CONFERENCE

The International Private Client: Reconciling Testamentary Freedom, Community Property and Shari ‘a

ON
Thursday 5 December 2013, 2.00pm – 5.35pm

AT
Park Plaza Hotel London Victoria, 239-251 Vauxhall Bridge Road, London SW1V 1LJ, United Kingdom

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*NB In all cases, points/credits are subject to the appropriate claim being made*
PROGRAMME

1.00pm  Guest Arrival, Registration and Networking Buffet Lunch

2.00pm  Chairman’s Welcome Address
Richard Frimston TEP, Partner and Head of Private Client Group, Russell-Cooke LLP

2.05pm  The English Law Commission’s Study on Nuptial Agreements
Ann Northover, Partner and Head of Family Law Group, Forsters LLP

2.25pm  UK Estate Planning Perspective on Testamentary Freedom
Edward Reed TEP, Partner-Private Client, Macfarlanes LLP

3.00pm  EU Perspective: The Philosophy of the Napoleonic Code
Michael Wells-Greco TEP, Partner, Speechly Bircham AG Geneva and Lecturer and Tutor, International and European Law Faculty, Maastricht University

3.35pm  Break

4.10pm  Shari ‘a Law Perspective to Inheritance Rules and Estate Planning
Andrew De La Rosa, Barrister, ICT Chambers

4.45pm  Reconciling Competing Legal Philosophies for International Clients
Panel discussion followed by questions & answers
- Andrew De La Rosa
- Richard Frimston TEP
- Ann Northover
- Edward Reed TEP
- Michael Wells-Greco TEP

5.30pm  Chairman’s Welcome Address
Richard Frimston TEP, Partner and Head of Private Client Group, Russell-Cooke LLP

5.35pm  Conference Close
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Ann Northover, Partner and Head of Family Law Group, Forsters LLP

Ann Northover trained in the City at Stephenson Harwood and qualified as a solicitor in 1992. Ann became a partner at Gordon Dadds in 2002 and joined Forsters LLP as a partner in 2004 to head up the Family team.

Ann specialises exclusively in family law, particularly complex and high asset divorce and dissolution, separation and cohabitation, pre and post-nuptial agreements and wealth structuring. She has particular experience in dealing with the treatment of pensions, trusts and business assets on divorce with many of her cases involving international issues and clients with multiple nationalities. Ann’s clients include trustees and beneficiaries, entrepreneurs (often those who have set up private equity and hedge fund companies) and city professionals.

Ann also has considerable experience in private children law matters, including difficult residence and contact matters (often with an international element), intractable disputes and applications for leave to remove children from the jurisdiction.

Ann is identified as a leading individual in the matrimonial finance and private children section of Chambers Guide to the Legal Profession, and is "renowned for being a fighter" and praised "for her sound judgment." She is described as a "tactician" who is "outstanding" by the Legal 500 and is "highly recommended."

Ann relishes complex cases and has an incisive grasp of the issues, whilst consistently delivering her advice with an admirable degree of emotional intelligence.

Ann is a qualified collaborative lawyer and formerly sat on the London Regional Committee of Resolution (formerly the Solicitors Family Law Association (SFLA)).
STEP Cross-Border Estates
2013 Conference
5 December 2013

2:05 to 2:25pm – The English Law Commission’s study on nuptial agreements
Ann Northover
Partner – Family Law Department
Forsters LLP
Index of Slides

- 1 – Law Commission remit, provisional proposals and industry response
- 2 – Matrimonial and Non-Matrimonial property – focus on inherited wealth
- 3 – MPAs/MPRs – the comparative picture on divorce
- 4 – The UK and International Dimension – Incoming MPAs/MPRs
- 5 – Arguments for and against a Qualifying Nuptial Agreement (QNA)
1. The Law Commission’s study on Marital Property Agreements ("MPAs")

- Provisional proposals and response from the industry.

- Consultation Paper No. 198 of 11/01/11 and Supplementary Consultation Paper ("SP") No. 208 of 11/09/12

- The remit (LC – 1.3): “Addresses one aspect of the financial consequences of divorce or dissolution, namely the extent to which they can be determined by agreement in advance, before a separation is contemplated.”

- The LC's provisional proposals and consultation questions are in part 8. The provisional conclusion:
  - LC 8.3 - MPA's (referred to as Qualifying Nuptial Agreements ("QNAs")) shall not be regarded as void or contrary to public policy.
  - LC 8.7 - An MPA will not rank as a QNA unless it is a valid contract.
  - LC 8.9 - QNAs to be made in writing and signed by the parties.
  - LC 8.10 - MPAs will not be treated as QNAs unless the party against whom it is sought to be enforced received, at the time of the agreement, material full and frank disclosure.
  - LC 8.12 - QNAs should not be valid if there was a lack of legal advice at the time of formation.
  - LC 8.13 - The scope of the legal advice to be given.
  - LC 8.15 - There to be no timing requirements imposed upon QNAs made prior to marriage or civil partnership.
  - LC 8.17 - Variation of QNAs to comply with the same formalities for the formation of QNAs.
  - LC 8.18 - The Court to retain jurisdiction over QNAs to vary or set aside to the extent that:
    - QNA made insufficient provision for children of the family; and/or
    - The QNA left or would leave one or both parties dependant upon state benefits where that could be avoided by the making of a Court Order or fails to meet the parties needs per the recommendation in the SP
1. The Law Commission’s study on marital property agreements (“MPAs”) (continued…)

- **LC 8.19** – Consultation is sought on different types of QNAs:
  - A “cast iron” model with no safeguards beyond those relating to children and social security;
  - Variation or set aside of the QNA by the Court on the happening of specified events;
  - QNA to be varied or set aside by the Court if it produced “significant injustice”;
  - QNA to be varied or set aside by the Court to the extent that it failed to meet the parties’ needs and to provide compensation for any losses caused by the relationship; and
  - QNA to be varied or set aside by the Court if it failed to meet the parties’ needs, narrowly defined;

- **LC 8.20** – For there to be rules to enable property to be identified over time and the QNA to set out the consequences of investment in that property by the other party or for the mixing of that property with property of the other party.

- **LC 8.22** – QNAs to be able to restrict or modify the ability of either party to apply to the Court for family provision under the IPFDA 1975.
1. The Law Commission’s study on marital property agreements ("MPAs") - Industry Response

Resolution (Resolution response to the Law Commission consultation: Marital property agreements - 11/04/11)

- David Allison, the chair of Resolution stated 'we strongly believe that pre-nuptial agreements should be legally binding...as long as the needs of any children are satisfied and provided that they do not result in injustice'

- Resolution argue that the clarity of the law of ancillary relief would be improved by the recognition of marital agreements.

