The Law Reform Commission

FAMILY LAW REFORM
(PART 2)- REVIEW OF THE MATRIMONIAL CAUSES LAW (2005 REVISION) AND THE MAINTENANCE LAW (1997 REVISION); THE FAMILY PROPERTY (RIGHTS OF SPOUSES) BILL, 2013

Tuesday, July 09, 2013

TABLE OF CONTENTS

FAMILY LAW REFORM
(PART 2)- REVIEW OF THE MATRIMONIAL CAUSES LAW (2005 REVISION) AND THE MAINTENANCE LAW (1997 REVISION); THE FAMILY PROPERTY (RIGHTS OF SPOUSES) BILL, 2013

DISCUSSION PAPER

INTRODUCTION

1. This paper is the second discussion paper relating to the family law reform currently being undertaken by the Law Reform Commission. In the first discussion paper[1] ("the 2011 paper") the need for certain areas of reform were discussed and the public was asked to submit comments on a variety of matters.

2. Pursuant to public input the Matrimonial Causes Bill, 2013 was drafted together with a Maintenance Bill and a Family Property (Rights of Spouses) Bill which are all the subject of this discussion paper.

3. This paper contains a summary of the above-mentioned legislation which are contained in Appendices A to C. The paper will focus on the main areas of reform under each piece of legislation.

4. A draft Matrimonial Causes Bill and Maintenance Bill were sent in May 2012 for preliminary comments to two local attorneys who are well-known and respected local practitioners, Ms. Karin Thompson and Mr. David McGrath. Their views were taken into account in the re-draft of the legislation and the Commission thanks them for their invaluable input.

PART I

THE MATRIMONIAL CAUSES BILL, 2013

Grounds of divorce

5. It was noted that one of the distinct differences between the Matrimonial Causes Law (2005 Revision) ("the MCL") and the legislation of several jurisdictions such as New Zealand, Australia and Jamaica is that parties are still required in the Cayman Islands to provide fault-based grounds for divorce such as adultery, unreasonable behaviour and desertion.

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

[1] February 18, 2011

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

7. One of the principal aims of modern divorce legislation is to ensure that when a marriage has broken down and parties have no intention of trying to fix such marriage, the process of dissolving the marital partnership should be as free of acrimony as possible. Naturally this depends on the personality of the parties and the circumstances leading to the breakdown but legislation should ensure that this difficult time is made less painful. One of the legislative responses to this was to move away from fault-based divorce and provide for one ground of divorce i.e. irretrievable breakdown.

8. The historical development and legislative precedents in other countries were discussed at paragraphs 6 to 22 of the 2011 paper. In essence, the opinion, from as long ago as 1965 in the case of the UK, was that the Matrimonial Causes Act at the time, with its insistence on guilt and innocence, tended to embitter relationships with particular damaging results to the children of the marriage, rather than to promote future harmony. The Scottish Law Commission in 1988 in its discussion paper "The Ground for Divorce- Should the Law be changed?" argued that the retention of fault-based grounds may in some cases "be an unnecessary dredging up of incidents which would be best forgotten, an unnecessary emphasis on blame and recrimination and an unnecessary increase in bitterness and hostility".

9. The Commission posed the following questions in the 2011 paper-

A. Should the MCL be reformed to provide for one ground for divorce i.e. irretrievable breakdown or should the Cayman Islands continue to require parties to prove fault or separation?

B. Would a single no-fault ground be more effective in reducing acrimonious divorces?

10. While the Cayman Islands Law Society and the Caymanian Bar Association ("the legal associations") and other persons were in favour of the one ground of divorce, there were negative responses from one local firm[2] ("the local firm") and the Cayman Minister's Association. The local firm opined that the matrimonial offence principle

[2] Brooks & Brooks

appears to work in the Cayman Islands. Further, that if the fault-based system is taken away then divorce rates are likely to substantially increase with its attendant problems for the children and the less well-off spouse.

11. The Ministers' Association was equally unsupportive and was of the view that proving fault or separation should be retained. According to the Association, in the United States, those states adopting no-fault divorces appear to have contributed to escalating divorce rates over the past three decades. The Association expressed its hope that the grave mistake of principles that have been made elsewhere would not be adopted blindly into the Cayman Islands legislation.

12. The Commission believes that this review would have benefited from a greater number of responses from a wider cross section of the society. What is required is a balance between, on the one hand, modernising our legislation to ensure that when a marriage is in its final days and parties are intent on ending their marriage that this can be facilitated by the law and courts in a way to ensure the minimum of bitterness and, on the other hand, to ensure that spouses do not believe that divorce is an easy way out of marital discord.

13. The role of the law and the court in marriages should be carefully considered- what is the role of the court when persons wish to bring their marriage to an end? Should the court retain the role of inquisitor? One cynical view is that the "law is designed to deal with the cold hard facts more than it is with the emotional issues. The goal of most divorce legislation is to mete out a somewhat equitable division of debts and assets, ensure that the custody and financial care of any children is established and dissolve any further legal obligations between the parties."[3]

14. The Hong Kong Law Reform Commission in its paper "*Grounds for divorce and the time restriction on petitions for divorce within three years of marriage*"[4] noted that-

> "The law in the area of divorce is needed to dissolve the legal tie of marriage between the parties and to ensure that matters regarding the welfare of the children and fair distribution of the matrimonial assets are attended to. Another role of the law in this area, which is not always recognised, is that it provides a "rite of passage" so that the parties involved have a definite point from which to let go of their old lives and to start afresh. Issues for consideration includes: how effectively does the law which is the subject of this report facilitate what has become a fact of modern life – the ever-increasing incidence of divorce? To what further extent than at present can this area of the law be made to fulfil its functions and assist the parties to resolve their divorce with as little harm as possible?"

[3] "No Fault Divorce: Increasing Divorce Rate in America"- Sandra J. Patterson

[4] Topic 29, August, 1992

15. The Commission does not accept that the court should only deal with cold hard facts and believes modern matrimonial legislation should, while seeking to resolve divorce with as little harm as possible to all interested persons, also seek to assist parties in re-considering their decision to end their marriage. The legislation should also include mediation and other "family support" steps which must be taken prior to the grant of a decree.

16. In Australia, one of the pioneer countries in the reform of divorce legislation, irretrievable breakdown based on 12 months separation is the only ground which needs to be proved. However, the Family Law Act contains many provisions which aim to assist parties in resolving marital differences and in maintaining the family unit. For example, under sections 12E and 12F of the Act legal practitioners and principal executive officers of the court are mandated to provide information about-

(a) the legal and possible social effects of the proposed proceedings (including the consequences for children whose care, welfare or development is likely to be affected by the proceedings);
(b) the services provided by family counsellors and family dispute resolution practitioners to help people affected by separation or divorce;
(c) the steps involved in the proposed proceedings;
(d) the role of family consultants;
(e) the arbitration facilities available to arbitrate disputes in relation to separation and divorce; and
(f) reconciliation.

17. If parties receive such information and are provided ready access to free or subsidised counselling services why should there be any need, after all such steps are taken, to engage in a matrimonial battle in a court room refereed by the court?

18. One of the questions raised in relation to separation being the sole ground to prove the breakdown of the marriage relates to the nature of the evidence which is to be given to the court. In the affidavit to be provided in support of the application under the Australian Family Law Act an applicant must prove that there has been a change in the marriage, gradual or sudden, showing that the applicant and his or her spouse have separated. The applicant will need to explain any-

- change in sleeping arrangements;
- reduction in shared activities or family outings;
- decline in performing household duties for each other;
- division of finances; for example, separate bank accounts; and
- any other matters that show the marriage has broken down; for example, if you have notified family and friends of your separation.

19. An affidavit should also explain:

- why the applicant continued to live in the same home following separation and what intention, if any, he or she has of changing the situation;
- living arrangements made for any child of the marriage under 18 years during the time the spouses were living under one roof;
- what government departments have been advised of the separation if the person receives a government benefit.

20. An applicant for a divorce must therefore in Australia prove to the satisfaction of the court that a relationship has broken down. A divorce order cannot be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.

21. In the UK, while the sole ground is irretrievable breakdown, the petitioner must prove one or more of five facts which are similar to the grounds of divorce in the Cayman Islands. In Canada, under the Divorce Act, breakdown of a marriage is established only if-

(a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; or

(b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,

(i) committed adultery, or

(ii) treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

22. The Hong Kong Law Commission and other writers have noted that one of the disadvantages with separation only is that in cases where one party has been guilty of very bad conduct towards the other, the grieved party is unable to use such conduct as ground to escape the marriage and must instead wait out the full term of required separation. The Commission noted that this may not be of much concern when the separation period is one year but may cause many difficulties where, as in New Zealand, it is two years. It may also be a challenge economically to separate especially for the less well-off spouse.

23. After an examination of the various approaches adopted the Commission submits, for discussion, clause 29 of the Bill which provides as follows-

"29. (1) A petition for a decree of dissolution of marriage may be presented to the court by either spouse on the ground that the marriage has broken down irretrievably.

