Spiliada* case¹³⁶ and in *De Dampierre*¹³⁷ are applicable in this context. In *M v M*¹³⁸ a divorce was granted in France and financial relief obtained there, but an application for the distribution of shared property was rejected and the wife was unsuccessful on appeal in France. The wife’s application for financial relief under Part III of the Matrimonial and Family Proceedings Act 1984 was rejected. She had pursued her financial rights fully before the French courts which were the courts of ‘competent jurisdiction in one of our nearest neighbouring friendly states and the principles of comity’ required that its orders be respected and not ‘chauvinistically’ judged.¹³⁹ In *Hewitson v Hewitson*¹⁴⁰ it was stated that even if circumstances between the parties had changed and they had cohabited subsequent to the foreign divorce, it would be ‘inconsistent with the comity existing between courts of comparable jurisdiction’¹⁴¹ for the English court to review or supplement the foreign order.

Recognition of maintenance orders are largely regulated by statute. As such orders are not of central importance to this report, the relevant provisions, extracted from a forthcoming book by the author, are set out in the Appendix.

2.4.2 Rules on the effectiveness of foreign 'public' and private acts and court decisions specific to the area of matrimonial property regimes

2.4.2.1 Recognition of marriage contracts concluded abroad

See 2.3.1.1

2.4.2.2 Recognition of modifications agreed between spouses which took place abroad (e.g.: by private agreement, before a public authority or before a court, ...)

See 2.3.3.3.1

2.4.2.3 Enforcement of foreign court decisions on winding up and distribution of the matrimonial property regime

See 2.4.1.2

¹³² S 16(1).

¹³³ S 16(2).

¹³⁴ *Lamagni v Lamagni* [1995] 2 FLR 452 at 454.

¹³⁵ [1989] Fam 47, [1989] 3 All ER 786.

¹³⁶ [1987] AC 460, [1986] 3 All ER 843.

¹³⁷ [1988] AC 92, [1987] 2 All ER 1.

¹³⁸ [1994] 1 FLR 399.

¹³⁹ At 407-408.

¹⁴⁰ [1995] Fam Law 100, [1995] 1 All ER 472.

¹⁴¹ At 105.

2.4.2.4 Cooperation between the courts and public authorities in this respect.

Foreign judgments can be enforced in the same manner as English judgments with the normal co-operation between the courts and public authorities.

There are no special provisions on publication.

2.4.2.5 Problems

Any foreign judgment can be denied recognition and enforcement if it is contrary to English notions of public policy.

2.4.3 Practical significance of the rules set out under 2.4.1 -2.4.2

2.4.3.1 Frequency of court decisions (judgments) concerning the effectiveness of foreign court decisions

For the reasons indicated above (2.4.1.2), the rules set out in 2.4 (apart from recognition of maintenance orders) are of little practical significance. The author is unaware of any modern reported court decisions on this topic apart from ones under the 1984 Act.

2.5 OTHER REMARKS

None

CHAPTER 3

UNMARRIED COUPLES. INTERNAL LAW

3.1 SOURCES OF THE LAW ON UNMARRIED COUPLES

3.1.1 (& 2) Description of the general legislative sources

There are no general sources of law on this topic. Certain specific statutory provisions and judicial decisions have addressed this issue and are referred to in the following text.

3.1.3 Description of any reforms of the law carried out in your country

There have been no general reforms on this topic. Specific statutory provisions (for example, relating to family provision) have been enacted and some judicial decisions (for example, *Fitzpatrick v Sterling Housing Association Ltd*¹⁴²) have expanded legal provisions to embrace unmarried persons. These are discussed in the following text.

The English Law Commission has been considering law reform for homesharers (broader than ‘unmarried couples’) and is expected to issue a Consultation Paper in the summer of 2002.

3.2 HISTORIC DEVELOPMENT OF THE LAW ON UNMARRIED COUPLES

As there is no general law relating to unmarried couples there has been no historic development as such. However, the social reality is that increasing numbers of persons are cohabiting outside marriage.¹⁴³ As indicated above, only piecemeal attempts to address this reality have been made by the law.