- They agree with the Law Commission that QNAs should be able to restrict of modify the ability of the other party to apply under the I(PFD)A 1975 save insofar as the application is made for maintenance.

- They argue for the retention of the court’s discretionary approval i.e. they do not think that the enforceability of QNAs should be dealt with only on a contractual basis (by providing a defence to an application for ancillary relief) – they should be considered by a family court in the context of the financial consequences of a family breakdown.
1. The Law Commission’s study on marital property agreements ("MPAs") - Industry Response (continued…)

Resolution, in their 2009 report ‘Family Agreements: seeking certainty to reduce disputes’ propose the introduction of new subsections 25(2A) and 25(2B) into the Matrimonial Causes Act 1973

- s. 25(2A) The court shall regard any agreement in writing entered into between the parties to the marriage in contemplation of or after the marriage for the purpose of regulating their affairs on the breakdown of their marriage as binding upon the parties and shall make an order in the terms of the agreement unless:
  - (a) the agreement was entered into as a result of unfair pressure or unfair influence;
  - (b) one or both parties did not have a reasonable opportunity to receive independent legal advice about the terms and effect of the agreement;
  - (c) one or both parties failed to provide substantially full and frank financial disclosure before the agreement was made;
  - (d) the agreement was made fewer than 42 days before the marriage; (In their response they state that the timing deadline is arbitrary and suggest that the time when the agreement was signed should be one of the factors to take into account in determining whether there has been unfair pressure or unfair influence on either party)
  - (e) enforcing the agreement would cause substantial hardship to either party or to any minor child of the family.

- s. 25(2B) If one or more of the factors in paragraphs (a) to (e) of subsection 25(2A) applies, the Court shall give the agreement such weight as it thinks fit taking into account:
  - (a) all the facts surrounding the agreement;
  - (b) the matters in section 25(1) and (2).
2. Matrimonial and Non-Matrimonial Property – focus on inherited wealth

- Non-matrimonial property is addressed in the LC SP at part 6.

- There is no statutory definition of matrimonial and non-matrimonial property. The LC note that there was no need for such distinction as pre-White, no capital was shared beyond the meeting of reasonable requirements.

- The distinction arose in the case of White (the gift of money from Mr White’s father meant Mrs White could not have an equal share in the family assets). This is a recognition of the different treatment of inherited property.

- Further development in Miller v Miller, Macfarlane v Macfarlane – Lady Hale took a wider view and said that in some circumstances, business or investment assets generated solely or mainly by one party should be considered non-matrimonial property.

- Non-matrimonial property at the outset may subsequently become “matrimonial”, i.e. shared on divorce.

- In Charman v Charman (CA) a reminder that sharing applies to all property; non-matrimonial property is not off limits: “the principle applies to all the parties’ property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality.”

- The drawing down of inherited wealth to enhance/support lifestyle during marriage may also make the property more likely to be shared on divorce (Robson v Robson [2010]). Equally, satisfaction of needs may require the sale of inherited property (Y v Y [2012]).
2. Matrimonial and Non-Matrimonial Property – focus on inherited wealth (continued...)

- There is a need for a definition of non-matrimonial property: LC SP (6.34) such definition should address:
  1. Inherited, gifted and pre-acquired property, currently regarded as non-matrimonial property.
  2. What is the status of property derived from non-matrimonial property such as bonus shares issued during the marriage?
  3. Is separate business property non-matrimonial?
  4. Are post separation bonuses non matrimonial?
  5. Should a family home derived from inherited, gifted or pre-acquired assets be regarded as matrimonial property in any event?
  6. What should be the status of property acquired by one party during cohabitation?

- LC Part 6 proposals:
  - LC 6.41 – that non-matrimonial property received as gift or inheritance or pre-acquired should not be subject to the sharing principle on divorce save where it is required to meet the other party's needs.
  - LC 6.77 – that non-matrimonial property should not lose its status as such, merely by virtue of having been used by the family.
  - LC 6.87 – where non-matrimonial property is sold and the substitute property purchased is for use by the family, it should be matrimonial. If the substitute property is of the same kind as the property sold it should not.
  - LC 6.88 – where non-matrimonial property has been sold and the proceeds invested in matrimonial property, the property becomes matrimonial property.
3. MPAs/MPRs – the comparative picture on divorce

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<td>MPR</td>
<td>Operates Matrimonial Property Regimes (MPRs), i.e. systems of rules for division of property on death, divorce, bankruptcy. Such division is usually equal unless altered by contract.</td>
<td>Do not operate one.</td>
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<td>England does not operate an MPR.</td>
<td>Divorce - usually based on substantive sharing of property involving redistribution assets</td>
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| MPA     | MPAs – distribution upon divorce is by either:  
• Default reliance upon MPR; or  
• As varied by an MPA.  
MPRS may be opted into and out of during the marriage – e.g. Opting out of community during marriage where one party goes into business, so that the other might avoid community of liability.  
MPRs are not concerned with maintenance (income provision) post-divorce.  
There is an ability to change the MPR pre or post marriage.  

**Types of MPR:**  
a. Immediate community of property  
Automatic joint ownership of community property from date of marriage together with community of liability;  
b. Deferred community of property  
Property held separately from marriage and only pooled as joint on death, divorce or bankruptcy, and a 50/50 split.  

**Different systems of community of property:**  
i. Total community;  
   All property is joint  
ii. Community of acquists  
   Pre-acquired property, gifts and inheritance post-marriage is all excluded  

E.g. France – Default regime is immediate community of acquists.  
E.g. Germany – Operates an accruals system similar to a deferred community of acquists where the couple share the increase in value of their assets during the marriage.  
E.g. USA – 9 states have a system of community of property and of these, 5 operate equitable distribution rather than a strict division of community of property 50/50,  
E.g. South Africa – System of immediate total community from Dutch law and couples may contract into either community of acquists or into separation of property. | A move towards enforceable status for MPAs in recent decades.  
e.g. Australia, equitable distribution model and Courts have wide discretionary power to redistribute assets. Post-2000, Binding Financial Agreements can oust the jurisdiction of the Court, able to be set aside on narrow grounds.  
Similar in New Zealand, where agreement can be set aside if it would cause serious injustice.  
E.g. Singapore, MPAs are regarded as valid but cannot oust the jurisdiction of the Court  
E.g. Scotland – a form of deferred community of property with a discretionary element. Special circumstances permit departure from equality which includes the existence of an MPA.  
These MPAs will usually deal with maintenance provisions and parties can usually contract out of capital redistribution but not maintenance |

**Status**  
Not binding but upheld unless unfair (Radomacher – query how will a domestic MPA be decided (see list of key decided cases from Radomacher to-date).
4. The UK and International Dimension – Incoming MPAs/MPRs

- The treatment of foreign MPAs in an English Court on divorce is often one of great concern to the couple who might not have expected to be divorced in England, and may have no “mirror” English agreement.

