

The Law Commission
Consultation Paper No 198

MARITAL PROPERTY AGREEMENTS

A Consultation Paper

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission for England and Wales was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Munby (*Chairman*), Professor Elizabeth Cooke, Mr David Hertzell, Professor David Ormerod and Frances Patterson QC.

The Chief Executive is Mr Mark Ormerod CB.

Topic of this consultation: This Consultation Paper reviews the law relating to agreements made before or during a marriage or civil partnership which seek to regulate the couple's financial affairs during the relationship or to make financial arrangements for any period of separation or for the financial consequences of divorce or dissolution.

We discuss the current law and set out a number of provisional proposals and options for reform on which we invite consultees' views.

Scope of this consultation: The purpose of this consultation is to generate responses to our discussion, provisional proposals and questions with a view to making recommendations for reform to Parliament. Our provisional proposals and consultation questions are listed in Part 8.

Geographical scope: This Consultation Paper refers to the law of England and Wales.

Impact assessment: The impact of the current law and potential reforms is considered throughout this Consultation Paper. Consultees are invited to give their views on the financial and other impacts of the current law or of reform of the law relating to marital property agreements and to suggest sources of further information.

Duration of the consultation: from 11 January 2011 to 11 April 2011.

How to respond

Please send your responses either –

By email to: propertyandtrust@lawcommission.gsi.gov.uk or

By post to: Eleanor Sanders, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0297 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, where possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

After the consultation: In the light of the responses we receive, we will decide our final recommendations and present them to Parliament. It will be for Parliament to decide whether to make any change to the law.

Code of Practice: We are a signatory to the Government's Code of Practice on Consultation and follow the Code criteria, set out on the next page.

Freedom of information: It is important that you refer to our Freedom of Information Statement on the next page.

Availability of this Consultation Paper: You can view or download the paper free of charge on our website at: www.lawcom.gov.uk/docs/cp198.pdf.

CODE OF PRACTICE ON CONSULTATION

THE SEVEN CONSULTATION CRITERIA

Criterion 1: When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2: Duration of consultation exercise

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3: Clarity and scope of impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4: Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5: The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6: Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7: Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

CONSULTATION CO-ORDINATOR

The Law Commission's Consultation Co-ordinator is Phil Hodgson.

You are invited to send comments to the Consultation Co-ordinator about the extent to which the criteria have been observed and any ways of improving the consultation process.

Contact:

Phil Hodgson, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ
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Full details of the Government's Code of Practice on Consultation are available on the BIS website at <http://www.bis.gov.uk/policies/better-regulation/consultation-guidance>.

Freedom of Information Statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

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THE LAW COMMISSION
MARITAL PROPERTY AGREEMENTS

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GLOSSARY

“Ancillary relief”: discretionary re-distribution by the courts of the property and income of spouses or civil partners upon divorce or dissolution.

“Civil partnership”: a legal status acquired by same-sex couples who register as civil partners which gives them the same legal rights as married couples.

“Dissolution”: the legal termination of a civil partnership.

“Divorce”: the legal termination of a marriage.

“Marital property agreements”: we use this term to refer to pre-nuptial agreements, post-nuptial agreements, and separation agreements. In some legal writing these are known collectively as “nuptial agreements”.

“Post-nuptial agreement (or contract)”: an agreement made during marriage or civil partnership which seeks to regulate the couple’s financial affairs during the relationship or to determine the division of their property in the event of divorce, dissolution or separation.

“Pre-nuptial agreement (or contract)”: an agreement made before marriage or civil partnership which seeks to regulate the couple’s financial affairs during the relationship or to determine the division of their property in the event of divorce, dissolution or separation. Often referred to colloquially as a “pre-nup” and in some legal writing as an “ante-nuptial agreement”.

“Separation”: the informal termination of the spouses’ or civil partners’ relationship, when they cease to live together in a joint household. Separation may or may not be followed by divorce or dissolution.

“Separation agreement (or contract)”: an agreement made when a couple are contemplating imminent separation or have already separated which makes financial arrangements for the period of separation and any subsequent divorce or dissolution.

“Spouse”: we use this term to refer to one of the parties to a marriage or a civil partnership.

PART 1

THE BACKGROUND AND SCOPE OF THIS PROJECT

INTRODUCTION

- 1.1 Divorce, and the dissolution of civil partnership, almost invariably have profound financial as well as emotional consequences. Those financial consequences are the subject of a great deal of law, much of it developed by the courts. There are, however, very few statutory rules; the relevant statutes – the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 – do not set out principles that determine how a couple’s property is to be shared on divorce or dissolution. Instead, they set out the matters to be taken into consideration,¹ but give the court a wide discretion to make orders for sharing, selling or settling property and for the payment of maintenance, both for the adults and for any children.
- 1.2 A relatively small proportion of couples have their financial issues resolved by litigation on divorce or dissolution. Most reach a negotiated solution, with an eye to what could be ordered if the matter were to come to court, often asking for their solution to be confirmed by the court in a consent order.
- 1.3 This Consultation Paper 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. We examine the law relating to pre-nuptial agreements (colloquially “pre-nups”, or “ante-nuptial agreements” in legal writing) and post-nuptial agreements, depending on when they were made, as well as “separation agreements” which are made at the point when the relationship ends.
- 1.4 The background to our consideration of that issue is the fact that, although pre-nuptial and post-nuptial agreements were until relatively recently regarded with considerable suspicion within the legal system, there have been a number of recent high-profile cases where the outcome of an application for financial provision, known technically as “ancillary relief”,² has been determined, or heavily influenced, by a pre-nuptial or a post-nuptial agreement. There has also been a great deal of interest in such agreements in the media and in professional journals. Most significantly, in March 2010 the Supreme Court heard the appeal in *Radmacher v Granatino*,³ relating to an agreement executed in Germany before a marriage in England. Judgment was handed down in October 2010 and it was decided to delay publication of this Consultation Paper in order to await this significant decision and then consider the implications for the current law.
- 1.5 Whether the Supreme Court’s decision, and the interest it has generated, results in greater use of pre- and post-nuptial agreements remains to be seen. Although the use of these agreements in England and Wales has become more

¹ Matrimonial Causes Act 1973, s 25; and Civil Partnership Act 2004, sch 5, part 5, para 20.

² So called because the discretion is ancillary to – that is, subordinate to and exercised as a consequence of – the power to make a decree of divorce or dissolution.

³ [2010] UKSC 42.

widespread over the last 20 years, they have up to now been of interest almost exclusively to those couples whose assets exceed their needs. Our consultation does not presuppose that reform is necessary or inevitable, but if there is to be reform we are concerned to ensure that it is introduced in a way that retains important safeguards for spouses and their children.