(2) In proceedings for a decree of dissolution of marriage the ground shall be held to have been established, and such decree shall be made if the court is satisfied that the spouses have separated and thereafter lived separately and apart for a continuous period of not less than twelve months immediately preceding the

date of filing of the petition for that decree and there is no reasonable likelihood of cohabitation being resumed."

24. The Commission is of the opinion that the above provides a balance and deals with the disadvantage noted above where separation is the only fact which must be proven. Comments on this provision is welcomed.

25. A part of the discussion on the grounds of divorce in the discussion paper related to the time within which a petition for divorce can be brought. Section 10 of the MCL prohibits the presentation of a petition in the case of adultery, without the leave of the court, within two years of the celebration of marriage. The rationale for a restriction period has been that a restriction "is a useful safeguard against irresponsible or trial marriages and a valuable external buttress to the stability of marriages during the difficult first years"[5]. There is no time restriction for the presentation of a petition where the ground for divorce is unreasonable behaviour. A time limit is implicit in the other grounds of divorce which are desertion for two years or more or separation from two to five years.

26. The legal associations were of the view that an absolute time restriction of a period of one year as exists in the UK MCA would provide some form of buttress to the stability of marriage. The legal associations noted however that most practitioners are of the view that such a bar is not necessarily helpful as once a couple has decided to separate, regardless of how soon after the marriage ceremony, they should be permitted to do so without having to overcome additional legal barriers. The local firm agreed that the two year bar in relation to adultery should be removed as this creates an extra and unnecessary hurdle for litigants.

27. In response to this issue clause 33 of the Bill provides that a petition for a decree of dissolution of marriage where the ground of divorce is irretrievable breakdown shall not be presented unless at the date of the presentation of the petition one year has passed since the date of the marriage.[6] What are the views on this clause?

Promotion of reconciliation

28. Reconciliation as an important part of a modern Matrimonial Causes Law was discussed in the 2011 paper at paragraphs 27-41. The Commission asked whether the divorce rates could be reduced in the Cayman Islands if parties are legally required to undergo counselling or mediation. Should parties, who may be at the end of their tether in their relationship, be forced to go through such a process? Should such services be funded by the government?

29. The response from the legal associations was that a minority within the profession take the view that there should be a mandatory requirement that the petition and/or verifying affidavit must certify that the parties have considered counselling and

[5] 1988 Law. Com. No.116- "Time restrictions on Presentation of Divorce and Nullity Provisions"
[6] See UK MCA 1973

record the result of either the counselling itself or the reason for not attending counselling. It was argued that-

> "[w]hilst a good idea in principle, practical difficulties arise if a 'Family Dispute Resolution' service or similar were to be introduced as exists under the Australian Family Law Act. It needs to be considered, how this would be implemented and what resources are available in Cayman to allow such a service to be implemented in practice. The Department of Children and Family Services (DCFS) is already stretched in its responsibilities and resources and so an addition to its services would not be a realistic option. There would need to be a constant pool of experienced practitioners in place to facilitate such a service.".

30. They were also of the view that with the high divorce rate in the Islands it may be very difficult to fund and administer mediation and administrative services. It was further argued it would not be appropriate to obligate a victim of domestic violence to go through a face to face conciliation.

31. The Ministers' Association supported the provision of mediation as a means of preserving a marriage but felt that in certain circumstances persons should be permitted not to undertake mediation.

32. The local firm was of the view that counselling and reconciliation could assist in the reduction of the number of divorces. The firm recommended the approach taken under the Jamaican MCA which provides for counselling by approved marriage counselors.

33. The Commission agrees that the encouragement of reconciliation and the promotion of counselling of the spouses and the family are an integral part of any modern matrimonial legislation. Clause 14 provides that counselling services as a facility for reconciliation in matrimonial causes shall be provided by approved marriage counsellors. and family dispute resolution shall be provided by family dispute resolution practitioners. "Counselling" is defined in clause 2 as a process in which an approved marriage counsellor helps-

(a) one or more persons to deal with personal and interpersonal issues in relation to marriage; or
(b) one or more persons, including children, who are affected, or likely to be affected, by separation or divorce to deal with either or both of the following-
    (i) personal and interpersonal issues; and
    (ii) issues relating to the care of children.

34. "Family dispute resolution" is a process (other than a judicial process)-

(a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and

(b) in which the practitioner is independent of all of the parties involved in the process.

35. Clause 15 provides for the appointment of approved marriage counselors and family dispute resolution practitioners by the Attorney General. The names of all approved marriage counselors and family dispute resolution practitioners would be published in the Gazette.

36. In clause 19, under part 4 of the Bill, it is provided that where proceedings for a dissolution of marriage have been instituted, or financial or custodial proceedings have been instituted by a spouse to a subsisting marriage, it is the duty of the judge or magistrate constituting the court to give consideration to the possibility of a reconciliation of the parties. If at any time during the proceedings it appears to the judge or magistrate from the evidence, or the attitude of the spouses, or either of them, that there is a reasonable possibility of a reconciliation, the judge or magistrate may adjourn the proceedings to afford the parties an opportunity of considering a reconciliation.

37. Clause 19 further provides that where a judge or magistrate adjourns proceedings he may, if he thinks it desirable to do so, advise the parties to meet with an approved marriage counselor or a person recommended by the spouses or either of them to assist them whom the court considers suitable, in considering a reconciliation.

38. Clause 20 provides for family counselling and family dispute resolution. It is provided that where a court is of the opinion that counselling may assist the spouses to improve their relationship with each other and with any child of the marriage, the court may direct the parties to consult an approved marriage counsellor and, if it thinks it desirable to do so, adjourn the proceedings before it for the purpose. Further, where the court is of the opinion that family dispute resolution may assist the spouses to resolve any matter including financial and property matters which are the subject of the proceedings the court may direct the spouses to consult a family dispute resolution practitioner and if it thinks it desirable to do so, adjourn the proceedings before it for the purpose.

39. It is emphasized that a spouse’s refusal or failure to comply with any direction or advice given under this provision would not constitute a contempt of court.

40. An attorney would also be required under the legislation to notify his client of the facilities that exist for assisting spouses in reconciliation or for providing counselling. He will be required to certify to the court when there is an application for a hearing that he has in fact carried out the requirements provided under the legislation.

41. Clause 25 provides that Rules may provide for the furnishing to a person proposing to institute proceedings under this Law, and in appropriate cases to the other spouse to the marriage, of documents setting out the legal and possible social effects of

the proposed proceedings (including the consequences for the children of the marriage) and the counselling, dispute resolution and other welfare facilities available within the court and elsewhere.

42. Statements given in counselling and dispute resolution will, in accordance with the legislation, be confidential and a marriage counsellor and practitioner providing counselling under the legislation, before entering upon the performance of his functions, shall make, before a person authorised by law to take affidavits, an oath or affirmation of secrecy in accordance with the form prescribed in the Schedule to the legislation.

Protection of the interests of children

43. As noted at paragraph 42 of the 2011 paper, one of the field of choice criteria is that a good divorce law should protect the interests of the children by ensuring that when a marriage comes to an end children should be spared embarrassment and humiliation. A good divorce law should "not merely bury the marriage but do so with decency and dignity and in a way which will encourage harmonious relationships between the parties and their children in the future".[7]

44. The MCL does satisfy these criteria to some extent as it provides under section 13 that the court shall not grant a decree until it is satisfied that provision has been made for the custody and care of all the children of the marriage. The proposed Bill in clause 46 re-enacts clause 13 of the current MCL. The age however of a child under clause 46 has been changed to a child under the age of eighteen. Thus under clause 46 a court shall not proceed to grant an order of divorce, separation or nullity until matters pertaining to a child under the age of eighteen or such greater age that the court specifies have been resolved.

45. The legislation will recognise maintenance agreements entered into by spouses with each other for the purposes of facilitating the settlement of their affairs. This can include agreement on support rights and obligations of the spouses with respect to each other or any child of the marriage that either spouse has an obligation to maintain and the right to direct the education and other training of their children, but not the right to custody of or access to their children. Clause 45 provides that in the determination of any matter relating to the welfare and parental responsibility of a child in proceedings under the legislation the court may take into account any maintenance agreement entered into by the parties to the marriage but the court may disregard any provision of such agreement pertaining to such issues where, in the opinion of the court, to do so is in the best interests of the child.

46. The legal associations recommended the inclusion of a provision similar to section 43 of the Family Law Act of Australia which details the primary considerations in determining the best interests of the child. This recommendation has been accepted and clause 9 provides that in the exercise of its jurisdiction under the legislation or any other enactment, the court shall have regard to the following principles-

[7] 1966 UK Law Commission Report ante

(a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
(b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;
(c) the need to protect the rights of children and to promote their welfare;
(d) the need to ensure safety from family violence; and
(e) the means available for assisting spouses to consider reconciliation or the improvement of their relationship with each other and with the children of the marriage.

47. In accordance with clause 47, where in any matrimonial proceedings the welfare of a child is relevant, the court may, at any stage of the proceedings, of its own motion or upon the request of a spouse make an order directing the parties to attend a conference with a family dispute resolution practitioner, social worker or probation officer, as the circumstances require, to discuss the welfare of the child, and, if there are any differences between the spouses as to matters affecting the welfare of the child, to endeavour to resolve those differences.