- The LC refers to the danger of misleading comparisons when comparing MPAs and MPRs in England and elsewhere, largely due to the different social systems in operation, especially regarding housing and provision of social security.

- An English divorce for foreign nationals is most likely to occur due to the operation of Brussels IIa rules which operate on a “first past the post” system and hence the “poorer” party may seek the jurisdiction of the English Court as opposed to, for example, a Spanish Court, where there may be a less beneficial MPA or default MPR.

- Neither English nor Foreign MPAs bind an English Court.

- In B v S [2012] 2 FLR 502, Mostyn J stated that:
  - “It is important to note that the UK is not participating in [Rome III] and therefore there is no prospect in a future case of the application of a foreign law in determining rights under a civil law marital property agreement.”
  - He then added, “The only possible relevance of foreign law is to evidence the intentions of the parties at the time of the formation of the agreement.”

- In Radmacher v Granatino [2010] 2 FLR 1900, the Supreme Court saw the foreign law element as merely a factor enhancing weight to the agreement. The Court at para 74 expressly stated that foreign law did not need to be considered.

- Interesting to note that the English Court was not put off by the lack of separate independent legal advice for the parties in Radmacher due to the fact that use of a Notaire for both parties was correct local procedure, albeit very different from this jurisdiction.

- LC 7.102 – the UK position as regards Brussels III (now Rome IV) and the introduction of QNAs is such that it would not make foreign agreements binding on the English Court as the English Court are unlikely to abandon the Lex Fori principle.

- LC 7.103 – the LC concludes that it is unrealistic for the English courts not to give great weight in ancillary relief proceedings to overseas regimes and contracts where these are part of the circumstances of the case.
5. Arguments for and against a Qualifying Nuptial Agreement ("QNA")

- Post Radmacher: MPAs must be fair. This is highly subjective. Compare Rowntree’s definition of poverty in 1901. The line was drawn at the sum of money required “to enable families...to secure the necessaries of a healthy life”. This was a subsistence level, a far cry indeed from the interpretation of fairness meeting “needs, compensation and sharing.”

- The LC SP investigates the concept of needs and concludes that “it will not be appropriate to enable couples to use such agreements to contract out of making provision for needs.” The LC has provisionally proposed (5.69) that “parties will draft QNAs either by general reference to agreeing to meet the other party’s needs or by specifying a level of provision clearly in excess of needs.”

- The LC SP notes that there is currently no legal definition of needs. The law developed during the 1970s to 1990s at a time of pre-sharing, such that needs were widely drawn to encompass maintenance (aka alimony or spousal support) and “a wide range of provision: income and capital: present and future” (LCSP 3.2).

- LC proposes that QNAs (properly drafted and entered into) should provide either a complete or partial defence to an application for ancillary relief (partial if the QNA makes provision only for part of the couples’ property such as ringfencing, inherited property.)

- The LC considered the arguments for and against reform, encompassing:
  - Supporting marriage (this argument was used in each direction)
  - Autonomy – the LC raises a note of warning that autonomy can also be “the freedom to force one’s partner to abide by an agreement when he or she no longer wishes to do so” (5.31)
  - Certainty – especially attractive given the state of English ancillary relief law and that we “do not know exactly how needs, compensation and sharing relate to each other under the current law” (5.35). A strong note of warning, however, by recognition of the fact that assets can change over time for various reasons (e.g. the other spouse does things to that asset that may increase or decrease its value, the assets may be intermingled and so on).
  - The international perspective – due to the operation of MPRs in Europe, the motives for MPAs in those jurisdictions are different from those that operate here – the argument can be summed up as the desire for greater conformity with Europe and other common law jurisdictions.
  - Hardship and the social cost of reform – in other words, who pays for the poorer spouse on divorce, and for what period?
5. Arguments for and against a Qualifying Nuptial Agreement ("QNA") (continued)

Special property and a community of acquests.

- Recognition of the desire by many to protect what the LC calls "special property" such as family business interests/farms/property from a previous relationship; parental gift to the spouse only and not to their partner and inherited wealth. NB in support of this provision, the LC notes that in France, or any country operating a form of community of acquests (immediate or deferred), all the forms of special property above would fall outside the default matrimonial regime and would be automatically exempt from sharing or divorce (unless the couple opted into total community). (LC - 5.54)

- A saving of cost/encouragement of honesty.

- If QNAs are to be directly enforceable, then there will be no need for the Court to incorporate such terms in an ancillary relief consent order, and the need for legal advice should be vastly reduced and the process made quicker.

- How far can one go? Eg For those who wish to protect future wealth, the LC asks if this is "marriage lite", namely a form of a relationship that does not incorporate what we currently regard as the implications of marriage (5.60).

Alternatively, rather than introducing QNAs, do we really all need a fundamental reform of the English law of ancillary relief?
PART 8
LIST OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

INTRODUCTION
8.1 In this Part, we set out our provisional proposals and consultation questions on which we are inviting the views of consultees. We would be grateful for comments not only on the issues specifically listed below, but also on any other points raised in this Consultation Paper. It would be helpful if, when responding, consultees could indicate either the paragraph of this list to which their response relates, or the paragraph of this Consultation Paper in which the issue was raised.

IMPACT ASSESSMENT
8.2 We would welcome information and comments from consultees on any potential impacts of the current law or of reform of the law relating to marital property agreements.

[paragraph 1.55]

CONTRACTUAL VALIDITY AND PUBLIC POLICY
8.3 We provisionally propose that for the future an agreement made between spouses, before or after marriage or civil partnership, shall not be regarded as void, or contrary to public policy, by virtue of the fact that it provides for the financial consequences of a future separation, divorce or dissolution.

[paragraph 3.84]

QUALIFYING NUPHTIAL AGREEMENTS
8.4 Should a new form of qualifying nuptial agreement be introduced, that provides for the financial consequences of separation, divorce or dissolution and excludes the jurisdiction of the court in ancillary relief?

[paragraph 5.69]

8.5 If so, should such agreements be able to contain only terms relating to pre-acquired, gifted or inherited property?

[paragraph 5.70]

8.6 Should the reform of the law relating to marital property agreements be postponed to await a wider review of the law of ancillary relief?

[paragraph 5.72]
CONTRACTUAL VALIDITY

8.7 We provisionally propose that, in the event that qualifying nuptial agreements are introduced, a marital property agreement should not be treated as a qualifying nuptial agreement unless it was a valid contract.

[paragraph 6.47]

8.8 Do consultees think that the law relating to undue influence would require reform, for qualifying nuptial agreements only, in order to ensure that they were not too readily challenged or overturned?