1.6 In examining pre-nuptial, post-nuptial and separation agreements, we have to engage with a number of rules of public policy:

- (1) the rule developed by the courts in the nineteenth century that a contract that made provision for the future separation of spouses (whether that contract was made before or after marriage) was void. That meant that it was not a contract and could not be enforced. The reason for that rule was the public policy that marriage was indissoluble and that spouses had a duty to live together; a contract that made future provision for separation or divorce might encourage immorality;⁴
- (2) the rule, developed much later,⁵ that the courts will not enforce an agreement that purports to exclude the jurisdiction of the court to determine the financial consequences of divorce or dissolution; and
- (3) the rule that it is not possible to contract out of one's responsibilities to one's children.

1.7 Any term in a pre-nuptial or post-nuptial agreement, or a separation agreement, that purports to contract out of financial responsibility to a child could not be enforced by the courts, and we say nothing to cast doubt upon that principle. But we have to engage closely with the first two of those rules.

1.8 The first has, until recently, meant that pre-nuptial and post-nuptial agreements were contractually void.⁶ The policy was scarcely consistent with modern values; married couples no longer have an enforceable duty to live together, and the law makes provision for marriage and civil partnership to be brought to an end. The Supreme Court has recently stated that the rule "is obsolete and should be swept away".⁷ Later in this Consultation Paper we look at the implications of that change.⁸

1.9 But all three types of agreement – pre-nuptial, post-nuptial and separation agreements – remain subject to the second of those three policies. A central issue for our consultation is whether or not it should be possible for couples to contract out of the court's discretion and, if so, to what extent.

⁴ We explore the origins of this rule in Part 3; see para 3.21 below.

⁵ Its most authoritative expression is in *Hyman v Hyman* [1929] AC 601; see para 3.21 below.

⁶ But not separation agreements, which provide for a separation that has already taken place or is about to take place; see the discussion at paras 3.4 to 3.15 below.

⁷ *Radmacher v Granatino* [2010] UKSC 42.

⁸ See the discussion at paras 3.38 to 3.82 below.

- 1.10 Giving the judgment of the majority, in October 2010, Lord Phillips enunciated the principles that govern the relevant law for England and Wales as follows:⁹

A court when considering the grant of ancillary relief is not obliged to give effect to nuptial agreements – whether they are ante-nuptial or post-nuptial. The parties cannot, by agreement, oust the jurisdiction of the court. The court must, however, give appropriate weight to the agreement.¹⁰

...Under English law it is the court that is the arbiter of the financial arrangements between the parties when it brings a marriage to an end. A prior agreement between the parties is only one of the matters to which the court will have regard.¹¹

...The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.¹²

- 1.11 In this Consultation Paper we ask whether that should remain the law. Should pre-nuptial and post-nuptial agreements continue to be enforced by the courts at their discretion – governed by the principles enunciated by the Supreme Court – within ancillary relief proceedings? The Supreme Court’s restatement of the law in *Radmacher v Granatino* arguably takes the law as far towards an enforceable status for marital property agreements as is possible within the current statutory framework.¹³ Our consultation asks whether there should be legislative reform to enable couples effectively to contract out of ancillary relief, and out of the court’s discretion, by entering into an agreement in a prescribed form and subject to appropriate safeguards.
- 1.12 That is, at first sight, quite a narrow question. But it is a deep one and requires us to consider issues at the heart of family law, such as: what, if any, are the responsibilities of former spouses¹⁴ to each other after their divorce or dissolution? What is the place of autonomy in family law? What is the social cost of divorce and dissolution?
- 1.13 Our terms of reference were set out formally in our Tenth Programme of Law Reform:

⁹ We emphasise at this point that the law of Scotland is different, and rests upon different legislation and a distinct legal background.

¹⁰ [2010] UKSC 42 at [2].

¹¹ [2010] UKSC 42 at [3].

¹² [2010] UKSC 42 at [75].

¹³ [2010] UKSC 42 at [69].

¹⁴ We use this term to refer to a husband, wife or civil partner.

This project will examine the status and enforceability of agreements made between spouses and civil partners (or those contemplating marriage or civil partnership) concerning their property and finances. Such agreements might regulate the couple's financial affairs during the course of their relationship; equally they might seek to determine how the parties would divide their property in the event of divorce, dissolution or separation. They might be made before marriage (often called "pre-nups") or during the course of marriage or civil partnership. They need not be made in anticipation of impending separation; but they might constitute separation agreements reached at the point of relationship breakdown.¹⁵

- 1.14 The Supreme Court used the term "nuptial agreements" to describe these arrangements in *Radmacher v Granatino*; we have adopted the term "marital property agreements" to describe the interests under consideration, in order to emphasise that the agreements we are considering are financial ones. We have not explored other areas of family law that raise different policy considerations, such as the significance of terms that do not relate to financial matters. In particular we propose no reform of the law relating to children.¹⁶ The courts, in deciding applications for ancillary relief, must regard the welfare of minor children as their first consideration,¹⁷ and we take the view that there is no scope for contractual arrangements between individuals to displace that principle.
- 1.15 One of the difficulties of discussing marital property agreements is that a clear view of the options for reform is impossible without a good understanding of the law of ancillary relief; it is not possible to form a view on these contracts without knowing what it is that the parties are contracting out of. In this introductory Part we briefly summarise the current law; we also explain its international dimensions, comment upon the various sources of information that we have used, and acknowledge the help we have received.
- 1.16 In the Parts that follow, we set out the current law in more detail, looking at ancillary relief in Part 2 and at the law relating to marital property agreements in Part 3. We examine in that Part some of the implications for the couple themselves and also for third parties of the change in contractual status of pre- and post-nuptial agreements following the Supreme Court's decision in *Radmacher v Granatino*.¹⁸ Part 4 provides a comparative perspective, outlining the treatment of pre- and post-nuptial agreements in other jurisdictions. Part 5 puts the case for and against the introduction of "qualifying nuptial agreements" that would enable couples to make enforceable agreements to contract out of ancillary relief. We suggest two possible models for qualifying nuptial agreements, one of wide scope and one narrow. We ask an open question about the introduction of such agreements, in either form, without proposing that the law

¹⁵ Tenth Programme of Law Reform (2007) Law Com No 311, paras 2.17 to 2.18. See also paras 2.19 to 2.20.

¹⁶ See paras 2.20 to 2.23, and further comment at paras 3.26 and 7.12.

