"What is Marriage? What should it be?"

A summary of the All Party Parliamentary Group on Family Law's Opening Event

On Tuesday 2nd November, the newly established All Party Parliamentary Group on Family Law and The Court of Protection ("The Group") held its first open event in The Grand Committee Room at the Palace of Westminster. This was a debate on the future of ancillary relief and focused on the philosophy of marriage as the starting point for the discussion.

The Group invited guest speaker, Mr Justice Mostyn to lead the debate. Mr Justice Mostyn has long been regarded as the leading family lawyer of his generation and now sits as a High Court judge in the Family Division. Joining him on the panel were Baroness Deech, acting as Chair for the evening and John Hemming MP, who introduced Mr Justice Mostyn to the audience with an engaging summary of the judge's career and hobbies.

Mr Justice Mostyn began his speech with a light-hearted illustration of what marriage may subconsciously mean, still, to men and women in Britain. He talked about the elusive nature of marriage, the difficulty especially in today's world, of defining the tangible qualities of marriage and considered the problems in trying to define legal boundaries in order to characterise the essence of marriage and the perceived obligations that fall within it.

Having touched upon the relative naivety of most parties in relation to the legal consequences of marriage, Mr Justice Mostyn then went on to illustrate the delicate balance between romance and practicality and asked the audience to consider when they might feel the law should involve itself and when such intrusion might be unnecessary. In order to explain further the changing nature of ancillary relief, Mr Justice Mostyn gave a very helpful and detailed explanation of the history of marriage, the inequalities in relation to historic perceptions of women and property and the need to be ever mindful of protecting the spouse who comes to the table as the weaker party, a point he reiterated when considering the potentially damaging effect of pre-nups in this context.

Mr Justice Mostyn then spoke about community of property, a significant feature in European ancillary relief which has begun to make some headway here in England and the three different versions currently in use, namely: traditional community, deferred community and participation systems. Interacting with the audience, he then asked the floor to identify which version they felt was most effective and combined the challenge with the added suggestion of having a basic contract printed on the back of every marriage certificate with the possibility of amending that contract by agreement.

From community of property, Mr Justice Mostyn moved on to the notion that marriage implicitly created mutual obligations between the parties and went on to talk about the evolution of Family Law in England after the year 2000, which, as he explained, had begun to look considerably similar to Germany's deferred community of accrued gains in relation to ancillary relief. Mr Justice Mostyn also expressed concern that law was clearly evolving with the aid of the judiciary but without public or democratic input, a concern which he felt jeopardised the very nature of democracy – the ability of society to breathe life into its law.

Mr Justice Mostyn also broached the subject of nuptial agreements as an understandable move which acted as a reflection of the times and the change in law and intimated that these shifts were also part of a wider picture, involving a nation struggling to find certainty in a system which offered no solid outlines on ancillary relief or what to expect during those times when married couples may find themselves unfortunate enough to need guidance post separation and with the intention of divorcing.

In essence, the speech was one of exploring definitions and limits and this extended to the concepts of trust and confidence in marriage. Mr Justice Mostyn's final reflections asked us to focus on the intangible aspects of marriage – those aspects which are often enigmatic at the best of times but which require careful analysis in order to allow our family courts to move forward into the future, rather than back to it.

At its heart, the speech was a philosophical allegory: marriage as the hub of the heart and the head. And when two hearts and heads combine, those definitions of fairness within the context of ancillary relief become, perhaps, infinite and so the task of defining it in law, a challenging one. Mr Justice Mostyn asked the floor to think about the definition of marriage as both an economic union and one involving trust and confidence and where we might draw the line on both.

Following this parting thought, Baroness Deech made some thought provoking observations as she chose to explore cultural inequalities within matrimonial finance, offering the view that the discrepancies between awards for women were unfair and unlikely to promote confidence in a system which she felt seemed to reward wives who stayed at home and penalised those who went to work.

Baroness Deech went on to describe the need to prevent costly litigation in court as between spouses and the detrimental effect this had on the family, both economically and emotionally. She expressed concern over awards that have historically been given to women with husbands deemed high net worth individuals and called for legislation that offered clear and simple guidelines on matrimonial finance. She then opened the debate to the floor.

The audience was made up of lawyers, representatives of think tanks and interested members of the public and they were keen to ask questions on the nature of ancillary relief in England. Two solicitors who worked in urban areas outside of London talked about the wide gap in practice between those in London and elsewhere, explaining that their work revolved around much smaller income brackets, those of the ordinary family, and were often accompanied by advice on tax credits rather than trips to the Bahamas as standard! Hayley Trim from Jordans also expressed concern over the lack of clarity in the legislation on just what equitable solutions in matrimonial finance might look like and a gentleman from Resolution affirmed the sentiment. Further members of the audience explored the notion of compulsory mediation, to which Baroness Deech contributed by explaining that she felt by and large such an option was unhelpful as research had shown this to be the case.

The conversation from the floor also moved in the direction of family law in general and there was an overall dissatisfaction with the way the family justice system ran as a whole. Given that this field encompasses so many different areas of law and life, it was not surprising that the debate occasionally veered away from ancillary relief into the more generalised territory of relief in general – relief for families at a time when they need it most.

The evening was filled with ideas both from the panel and the floor and if there was perhaps one lingering sentiment that lodged itself into the minds of guests and Group members alike, it may well have been the increasingly obvious need to look at the family justice conundrum through the eyes of the families it was established to protect. There was a call for Parliament to tackle the issue.

2nd November, 2010