[paragraph 6.48]

SIGNED WRITING

8.9 We provisionally propose that, in the event that qualifying nuptial agreements are introduced, it should be a requirement that they be made in writing and signed by the parties.

[paragraph 6.56]

THE CONSEQUENCES OF FAILURE TO MAKE DISCLOSURE

8.10 We provisionally propose that, in the event that qualifying nuptial agreements are introduced, a marital property agreement shall not be treated as a qualifying nuptial agreement unless the party against whom it is sought to be enforced received, at the time of the making of the agreement, material full and frank disclosure of the other party’s financial situation.

[paragraph 6.74]

8.11 We ask consultees whether parties should be able to waive their rights to disclosure.

[paragraph 6.75]

THE EFFECT OF FAILURE TO TAKE ADVICE

8.12 We provisionally propose that, if qualifying nuptial agreements are introduced, a marital property agreement should not be treated as such against a party who did not receive legal advice at the time when it was formed.

[paragraph 6.98]

8.13 We provisionally propose that in order to prove that legal advice has been given it shall be necessary to show that the lawyer advised the party against whom the agreement is sought to be enforced about:

(1) the effect of the agreement on the rights of that party; and

(2) the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement.

[paragraph 6.99]
JOINT LEGAL ADVICE

8.14 We ask consultees if they believe that there are any circumstances where the statutory requirement for legal advice could be met by having the same lawyer advise the two parties.

A TIMING REQUIREMENT

8.15 We provisionally propose that, if qualifying nuptial agreements are introduced, there should be no timing requirements imposed upon qualifying nuptial agreements made before marriage or civil partnership.

THE CONTENT OF THE AGREEMENT

8.16 We seek consultees' views as to whether, if qualifying nuptial agreements are introduced, there should be any further provision, beyond what we have already proposed, about either:

(1) the formation; or

(2) the content

of the agreement.

VARIATION OF A QUALIFYING NUPTIAL AGREEMENT

8.17 We provisionally propose that any variation of a qualifying nuptial agreement must comply with all the pre-requisites for the formation of a qualifying nuptial agreement.

PREJUDICE TO CHILDREN AND TO THE PUBLIC PURSE: TWO INESCAPABLE PROVISOS

8.18 We provisionally propose that, if qualifying nuptial agreements were introduced, they should be able to be varied or set aside by the court to the extent that:

(1) the agreement made insufficient provision for the children of the family; and/or

(2) the agreement left, or would in the foreseeable future leave, one or both parties dependent upon state benefits in circumstances where that could be avoided by the making of an order in ancillary relief.
FURTHER SAFEGUARDS: THE OPTIONS

8.19 We ask consultees to tell us which of the following options they would prefer:

(1) a "cast-iron" model, imposing no safeguards beyond those relating to children and to social security;

(2) provision for the agreement to be able to be varied or set aside by the court on the happening of specified events;

(3) provision for the agreement to be varied or set aside by the court if it produced significant injustice;

(4) provision for the agreement to be varied or set aside by the court to the extent that it failed to meet the parties' needs and to provide compensation for any losses caused by the relationship;

(5) provision for the agreement to be varied or set aside by the court if it failed to meet the parties' needs, narrowly defined.

[paragraph 7.65]

IDENTIFYING PROPERTY OVER TIME

8.20 We provisionally propose that there should be rules that enable property to be identified over time, for the purpose of a marital property agreement, and that they should set out the consequences of investment in that property by the other party or of the mixing of that property with property of the other party.

[paragraph 7.75]

8.21 We ask consultees to tell us whether they think that such investment or mixing should give rise to shared ownership, or to a right to reimbursement.

[paragraph 7.76]

BINDING MARITAL PROPERTY AGREEMENTS AND THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

8.22 We provisionally propose that, if qualifying nuptial agreements were introduced, it should be possible for them to restrict or modify the ability of either party to apply to the court for family provision under the Inheritance (Provision for Family and Dependants) Act 1975, save insofar as application is made for provision for maintenance (as that term is used in the context of the Inheritance (Provision for Family and Dependants) Act 1975).

[paragraph 7.89]
### Timeline

**Key dates in the current law of English Ancillary Relief**

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1882</td>
<td>Married Women's Property Act</td>
<td>MPR (Marital Property Regime) of Separate Property for spouses (therefore, marriage has no effect on property ownership for spouses). Very unusual in Europe at this time where community of property during marriage prevailed.</td>
</tr>
<tr>
<td>1973</td>
<td>Matrimonial Causes Act</td>
<td>Discretionary statutory regime with no principle of sharing – must have regard to all the circumstances of the case, first consideration to the welfare of any child of the family. S.25 factors, but no specific objective for distribution. Commenced a system of &quot;reasonable needs&quot; for the non-propertried spouse with the surplus being retained by the creator/beneficiary of such wealth.</td>
</tr>
<tr>
<td>1975</td>
<td>Inheritance (Provision for Family and Dependants) Act 1975</td>
<td>Enables relatives and other categories of claimant to apply to the court for provision out of a deceased's estate where reasonable financial provision has not been made for them under the deceased's will or intestacy.</td>
</tr>
<tr>
<td>1998</td>
<td>Home Office &quot;Supporting Families&quot; Paper</td>
<td>Consideration as to whether written agreements made during or after marriage, dealing with financial affairs, should be legally binding upon divorce. Reference to 6 safeguards to be followed.</td>
</tr>
<tr>
<td>2000</td>
<td>Revolution! White v White [2000] UKHL 54</td>
<td>Out with confinement to &quot;reasonable needs&quot; and in comes the overriding criteria in ancillary relief of FAIRNESS. No discrimination between husband and wife and their respective roles. Yardstick of equality - an aid not a rule. [LC 2.49].</td>
</tr>
<tr>
<td>01.12.00</td>
<td>Pension sharing orders on divorce (December 2005 for Civil Partnerships)</td>
<td>Further radical shake-up to English divorce</td>
</tr>
<tr>
<td>27.11.03</td>
<td>Brussels IIA - Council Reg (EC) no 2201/2003</td>
<td>Governs jurisdiction in England &amp; Wales for divorce – &quot;first past the post&quot; system. Very important in England and Wales as there is no adoption of applicable law rules.</td>
</tr>
<tr>
<td>2005</td>
<td>Civil Partnership Act 2004</td>
<td>The Civil Partnership Act 2004 came into force granting homosexual couples the right to a legally recognised union</td>
</tr>
<tr>
<td>2006</td>
<td>Miller &amp; McFarlane [2006] UKHL 24</td>
<td>Introduced &quot;needs compensation &amp; sharing&quot; as the three elements of a fair financial split.</td>
</tr>
<tr>
<td>2008</td>
<td>Macleod [2008] UKPC</td>
<td>Privy Council case regarding postnuptial agreements, established postnuptial agreements are not void for being</td>
</tr>
<tr>
<td>Date</td>
<td>Event/Document</td>
<td>Description</td>
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<tr>
<td>Oct 2010</td>
<td><em>Radmacher v Granatino</em> [2010] UKSC 42</td>
<td>&quot;The Court should give effect to a nuptial agreement...freely entered into...with a full appreciation of its implications...unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.&quot; NB – Such contracts are not binding on the English Courts which still retain discretion.</td>
</tr>
<tr>
<td>October 2010</td>
<td>Rome III – Council Reg (EC) no 1259/2010</td>
<td>Applicable law in divorce &amp; legal separation - Allows international couples in member states where it applies to agree in advance what law will apply to their divorce or legal separation. The UK has not opted in to this regulation.</td>
</tr>
<tr>
<td>11.01.2011</td>
<td>Law Commission Consultation Paper No. 198 &quot;Matrimonial Property Agreements&quot;</td>
<td>Publication delayed for <em>Radmacher</em> decision. To address whether financial consequences of divorce/dissolution can be agreed in advance – ie by a pre-or post-nuptial agreement.</td>
</tr>
<tr>
<td>16.03.2011</td>
<td>Rome IV – Proposal for Council Reg COM(2011) 1262 2011/xxxx</td>
<td>Further EU proposal to give Member States jurisdiction over EU property. The proposed regulation seeks to ensure that in the event of the death of one of the spouses the competent court can handle both the succession of the deceased spouse and the liquidation of the matrimonial property. The UK and Ireland have not opted in.</td>
</tr>
<tr>
<td>November 2011</td>
<td>Final Report of Family Justice Review</td>
<td>Concluded that the Government should establish a separate review of financial orders to include examination of the law.</td>
</tr>
<tr>
<td>11.09.2012</td>
<td>Law Commission Supplementary Consultation Paper</td>
<td>To address 2 further questions: Needs – meeting these post divorce/dissolution Non-matrimonial property – definition &amp; treatment</td>
</tr>
<tr>
<td>27.07.12</td>
<td>EU Succession Regulation 650/2012 wef 17.08.15</td>
<td>Denmark, Ireland and the UK did not adopt instrument and are not bound by it.</td>
</tr>
</tbody>
</table>
English MPA Cases
The 4 main post Radmacher cases