3.3 THE LEGAL CHARACTER OF RELATIONS OTHER THAN TRADITIONAL MARRIAGE

3.3.1 The concept of ‘legal’ marriage

Only persons who are respectively male and female may marry.¹⁴⁴ Marriages between persons of the same sex are void. No polygamous marriage may be celebrated in England. However, a polygamous marriage celebrated abroad is recognized as a valid marriage provided that neither party was at the time of the marriage domiciled in England and provided the marriage satisfies the private international law rules relating to the creation of a valid polygamous marriage.¹⁴⁵

3.3.2 The marriage of fact

There are no legal consequences flowing from the fact of cohabitation. With regard to specific legal provisions, see below.

¹⁴² [2000] 1 FCR 21.

¹⁴³ In 1989, 23% of women in the age group 18-49 were cohabiting outside marriage (Kiernan and Estaugh, *Cohabitation, Extramarital Childbearing and Social Policy* (1993, London: Family Policy Studies Centre).

¹⁴⁴ Matrimonial Causes Act 1973, s 11(c).

¹⁴⁵ Clarkson and Hill, *Jaffey on the Conflict of Laws* (1997, London: Butterworths) pp 348-364.

3.3.3 Partnership registration

There is no provision for registered partnerships. Some public thinking is, however, moving in this direction. In 2001 the Greater London Authority introduced measures allowing persons to register same-sex partnerships. Although such registration will have no legal effect, the hope was that it would be recognized by public bodies and be used in disputes over wills, property and succession rights.¹⁴⁶ A Private Members' Civil Partnership Bill¹⁴⁷ has been introduced into the House of Lords. This would allow all cohabiting couples to have the same legal rights and obligations as married couples. It is unlikely that this Bill will be enacted as it is not being supported by the Government.

3.3.4 Contract to cohabit

Unmarried couples are free to enter into any contract which will be enforceable provided the courts are satisfied there is an intention to create legal relations. For instance, they may enter into a contract to permit continued occupation of the family home.¹⁴⁸ Whether courts would uphold other terms in a cohabitation contract has not been tested. Apparently, such contracts are rare.¹⁴⁹

3.3.5 Any other type of relation accepted by the internal legal system which is other than 'legal' marriage

None

3.4 PROPERTY IN RELATIONS OTHER THAN TRADITIONAL MARRIAGE

Like marriage, the fact of cohabitation has no effect, per se, on any property owned by the parties. However, the normal rules of property law apply to such persons (whether heterosexual or homosexual) in the same way as they apply to married persons. This means that the law outlined above (1.2.1.1) relating to legal and equitable interests in a home and other property is equally applicable here.

Matrimonial home rights do not vest in unmarried couples.¹⁵⁰ However, a cohabitant or former cohabitant can apply to court for an occupation order where the criteria to be taken into account are different for unmarried cohabitants. In particular, the court must consider 'the nature of the parties relationship'¹⁵¹ and the length of time they have lived together as husband and wife¹⁵² (thus excluding same-sex cohabitants) and, further, the court is to 'have regard to the fact that they have not given each other the commitment involved in marriage'.¹⁵³ The law also discriminates against unmarried cohabitants in that an occupation order may only be granted for a maximum of six months and then only renewed once for a further maximum six-month period.¹⁵⁴

Unmarried cohabitants are not entitled to rely on any of the special provisions relating to bankruptcy and pension rights which only apply to married couples. Unmarried cohabitants are not entitled to seek maintenance from each other. However, the most significant difference between married and unmarried persons is that, on the ending of the relationship between the latter, courts have no powers to distribute property or make any financial provision orders. The court only has the

¹⁴⁶ *The Independent*, 6 September 2001.

¹⁴⁷ See Appendix.

¹⁴⁸ *Tanner v Tanner* [1975] 1 WLR 1346.

¹⁴⁹ Douglas, *An Introduction to Family Law* (2001, Oxford: Oxford University Press).