48. Further, clause 49 provides where the parental responsibility, guardianship or maintenance of, or access to, a child of a marriage is being considered by the court, if it appears to the court that the child ought to be separately represented, the court may, of its own motion, or on the application of the child or of the social worker or the probation officer or of any other person, order that the child be separately represented. The court may make such other orders as it thinks necessary for the purpose of securing separate representation.

49. The legislation also seeks to ensure that children are not exposed unnecessarily to court room proceedings by providing in clause 87 that a child, other than a child who is or is seeking to become a party to proceedings, shall not swear an affidavit for the purposes of proceedings, unless the court makes an order allowing the child to do so. Further, it is provided that a child shall not be called as a witness in, or be present during, proceedings in any court when exercising jurisdiction under the legislation, unless the court makes an order allowing the child to be called as a witness or to be present.

50. In the interest of protecting all parties, including children in matrimonial proceedings, clause 89 provides that the court shall forbid the asking of, or excuse a witness from answering, a question that it regards as offensive, scandalous, insulting or humiliating, unless the court is satisfied that it is essential in the interest of justice that the question be answered. The court will also be empowered to forbid an examination of a witness that where it regards such examination as oppressive, repetitive or hectoring, or excuse a witness from answering questions asked during such an examination, unless the court is satisfied that it is essential in the interests of justice for the examination to continue or for the questions to be answered.

Divorce proceedings

51. The delay in concluding divorce proceedings in the Cayman Islands was discussed in the 2011 paper and the Commission queried whether the MCL should be reformed in similar terms to the UK or Hong Kong to permit-

(a) the grant of summary divorces where there are no children; and
(b) the hearing of some financial arrangements after a divorce has been granted.

52. The legal associations were of the view that the Grand Court should have discretion to grant a summary divorce only in circumstances where the parties do not have children or matrimonial assets. They expressed the view that, from a psychological perspective for the parties, it is best that a decree is not issued until all ancillary matters have been resolved. It was further noted that-

> " There is a sense of finality on the issuing of a decree and if the law was to be reformed to allow for the grant of summary divorce (even when there are no children) it may actually result in parties taking longer to resolve their financial affairs, especially where the parties are in new relationships and perhaps expecting children etc. In these cases there may be a lack of motivation for parties to actually finalise their issues resulting in broader ramifications later on in life e.g. ties to property, difficulties with inherited assets, post separations assets after long periods of separation etc.".

53. The local firm agreed with the legal associations that ancillary matters should be resolved before the grant of a decree of dissolution. It however agreed with the Hong Kong provision which provides that the court may, if it thinks fit, proceed without observing certain statutory requirements if it appears that there are circumstances making it desirable that the decree should be made absolute without delay and the court has obtained a satisfactory undertaking from the petitioner that he will make such financial provision for the respondent as the court may approve.

54. The approach taken under the draft legislation is as follows- a decree cannot be granted unless matters relating to the maintenance and welfare of a child have been resolved to the satisfaction of the court. Also in accordance with clause 53, subject to clause 46, a decree for the dissolution of marriage or separation shall not be granted by the court, unless it is satisfied that-

(a) financial provision for the spouse applying for such provision has been resolved or no financial provision is required for either spouse; or
(b) the financial provision for the spouse applying for such provision is reasonable and fair or the best that can be made in the circumstances.

55. However clause 53 goes on to provide that where there are no children of the marriage the court may, if it thinks fit, proceed with the grant of a decree without observing the requirements of clause 53(1) if-

(a) it appears that there are circumstances making it desirable that the decree should be granted without delay; and
(b) the court has obtained a satisfactory undertaking from the spouse who will be required to make financial provision under this Part that he will make such financial provision for the applicant spouse as the court may approve.

56. The Commission believes that the approach taken under the draft Bill protects the welfare of the children of the marriage and any dependent spouse but allows parties to divorce where hardship may be caused by prolonged proceedings relating to ancillary matters. The undertaking which must be provided for the expedited divorce or separation to be granted seeks to ensure that the concerns of the legal associations are addressed as a party would not be able ignore an undertaking to resolve ancillary matters with impunity.

Financial relief in Cayman Islands after separation or divorce in another jurisdiction

57. The local case of *Wheeler v Wheeler*[8] was discussed in paragraphs 77 to 83 in the 2011 paper and the question posed in relation thereto was whether the law should be reformed to give the Grand Court power to grant ancillary relief to resident persons under decrees made in other jurisdictions.

58. Unlike the UK, in the Caymans Islands if the court recognises a divorce decree of another jurisdiction and no financial provision has been made for an economically weaker party who is in need of such provision, the court still has no power to order maintenance for a party who is resident in the Cayman Islands. This power was given to the UK court in 1984 by the Matrimonial and Family Proceedings Act 1984 ("the 1984 Act"). Section 12 (1) of that Act provides as follows-

" (1) Where-

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

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

59. The legal associations were of the view that the Law should not be amended to provide such relief as noted above but that there needs to be clear provision for reciprocal

[8] 1997 CILR 362

enforcement of matrimonial and children orders made in other jurisdictions. The associations believed that the *Wheeler case* was not typical and that persons should be encouraged, in order to avoid jurisdictional disputes between Cayman and foreign courts in respect of ancillary matters, to apply for relief in the jurisdiction in which the divorce order was made.

60. The UK provisions were enacted pursuant to recommendation in the UK Law Commission Report no. 117 of 1979 which highlighted cases in which the court's residual power to refuse to recognise a foreign divorce was sought and frequently refused. The UK Commission in its report *"Financial Relief after Foreign Divorce"* felt that-

> "a widespread refusal to recognise foreign decrees on the grounds of public policy would be unfortunate and the possibility of such a trend emerging adds weight to the case for conferring adequate powers on the court to ensure that recognition of a foreign divorce does not necessarily affect the parties financial position.".

61. The Commission believes that the 1984 Act contains sufficiently stringent conditions relating to application for financial relief in order to ensure that the possible problems which the legal associations have highlighted would be guarded against. The relevant provisions of the 1984 Act should be used as a model in order to ensure the full right of access to justice under the family law system in the Cayman Islands.

62. Many cases have been heard under which the 1984 Act has been invoked and the general trend appears to be one of judicial caution in granting the relief sought. In relation to the point of jurisdictional disputes, in *Golubovich v Golubovich*[9] where there was a dispute concerning whether the court should recognise a decree of divorce obtained in Russia, Thorpe LJ emphasised the need for the courts to be fully informed in determining such matters. He stated that-

> "It is clearly essential that the two courts seised should have the fullest information as to issues tried, or to be tried together with the likely timetable for future progress. Judges should communicate directly to ensure that the record in one court is available to the other. If the judge in one court feels that he is deprived of information necessary for the management of the case before him he should communicate with the judge in the other court directly, requesting whatever it is that he requires. The benefit of cross-border judicial collaboration in children's cases is now universally recognised. There is every reason to extend this innovation into all areas of international family law."

63. In order to get financial relief under an overseas order in the UK, in accordance with section 13 of the 1984 Act, the leave of the court must be obtained for the application for financial relief and the court cannot grant leave unless it considers that there is substantial ground for the making of an application for such an order.

[9] [2010] EWCA Civ 810

64. In *Holmes v Holmes*[10] the parties married in 1968 and a child was born in 1973. In 1978, the family moved to New York, where an apartment was bought in the husband's sole name. A cottage in England was also purchased and conveyed into joint names. In proceedings brought by the husband in New York the judge granted each party a decree of divorce, made provision for maintenance and ordered that the properties in New York and England be sold and the proceeds of the sale divided equally between the parties. The wife returned with the child to the United Kingdom and lived in the English cottage, but did not co-operate in the sale of the cottage. During 1987, in further proceedings in New York, the wife failed to satisfy the judge that she could obtain a loan to buy out the husband's interest in the cottage. On 21 March, 1988 the Supreme Court of the State of New York confirmed the order of sale relating to the cottage. In May 1988 the wife sought leave to apply for financial relief under s.13 of the Matrimonial and Family Proceedings Act 1984. Heilbron J dismissed the application. The wife appealed.[11]

65. The appeal was dismissed. The court noted that before granting leave to make the application for financial relief, the court had to be sure that there was a substantial ground for so doing. The test was a stringent one. New York was the natural forum to resolve the disputes between the parties. Heilbron J had been correct to hold the New York court was the proper forum to resolve the disputes between the parties

66. In the case Purchas LJ said-

> "the phrase 'substantial ground for the making of an application for such an order' is clearly central to the issues in this application…[i]n particular when the court comes to consider such an application, it will have to take into account under s. 16(1) whether in all the circumstances of the case it will be appropriate for such an order to be made by a court in England and Wales. If it is not satisfied that it would be appropriate (and that is a positive onus), the court shall, as a matter of mandatory instruction, dismiss the application.
>
> In my judgment that section reflects the fundamental rule of comity as between competent courts dealing with matters of this kind. Of course s. 16 is to be considered on the application itself. Mr. Bond very properly drew the distinction between the criteria which the court should take into account if it decides to entertain the application and those which the court has to consider on the application for leave to make the application. Nevertheless, if on the application for leave to apply it is clear that if leave were given the application must founder at the first hurdle of s. 16(1), then it would clearly be wrong for the court to grant leave to apply in the first instance. So it is not possible to isolate the considerations which arise under this group of sections and the purpose of this Act is generally apparent, namely, that it is there to remit hardships which have been experienced in the past in the presence of a failure in a foreign jurisdiction to afford appropriate financial relief. The obvious cases are