V v V [2011] EWHC 3230 (Fam) [2012] 1 FLR 1315 Charles J
• Concerned a Swedish wife and an Italian husband.
• £1.2m assets, £1m of which were brought into the marriage by the Husband.
• The marriage settlement, agreed 3 months before the marriage provided that all property 'now owned by the husband shall be his private property'.
• Charles J found that the husband was the driving force in obtaining it and the wife had agreed without disclosure of asset values or independent advice.
• The agreement was given weight by the judge but only to the extent that the husband should be granted a charge back over the wife's property in favour of the husband.
• The husband was left with approximately 60% of the total assets.

Z v Z (No. 2) (Financial Remedies; Marriage Contract) [2011] EWHC 2878 (Fam), [2012] 1 FLR 1100; Moor J
• Both the husband and wife were French
• A marriage settlement was entered into a week before the marriage (separation de biens) stating that all property owned by each of them at the time of marriage or acquired thereafter by gift, inheritance or for consideration shall remain their separate and independent property.
• £15m marital acquest
• 14 year marriage with 3 children
• The wife accepted that she had understood the meaning of the agreement and that she had adequate knowledge of the financial consequences.
• Moor J found that the wife entered into the agreement with "a full appreciation of its implications" and upheld the agreement to the extent that it excluded an equal sharing of the assets.
• The wife received 40% because of the agreement; without it she would have received 50%
English MPA Cases
The 4 main post Radmacher cases (continued)

Kremen v Agrest (Financial Rememdy: Non-Disclosure: Post-Nuptial Agreement) [2012] EWHC 45 (Fam), [2012] 2 FLR; Mostyn J

- 16 year marriage between a Russian couple
- They entered into a post-nuptial agreement limiting the wife's claim on the joint assets and the husband's assets.
- The husband controlled assets in the region of £20m-£30m (he did not disclose his full entitlement).
- If the agreement had been enforced, the wife would have been left with approximately £1.5m.
- Mostyn J held that as there had been no prior disclosure and that as the wife had received no prior independent legal advice, the agreement was to be given no weight and was to be discarded from his assessment. His opinion at paragraph 73 was that 'it will only be in an unusual case where it can be said that absent independent legal advice and full disclosure, a party can be taken to have freely entered into a marital agreement with a full appreciation of its implications.'
- Wife was awarded £12m

B v S (Financial Remedy: Matrimonial Property Regime) [2012] EWHC 265 (Fam); Mostyn J

- The wife was Spanish and the husband had been born in Peru.
- They married in Catalonia under the "default" separation of property regime.
- Assets totalled about £8m of which £7m was in the husband's name.
- Mostyn J did not give any weight to the agreement and repeated as in Kremen that each party will need full mutual disclosure and to have received separate legal advice (paras 34-35).
- Held that 'the only possible relevance of foreign law in divorce proceedings is to evidence the intentions of the parties at the time of the formation of the agreement' (para 11)
25 Matters to which court is to have regard in deciding how to exercise its powers under ss 23, 24 and 24A

(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A or 24B above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare of a minor of any child of the family who has not attained the age of eighteen.

(2) As regards the exercise of the powers of the court under section 23(1)(a), (b) or (c), section 24, 24A or 24B above to make a financial provision order in favour of a party to a marriage, the court shall in particular have regard to the following matters—

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increases in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, whatever the nature of the conduct and whether it occurred during the marriage or after the separation of the parties or (as the case may be) dissolution or annulment of the marriage, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

(3) As regards the exercise of the powers of the court under section 23(1)(d), (e) or (f), (2) or (4), 24 or 24A above in relation to a child of the family, the court shall in particular have regard to the following matters—

(a) the financial needs of the child;

(b) the income, earning capacity (if any), property and other financial resources of the child;

(c) any physical or mental disability of the child;

(d) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;

(e) the considerations mentioned in relation to the parties to the marriage in paragraphs (a), (b), (c) and (e) of subsection (2) above.

(4) As regards the exercise of the powers of the court under section 23(1)(d), (e) or (f), (2) or (4), 24 or 24A above against a party to a marriage in favour of a child of the family who is not the child of that party, the court shall also have regard—

(a) to whether that party assumed any responsibility for the child’s maintenance, and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;

(b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;

(c) to the liability of any other person to maintain the child.
Edward Reed, Partner-Private Client, Macfarlanes LLP

Edward is a partner in private client. He advises on UK and international wills, trusts and personal tax planning. He is a trustee or protector of a number of private and charitable trusts, many of which are administered within our trust administration group. Having been educated both in the UK and in France, Edward has developed an affinity for civil law issues generally and acting for French-speaking and Swiss-based clients in particular.