¹⁵⁰ Of course, such a person has a right to occupy the home if they have a beneficial interest in the property.

¹⁵¹ Family Law Act 1996, s 36(6).

¹⁵² *Ibid.*

¹⁵³ Family Law Act 1996, s 41.

¹⁵⁴ Family Law Act 1996, s 36(10).

power to make a declaratory judgment as to the ownership of the property. However, in this context, it should be borne in mind that on the termination of a relationship (between married or unmarried couples), maintenance for children is of critical importance. This is dealt with by the Child Support Act 1991 and the Children Act 1989 whose provisions apply to both married and unmarried parents.

With regard to state benefits, the law now generally treats married and heterosexual unmarried couples in much the same way. For example, where a woman is cohabiting with a man 'as husband and wife' they will be regarded as if married for the purpose of claiming means-tested benefits.¹⁵⁵ Such provisions are not aimed at eliminating discriminations between married and unmarried couples but are designed to ensure that unmarried couples do not benefit by being able to each claim benefits as if living alone.¹⁵⁶

3.5 PROPERTY ISSUES IN CASE OF SEPARATION OF UNMARRIED COUPLES

3.5.1 The separation of the couple

No formalities required

3.5.2 The effects of the separation upon the property of the members

The normal rules relating to ownership of the property apply (see above). The court only has a power to declare who owns what and no power to distribute assets. No rights to maintenance, pension rights or life insurance are available.

3.5.3 Effects of the separation with regard to third parties

The normal rules apply. No significance is attached to the fact of cohabitation.

3.6 PROPERTY ISSUES IN CASE A MEMBER OF THE UNMARRIED COUPLE DIES

3.6.1 In relation to the surviving member

As the fact of cohabitation does not in itself generate property rights, the normal rules of succession apply.

3.6.1.2 Intestate succession

An unmarried surviving cohabitant has no automatic entitlement to any share of the deceased's estate. However, a surviving cohabitant may apply for family provision.

3.6.1.3 Testate succession

As there is complete freedom of testation in English law a person may leave his/her entire estate to a cohabitant (of the same or different sex). However, this is subject to the right of any spouse to apply for family provision. Equally, if disinherited, a surviving cohabitant has no right to any share of the deceased's estate (but can apply for family provision).

¹⁵⁵ Social Security Administration Act 1992, s 78(6).

¹⁵⁶ Douglas, *An Introduction to Family Law* (2001, Oxford: Oxford University Press) p 67.

3.6.1.4 Family Provision

Under the Inheritance (Provision for Family and Dependants) Act 1975 (as amended in 1995¹⁵⁷) a cohabitant who has lived with the deceased in the same household as husband and wife for two years immediately before the death may apply for family provision.¹⁵⁸ However, unlike married couples, an unmarried cohabitant is only entitled to receive such financial provision as would be reasonable in all the circumstances for his or her maintenance. Applications for maintenance may also be made by any person who ‘immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased’.¹⁵⁹ A same-sex surviving partner (who cannot apply as a former cohabitant) can apply under this provision if he or she was being ‘maintained’ by the deceased.¹⁶⁰

3.6.1.5 Statutory succession to tenancies

Broadly speaking, spouses, cohabitants who have lived as husband and wife of the deceased and members of the tenant’s family can succeed to statutory and certain other protected tenancies. In *Fitzpatrick v Sterling Housing Association*¹⁶¹ a same-sex cohabitant was held to be entitled to succeed as a member of the deceased tenant’s family.

3.6.2 In relation to third parties

No significance is attached to the fact that the deceased was cohabiting with another.

3.7 OTHER REMARKS

None

¹⁵⁷ Law Reform (Succession) Act 1995.

¹⁵⁸ S 1A.

¹⁵⁹ S 1(e).

¹⁶⁰ The deceased must have been making a substantial contribution towards the survivor’s reasonable needs: s 1(3).

¹⁶¹ [1999] 4 All ER 705.