¹⁷ Matrimonial Causes Act 1973, s 25(1). Half of couples divorcing in 2008 had at least one child aged under 16: Office for National Statistics, *Divorces in England and Wales*, Statistical Bulletin (28 January 2010).

¹⁸ [2010] UKSC 42.

should or should not take that step. Finally, in Parts 6 and 7 we explore some options; if qualifying nuptial agreements were to be introduced, what should be the requirements for their formation and what should be their effect?

THE CURRENT LAW

- 1.17 On divorce, or dissolution of a civil partnership, the courts have a very broad discretion to redistribute the parties' property and income, in the light of a number of factors. Those factors include, but are not limited to, the needs and responsibilities of the parties, their income, earning capacity and all their resources, and the contributions they have made to the relationship.¹⁹ First consideration is to be given to the needs of the parties' children while they are minors. Those needs go beyond just the cost of housing, food and clothing, and are understood to include the need to have someone to care for them.
- 1.18 That is a very wide discretion, and the statute does not state the objective that the court is to aim for in exercising its discretion. Nevertheless we can identify, broadly, two categories of outcome.
- 1.19 First, the vast majority of cases are not contested in the courts, and many couples do not take legal advice.²⁰ Whether the problem is addressed by a judge or resolved by the couple themselves, the practical problem is that it is usually difficult to meet the needs of two households out of the resources formerly devoted to one. The resources available may be just adequate to meet the needs of the children, if any, and of the party with day-to-day care of the children; or there may be enough to re-house all the family. Rarely are there assets or income over and above what is required to ensure that all the family have accommodation and an adequate income. The objective that the courts are pursuing – and that lawyers will advise couples to try to achieve by negotiation – is clear; the problem is simply finding enough to go around.
- 1.20 By contrast, the higher value cases where the assets exceed the needs of the parties are more likely to be the subject of reported court proceedings.²¹ It is in these cases that the courts have developed principles to supplement and guide the very broad discretion conferred by statute. There is no statutory guidance as to what is to happen to the parties' assets over and above what is required to meet their needs. Until the early 21st century the courts operated on the principle

¹⁹ Matrimonial Causes Act 1973, s 25 and Civil Partnership Act 2004, sch 5, part 5, para 21; see paras 2.5 to 2.8 below.

²⁰ In 2008 there were 121,779 divorces in England and Wales: Office for National Statistics, *Divorces in England and Wales*, Statistical Bulletin (28 January 2010). In the same year the county courts disposed of 94,431 applications for orders in ancillary relief (note that each individual may ask for more than one type of order and therefore this number is greater than the total number of divorces involved), of which the majority (70%) were uncontested: Ministry of Justice, *Judicial and Court Statistics* (2008) Cm 7697, p 97. See also the findings of G Barton and A Bissett-Johnson, "The Declining Number of Ancillary Financial Relief Orders" (2000) 30 *Family Law* 94, 100.

²¹ There is no precise legal definition of "need" in this context; as we explain in Part 2, the courts take a broad view of need that encompasses housing as well as income and takes a fairly long-term view of what will be needed by, in particular, those who have given up their employment in order to care for children. Where possible, the courts will endeavour to ensure that the parties and the children have a lifestyle as close as possible to their lifestyle during the marriage, but of course that is only feasible in the more wealthy cases.

that an applicant in ancillary relief proceedings was entitled to a sum of money which would meet her (usually the applicant for ancillary relief was the wife) needs, generously assessed; any surplus remained with the other party. This led to significant inequality, and stood in stark contrast to the principle of equal distribution operated throughout Europe, and to the approach of the courts in the United States, and in many Commonwealth jurisdictions.²²

- 1.21 However, since 2001, following the House of Lords' decision in *White v White*,²³ the courts developed a principle of sharing. Generally, once the parties' needs have been met, their assets are shared;²⁴ the House of Lords famously said that the judge is to use the "yardstick of equality".²⁵ This is not a rigid principle of 50/50 division; in particular, there may be cases where one party is felt to deserve more, and sharing is less likely in shorter marriages.²⁶ The courts have also developed the idea of non-matrimonial property, which may enable certain assets – those acquired before the marriage, inherited property, and perhaps business property generated by one party – to be exempted from sharing. The extent and effect of the doctrine of non-matrimonial property remains unclear, and it is difficult to predict, under current law, how much of a couple's property will be regarded by the court as "non-matrimonial".²⁷
- 1.22 The latest development in the House of Lords' view on the ambit and function of section 25 in the "big money cases" is found in *Miller v Miller, McFarlane v McFarlane*,²⁸ where it was held that the distribution of assets is motivated by three principles: needs, compensation and sharing. Commentary on that decision has stressed the difficulties that arise from the fact that we are not told how those three principles are ranked – which one takes priority?²⁹ It seems that in practice, needs are still addressed first,³⁰ but the role of compensation is puzzling.³¹ As a result of that confusion, practitioners often find it very hard to predict outcomes for ancillary relief where there are substantial assets.
- 1.23 The overall effect of the change of approach since 2001 is that substantial assets are likely to be shared between a couple, and as a result we have seen some

²² See the discussion of the law at this period at paras 2.18 to 2.40, below, and our account of the comparative picture in Part 4.

²³ [2000] UKHL 54, [2001] 1 AC 596.

²⁴ *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246.

²⁵ *White v White* [2000] UKHL 54, by Lord Nicholls at [25], [2001] 1 AC 596, 605.

²⁶ *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508.

²⁷ For examples of recent decisions regarding non-matrimonial property see *S v S* [2006] EWHC 2793 (Fam), [2006] All ER (D) 137; *Robson v Robson* [2010] EWCA Civ 1171.

²⁸ [2006] UKHL 24, [2006] 2 AC 618.

²⁹ E Cooke, "Miller/McFarlane: Law in Search of Discrimination" (2007) 19(1) *Child and Family Law Quarterly* 98.

³⁰ E Hitchings, "Everyday Cases in the Post-White Era" (2008) 38 *Family Law* 873.

³¹ *VB v JP* [2008] EWHC 112 (Fam), [2008] 1 FLR 742; see also M Hatwood, "Compensation Culture: The Latest" (2010) 40 *Family Law* 52.

very large awards made.³² The law of England and Wales is now much closer to the European approach, where equal sharing is the norm and has been for many decades.³³ However, we lack a facility that most continental European jurisdictions do have, namely the ability for couples to make agreements, before or during marriage, that will determine what happens to their property on divorce. Such agreements can be made throughout Europe; they have to be regarded with caution because they are often made for reasons that have nothing to do with the ending of a marriage and are focused on what happens during a marriage, as a result of the very different property regimes prevalent in Europe.³⁴ But their effect may be to contract out of law that requires assets to be shared on divorce or dissolution. With the advent of a more egalitarian system of sharing in England and Wales, there may well be reasons for some to want to contract out of that system. Those and other reasons for doing so, and the extent to which couples should be able to do so, are key issues for this project.