In conjunction with overseas lawyers, he frequently advises on cross-border estate and succession planning issues and is involved in the establishment of trust structures in a number of jurisdictions. He has a particular interest in the drafting of trusts and some of their constitutional mechanisms and has advised institutional and corporate trustees on the drafting and implementation of their standard forms, focusing on such issues as settlor reserved powers, settlor-directed investment provisions, protector committees and their appointment mechanisms and the trigger events (e.g. incapacity) for the transmission of key trust powers. He advises trustees and settlors on fiduciary and tax issues arising out of the administration of existing structures. Much of his work is on vehicles which have little or no connection to the UK.

Edward writes frequently on tax and trust issues, has been quoted in the industry and national press and has lectured in the UK, Isle of Man and continental Europe at industry conferences. He is also involved in charity law and advice to clients on philanthropic issues more generally. He advises on UK immigration and nationality law and procedure for private and corporate clients. He has administrative oversight of the firm’s wholly-owned trust company, Embleton Trust Corporation Limited. Edward is a contributor to Tolley’s Administration of Trusts and the author of the England and Wales Chapter in The World Trust Survey (Gothard & Shah) published by Oxford University Press. He is also co-author of the “Trusts, Trustees and the UK Anti Financial Crime Regime”, chapter (C11) in Glasson, The International Trust (3rd Ed. 2011).

Edward is also the Chairman of the steering committee of the Cross-Border Estates Group of STEP, a member of the Capital Taxes Sub-Committee of the Law Society’s Tax Law Committee and a trustee of The Friends of the Institut Français.
TESTAMENTARY FREEDOM – ENGLAND & WALES

- Wills & the common law
- Claims by dependants
- Intestacy
- Private International Law
THE BASIC PRINCIPLE

“He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued.”

Sir John Hannen in Boughton v Knight [1873]
WILLS

• An English testator is free to leave his assets by will as he wishes.

• No forced heirship, such as in Scotland and France.

• Statutory provisions now allow certain dependants to make claims against the estate if they have not been adequately provided for.
  – Inheritance (Family Provision) Act 1938
  – Inheritance (Provision for Family and Dependents) Act 1975
INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

• 3 principal requirements:
  – deceased must be domiciled in England or Wales;
  – applicant must be listed in section 1(1) of the Act:
    • spouse or civil partner;
    • unmarried former spouse;
    • child of the deceased;
    • any person who was treated as a child of the family; and
    • any person who was being maintained by the deceased; and
  – the deceased’s will did not make reasonable financial provision for the applicant.
WHAT IS REASONABLE FINANCIAL PROVISION?

• In relation to a surviving spouse (section 2(a)):

“financial provision as it would be reasonable in all the circumstances of the case for a husband and wife to receive, whether or not that provision is required for his or her maintenance”

• In relation to another claimant (section 2(b)):

“financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance”
WHAT IS MAINTENANCE?

• No statutory definition
• Determined by the court objectively on the facts of the case
• Sufficient to enable the applicant to live decently and comfortably, not in luxury, but at a breadline standard
• Moral obligation, e.g. a promise to the applicant that they would be provided for.

Where the applicant is the surviving spouse, the court will consider:

• the deemed divorce test; and
• maintaining the standard of living which the spouse enjoyed during the deceased’s lifetime.
THE EFFECT ON TESTAMENTARY FREEDOM

- Sharp v Adam – “irrational”
- VAC v JAD – “best interests”
- Ilott v Mitson

- Is the Act being used to fix a decision the judge condemns as irrational or inequitable?

- A testator must decide, with advice about the potential for a claim, how to distribute his estate given the risk of a potential claim.

- ? Family law advice needed.

MACFARLANES
WHAT’S NEXT?


• A “child of the deceased” need not be so in relation to the deceased’s marriage or civil partnership.
• The deceased must provide maintenance for a dependant, but need not “assume responsibility” for that maintenance.
• The question of assumption of responsibility should be a factor in determining reasonable provision.
• A dependant should not be required to show that the deceased contributed more to the parties’ relationship than the applicant.
• Where the deceased is non-UK domiciled, a claim can still be brought provided the testator has UK-situs assets or English succession law applies to a part of his estate.
If the deceased is survived by a spouse and issue:

**Spouse:**
- Personal chattels
- Statutory legacy of £250,000
- Life interest in half the remainder of the estate

**Children:**
- Half the remainder of the estate on statutory trusts
- The other half of the remainder once the life interest comes to an end
If the deceased is survived by a spouse and no issue:

Spouse:
• Personal chattels
• Statutory legacy of £450,000
• Half the remainder of the estate absolutely

If the deceased’s parents, or failing that siblings (or their issue) are living, the other half of the estate passes to them.
If none are living, the surviving spouse takes the whole estate absolutely.
If the deceased is not survived by a spouse, then the whole estate is inherited by other relatives, in the following order of priority:

- Issue
- Parents
- Full siblings or their issue
- Half siblings or their issue
- Grandparents
- Uncles and aunts or their issue
- Half uncles and aunts or their issue
INTESTACY

WHAT’S NEXT?

Inheritance and Trustees’ Powers Bill

• Where the deceased leaves surviving spouse and no issue, the whole estate should pass to the surviving spouse.
• Where the deceased leaves surviving spouse and issue, the surviving spouse should receive, in addition to the personal chattels and statutory legacy, one half of the balance of the estate outright.
• When hearing an application under the Family Provision legislation brought by the surviving spouse, the court should have regard to the sum which may have been received on a divorce but is not required to treat this as an upper or lower limit.
INTERNATIONAL TESTATORS

Which law applies to the succession to the estate of a non-domiciliary with UK situate assets?

England & Wales is a schismatic jurisdiction.

- **Immovables**
  - the law of the place where the real property is situated
- **Movables**
  - domicile – what does this mean?
  - habitual residence
  - location of movables
RENOVI

e.g. a British citizen dies domiciled in Italy with immovables and movables in the UK.

• The immovables are governed by English law as the *lex situs* regardless of the deceased’s domicile.

• The movables are governed by either:
  • applying English law, whereby the movables pass under the law of his domicile, i.e. Italian law; or
  • applying Italian law, whereby the movables pass under the law of the testator’s nationality, i.e. English law.
RENVOI

3 options:

1. The English court can apply the foreign law, meaning only the internal law of that country and ignore the conflict of laws rules.

2. The English court can accept the renvoi and apply English law – single or partial renvoi.

3. The English court can decide the case as the foreign court would do – double renvoi.
   i.e. apply English law if that is what the Italian court would apply, or apply Italian law if that is what the Italian court would do.