CHAPTER 4

UNMARRIED COUPLES. PRIVATE INTERNATIONAL LAW

4.1 GENERAL ISSUES OF P.I.L.

There is no authority in English law on any of these issues. The following is based on deductions from general principles of private international law.

4.1.1 Public policy. Characterization.

A distinction should be drawn between Registered Partnership Agreements, for example under the Danish Registered Partnership Act 1989, (hereafter referred to as RPA) and other unmarried couples who have not gone through any formal ceremony or agreement.

(i) *Registered Partnership Agreements*

(a) Characterisation

Are RPAs to be classified as marriages or contracts? If the latter view were taken, the conflicts rules on contract would apply. In such a situation it is not clear which contract rules would apply. The Rome Convention does not apply to questions involving 'status' or 'rights and duties arising out of a family relationship'¹⁶² thus suggesting that the common law should apply and the contract be governed by its proper law. On the other hand, it could be argued that if the relationship were not to be classified as a 'marriage' that must be because it is not regarded as raising an issue of status or family relationship and so the Rome Convention rules do apply.

However, the better and more realistic approach is to recognise that the process of classification involves examining the incidents of a status or relationship and then characterising it according to its nearest English analogue. On this basis as RPAs involve most of the incidents of marriage, they should be classified as 'marriages'. The same reasoning applies with equal force to Dutch same-sex marriages.

(b) Public policy

An argument that RPAs between persons of the opposite sex would be contrary to public policy is untenable. However, a potential problem could arise with regard to same-sex RPAs or Dutch same-sex marriages. However, attitudes towards such relationships have changed markedly over the past few decades and, indeed, there is a Private Member's Bill currently before Parliament to legalise same-sex partnerships. While this Bill is unlikely to become law, the fact of its existence and the changed climate is strongly indicative that recognition of same-sex RPAs and Dutch same-sex marriages would not be regarded as contrary to English public policy¹⁶³ (see also 3.3.3).

(ii) *Other unmarried couples*

(a) Characterisation

Disputes between such persons could not be classified as matters relating to marriage or matrimonial property. The same rules would apply as if the dispute was between strangers: for example, the issue would be classified as one relating to property or contract.

¹⁶² Art 1(2).

¹⁶³ While such RPAs would be likely to be recognised for the purposes of succession and matrimonial property, it is possible they might not be recognized for all purposes, for example, for the purposes of immigration law.

4.1.2 Recognition of the relation between an unmarried couple

If RPAs are classified as marriages and are not contrary to public policy, the validity of such a RPA would be determined in the same way as for marriages. The formal validity of the RPA would be determined by the *lex loci celebrationis*. The essential validity or the capacity of the parties to enter into the RPA would be governed either by the dual domicile doctrine (both parties must have capacity to enter into the RPA) or by the law of the intended matrimonial home. While the dual domicile is the one most favoured by English authorities for the other incapacities to marriage, there is an argument that for same-sex marriages and RPAs, at least, the intended matrimonial home test would be more appropriate.¹⁶⁴

4.1.3 Admissibility of the ‘celebration’ of a same sex ‘marriage’ (or other relation).

Not permitted.

4.2 INTERNATIONAL JURISDICTION

4.2.1 Separation of unmarried couples. International jurisdiction

There are no special rules on international jurisdiction for unmarried couples wishing to separate. The provisions applicable to married spouse would not be applicable to unmarried persons. Jurisdiction could not be assumed on the basis of general matrimonial jurisdiction rules.

4.2.2 Property aspects of the separation. International jurisdiction

There are no special rules. The main vehicle for property distribution for married spouses is divorce proceedings: this is not available for unmarried couples. However, the general rules for of international jurisdiction relating to property disputes (see 2.2.2(e)) would be available in the same way as they would for disputes between strangers. On the death of one party the English court has jurisdiction to award family provision to a cohabitant (see 3.6.1.4), but only if the deceased dies domiciled in England and Wales.

4.2.3 Relation between 4.2.1 and 4.2.2

This is covered at 4.2.2.