[10] [1989] Fam 47
[11] Taken from the Law Society Gazette

those jurisdictions where there simply are not any provisions to grant financial relief to wives or children or, maybe husbands and children. In such cases, although the dissolution of the marriage has taken place in a foreign jurisdiction according to foreign laws, then the courts in this country are empowered by Parliament to step in and fill the gap. *For my part I do not believe that the intention of Parliament in passing this Act was in any way to vest in the English courts any power of review or even correction of orders made in a foreign forum by a competent court in the whole matter had been examined in a way exactly equivalent to the which examination which would have taken place if the application had been made in the first instance in the courts here. That is not the object of this legislation at all*".[12]

67. The local firm did not hold the same view as the legal associations on this point and was of the opinion that the Grand Court should be granted statutory jurisdiction to make original orders and or vary existing orders relating to overseas divorces and annulments. The Commission agrees with this opinion and has incorporated in the draft MCL Bill in clauses 70 to 80 provisions which are based on the UK legislation. The Commission is of the view that they contain sufficient safeguards against duplication of proceedings and abuse of the process of the court.

Ancillary orders

68. Ancillary orders were discussed in the 2011 paper[13] as it had been recommended to the Commission that ancillary orders similar to those under the MCA should be included in any reform to the law. The sections of the MCA discussed were sections 25, 25A, 28 (1) and section 37.

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

70. Sections 25A and 28 are known as the clean break provisions i.e. orders can be made under those sections by the court to ensure that parties make a clean financial break from each other once the final decree has been granted. Once a clean break is made the court will not hear any further claims that the spouses have for the duration of the parties' lives and even after the death of one or other of the ex-spouses. This type of financial settlement relates only to the finances of the parties. Future financial provision for children cannot be finalised in this way.

[12] Quote referenced from lawindexpro, August 2012
[13] Paras 84 to 107

71. Section 25 of the UK MCA details the matters which should be taken into account by the court in determining financial matters while section 37 empowers the court, upon application, to make a restraining or freezing order to prevent one spouse from disposing of assets and to make a setting aside or unscrambling orders where the disposition has already taken place.

72. There was support for the inclusion of these provisions and calls for express legislative provision for the use of trusts for sale in matrimonial settlements. The legal associations and the local firm were of the view that with regard to how the matrimonial home is dealt with, the starting point of division should always be an equal entitlement to that home.

73. Clauses 2, 52 to 68 of the draft Bill deal with the matters cited above. "Matrimonial home" is defined in clause 2 as follows-

> "the dwelling-house that is owned by either or both spouses and used habitually or from time to time by the parties as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household".

74. Also, under clause 2 "matrimonial property" is defined as the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of -

(a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
(b) an award or settlement of damages in court in favour of one spouse;
(c) money paid or payable to one spouse under an insurance policy;
(d) reasonable personal effects of one spouse;
(e) business assets;
(f) property exempted under a marriage contract or separation agreement; and
(g) real and personal property acquired after separation unless the spouses resume cohabitation. [14]

It also includes real and personal property acquired before the marriage by either spouse where such property was acquired in contemplation of the marriage, has been subsequently used for the benefit of the family or has increased in value by the intermingling with other matrimonial property;

75. Clause 56[15] provides that subject to the Family Property (Rights of Spouses) Bill, 2013[16] and the power of the court to vary such entitlement, each spouse shall be entitled to one-half share of the matrimonial home-

[14] Nova Scotia Matrimonial Property Act
[15] Precedent is the Family Property (Rights of Spouses) Act, 2003, Jamaica

(a) on the grant of a decree of dissolution of a marriage;
(b) on the grant of a decree of nullity of marriage; or
(c) on the grant of a decree of judicial separation.

76. The right to a share in the matrimonial home is also subject to the right of creditors, including chargees, in accordance with the Family Property (Rights of Spouses) Bill, 2013.

77. Clause 63 lists the range of powers which the courts have in dealing with financial matters in matrimonial proceedings and these include the power to-

(a) appoint or remove trustees;
(b) order that payments be made directly to a spouse, to a trustee to be appointed, into court or an account standing in the name of the spouse at a Class A bank or to such public authority as the court specifies in the order, for the benefit of a spouse;
(c) order that payment of maintenance in respect of a child be made to such person, trustee or public authority as the court specifies;
(d) make an order providing for the delivering up, safekeeping and preservation of the matrimonial home and its contents;
(e) make an order directing that one spouse be given exclusive possession of the matrimonial home or part of it for the period that the court directs and release other property that is a matrimonial home from the application of this Part;
(f) make an order directing a spouse to whom exclusive possession of the matrimonial home is given to make periodic payments to the other spouse;
(g) make an order directing that the contents of the matrimonial home, or any part of them-
    (i) remain in the home for the use of the spouse given possession; or
    (ii) be removed from the home for the use of a spouse or child;
(h) order a spouse to pay for all or part of the repair and maintenance of the matrimonial home and of other liabilities arising in respect of it, or to make periodic payments to the other spouse for those purposes;
(i) authorising the disposition or encumbrance of a spouse's interest in the matrimonial home, subject to the other spouse's right of exclusive possession as ordered;
(j) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for life or during joint lives or until further order; or
(k) impose terms and conditions.

78. Clause 64 of the Bill deals with the duty of the court to end financial relations between spouses. Thus it is provided that in matrimonial proceedings other than proceedings relating to the alteration of property interests or proceedings in respect of

[16] Discussed in Part III

maintenance payable during the subsistence of a marriage, the court shall, as far as practicable, make such orders as will finally determine the financial relationships between the spouses and avoid further proceedings between them. Further, where the court decides to make a periodical payments or secured periodical payments order in favour of a spouse, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would, in the opinion of the court, be sufficient to enable the spouse in whose favour the order is made, to adjust without undue hardship to the termination of the spouse's dependence on the other party.

79. Clause 68 deals with transactions to defeat claims in matrimonial proceedings. The clause provides that the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a spouse, which is made or proposed to be made to defeat an existing or anticipated order in any proceedings under Part 8 of the Bill for costs, maintenance or the declaration or alteration of any interest in property or which, irrespective of intention, is likely to defeat any such order. The court may order that any money or real or personal property dealt with by any such instrument or disposition may be taken in execution or charged with the payment of such sums for costs or maintenance as the court directs, or that the proceeds of a sale shall be paid into court pending an order of the court.

80. Clause 68 further provides that the court shall have regard to the interests of, and shall make an appropriate order for the protection of, a purchaser in good faith or other interested person. Also, the court may order a party or a person acting in collusion with a party to pay the costs of any other party, a purchaser in good faith or any other interested person, that are incidental to the instrument or disposition and the setting aside or restraining of the instrument or disposition.

81. Ancillary orders may also be made under clause 43 of the Bill which provides for the making of injunctions and other orders relating to situations where there is domestic abuse or a volatile family situation. In addition to any other order the court may see fit to make in the circumstances, the court may grant an injunction or other order-

(a) for the personal protection of a spouse or of any relevant child;
(b) restraining a spouse from entering or remaining in the matrimonial home or the premises in which the other spouse resides, or restraining a spouse from entering or remaining in a specified area, being an area in which the matrimonial home is, or which is the location of the premises in which the other spouse to the marriage resides;
(c) restraining a spouse from entering the place of work of the other spouse or restraining a spouse from entering the place of work or the place of education of any relevant child;
(d) in relation to the property of a spouse; or
(e) relating to the use or occupancy of the matrimonial home.

82. Clause 43 provides in exercising its powers specified above that the court shall act in accordance with the Protection From Domestic Violence Law, 2010 where necessary and may make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights.

Action and damages for adultery

83. The need to abolish the archaic action for damages for adultery was highlighted in the discussion paper.[17] The majority of the responders agreed that this had no place in modern legislation. As a result, clause 98 provides that after the date of the commencement of the legislation no action lies for damages for adultery. Any such proceedings instituted before the commencement of the legislation would not be continued after that day.

Pre-nuptial agreements

84. The use and growth of pre-nuptial agreements were discussed in the 2011 paper and the Commission queried whether the law should be reformed to provide statutory recognition of pre-nuptial agreements. Responders acknowledged the utility of doing so. The CMA stated that while it did not advocate the use of such agreements prior to holy matrimony and was inclined to "deplore" them, their objective existence is not in doubt and they should be taken into account and recognised in divorce settlements.