Foreign law may therefore govern the succession to a non-domiciliary's movables situate in England so that foreign forced heirship rules could apply here.
TESTAMENTARY FREEDOM

EDWARD REED
Michael Wells-Greco TEP, Partner, Speechly Bircham AG Geneva and Lecturer and Tutor, International and European Law Faculty, Maastricht University

Michael advises families, entrepreneurs, trustees and financial intermediaries on cross-border private client, succession and family law matters.

In the private client field Michael specialises in all aspects of wealth structuring and estate planning, using domestic and international trusts and foundations in local as well as low tax jurisdictions.

Michael advises on cross-border family law matters, in particular advising on pre and post-nuptial agreements and the financial repercussions of relationship formation and breakdown. His work usually has an international perspective, often involving tax and trust implications, substantial assets or incomes. Michael champions a collaborative approach to ensure complex issues are identified and resolved quickly. He advises on forum, applicable law, recognition and enforcement in international cases and those involving wealth structuring vehicles.

In September 2012, Michael was named one of Private Client Practitioner’s Top 35 Under 35 – the definitive annual list of young private client practitioners.

In addition, Michael holds a full faculty post at Maastricht University in private international law and European family law. He speaks regularly at international conferences and seminars and is a member of the Society of Trust and Estate Practitioners (Suisse-Romande), the International Bar Association, the Swiss Institute of Comparative Law and Resolution.

Michael graduated from University College London (UCL) and Genova University with an LL.B (hons) law degree in English Law with Italian law. He was awarded distinction for his postgraduate diploma in legal practice, and received an LL.M cum laude in European Law for graduating in the top 3% from Maastricht University.

He is a Trust and Estate Practitioner (TEP), Solicitor of the Senior Courts of England and Wales (admitted) and Solicitor Advocate of the Eastern Caribbean Supreme Court (admitted).

Michael is fluent in Italian and French and has a working knowledge of Maltese and Spanish.
EU Perspective: The Philosophy of the Napoleonic Code

Michael Wells-Greco
Partner - Geneva
"On or about December, 1910, human character changed. I am not saying that one went out, as one might into a garden, and there saw that a rose had flowered, or that a hen laid an egg. The change was not sudden and definite like that. But a change there was nevertheless, and since one must be arbitrary, let us date it to about the year 1910.... All human relations have shifted -- those between masters and servants, husbands and wives, parents and children. And when human relations change there is at the same time a change in religion, conduct, politics, and literature. Let us agree to place one of these changes about the year 1910."

Virginia Woolf, "Character in Fiction"
MPRs and Succession

- Primary
- Secondary
- Community
- Separation
- Legal Regime
- EU proposals
Napoleonic Code and Protection by Succession and Solidarity

The various members of the family and their right to inherit:

• The surviving spouse
  (a) the influence of matrimonial property regimes
  (b) rights of the surviving spouse on intestacy
  (c) the dual protection of the surviving spouse

• Descendants
  (a) the impact of matrimonial property regimes
  (b) the right to inherit on intestacy

• More distant relatives

• Other family members
  (a) the surviving partner (same or opposite sex)
  (b) children not related to the deceased
Mandatory protection for certain members of the family

- Transmission of the assets
- Transmission of the liabilities
- Testamentary succession
- Obstacles:
  (a) mandatory rights to inherit (forced heirship)
  (b) unlawful consideration
  (c) taxation
- Forced heirship? Balancing party autonomy and the protection of family members
- Succession pacts
Considerations

- Same sex couples
- Step-children
- Children born by means of surrogacy and ART
- Contours of public policy
Practical Points

- Reducing jurisdictional mix
- Wills
- Succession or Family Pacts (e.g. Belgium, Germany and Italy)
- Trusts
- Inheritance tax
- Joint property
- Change of Matrimonial Property Regime (NB EU proposals)
- EU Succession Regulation
FURTHER INFORMATION

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Andrew De La Rosa, Barrister, ICT Chambers

Andrew De La Rosa is a practising English barrister and Cayman Islands attorney. He acts as independent counsel in advisory and litigation matters concerning fiduciary relationships in the trust, inheritance, investment management, corporate and partnership spheres and is an acknowledged authority on Islamic wealth management and succession planning issues. His connection with the Middle East dates back to his undergraduate days. He is a graduate of the University of Chicago Law School.

Andrew has acted in cases concerning the laws of all of the major common law jurisdictions, including those of the established and emerging International Financial Centres, and appeared in a substantial number of reported cases in his fields of practice. He has also published and lectured widely and for seven years has served as the Director of Studies of the annual Oxford Offshore Symposium at Jesus College, Oxford University.

For a number of years Andrew has been recognised as one of the leading specialists in his fields of practice. In The Chambers & Partners Guide to the UK Legal Profession clients have described him as “awesome and absolutely compelling,” a “great advocate and terrific strategist,” “charming and easy-going but with a deadly eye and known to get results” and “experienced inside and outside of the courtroom.” The Citywealth Leaders List has named him as one of the leading trust advisers at the English Bar.
Inheritance in Shari’a Law: Principle and Practice

Andrew De La Rosa
ICT Chambers, London and Cayman
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Some Ground Rules:

• This is not just about law

• “You cannot ignore the spiritual dimension”

• “Some things in this region are older than Islam”
Home Truths - No. 1:

- Islam is the fastest growing religion in the world
- Worldwide distribution of Muslim population (1.6 billion): 60% Asia-Pacific region; only 20% in Middle East
- **India**: probably 178 million Muslims; 10 year growth rate 36% (Muslim population growth in **Russia** far exceeds other groups)
- Compare Egypt (**80 million**), GCC (**40 million**), Qatar (**300,000 citizens**)
Home Truths - No. 2:

- About 90% of businesses in the GCC are family-owned; 60% elsewhere

- 75% of those FOBs are now at the point of succession between founding and younger generations

- Over the next decade, about 70% of FOBs in Asia-Pacific will reach the same point
Some Common Scenarios

(M.E. and Asia):

• Patriarchal family and business structure; patriarch goes on working well into his 90s - estate planning is more often than not left until late

• Multiple wives and households with children ranging in age from teenagers to middle aged business executives

• Assets held in the name of patriarch himself or through informal nominee arrangements; sometimes large corporate group structures with “partners” of different faiths or nationalities - and the “trusted advisor”
All of the most wealthy M.E. monarchies are examples of “Co-habitation”

- Shari’a is entrenched by (or as) constitutional provisions
- Civil law codes - often slavishly copied from Egyptian Codes drafted by Abd el-Razzaq el-Sanhouri
- Common law-based enclaves and/or tribunals and/or legislation (UAE, KSA, Bahrain)
- Elsewhere (outside the M.E.) hybrid systems - the legacy of British rule
The impact of the Shari’a inheritance rules cannot be overstated:

- Forced heirship system based both on religion and kinship
- Imperfectly codified in many M.E. countries - but underlying religious precepts central to family wealth transmission
- The heirs’ expectation of inheritance
- Observance a central concern of the “new orthodoxy”
What distinguishes it?