- 1.24 A couple or an individual might, for example, wish to make it clear in advance that certain property is non-matrimonial, and therefore not to be shared on divorce or dissolution. More generally, a couple might wish to make their own decision about how their finances will be arranged in the event of divorce or dissolution, and perhaps to make that decision even before they marry. There is evidence, some of it anecdotal and some of it in media and professional commentary written before and after the Supreme Court's decision in *Radmacher v Granatino*³⁵ that an increasing proportion of couples wish to do this.³⁶ There has also been some indication that a number of couples were holding off signing an agreement until the Court had given judgment.³⁷
- 1.25 Aside from the very wealthy, others wishing to "contract out" to some extent of the reach of ancillary relief might be those who would otherwise be deterred from marriage by the risk of ancillary relief proceedings. They include those who have gone through divorce after a previous relationship,³⁸ those with inherited wealth,

³² For instance, in *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246 the wife was awarded approximately £48m. Other large awards have been seen in *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam), [2003] All ER (D) 40; *Cowan v Cowan* [2001] EWCA Civ 679, [2002] Fam 97; and *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] Fam 103.

³³ See Part 4.

³⁴ See the discussion at paras 4.6 to 4.15 below.

³⁵ [2010] UKSC 42.

³⁶ G Morris, "Resolution News- Family Agreements" (2010) 40 *Family Law* 305; R Lefort, "Large increase in couples signing prenuptial agreements" *Daily Telegraph*, 26 September 2009; "More couple signing pre-nuptials" *BBC News Online*, 26 September 2009. However, other sources indicate that demand has remained stable, at least in some areas and for some legal practitioners, over the last couple of years: E Hitchings, *A study of the views and approaches of family practitioners concerning marital property agreements* (2011); and E Hitchings, *Marital Property Agreements: A supplemental enquiry* (2011); "Harvey Nichols launches pre-nup package", *Family Law Journal* (online version) 28 October 2010.

³⁷ "Family lawyers expect pre-nup rush" *Financial Times*, 22 October 2010.

³⁸ Since 1998 approximately 18% of marriages annually in England and Wales have been between a couple who have both previously been divorced: see http://www.statistics.gov.uk/downloads/theme_population/Marriages_2008_provisional.xls.

those who own family businesses,³⁹ or those where one or both parties comes from elsewhere in Europe and regards it as normal and uncontroversial to have a marital property agreement.⁴⁰ There may also be cases where parents, for example, who have contributed to the purchase of the couple's house want to ring-fence their contribution from the risk of distribution on divorce or dissolution.

- 1.26 We discuss in more detail in Part 3 of this paper the evolution of the law of marital property agreements and the current position, and we merely provide a summary here by way of introduction. Until recently, the clearest law related to separation agreements, entered into in contemplation of an impending or very recent separation; stemmed from the Court of Appeal's decision in *Edgar v Edgar*, where it was said that:

Formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement.⁴¹

- 1.27 Pre-nuptial agreements were held to be formally void in a number of nineteenth-century cases,⁴² on the grounds that they might discourage couples from enforcing the duty to cohabit. Despite their lack of contractual validity, however, they have been taken into account as part of "all the circumstances of the case" when the court exercises its discretion under section 25,⁴³ and have in some cases determined the outcome of the litigation.⁴⁴ Post-nuptial agreements, by which we mean agreements made after marriage or civil partnership and providing for the financial consequences for the future termination of the relationship at a time when it is intended to continue, were held in a recent decision of the Privy Council to be no longer contrary to public policy but able to be set aside by the courts.⁴⁵
- 1.28 The Supreme Court's decision in *Radmacher v Granatino* confirms that the law has moved on from the nineteenth century cases; no longer are either pre- or post-nuptial agreements to be regarded as void for the reason that they might

³⁹ The Institute for Family Business (UK) has told us that "families are increasingly adopting an unofficial policy of requiring marrying family members to establish prenuptial agreements... . The pre-nup will seek to exclude such assets from the shared pool of assets that would be divided in the event of separation, establishing a form of 'firewall' in order to protect the business against a possible cash call".

⁴⁰ We say more about the important international aspects of this project at paras 1.37 to 1.41 below.

⁴¹ [1980] 1 WLR 1410, 1417.

⁴² *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 at [19], citing *Cocksedge v Cocksedge* (1844) 14 Sim 244, 13 LJ Ch 384, 8 Jur 659; *Cartwright v Cartwright* (1853) 3 De GM & G 982, 22 LJ Ch 841, 1 Eq Rep 138; and *H v W* (1857) 3 K & J 382, 112 RR 196, 69 ER 1157.

⁴³ Matrimonial Causes Act 1973, s 25 and Civil Partnership Act 2004, sch 5, part 5, paras 20 to 22.

⁴⁴ In *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467, the pre-nuptial agreement was described by Thorpe LJ at [15] as "a factor of magnetic importance".

⁴⁵ *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298.

encourage separation.⁴⁶ And although an agreement still cannot be used to oust the jurisdiction of the court, the court will exercise its discretion in accordance with the agreement's terms if it was freely entered into, unless in the circumstances it would be unfair to hold the parties to their agreement.⁴⁷ Unfairness is to be assessed on the basis of a wide range of factors – from the nature of the property to the personal characteristics of the parties – discussed in the majority judgment.⁴⁸ This is very close to (perhaps indistinguishable from) the law as to separation agreements enunciated in *Edgar v Edgar*.⁴⁹

- 1.29 Accordingly, although the Supreme Court's decision has emphasised the weight that the courts will give to marital property agreements, the extent to which such agreements will determine the outcome of the ancillary relief process depends upon an assessment of fairness. Legal advisers who draft them may build up considerable experience in assessing what terms will be regarded as fair. Those predictions may or may not be proved correct, depending among other things upon the extent to which circumstances change after the agreement is concluded.
- 1.30 The decision in *Radmacher v Granatino* is perhaps as far as the courts can go in providing a structure for the enforcement of marital property agreements within the framework of the current legislation. Should the law change so that it is possible to exclude, by agreement in advance, the court's discretionary jurisdiction under the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004?⁵⁰ Arguably that would give far greater weight to the autonomy of individuals, and would facilitate financial planning as well as perhaps preventing litigation. That might be a popular step in some quarters, but would it be the right one?
- 1.31 There are many reasons for caution when we consider the implications of an agreement. We have to ask whether it is possible to be sure that the agreement was entered into freely, whether before or after the celebration of marriage or civil partnership. Pressure may be overt, or it may be very subtle – perhaps unperceived by those who exert it or suffer it. We also have to ask about the risks of agreements made a long time before they are put into effect, and at a time when – it is to be hoped – both parties believe that it will not be put into effect.
- 1.32 There are important social policy considerations to be borne in mind. The courts in England and Wales take conspicuous care, in ancillary relief proceedings, for children,⁵¹ for those who care for children, and for those whose children have grown up but whose child-caring years have left them at a disadvantage in seeking employment. They are also able to make flexible and appropriate

⁴⁶ [2010] UKSC 42 at [52], and see para 3.64 below.