85. The UK, Canada, Jamaica and Australia, among others, are all jurisdictions which recognise and give effect to such agreements subject to certain conditions. The views of the Supreme Court in the British Columbia case of *Hartsborne v Hartsborne*[18] is very instructive on the recognition to be accorded to pre-nuptial agreements. In that case, the Supreme Court in upholding a pre-nuptial agreement held as follows-

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

[17] Paras 108 to 116
[18] (2004) 1 S.C.R. 550

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

86. Clause 60 of the Bill seeks to provide legislative recognition of marriage agreements which will be regulated under the Family Property (Rights of Spouses) legislation. Clause 60 provides that spouses or persons in contemplation of marriage may enter into a maintenance or marriage agreement which may provide that the agreement shall operate, in relation to the maintenance and other financial matters dealt with in the agreement, in substitution for the rights (if any) of the parties to the agreement under that Part of the legislation. Marriage agreements will be discussed in Part III which deals with the Family Property (Rights of Spouses) legislation. The marriage agreement differs from the maintenance agreement because the latter may cover how children are to educated and maintained, unlike the marriage agreement. Due to the fact that a maintenance agreement deals with children it must be approved and registered by the court. A marriage agreement does not have to be registered but must comply with the provisions of the Family Property (Rights of Spouses) legislation.

Artificial insemination

87. The Law Reform Commission had, in the 2011 paper, sought comment on the need to expressly define in legislation as "child of a marriage" those children who are the products of artificial insemination. A child of the marriage who is covered by the MCL is defined as including any child under the age of sixteen years[19] who is the child, adopted or otherwise, of either party to such marriage or who has been brought up in the matrimonial home of the parties to such marriage as a member of their family.

88. It was submitted that that definition of a child of the marriage in the Matrimonial Causes Law is sufficiently wide to cover any child including a child conceived by way of artificial insemination. The New South Wales Commission in 1986[20] noted that this was the position also taken in Australia by Mr. Justice Asche of the Family Court of Australia in 1980 and 1983.[2] Mr. Justice Asche expressed the opinion that no legal complications arise out of artificial insemination because the resulting child is in all respects the child of the parties to a marriage.[3] He noted however that "it is the use of donated semen that leads to complexity under the common law, for example in relation to the legal obligation to maintain a child, the rights of the child to be maintained, the inheritance of property by the child and from the child, the inclusion or exclusion of the child from the gifts in a will in favour of a testator's "children", and the stigma of illegitimacy in those jurisdictions that have retained the notion of illegitimacy.

[19] See above re need to change age limit
[20] Report 49 (1986) - Artificial Conception: Human Artificial Insemination

89. The majority of responders believed that it would enhance the law to include provisions which make it clear that such children should be considered as children of marriage unless there is agreement otherwise. Pursuant thereto, the draft bill has incorporated in clause 3 provisions similar to the Australian precedent of section 60H of the Family Law Act.

Domicile and jurisdiction of the court in matrimonial proceedings

90. The Commission previously expressed dissatisfaction with the issue relating to the provisions of the Law in relation to the domicile of parties to a marriage and the jurisdiction of the court.[21] The main problem related to the fact that in accordance with section 5 of the MCL a woman had only to prove ordinary residence for two years in order to be able to file suit under the Law while a male had to prove domicile.

91. Most of the responders noted their dissatisfaction with the unequal criteria. The local firm proposed two years residency (or less in certain circumstances) for both parties while the legal associations also recommended either habitual residence or two years residency prior to the presentation of the petition and this would be applicable to either spouses.

92. Clause 8 of the draft Bill provides that proceedings for a decree of dissolution of marriage or decree of nullity or separation may be instituted under the legislation by a spouse if, at the date on which the application for the decree is filed in the court, either spouse-

(a) is Caymanian; or
(b) is resident in the Islands at the date of commencement of the proceedings and has resided in the Islands continuously for a period of not less than one year immediately preceding that date.

93. In proceedings relating to a decree of presumption of death the court will have jurisdiction if the petitioner-

(a) is Caymanian; or
(b) is resident in the Islands at the date of commencement of the proceedings and has resided in the Islands continuously for a period of not less than two years immediately preceding that date.

General

94. This Part of the discussion paper focused on the matters raised for discussion in the 2011 paper and the responses thereto. Persons were invited to provide proposals for changes in other areas not covered by the 2011 paper. Other matters which responders believed should be reformed included the following-

[21] 2011 paper, paras 153-162

- the need to implement the Children Law;
- the need for better procedural guidance by way of modernised Rules of Court;
- greater availability of legal aid for family law matters;
- a review of section 9 of the Married Women's Property Law (1997 Revision) with a view to its repeal.

95. The Children Law was finally brought into force in July, 2012 nearly ten years after its enactment. As the court must take regard of the provisions of this Law in matrimonial proceedings its commencement has been widely welcomed.

96. The legal associations opined that clear express procedural guidance in this area of the Law is required and recommended rules similar to the UK Family Procedure Rules 2010. The preparation of such Rules are the domain of the Rules Committee of the Grand Court and these Rules were made and promulgated by Committee on 29 April, 2013.

97. Legal aid and the Married Women's Property Law will be discussed briefly at the end of this paper.

PART II

REFORM OF THE MAINTENANCE LAW (1996 REVISION)

An overview of the current Maintenance Law

98. One of the first Laws brought to the attention of the Commission for reform was the Maintenance Law (1996 Revision) which was first enacted in 1964 and contains a slew of outdated provisions.

99. While there is a duty imposed on a father and an unmarried or widowed mother to maintain a child where a maintenance order is made against a person in respect of such child the Law provides in section 8 that an order of maintenance made under this Law shall in the case of a child be made to hold good until such child attains the age of fourteen years although this order may be renewed. There is therefore an assumption under the Law that a child no longer requires maintenance after the age of fourteen and can maintain him or herself. In fact section 10 of the Law provides that for the purposes of this Law every child under fourteen years of age shall be deemed unable to maintain himself or herself by reason of tender years, unless the contrary be shown.

100. These are provisions which directly conflict with the Children Law which provide for maintenance of children up to the age of 17 and over the age of 18 in certain circumstances.

101. The Law also makes reference to the outdated concept of illegitimacy and provides for example that every man is required, inter alia, to maintain his own children and the legitimate children of any child that his wife may have by him during his marriage, or of any child of which he may have been duly adjudged to be the father under

any law that may be passed to provide for the maintenance of illegitimate children, in the event of the parents of such children failing to maintain them.

102. Another glaring archaism is seen in section 11 of the Law which provides tha**t** that no order for the payment of any sum of money by the husband of any married woman shall be made against such husband if it is proved before a court to whom that the wife has committed adultery (unless such adultery has been condoned), or that the wife has wilfully and without just cause deserted her husband. Further, an order for payment of any such maintenance may be discharged by the court upon proof that the wife has, since the making of the order committed adultery.

103. Unlike most modern maintenance legislation the Law also does not specify the matters which must be taken into account in the making of a maintenance order by the court. For example, like section 25 of the UK MCA, the Maintenance Act 2005 of Jamaica provides in section 5 that in determining the amount and duration of support to be given, to a spouse under a maintenance order, the court shall have regard to the certain matters which include the following-

(a) the length of time of the marriage or cohabitation;
(b) the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;
(c) the effect of the responsibilities assumed during the marriage or cohabitation on the spouse's earning capacity;
(d) the spouse's needs, having regard to the accustomed standard of living during the marriage or cohabitation;
(e) whether the spouse has undertaken the care of a child of eighteen years of age or over who is unable, by reason of illness, disability or other cause, to care for himself;
(f) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family's support;
(g) the effect of the spouse's child care responsibilities on the spouse's earnings and career development;
(h) the eligibility of either spouse for a pension, allowance or benefit under any rule, enactment, superannuation fund or scheme, and the rate of that pension, allowance or benefit.

104. The Grand Court in local case *Wight v Wight*[22] acknowledged that the court is greatly assisted in the UK in determining financial provision for a spouse by the matters specified in section 25 of the MCA UK. The judge noted that the current law gives an extremely wide discretion and that the wisest course was for the courts of this jurisdiction to be guided by the considerations set out in the English Law.

105. The legal associations also noted in their response to this issue as follows-

[22] 2006 CILR 1

> "The factors set out in section 25 MCA of the UK give clear express guidance to the Court. Whilst these matters may often be considered by the Court and the Cayman jurisprudence (*Uzell, Wight*) provides that the list of s.25 MCA factors is relevant to its statutory consideration, there is currently no duty to consider such factors. We believe that such a duty would not only assist the Court in determining final orders but would focus the parties' mind at the time of preparing their cases before final hearing. The current lack of focus of all such available factors leads to less cases settling in good time prior to hearings or at all. In the circumstances, such a provision can only assist.".

106. In accordance with the Maintenance Law a woman is under no obligation to maintain her spouse and the law provides that every man shall be liable and is required to maintain his wife, irrespective of her being able to maintain herself.

107. The current law does have some provisions which are socially useful in that children are required to take care of parents and grandparents and a woman is obligated to maintain the legitimate children of any child that she may have had in the event of the parents of such children and of any man primarily bound to maintain such children failing to do so, so long as such children respectively are, by reason of tender years or bodily or mental infirmity, unable to maintain themselves. It is noted however that a man is not under an obligation to support his grandchildren and a distinction is made between children born in wedlock and out of wedlock in relation to the duty to support parents and grandparents.