• Potentially vast range of heirs

• Fragmentation of ownership - undivided shares in each and every estate asset

• No clawback rule equivalent to *la réserve héréditaire* but many people think and act as though there was
The impact of the *Sunni* rules - 1:

1. Where there is an heir or heirs within the forced heirship categories, testamentary freedom limited to one-third of estate

2. Only *Muslim* family members have status as forced heirs

3. Basic effect is that close Muslim family members - surviving spouse, children and parents - take fixed shares in the estate
The impact of the *Sunni* rules - 2:

4. The shares of certain male heirs (husband, sons) are twice those of female heirs entitled in same degree.

5. No bequest (in Arabic *wassiyah*) in favour of an heir - unless and to the extent that other heirs ratify it.

6. No inheritance between persons of different faiths, but nothing to prevent a lifetime gift (*hibah*) or bequest in favour of a non-Muslim.
The impact of the *Sunnī* rules - 3:

7. Forced heirs take undivided shares in each and every asset comprised in the estate

8. No “clawback” in strict sense but “death illness” rule applies in last 12 months of life

9. No concept of law of domicile governing succession, nor any distinction for inheritance purposes between movable and immovable property
The impact of the *Sunni* rules - 4:

- Inherently discriminatory on grounds of religion and gender? Query consistency with western human rights concepts

- Not designed to cater for transmission of large personal fortunes

- In absence of lifetime structure, heirs take estate on death and in potentially highly fragmented shares

- But historically dispositions intended to mitigate effect of rules have been upheld - *fatwahs*
The $64 trillion question:

• Enforceability as respects *onshore* assets subject to Shari’a law rules and courts

• Section 361, U.A.E. Personal Status Law 2006:

"Any circumvention of the provisions of inheritance by sale, donation, bequest or other disposals shall be null and void."

• An explicit and deliberate purpose to exclude an heir required? Or is anything permissible that is not explicitly prohibited?
The “Island Communities” -
(Muslims in secular jurisdictions)

- Succession governed by domicile, nationality or habitual residence, not religious affiliation

- Survivorship to jointly owned property prevails over Shari’a inheritance rules: see Talib v Talib [2010] SGCA 11 (but contrast Malaysian decision in Salmah Omar v Ahmad Aziz [2012] 1 CLJ 923)

- Estate/gift/wealth tax systems that are not favourable to Shari’a-compliant succession planning - largely because of the Muslim wife’s position
Appendix

Further reading
Selected References

1. **The Quran** “verses of inheritance”: 4.11, 4.12 and 4.176

2. **Inheritance, gifts and waqfs:**
   - Dr Jamil Nasir CVO, *The Islamic Law of Personal Status* (4th ed.)
   - N. Coulson, *Succession in the Muslim Family* (Cambridge)
   - Pearl & Menski, *Muslim Family Law* (3rd ed.)
   - Azami, Siddiqui & Summers, *Islamic Wills, Trusts and Estates; Planning for This World and the Next* (2011)

3. **Current trust and succession issues:**
   - De La Rosa, *The DIFC Trust Law*, Trusts & Trustees (Sept. 2008), p.480 and *A Precis of Shari’a Succession Rules, Trusts and Waqfs* (on request to adlr@ictchambers.com)
Richard Frimston BSc ARCS TEP CTAPS, Partner and Head of Private Client Group, Russell-Cooke LLP

Richard Frimston graduated from Imperial College London, with a degree in Physics. He qualified as a solicitor in 1979 and a Notary Public in 1995. Richard has been a partner with Russell-Cooke LLP since 1982 and head of private client since 1993.

He has particular expertise in dealing with multi-jurisdictional estates, especially France. Richard is a member of the European Law Institute, the British Institute of International and Comparative Law, the International Academy of Estate and Trust Law and the Association of Contentious Trust and Probate Specialists.

Richard is co-chairman of the STEP Public Policy Committee and chairman of the STEP EU Committee and sits on the Law Society International Issues Committee.

Richard is Foreign Affairs correspondent for Sweet & Maxwell’s Private Client Business, a member of the editorial board for their publication European Cross-Border Estate Planning and contributes the international chapters to Heywood & Massey, Court of Protection Practice and to Jordan’s Court of Protection Practice.

The EU Succession Regulation No. 650/2012 and the proposed Matrimonial Property Regimes Regulations {COM(2011)126/2 and 127/2} have been of particular interest to Richard, who was a member of the EU Commission group of experts PRM-III/IV and PRM-III. He writes and lectures widely on the Regulations and has given evidence to the EU Parliament Legal Affairs Committee and the House of Lords sub-committee E.
STEP CROSS BORDER ESTATES GROUP

The International Private Client:

Reconciling Testamentary Freedom, Community Property and Shari’a

Thursday 5th December 2013

Richard Frimston TEP

Chair STEP EU Committee and Co-chair STEP Public Policy Committee

www.russell-cooke.co.uk
Discussion Points

- How is a nuptial contract recognised in civil law jurisdictions?

- How is a choice of a matrimonial property regime recognised in a common law one?
Discussion Points

- Where are the boundaries between transfers of property rights, changes to matrimonial property regimes and inheritance of property?
Discussion Points

- Is testamentary freedom a right recognised by EU or other public policy?
Discussion Points

- If separation of property involves the giving up of property rights, what protections should EU or other public policy require?
Discussion Points

- Is it realistic to consider matrimonial property regimes and succession separately?
Discussion Points

- How can the tensions between Shari’a succession law and EU public policy be resolved?
Discussion Points

- Will forced heirship fade away?
To Happy Relationships

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Co-chair STEP Public Policy Committee

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The STEP Cross-Border Estates Group (C-BEG) was founded in 2004 at the instigation of Richard Frimston of Russell-Cooke LLP. Its area of reference is the domain of estate planning and the administration of estates/successions across national borders. It focuses on reconciling divergent inheritance rules between civil code jurisdictions, between a civil code approach and a common law approach and between such systems and others such as Shari'a.

This Special Interest Group has to date focused on providing seminars on both tax and 'civil' topics surrounding such conflicts of law issues, touching on marriage, death, divorce and property law questions. C-BEG continues to follow the Brussels legislation process and the passage of the proposed Brussels III and Brussels IV Regulations.

Visit the Cross-Border Estates Special Interest Group web-pages:
www.step.org/cross-border-estates
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