⁴⁷ See para 1.10 above.

⁴⁸ [2010] UKSC 42 at [67] to [84], and see the discussion at paras 3.47 to 3.54 below.

⁴⁹ [1980] 1 WLR 1410.

⁵⁰ The law is expressed in the same terms for both divorce and dissolution; there is as yet no case law to tell us whether court decisions about financial provision on dissolution are likely to be any different from decisions on divorce.

⁵¹ Matrimonial Causes Act 1973, s 25(1) and Civil Partnership Act 2004, sch 5, part 5, para 20.

provision from a couple's assets for a party who is disabled or has other specific needs. Accordingly, a project examining marital property agreements has to be concerned not only about enforceability and the associated issues of autonomy and predictability, but also about protection. So when we ask whether marital property agreements should be able to oust the jurisdiction of the court, so as to give the advantages of autonomy and predictability, we give careful consideration to the downsides of allowing a party to a divorce or dissolution to force his or her partner to abide by an agreement about financial provision. Such a reform could have a positive impact on relationship breakdown by minimising litigation; it could also have a very negative impact upon individuals if it means that they are deprived of financial provision to which they would otherwise have been entitled. And if the effect of an agreement is to leave one of the parties, or their children, in need, then there is a considerable social cost.

- 1.33 Accordingly, in considering the possibility of reform, we have to consider what safeguards are necessary, both at the time the agreement is made and at the point when it comes to be enforced, so as to minimise those costs if marital property agreements are to be given greater legal force.
- 1.34 These are complex issues. We note and are grateful for Lady Hale's comment that "this is just the sort of task for which the Law Commission was established".⁵²

Religious marriage contracts

- 1.35 We have made no separate proposals about religious marriage contracts. We are aware that religious marriage contracts are regarded as important in a number of racial and faith groups. Some – but not all – of those contracts make provision for what is to happen in the event of divorce and amount to marital property agreements. Insofar as they do, they are subject to the current law.
- 1.36 If a form of binding marital property agreement is eventually made available by legislation, it will be open to everyone to make use of that, although as we have said we doubt that it would be in the interests of the majority to do so. A religious marriage contract that met the criteria for a binding marital property agreement would be enforceable as such, no less and no more than any other. We are not persuaded that there is any reason to propose special criteria for the enforceability of religious marriage contracts, because we do not accept that anyone should be subject either to more or to less legal protection, in terms of the financial consequences of divorce, by virtue of their race or membership of a faith group. To make such a proposal would be discriminatory. Those who wish to make, and to abide by, religious marriage contracts will always be free to do so subject to the constraints of their legal obligations to each other and to society as a whole.

THE INTERNATIONAL DIMENSION

- 1.37 This project has some significant international dimensions.
- 1.38 First, couples who married in another jurisdiction, and made a marital property agreement that would be enforceable there, may be startled to find that if they divorce here the enforceability of their agreement is at the discretion of the court

⁵² [2010] UKSC 42 at [134].

– although the chances of enforceability are likely to be much greater, for international agreements following the Supreme Court’s decision in *Radmacher v Granatino*. It is particularly interesting to note that the Supreme Court was undismayed by the fact that the agreement had been concluded without the parties receiving separate, independent legal advice, and without the husband having read the agreement in his own language.

1.39 Secondly, couples from abroad (or where one party is from abroad) who want to get married here may find it very unattractive to do so if they cannot conclude a reliable agreement. We have heard anecdotal evidence that this is a problem for couples from, for example, the Nordic countries where it would be regarded as normal and reasonable to conclude an agreement exempting inherited property from the scope of those countries’ otherwise very broad community of property regimes. The decision in *Radmacher v Granatino* does not offer the certainty that such couples would seek.

1.40 Finally, the European Commission is currently considering the rules that determine in which court, and according to what law, disputes about family property are resolved in cases where a couple has moved from one country to another, or where spouses are from different countries. A Green Paper, published in 2007,⁵³ envisaged a rule that determines the applicable law, which will be the same no matter where the financial consequences of divorce are determined. This involves the courts of one country applying the law of another. It might involve, say, the English court applying French property rules – including the French law relating to a marital property agreement – to resolve the property issues between a French couple. Views on whether or not this is acceptable or appropriate vary widely.

1.41 We do not know whether the United Kingdom would opt in to an instrument that required the courts to operate principles of foreign law in ancillary relief cases, as they do in other contexts. The Supreme Court’s decision in *Radmacher v Granatino* does indicate a greater willingness on the part of the courts to respect the provisions of an agreement that would have been enforceable elsewhere. We bear in mind, at the very least, the European Commission’s wish to promote consistency in this area of the law; as Lord Justice Thorpe put it in the Court of Appeal decision in *Radmacher v Granatino*:

As a society we should be seeking to reduce and not to maintain rules of law that divide us from the majority of the member states of Europe.⁵⁴

SOURCES OF INFORMATION

1.42 In preparing this Consultation Paper, as well as carrying out our own research into domestic and overseas law, we have drawn upon the scholarship of academics and the experience and views of a range of legal professionals.

⁵³ Commission of the European Communities, *Green Paper: On conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition*, COM (2006) 400 final. Available online at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0400en01.pdf.

⁵⁴ [2009] EWCA Civ 649, [2009] 2 FLR 1181 at [29].