108. One of the penalties for neglecting or abandoning a child is to be deemed a rogue and a vagabond a penalty which dates back to the 14th century and it has been argued was used historically to control former slaves and freed blacks in the Americas. The penalty was abolished in Jamaica in 2005 by the Maintenance Act of that year.

109. A draft Maintenance Bill has been prepared to modernise the maintenance provisions. The Bill does not provide for the maintenance of children as this is dealt with comprehensively in the Children Law[23].

Summary of Maintenance Bill, 2013

110. The main precedent for the Bill is the Jamaican Maintenance Act of 2005. One of the primary changes being proposed is that either a male or female spouse can apply to the court for maintenance. The Bill however limits spousal support to married or divorced persons not co-habiting couples which is different under the Jamaican legislation.

111. The Commission has discussed whether common law spouses should be able to apply for maintenance but in our preliminary discussions this was rejected. Jamaica has however dealt with this by providing that in the case of cohabiting parties[24] after the

[23] More particularly Schedule 1
[24] Must have co-habited for at least 5 years

termination of cohabitation each spouse has an obligation, so far as he or she is capable, to maintain the other spouse to the extent that such maintenance is necessary to meet the reasonable needs of the other spouse, where the other spouse cannot practicably meet the whole or any part of those needs having regard to the circumstances specified in the Act and any other circumstances which, in the opinion of the Court, the justice of the case requires to be taken into account.

112. An application for maintenance upon the termination of cohabitation may be made within twelve months after such termination, and the Court may make a maintenance order in accordance with the Act. However, the Act goes onto provide that a person shall not be liable to maintain a former co-habiting spouse if the other person being maintained marries someone else or is cohabiting with someone else. Any maintenance order will upon the person marrying or co-habiting cease to have effect. It is noted however that if the person who has been required to maintain the other person marries or co-habits with another person his or her obligation to continue to pay maintenance for a former common law spouse does not cease.

113. While it has been argued that there is a common law duty to maintain a spouse it has been posited that there is no method to enforce this obligation.[25] The issue which the Commission believes should be considered is whether there a case for the provision of maintenance for a former common law spouse? What type of effect would this have on a subsequent marriage of a person who is the maintainer?

114. The Bill states the obligation of spouses to maintain each other. It is provided that each spouse has an obligation, so far as he or she is capable, to maintain the other spouse. This obligation is limited to the extent that such maintenance must be necessary to meet the reasonable needs of the other spouse, where the other spouse cannot practicably meet the whole or any part of those needs having regard to the circumstances specified in the legislation and any other circumstances which, in the opinion of the court, the justice of the case requires to be taken into account.

115. Clause 5 of the Bill provides that a maintenance order for the support of a spouse shall contain such provisions as will ensure that the economic burden of child support is shared equitably and make such provision as the court considers fair with a view to assisting the spouse to become able to contribute to that spouse's own support. Further to this the Bill sets out the matters which the court must take into account in making an order which are similar to those in the UK and Jamaica.

116. Part 3 of the Bill deals with the obligation of a parent to maintain a child over the age of 18. In accordance with clause 6 every parent has an obligation, to the extent that the parent is capable of doing so, to maintain the parent's unmarried son or daughter who is not a minor but is in need of such maintenance, by reason of physical or mental infirmity or disability. It is further provided in clause 7 that a maintenance order for the support of a dependant under should apportion the obligation according to the capacities of the parents to provide support. In considering the circumstances of such a dependant

[25] "Family Law"- J. Herring

the court shall have regard to the matters specified above at paragraph 103 in addition to the following-

(a) that each parent has an obligation to provide support for the said dependant;
(b) the dependant's aptitude for, and reasonable prospects of, obtaining an education; and
(c) the dependant's need for a stable environment.

117. Clause 8 of the Bill deals with the obligation of a person to support his parents and grandparents. It is provided that every person who is not a minor has an obligation, to the extent that the person is capable of doing so, to maintain the person's parents and grandparents who are in need of such maintenance by reason of age, physical or mental infirmity or disability. In considering the circumstances of a dependant who is a parent or grandparent, the court will be required to have regard to -

(a) whether, by reason of age or infirmity, that dependant is unable to provide for himself or herself; and
(b) certain other circumstances such as the following[26]-

(i) the respondent's and the dependant's assets and means;
(ii) the assets and means that the dependant and the respondent are likely to have in the future;
(iii) the dependant's capacity to contribute to the dependant's own support;
(iv) any legal obligation of the respondent or the dependant to provide support for another person; and
(v) the quality of the relationship between the dependant and the respondent.

118. It should be noted that the obligation of a person in respect of that person's grandparent only arises in the event of the failure of the grandparent's children to do so owing to death, physical or mental infirmity or disability.

119. An application for maintenance may be heard either in the summary or the Grand court and it is provided [27] that in hearing an application for an order, the court shall consider the application if satisfied that the dependant is entitled under the legislation to be maintained by the respondent named in the application and the respondent has failed to fulfil the obligation to maintain the dependant. In determining the amount and duration of support, the court shall consider all the circumstances of the parties including the matters specified in clause 12(5) of the Bill which are similar to those stated above at paragraph 103.

[26] See clause 8(2)
[27] Clause 12

120. In accordance with the legislation the court may make an interim or final maintenance order and the court may, on application by or on behalf of a person for whose benefit a maintenance order has been made, make an interim or final order restraining the depletion of a person's property that would impair or defeat a claim under the legislation. The Bill also deals with the duration of a court order and it is provided, inter alia, in clause 14 that where a dependant is unable to maintain himself or herself by reason of old age or an illness or infirmity which is likely to be permanent, a maintenance order may be made to be in force for the rest of the natural life of that dependant.

121. Further, subject to any agreement by spouses to the contrary, an order in respect of the maintenance of a spouse ceases to have effect upon the re-marriage of the spouses in whose favour the order is made. It will be the duty of the person for whose benefit the order was made to inform without delay the person liable to make payments under the order of the date that a re-marriage took place.

122. The Bill provides for various other matters but of final note are the provisions relating to maintenance agreements. The legislation provides that spouses or two persons in contemplation of their marriage to each other may, for the purpose of facilitating the settlement of their support rights and obligations, make a maintenance agreement. A maintenance agreement is defined in clause 25(2) as an agreement that-

(a) makes provision in respect of the support rights and obligations of the parties with respect to each other or any child that either party has an obligation to maintain under clause 26; and
(b) includes provisions in respect of-
    (i) financial matters;
    (ii) the right to direct the education and moral training of their children; or
    (iii) any other matter in the settlement of the support obligations of the parties,

and includes an agreement that varies an earlier maintenance agreement.

123. The formality provisions of the Family Property (Rights of Spouses) Bill which relate to ante and post nuptial agreements apply also to such maintenance agreements.

PART III

THE FAMILY PROPERTY (RIGHTS OF SPOUSES) BILL, 2013

Recognition of common law unions between men and women

124. In the 2011 paper the Commission queried whether the MCL should recognise and regulate common law unions between a man and a woman in the same way as Australia, Barbados and other jurisdictions.

125. Most responders to the paper were against the regulation of de facto relationships but emphasized that the interests of children of such relationships should be protected as

fully as possible. However, while preparing the draft family law legislation the Commission received several calls for legislation to deal with property ownership when such unions dissolved. Most of the responders were single women with children who found themselves in precarious financial positions after the breakdown of a union. Some referred to the fact that they did not know what rights they had apart from maintenance for their children and could not afford an attorney to find out the nature of such rights.

126. Further, in February 2013 the Ministry of Community Affairs, Gender and Housing submitted for the consideration of the Commission a report which dealt with the review of legislation in the Cayman Islands for CEDAW[28] compliance[29] and such report noted as follows-

> "Unfortunately, women who are living in common law relationships in the Cayman Islands do not enjoy the same rights as their married counterparts. These relationships are not afforded much legal recognition and protection regardless of the degree of permanence or commitment in the relationship. This is worthy of concern given the reality of family structure in the Cayman Islands and the broader Caribbean region where *de facto* spousal arrangements are commonplace and many children are the products of these types of unions. The failure to afford legal protection in the areas of property ownership and spousal support negatively affects large numbers of women and is clearly an issue that will need to be addressed to ensure compliance with CEDAW."

127. Pursuant thereto the report recommended, among other things, the legal recognition of common law unions.

Current law in the Cayman Islands to deal with financial matters between unmarried couples

128. The courts in some jurisdictions including Cayman where there is no legislation relating to the disposal of property upon the breakdown of a common law union, have used various ways of re-distributing property rights such as implied trusts and propriety estoppel in determining the rights to property.

129. The UK Law Commission Report *"Cohabitation: The Financial Consequences Of Relationship Breakdown"* of 2007 provides a helpful summary of the remedies or ways used by the courts and between the parties to provide for financial and property division upon the breakdown of marriage. Some of the remedies are discussed below.