4.3 APPLICABLE LAW

4.3.1 Determination of the law applicable to the property regime

4.3.1.1 In case the couple has entered into a ‘contract’

Such a contract would be governed by the law governing the contract. Arguably, this would be the applicable law as determined by the Rome Convention on the Law Applicable to Contractual Obligations as implemented by the Contracts (Applicable Law) Act 1990. Art 1(2)(b) excludes from the ambit of the Act contractual obligations relating to ‘rights in property arising out of a matrimonial relationship’. A couple simply living together are not in a ‘matrimonial relationship’. If a couple have entered into a RPA there is an argument that this could be construed as a ‘matrimonial relationship’. Indeed, it would be odd to say that their relationship in other respects is not governed by the Rome Convention but a contract affecting their proprietary

¹⁶⁴ Clarkson and Hill, *op cit*, p 339.

relationship does fall within the Rome Convention. If the Rome Convention does not apply, the common law rules will govern all aspects of the contract.¹⁶⁵

4.3.1.2 In case there is no contract between the members of the couple

(i) *unmarried couples with no RPA*

Any disputes relating to property will be governed by the normal private international law rules relating to property: for example, the general rule relating to the transfer of all such property is that the *lex situs* of the property governs.¹⁶⁶ Of course, this means that if the *lex situs* has special rules affecting title to property for unmarried couples, effect would be given to this.

(ii) *registered Partnership Agreements*

Two approaches are possible:

(a) the same approach as above at 4.3.1.2(i) could be adopted; or

(b) if the RPA is to be classified as the equivalent of a 'marriage' (see 4.1.1), it would be logical to apply the same rule as for married couples: namely, the law of the 'matrimonial domicile'. In ascertaining this 'matrimonial domicile' much weight would be given to the law under which the RPA was entered into. This would probably be rationalised as an implied contract. So if a couple (say, one English and one Danish) enter into a Danish RPA, the proprietary consequences flowing from that agreement would be governed by Danish law.

4.3.2 Scope of the applicable law

Bearing in mind that the English court will only have jurisdiction to determine these matters in the context of general property jurisdiction, the following can be surmised:

4.3.2.1 - 4.3.2.2. During the 'existence' of the couple and at the time of separation

The above rules at 4.3.1 would be applicable.

4.3.2.2.2

Upon the death of one of the members.

The suggested rules below depend on the extent to which recognition is given to any property contract between the couple. If such a contract is recognised as already vesting certain property rights in the survivor, the following rules will only apply to the deceased's property.

(i) *testate succession*: the general rule that this is governed by the law of the testator's domicile at the date of death would apply. Accordingly, if a testator dies domiciled in State X and fails to leave any property to a partner under a RPA as is required by the law of State X, the will is only valid with respect to that portion of the estate which remains after the partner has received the statutory portion. If the testator dies domiciled in England the whole will would be valid - but family provision could be available.

(ii) *in testate succession*: In testate succession to movables is governed by the law of the deceased's domicile at the date of death; interstate succession to immovables is governed by the *lex situs*. If a person dies domiciled in state X (or leaves immovable property situated in State X) and under that law a partner is entitled to a fixed share, effect would be given to this. If the person died domiciled in England, whether a partner could succeed to property would depend upon whether an English court would interpret the phrase 'spouse' as including such a person. While the logic of the

¹⁶⁵ See 2.3.1.1.1.

¹⁶⁶ See generally, Clarkson and Hill, *op cit*, pp 442-455.

argument at 4.1.1 would suggest such an expansive interpretation should be adopted, it is nevertheless unlikely.

(iii) family provision: As seen at 3.6.1.4 cohabitants can apply.

4.3.3 Applicable law and changes of the property regime

4.3.3.1 Modifications of the connecting factor

If there is a contract or if, as suggested above at 4.3.1.2(ii)(b), parties to a RPA can be regarded as having their property governed by an implied property contract, the doctrine of immutability would apply and a change of domicile would have no effect on their property relationship.