Existing reform proposals

- 1.43 A number of reform proposals have already grappled with the difficult issue of the extent to which marital property agreements should be enforceable.
- 1.44 In 1998 the Government Green Paper *Supporting Families*⁵⁵ recommended that pre-nuptial agreements should be made available. Such agreements were considered to have many potential benefits, including requiring parties to think about significant issues prior to marriage, and possibly reducing conflict in the event of divorce. However, the Green Paper recommended that in a wide range of circumstances agreements would not be binding: if there was a child of the family, if one or both parties did not receive legal advice when the agreement was made, if there had been a failure to provide full disclosure, if the enforcement of the agreement would cause significant injustice, or if the agreement had been made fewer than 21 days before the marriage.
- 1.45 In 2005 Resolution (the national organisation of family lawyers) recommended that binding pre-nuptial agreements should be available, but considered that the discretionary function of the court within section 25 of the Matrimonial Causes Act 1973 should be preserved.⁵⁶ The organisation recommended that judges should be expressly directed to consider any pre-nuptial agreement, and that agreements should be legally binding subject to an overall safeguard of “significant injustice”.
- 1.46 In 2009 the Centre for Social Justice advanced a similar proposal,⁵⁷ recommending that the courts would be able to intervene in cases where an agreement caused “significant injustice”. The proposal recommended a range of safeguards, including the provision of general legal advice to both parties, and financial disclosure by both parties. Parties would be required to reach their agreement more than 28 days before their wedding and the presence of mistake, misrepresentation or duress would invalidate the agreement.
- 1.47 Resolution produced a further policy in 2009.⁵⁸ It proposed that agreements should be binding unless they cause “substantial hardship” to either party or to a child, subject to some safeguards: agreements should not be binding if the parties did not have a reasonable opportunity to take legal advice, or if either party was subject to unfair pressure at the time of reaching the agreement. Agreements made without substantially full and frank disclosure or those made fewer than 42 days before the marriage would not be binding.
- 1.48 We have drawn upon the arguments presented in these reports and have found them very helpful, and their proposals have been in the forefront of our minds in preparing for this consultation. However, we note that to a considerable extent those who would benefit from reform are, if not all wealthy, at least in general possessed of more than average means. Law reform, in responding to a serious

⁵⁵ Home Office, *Supporting Families: A Consultation Document* (1998).

⁵⁶ Resolution, *A more certain future – Recognition of pre-marital agreements in England and Wales* (2005).

⁵⁷ The Centre for Social Justice, *Every Family Matters: An in-depth review of family law in Britain* (2009).

⁵⁸ Resolution, *Family Agreements – Seeking Certainty to Reduce Disputes: the Recognition and Enforcement of pre-nuptial and post-nuptial agreements in England and Wales* (2009).

practical problem about uncertainty in the law, should not disadvantage vulnerable groups, in particular children and those who make economic sacrifices in order to look after children. And we are concerned about the impact of certain models of reform upon those whose resources do not exceed – or are not sufficient to meet – their needs.

Legal research

- 1.49 We have been greatly assisted by research done by others. In 2008 we commissioned work by Dr Emma Hitchings, senior lecturer at the University of Bristol. She conducted some focus groups and interviews with legal professionals, in order to discover more about their clients' views and concerns. A report on the findings from the research is available on our website;⁵⁹ it has provided a source of evidence of solicitors' concerns, and of the practical difficulties that arise in the negotiation of pre-nups and other forms of marital property agreement, taking us beyond the anecdotal evidence that is so often referred to on this subject. Dr Hitchings carried out a follow-up study early in 2010, which is also available on our website.⁶⁰ She re-interviewed the solicitors she had approached in the original study in order to ascertain whether demand for legal advice on marital property agreements had increased since the initial survey. We had heard a great deal of comment from solicitors in London to the effect that their marital property agreement business was expanding dramatically, supposedly under the influence of high-profile reported cases. Overall, however, Dr Hitchings' more geographically diverse sample shows some increase in demand for some individual practitioners, but rather less than that reported to us by specialist London firms. Whether the decision in *Radmacher v Granatino* will have an effect upon the demand for marital property agreements remains to be seen.
- 1.50 A further source of information and inspiration was a conference held in June 2009 on marital property agreements, at Gonville and Caius College, Cambridge, organised by Dr Jens Scherpe with the express objective of assisting the Law Commission in its project. The speakers at the conference were leading family law academics from a wide range of jurisdictions. A number of papers were given, detailing the law on marital property agreements in these jurisdictions, and a wide ranging discussion took place. We benefited a great deal from the in-depth presentation of the law of other jurisdictions, given by experts in this field. Papers for this conference are to be published in 2011 in an edited compilation and we refer in this Consultation Paper to a number of the conference contributions.⁶¹
- 1.51 There is as yet no published empirical, statistically significant evidence of public attitudes in England and Wales to marital property agreements. This is partly because (for reasons that we explain later)⁶² they are a very recent focus of interest for lawyers and their clients. It is also because of the great difficulty of

⁵⁹ E Hitchings, *A study of the views and approaches of family practitioners concerning marital property agreements* (2011) (available at http://www.lawcom.gov.uk/marital_property.htm).

⁶⁰ E Hitchings, *Marital Property Agreements: A supplemental enquiry* (2011).

⁶¹ J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2011, forthcoming).

⁶² See Part 3.

devising any sufficiently robust way to ascertain people's views. We have already noted the need to understand clearly what is the effect of the law of ancillary relief before considering whether or not it should be possible to contract out of it. The regular large-scale surveys of public opinion⁶³ are based on questionnaires and there is no scope for explaining the law before asking a question.

- 1.52 However, research is being undertaken by Professor Anne Barlow and Dr Janet Smithson of the University of Exeter, entitled "Exploring Prenuptial Perceptions"; it is funded by the Nuffield Foundation. The researchers drafted questions about pre-nuptial agreements in order to test public attitudes, as part of the omnibus survey administered by the National Centre for Social Research.⁶⁴ The questions were based on scenarios, where respondents were asked if pre-nuptial agreements should be enforced in specific situations, after a brief explanation of the current law. The researchers also plan to undertake a small number of follow-up interviews in which they will explore the reasons for respondents' answers. We have had sight of preliminary data from the omnibus survey, and we refer to some of it later in this paper. We hope to include in our Report a full consideration of the data, which will by then be analysed and published. Although (for the reasons discussed) empirical research in this area is extremely difficult and has to be viewed with great caution, we anticipate that this study will give us some important indications of some general attitudes and of the sort of factors that people regard as important in this context.