130. Couples may regulate their interest by making gifts to each other. They can give beneficial interests in real or personal property by way of express trusts; personal property may include such funds in a bank account. The spouse who owns the family home may confer a contractual licence to the other spouse permitting him or her to

[28] Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

[29] July 2012, "Review of Cayman Islands' Legislation for CEDAW Compliance"

occupy the home. Cohabitation agreements are also frequently used although their status until recently has been uncertain due to the illegality rule i.e. the illegality of contracts which could be said to promote extra-marital sexual relations. The Commission notes that the more modern view is that such contracts are only liable to be struck down if they comprise contracts for prostitution. The UK Commission quoted Mr. Justice Hart in *Sutton v Mischon de Reya and Gawor & Co*[30] who stated that-

> "There is nothing contrary to public policy in a cohabitation agreement governing the property relationship between adults who intend to cohabit or who are cohabiting for the purposes of enjoying a sexual relationship.".

131. The UK Commission while conceding that there is still some uncertainty in UK Law in relation to such agreements, stated that, in so far as they are lawful, cohabitation agreements are governed by the ordinary rules of contract law. Thus, according to the Commission, "there must be an intention to create legal relations and lawful consideration (or use of a deed), and a contract between cohabitants may be susceptible to challenge on grounds such as fraud, duress, undue influence, misrepresentation, mistake, duress or illegality on some other ground.".

132. Where there are no gifts or cohabitation agreements to determine property rights the law of implied trusts and proprietory estoppel may be used by the court in determining property rights.

133. In relation to implied trusts, there are two types which may arise- a resulting trust or a constructive trust. It may be argued that a resulting trust has arisen where one person owns property but the other party has paid some or most of the purchase price. A resulting trust could be deemed to have arisen where the beneficial ownership in the property results to the parties in proportion to the share of the purchase price that each provided. However such a trust may be rebutted by evidence that the contributor did not intend to acquire a beneficial interest in the property and that the money may have been provided by way of gift or loan. Resulting trusts are considered limited in their scope as, for example, indirect contributions have not been regarded as giving rise to a resulting trust. Thus it may be argued that there is no trust result where one party pays the household bills while the other pays the mortgage and domestic contributions count for nothing.[31] A resulting trust is often seen as a last resort remedy.

134. Research shows that a constructive trust is more likely to be the remedy sought as it is seen as less limited in its scope. A constructive trust can be found if there is a common intention to share ownership and the party seeking to establish the constructive trust has relied on the common intention to his detriment. A common intent is established if there is "any agreement, arrangement or understanding reached between the parties that property is to be shared beneficially"[32] and the common intent can be inferred from a

[30] [2003] EWHC 3166 Ch
[31] See Commission Report, ante note 29
[32] Llloys Bank v Rosset [1991) 1 AC 107

direct contribution to the purchase price or mortgage instalment. Evidence of oral agreement can be used to establish common intent.

135. Detrimental reliance must also be proved by the party who is relying on the remedy. The law in this area is considered far from clear but it is opined that the approach with the most authority is that detrimental reliance requires conduct upon which the claimant could not reasonably have expected to embark unless he or she was to have an interest in a property.[33] Thus, in one case,[34] the act of reliance was the woman's manual work on the property, including breaking up concrete demolishing and rebuilding a shed and renovating a house. If the applicant oversteps the boundary of what might be expected of a partner, particularly perhaps in light of the applicant's gender, a finding of detrimental reliance is more likely[35].

136. Another remedy which can be claimed in the alternative to a constructive trust is the doctrine of proprietary estoppel. For a person (A) to establish a claim over his spouse or former spouse's (B) property it is necessary to show the following-

(a) A believes that he or she has or is going to be given an interest over B's property;
(b) A must act to his or her detriment in reliance on that belief;
(c) B must be aware of his own interests in the property; and
(d) B must have known of and encouraged A's belief.

137. The essential element which underlies proprietary estoppel is conscionability.[36] It is posited that proprietary estoppel is not tied down by a firm set of rules but rather each case turns on what is conscionable in all of the circumstances. An example of the application of the doctrine is cited in the case of *Greasley v Cooke* [37]where Doris Cooke moved in with a family. She formed a relationship with one son and nursed and cared for other members of the family. She had been led to believe that she would be able to live in the house for the rest of her life. This led to a successful proprietary estoppel claim.

138. The law regulating joint bank accounts is given separate discussion in the research material found and is summarised by the Law Commission as follows[38]-

> "The ownership of funds in bank accounts merits brief separate discussion. As we have seen, where an account is held in the sole name of one party, an express trust may arise by oral declaration. The mere fact that a bank account is in joint names does not mean that the account holders have a joint beneficial interest in the funds in that account. Whether they do or not depends on their intentions. If the account is fed from the resources of one party, A, but is held in joint names

[33] "Family Law", Jonathan Herring, 2007 ed.
[34] Eves v Eves [1975] 3 All ER 768
[35] Commission Report, ibid
[36] Gillet v Holt [2000] 2 FLR 308
[37] [1980] 3 All ER 710; cited in Herring ante note 33
[38] Ante note 29 paras A.46 to A. 48

with B merely for convenience – for example, to give B access to funds – B has no beneficial interest in the money in the account until he or she actually exercises the right to draw funds from it. While it remains in the account, the money will belong, under resulting trust principles, to A as the party who fed the account. If B has made no contribution to the account, A will be entitled to terminate B's access to the funds at any time.

Where both parties contribute to the account, pooling their resources, they will at least be found to own the funds on a resulting trust basis in accordance with their contributions. However, both in pooling cases and in cases where A has provided all the funds, the presumption of resulting trust might be displaced, for example, where there is an express declaration of trust or common intention to the effect that the parties should share the account in some other proportions. Indeed, the court might find that the parties intended to be joint tenants of the beneficial interest, each equally entitled to the whole of the fund.

Property purchased with funds from a joint account will ordinarily belong to whoever acquires title to that property, even if that person had no or only a part share in the funds when they were in the account. If, unusually, there is evidence that the assets acquired were intended to be held in the same way as the funds in the account, then that property will be held accordingly.".

Summary of proposed Family Property (Rights of Spouses) Bill, 2013

139. Instead of relying on the myriad and at times confusing remedies above some countries such as Australia and, closer to home, Barbados and Jamaica have enacted legislation, to provide for financial remedies upon the breakdown of common law unions.

140. The Commission has prepared the Family Property (Rights of Spouses) Bill, 2013 which is similar to the Jamaican precedent of the same name. It deals with property rights of both married and certain unmarried spouses in the same way. The Bill provides that, except as otherwise expressly provided in the legislation, the provisions of the Bill shall have effect in place of the rules and presumptions of the common law and of equity to the extent that they apply to transactions between husband and wife in respect of property and, in cases for which provision is made by this Law, between husband and wife, and each of them, and third parties.

141. "Spouse" for the purposes of the legislation includes a married person as well as a single man or single woman who is in a de facto relationship with a person of the opposite sex for a period of not less than five years immediately preceding the institution of proceedings under the legislation or the termination of cohabitation.

142. The legislation will provide that a person is in a de facto relationship with another person if-

(a) the persons are not legally married to each other;[39]
(b) the persons are not related by family; and
(c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

143. The circumstances referred to above may include any or all of the following[40]-

(a) the duration of the relationship;
(b) the nature and extent of their common residence;
(c) whether a sexual relationship exists;
(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
(e) the ownership, use and acquisition of their property;
(f) the degree of mutual commitment to a shared life;
(g) the care and support of children; and
(h) the reputation and public aspects of the relationship.

144. One of the principal provisions of the Bill is that it specifies entitlement to the family home. "Family home"[41] is defined as the dwelling-house that is owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household. In accordance with clause 7 of the Bill each spouse shall be entitled to one-half share of the family home-

(a) on the grant of a decree of dissolution of a marriage or the termination of cohabitation;
(b) on the grant of a decree of nullity of marriage; and
(c) on the grant of a decree of judicial separation.

145. The entitlement is not an absolute one and the court will have the power to vary such entitlement. Thus[42] where in the circumstances of any particular case the court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the court may, upon application by one of the spouses, make such order as it thinks reasonable taking into consideration such factors as the court thinks relevant including the following-

(a) that the family home was inherited by one spouse;
(b) that the family home was a gift to one spouse and the donor intended that spouse alone to benefit;
(c) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation; and

[39] Section 4AA of Australian Family Law Act, 1975
[40] ibid
[41] Also includes matrimonial home as defined in the MC Bill, 2013
[42] Clause 8

(d) that the marriage or the cohabitation is of short duration.

146. The entitlement to half of the family home may also be changed by a marriage or cohabitation agreement. Such an marriage agreement could be either a pre or post-nuptial one. This is another provision of note and one which was discussed in the 2011 paper.

147. The Commission had inquired in that paper whether the Law should be reformed to provide statutory recognition of pre-nuptial agreements. Most responders were in favour of such agreements. The legal associations for example noted that parties should be entitled to have recognition of the fact that often contributions are unequal and couples do not expect equal entitlement to property on separation. They further stated that "[the] availability and existence of such contracts give parties the right to opt out of the orthodoxy that both parties put equal amount of effort into a marriage and should therefore exit with an equal share of their assets.".

148. Clause 10 of the Bill provides that a marriage or cohabitation agreement may define the share of the property or any part thereof to which each spouse shall be entitled upon separation or dissolution of marriage and provides for the calculation of such share and the method by which property or part thereof may be divided. Every such agreement must be in writing signed by both parties whose signatures must be signed either by a justice of the peace, notary public or an attorney-at-law.