4.3.3.2 Modifications of the applicable law

Effect would be given to changes in the applicable law. This would not affect vested property rights before the modification of the law unless under that law the changes were retrospective.

4.3.3.3 Changes in the property regime by consent of the couple

These would be given effect to although for persons who had entered into a RPA this could depend on whether the law governing that RPA permitted such a change.

4.3.3.4 Other possible changes of the property regime

None

4.3.4 Law applicable to publication of the property regime of an unmarried couple

Not applicable

4.4 RECOGNITION AND ENFORCEMENT OF FOREIGN COURT DECISIONS AND 'PUBLIC' ACTS IN RESPECT OF PROPERTY OF UNMARRIED COUPLES

4.4.1 The general rules on the effectiveness of foreign 'public' acts and court decisions as applied in the area of property of unmarried couples

4.4.1.1 Overview of sources and contents of these rules

There are no special rules dealing with the recognition of foreign public acts and court decisions relating to unmarried couples. The general rules on recognition of foreign judgments set out at 2.4.1.1 would be applicable.

4.4.1.2 Their application in the area of unmarried couples.

The general rules on recognition of foreign judgments would be applicable and this would not depend on whether the foreign RPA, for example, was recognised. Recognition of any such foreign order relating to the property of the parties would almost certainly not be contrary to public policy.

4.4.2 Rules on the effectiveness of foreign ‘public’ and private acts and court decisions specific to the area of property of unmarried couples

4.4.2.1 Recognition of contracts concluded between unmarried couples abroad

See 4.3.1.1

4.4.2.2 Recognition of modifications agreed by the couple which took place abroad (e.g.: by private agreement)

See 4.3.3.3

4.4.2.3 Enforcement of foreign court decisions on winding up and distribution of the property of the couple

The general rules for recognition and enforcement of foreign judgments set out at 2.4.1.1 would be applicable.

4.4.2.4 Cooperation between the courts and public authorities

See 2.4.2.4

4.4.2.5 Problems concerning the international effectiveness (‘enforceability’) of contracts which have been concluded during the ‘existence’ of the couple (e.g. sales contracts, gifts, employment contracts)

These would be recognised and enforced under the general rules of private international law as though the parties were strangers.

4.4.3 Practical significance of the rules set out under 4.4.1 4.4.2

4.4.3.1 Frequency of court decisions (judgments) concerning the effectiveness of foreign court decisions and foreign ‘public’ acts

Because the English court has no jurisdiction over the separation of unmarried couples (and so no power to transfer property etc as it has on divorce), these rules are potentially of greater practical importance than is the case with married couples. No precise estimates are possible. There are no reported decisions. Anecdotal evidence (and common sense) suggests that such cases will be rare.

4.4.3.2 Frequency of application of the rules on effectiveness of foreign court decisions and foreign ‘public’ acts by other ‘public’ authorities, outside court (e.g. by a public notary).

Not applicable

4.5 VARIOUS MATTERS

None.

ANNEXES

STATUTES AND BILLS

Civil Partnerships Bill

Domicile and Matrimonial Proceedings Act 1973, Parts I & II, Schedule 1

European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001 (SI 2001/310)

Family Law Act 1986, ss.44-51

Family Law Act 1996, Part IV

Inheritance (Provision for Family and Dependants) Act 1975, s.1

Matrimonial and Family Proceedings Act 1984, Part III

Matrimonial Causes Act 1973 ss.11-14, Part II

CASES

Cowan v. Cowan [2001] 2 FLR 192

De Nichols, Re [1900] 2 Ch 410

Egerton's Will Trusts, Re [1956] Ch 593

F v. F [1995] 2 FLR 45

Lashley v. Hog (1804) 2 Coop. t. Cott. 449 (47 ER 1243)

S v. S [1997] 1 WLR 1200

Welch v. Tennent [1891] AC 639

White v. White [2000] 2 FLR 981

BOOKS

Clarkson & Hill, *Jaffey on the Conflict of Laws* (1997) London: Butterworths,