IMPACT ASSESSMENT

- 1.53 Throughout this Consultation Paper we consider the impact of the current law on a number of groups, including individuals who are planning to get married or enter into a civil partnership, those who are already married or in a civil partnership, and those going through separation, divorce or dissolution. We also consider other family members, particularly dependants, but also members of the wider family who may want to preserve inherited assets or the integrity of a family business. The position of those who offer legal advice and representation in this field is also discussed, as well as the implications of the law for society as a whole. In addition to considering the impact of the current law, we discuss the potential impact of the models for reform that we consider.
- 1.54 In one sense, therefore, the whole Consultation Paper is an exercise in impact assessment. We will, however, publish with our final report a formal impact assessment that will endeavour to quantify the financial costs and benefits of reform where that is possible and assess the other impacts that reform would have. We invite consultees' views on this, in particular on the potential impacts that we discuss in this paper and any others that we have not identified. We

⁶³ In particular, the British Social Attitudes survey gathers opinions from 3,000 respondents on social and political issues. The survey consists of many short multiple choice questions and the survey does not allow time for the interviewer to explain complicated scenarios. For more information, see A Park, J Curtice, K Thomson, M Phillips, M Johnson, E Clery and C Butt (eds), *British Social Attitudes: The 26th Report* (2010) Appendix 1.

⁶⁴ An omnibus survey is a large-scale study using a random sample of the population, involving numbers large enough to be statistically significant and therefore generating conclusions that can give a representative picture of public opinion. The research questions were asked in two waves, with 1,600 respondents in each wave, giving a total response from around 3,000 respondents. For more information about the omnibus survey see <http://www.natcen.ac.uk/study/omnibus>.

would also welcome the identification of any additional sources of information or means of obtaining data that may assist us further in our impact assessment work.

- 1.55 **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.**

ACKNOWLEDGEMENTS

- 1.56 We have held a number of meetings with individuals and organisations while we have been preparing this paper, and we are extremely grateful to them all for giving us their time and expertise so generously.
- 1.57 Particularly valuable to us have been our meetings with legal professionals, which have enabled us to draw on their experience of advising clients both on ancillary relief and on marital property agreements. On 10 February 2010 we held a meeting at the London offices of Withers LLP to which a wide range of solicitors and barristers were invited, where we shared our preliminary thinking and heard views from those attending. We have also met with a number of members of the judiciary, including the judges of the Family Division of the High Court. We invited a range of organisations to meet with us and share their thinking on the issues of interest to them, and we met with each organisation that responded. We held meetings with representatives from charities (Gingerbread, Stonewall and Marriage Care) and also held discussions with committee members from Resolution, with members of the Lesbian and Gay Lawyers' Association, and with the Family Justice Council. We received written comments from the Institute for Family Business (UK).
- 1.58 Finally, warm thanks are due to our advisory group, which met for the first time in February 2010; we look forward to working with the group again when we are at the stage of analysing consultation responses. The members of the group are: Sarah Anticoni, Charles Russell; Dr Thérèse Callus, University of Reading; James Carroll, Russell Cooke; Nicholas Francis QC, 29 Bedford Row; Mark Harper, Withers LLP; Dr Emma Hitchings, University of Bristol; David Hodson, The International Family Law Group; Tony Roe, Tony Roe Solicitors; His Honour Judge Mark Rogers, Midland Circuit; and Richard Todd QC, 1 Hare Court.

PART 2

THE CURRENT LAW OF ANCILLARY RELIEF

INTRODUCTION

- 2.1 In Part 1, we sketched an outline of the law of ancillary relief. We explained that the courts determine on a discretionary basis the financial consequences of divorce or dissolution. We noted that the law has changed dramatically, relatively recently, with the introduction of the “yardstick of equality” in *White v White*.¹ We also noted that some couples may wish to contract out of ancillary relief and determine for themselves the financial consequences of the ending of their relationship. We outlined the current legal basis of marital property agreements, and set out the principal questions for this project: should such agreements be able to oust the jurisdiction of the court in ancillary relief, rather than being merely one of the factors that the court must take into consideration in exercising its discretion? If so, in what circumstances should such agreements have that effect?
- 2.2 In this Part we explore in more detail the law of ancillary relief in England and Wales. We provide that further detail for two reasons. First, an account of the differences between the law of ancillary relief in England and Wales, and the very different legal regimes of most European jurisdictions, goes some way to explaining why our law relating to marital property agreements has developed in the way it has. Second, the issue for this project is whether, and to what extent, it should be possible to contract out of the law of ancillary relief; in considering the question of extent, we have to look at the detail of ancillary relief in order to assess whether there are aspects of it that should not be optional.
- 2.3 One important preliminary point has to be reiterated: many couples resolve the financial consequences of divorce or dissolution without going to court.² It may not occur to them to seek legal advice, or they may not wish to do so or may be unable to afford to do so.³ Those who do see a lawyer will often resolve matters without going to court; or they may reach an agreement which they then have sanctioned by the court in the form of a consent order.⁴ But all may be said to be, to some extent, “bargaining in the shadow of the law” because the solutions that their legal advisers will advocate or negotiate for them will be heavily influenced by the outcome that it is thought could be achieved as a result of a court

¹ [2000] UKHL 54, [2001] 1 AC 596.

² G Barton and A Bissett-Johnson, “The Declining Number of Ancillary Financial Relief Orders” (2000) 30 *Family Law* 94; and see Part 1, footnote 20.

³ Figures provided to us by the Legal Services Commission indicate that in 2006-2007 approximately 15,000 legal aid certificates were issued for ancillary relief proceedings. In 2008-2009 that figure had fallen to approximately 10,000. The Government has launched a consultation containing proposals which would further impact on the availability of legal aid in ancillary relief; the intention is that more ancillary relief disputes should be mediated. See <http://www.justice.gov.uk/consultations/legal-aid-reform-151110.htm>.

⁴ A consent order is an order setting out the financial compromise agreed by the parties which has been presented to the court for its approval.

hearing.⁵ Those who do not take advice may nevertheless be influenced by background knowledge or myth about what solution the law would impose.

- 2.4 Accordingly, the outcomes of many ancillary relief negotiations that are settled, with or without lawyers, are nevertheless influenced by the outcomes that the courts will order, whether or not the parties are aware of that influence. Bearing that in mind, we turn to the current law. We look at it in two sections: first the law before the House of Lords' decision in *White v White*,⁶ and secondly the position thereafter.

ANCILLARY RELIEF BEFORE *WHITE V WHITE*

The statutory discretion

- 2.5 The law of ancillary relief revolves around the courts' discretionary jurisdiction. The Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 give a menu of orders (identical in the two statutes) that the court can make, including orders for periodical payments, lump sum orders, pension sharing orders and orders for the transfer or settling of property.⁷ The two statutes then set out factors that the judge is to take into consideration when deciding whether to make one or more orders. The relevant provisions of the 1973 Act and of the 2004 Act are, again, identical and we set out sections 25(1) to (4) of the 1973 Act in full on the following page.⁸

⁵ RH Mnookin and L Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale Law Review* 950.

⁶ [2000] UKHL 54, [2001] 1 AC 596.