149. It is further proposed that an agreement under clause 10 will be unenforceable in any case where there is non-compliance with the formalities or the court is satisfied that it would be unjust to give effect to the agreement. An agreement made by a minor and every instrument executed by such minor for the purpose of giving effect to any such agreement shall be valid and effective as if the minor were of full age.

150. Under the draft legislation the court will have jurisdiction to enquire into any agreement made and may, in any proceedings under the legislation or on an application made for the purpose, declare that the agreement shall have effect in whole or in part or for any particular purpose if it is satisfied that the non-compliance mentioned in that subsection has not materially prejudiced the interests of a party to the marriage agreement. In deciding whether it would be unjust to give effect to an agreement under clause 10, the court must have regard to-

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

151. Any property to which an agreement does not apply will be subject to the other provisions of the legislation relating to the determination of financial matters by the court. It is proposed that parties to an agreement or an amendment of such agreement may register such agreement or amendment thereto with the Clerk of the Court.

152. It is submitted that the above provisions give parties to a marriage or union the right to determine their financial futures but retain a level of judicial intervention in order to ensure an equitable result. Views on the above provisions are welcomed.

153. The Bill sets out the provisions relating to the division of property between spouses upon the breakdown of a marriage or cohabitation. Also, the court may also declare interests in property during the subsistence of a marriage or union. Clause 11 provides that where during the subsistence of a marriage or cohabitation, any question arises between the spouses as to the title to or possession of property, either party or any bank, corporation, company, public body or society in which either of the spouses has any stocks, funds or shares may apply by summons or otherwise in a summary way to the Grand Court or, at the option of the applicant irrespective of the value of the property in dispute, to the summary court for a determination of such question.

154. Further, a spouse may make an application to the court in respect of any title, interest or rights to property which had been in the possession or under the control of the other spouse but has ceased to be in the possession or under the control of that other spouse. It is provided that the court may, on such application make such order as it thinks just for the payment of a sum in respect of-

(a) money to which the application relates or the spouse's share thereof; or
(b) the value of property to which the application relates or the spouse's interest therein if the court is satisfied that the property was in the possession of or under the control of the other spouse who has not made to the applicant, such payment or disposition in relation to the property as would have been appropriate in the circumstances.

155. Clause 12 sets out how property to which an application relates should be evaluated. Subject to the contrary in a marriage or cohabitation agreement and the rights of creditors, the value of property to which an application under the legislation relates shall be its value at the date of the hearing of the matter unless the court otherwise decides. A spouse's share in property shall be determined as at the date on which the spouses ceased to live together as man and wife or to cohabit or if they have not so ceased, at the date of the application to the court.

156. The Bill in clause 14 sets out the matters which must be considered by the court upon an application for division of property. Such matters include the following-

(a) the contribution made directly or indirectly to the acquisition, conservation or improvement of the property by either spouse, including any contribution made in the capacity of homemaker or parent;

(b) that there is no family home;
(c) the age of each spouse and the duration of the marriage or the period of cohabitation;
(d) that there is an agreement with respect to the ownership and division of property;
(e) the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made in the capacity of homemaker or parent;
(f) the effect of any proposed order upon the earning capacity of either spouse;
(g) the standard of living enjoyed by the family before the breakdown of the marriage or the relationship;
(h) any order that has been made under this Law in respect of a spouse; or
(i) such other fact or circumstance which, in the opinion of the court the justice of the case requires to be taken into account.

157. A contribution is not only a monetary one and the Bill affirms the fact that there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution. Such contribution may include-

(a) the care of any relevant child or any aged or infirm relative or dependant of a spouse;
(b) the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which-
  (i) enables the other spouse to acquire qualifications; or
  (ii) aids the other spouse in the carrying on of that spouse's occupation or business;
(c) the management of the household and the performance of household duties;
(d) the payment of money to maintain or increase the value of the property or any part thereof;
(e) the performance of work or services in respect of the property or part thereof; or
(f) the provision of money, including the earning of income for the purposes of the marriage or cohabitation.

158. The Bill seeks to provide protection to creditors and third parties and, in accordance with clause 17, it is provided that secured and unsecured creditors of a spouse shall have the same rights against that spouse as if the legislation had not been enacted. Further, property which, if the legislation were not enacted would have been administered under the Bankruptcy Law (1997 Revision) by the Trustee in Bankruptcy on the bankruptcy of a spouse, shall be so administered. Each spouse will have a protected interest in respect of one-half share of the family home but on the bankruptcy of a spouse the Trustee in Bankruptcy shall pay to the other spouse such amount in satisfaction of the protected interest of that spouse as the court, on application of the Trustee in Bankruptcy, or that spouse, may direct. The value of property that may be divided between the

spouses shall be ascertained by deducting from the value of property owned by each spouse-

(a) any secured or unsecured debts (other than personal debts or debts secured wholly by property) owed by one spouse; and
(b) the unsecured personal debts owed by one spouse to the extent that such debts exceed the value of any property of that spouse.

159. It is further provided under clause 18 that, subject to the legislation, the rights conferred on any spouse by an order made under the legislation shall be subject to the rights of any person entitled to the benefit of any security, charge or encumbrance affecting any property in respect of which the order is made if such security, charge or encumbrance was registered before the order was made or if the rights of that person arose under an instrument executed before the date of the making of the order. However, no money payable under any security, charge or encumbrance shall be called in or become due by reason of the making of an order under the legislation, not being an order directing the sale of any property.

CONCLUSION

160. It is anticipated that the three Bills discussed will improve how family matters are dealt with in the Cayman Islands together with the Children Law (2012 Revision). Other laws to be examined include the Affiliation Law, with a view to its repeal and the amendment of the Married Women's Property Law[43].

161. The Bar Association in response to the 2011 paper had called for the repeal of section 9 of the Married Women's Property Law. That section provides that a married woman may effect a policy on her own life or the life of her husband. It is further provided that a policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, his children or his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, her children or her husband and children, or any of them, shall create a trust in favour of the objects therein named; and the moneys payable under any such policy shall not, as long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts.

162. It has been argued by the Bar Association that this section which is based on 19th century English legislation was made with the intent to protect family members from creditors. However it is posited that the section creates a number of difficulties in divorce settlement especially how the court would treat an insurance policy where the ex-wife is named as a beneficiary. Further, it is argued, it also creates a problem for financial institutions in that certain life policies used to secure loans cannot be easily assigned.

163. While a similar provision remains in the English legislation it was repealed in Jamaica 18 years ago. Section 9 is based on section 11 of the Married Women's Property

[43] See repeal of section 13 of the MWP Law under the Family Property (Rights of Spouses) Bill, 2013

Act 1882 and this section provides for an express trust for a spouse and children. It has been held that the purpose of this section is to identify the trustees who are to hold the policy moneys on the appropriate trusts with a statutory direction that the moneys are not to form part of the estate of the insured so long as any objects of the trust are unperformed.[44]

164. In the case of *Gunner v Gunner and Stirling*[45] the court held that a policy for the benefit of a named wife confers an immediate vested interest on her, but not a complete gift of the rights hereunder and is therefore variable by the court as post nuptial settlement. The court noted that in the circumstances of the case the court had power to vary the policy but this was not to be taken to mean that in every case in which a policy is issued by a husband or wife in favor of the other under section 11 of the MWP Act that this is a settlement which can be varied- the documents and facts in each case must be taken into account.

165. The Commission is inviting opinions on the effects of section 9 and on the proposal by the Bar association for its repeal. We are also researching this matter more particularly as to why it was repealed in Jamaica in 1995.

166. Another submission by the Bar Association is that there should be greater availability for legal aid in family law matters. This is a matter outside of the ambit of this review but it should be noted that in the 2012 Legal Aid Bill which had been submitted for public consultation by the Cabinet it had been expressly provided that legal aid should be granted in family law proceedings if those proceedings involve questions of custody, access, adoption or maintenance. For the purposes of that legislation "family law proceedings" meant proceedings brought under the Adoption of Children Law (2003 Revision); the Affiliation Law (1995 Revision); the Guardianship and Custody of Children Law (1996 Revision)[46]; the Maintenance Law (1996 Revision); the Matrimonial Causes Law (2005 Revision) and the Succession Law (2006 Revision). However the Commission does not know the status of this Bill.

167. The Commission welcomes views on the matters discussed above and on the draft Bills. Comments should be submitted in writing to the Director of the Law Reform Commission, 1st floor dms house, by post to P.O. Box 1999 KY1-1104 or sent by e-mail to Cheryl.Neblett@gov.ky.

Law Reform Commission
Tuesday, July 09, 2013

APPENDIX A- MATRIMONIAL CAUSES BILL, 2013

APPENDIX B- MAINTENANCE BILL, 2013

APPENDIX C- FAMILY PROPERTY (RIGHTS OF SPOUSES) BILL, 2013

[44] Rooney v Cardona [1999] 1 WLR 1388 CA
[45] [1948] 2 All ER 771
[46] Now repealed by the Children Law (2012 Revision)