⁷ Matrimonial Causes Act 1973, s 23; and Civil Partnership Act 2004, sch 5, parts 1 to 4A. For full details of the available orders see M Everall, P Waller, N Dyer and R Bailey-Harris (eds), *Rayden and Jackson on Divorce and Family Matters* (18th ed 2005) ch 16.

⁸ Matrimonial Causes Act 1973, s 25; and Civil Partnership Act 2004, sch 5 part 5, para 20.

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 while 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 increase 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.

- 2.6 So there are two overarching principles: the court is to have regard to all the circumstances of the case; and the welfare of the parties' minor children is to be its first consideration. There is a further general requirement:⁹ the court must consider whether it is possible to make a "clean break".¹⁰ There is then a list of factors to which the court must have regard – we refer to the list by the usual shorthand, as "the section 25 factors", bearing in mind that it is found in both statutes.
- 2.7 The order of the section 25 factors does not indicate priority. As Lord Hoffmann has put it:
- Section 25(2) of the [Matrimonial Causes Act 1973], while listing the various matters to which particular regard should be had, does not rank them in any kind of hierarchy. Which of them will carry most weight must depend upon the facts of the particular case.¹¹
- 2.8 The court's discretion in ancillary relief is a very strong one, since the statutes do not prescribe any objective for its exercise or any result to be achieved.¹² It is therefore not surprising that the courts have themselves developed some principles. In order to understand what has happened it is worth looking back at the origin of the Matrimonial Causes Act 1973.

The Divorce Reform Act 1969 and the new regime

- 2.9 Since the enactment of the Married Women's Property Acts of 1882, England and Wales has operated a system of separate property for spouses. That means that marriage, by itself, has no effect at all upon property ownership. It does not create any joint property, although a couple may choose to own property jointly if they wish – and of course nowadays many do.
- 2.10 When that system of separation of property was created in 1882 it was extremely unusual in Europe; at that date most European countries – and others whose legal systems derived from Europe, such as South Africa and a number of US states – operated a system of community of property during marriage (as they still do today). This meant that, regardless of the paper title, marriage created a pool of jointly owned assets to which the couple were entitled together. The objective of this system was to ensure that the homemaker had property of her own, despite the fact that she was not earning. This gave her financial security and also the ability to obtain credit. The corollary of joint ownership was that the

⁹ Matrimonial Causes Act 1973, s 25A; and Civil Partnership Act 2004, sch 5, part 5, para 23(2).

¹⁰ A "clean break" is an order or a set of orders that leaves no scope for ongoing payments between the couple, nor for any further orders to be made. The requirement is to consider the feasibility of a clean break, not to achieve one. See M Everall, P Waller, N Dyer and R Bailey-Harris (eds), *Rayden and Jackson on Divorce and Family Matters* (18th ed 2005) ch 16.

¹¹ *Piglowska v Piglowski* [1999] 1 WLR 1360, 1370.

¹² The discretion has been described as "almost limitless": *Thomas v Thomas* [1996] 2 FCR 544, 546, by Lord Justice Waite.

community of property was available to satisfy the debts of both parties; with community of property went community of liability.¹³

- 2.11 England and Wales had no such system. And separation of property meant, in the vast majority of cases, a gender divide in the ownership of property. At that date, the family home was in most cases solely owned by the husband, and relatively few married women were in employment. The housewife who had no property of her own had no share in her husband's property or earnings by virtue of marriage.¹⁴ The financial disadvantage to the homemaker is obvious; as Sir Jocelyn Simon famously said:

... the cock bird can feather the nest precisely because he does not have to spend most of his time sitting on it.¹⁵

- 2.12 Moreover, whereas in a community of property system, the community property was (and is today) shared equally on divorce, England and Wales had no such provision. Until 1970 the courts had very limited powers to redistribute property on divorce:

[The provisions for financial relief on divorce] were primarily concerned with income for the maintenance of spouses and children. The property adjustment provisions were limited. They were first enacted in the middle of the nineteenth century and so they reflected the values of male-dominated Victorian society.¹⁶

- 2.13 By the 1960s, a period of significant social change and emerging personal freedoms, the absence of any form of community of property and the limited availability of financial relief on divorce had come to be regarded as "outdated and inadequate".¹⁷ As the Law Commission noted in 1971:

In effect what women are saying, and saying with considerable male support, is: "We are no longer content with a system whereby a wife's rights in family assets depend on the whim of her husband or on the discretion of the judge. We demand definite property rights, not possible discretionary benefit."¹⁸

¹³ A number of European countries today operate a system of deferred community of property – which we discuss at para 4.7 below – which involves equal division when the community is brought to an end but without joint liability for debt during the marriage.

¹⁴ Save that following the enactment of the Married Women's Property Act 1964, s 1, property bought with the surplus from housekeeping monies, or the surplus itself, was owned jointly by the spouses in the absence of any contrary agreement.

¹⁵ Sir J Simon, *With all my Worldly Goods...* (1965) p 14 (reproducing an address to the Holdsworth Club at the University of Birmingham on 20 March 1964). See also, Family Law: First Report on Family Property – A New Approach (1973) Law Com No 52, paras 12 to 30.

¹⁶ *White v White* [2000] UKHL 54, [2001] 1 AC 596 at [17] by Lord Nicholls.

¹⁷ *White v White* [2000] UKHL 54, [2001] 1 AC 596 at [17] by Lord Nicholls.

¹⁸ Family Law: Family Property Law (1971) Law Commission Working Paper No 42, para 0.22.

- 2.14 The Divorce Reform Act 1969 introduced a new basis for divorce; namely that “the marriage [had] broken down irretrievably”.¹⁹ The new law did not introduce “no-fault” divorce, but it was a significant move in that direction. Shortly afterwards, the Matrimonial Proceedings and Property Act 1970 introduced the new law of ancillary relief, consolidated in the Matrimonial Causes Act 1973 and replicated for same-sex spouses in the Civil Partnership Act 2004. The 1970 Act did not introduce a system of community of property or address the ownership of property during marriage; those issues were at that time the subject of a Law Commission project. The Commission’s investigation culminated in a Report in 1973;²⁰ it recommended automatic joint ownership of the family home, rather than a full community system. This recommendation was never implemented.²¹
- 2.15 So hopes both of the introduction of community of property, and of property entitlement on divorce for the party (usually the wife) who had not had opportunity to earn during the marriage, were dashed. The system remained one of discretionary provision. The statute initially imposed an overall duty on the court to exercise its powers in such a way “as to place the parties ... in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other”.²² This overall duty was widely derided as “quite impossible”,²³ and likened to a fruitless attempt to reassemble Humpty Dumpty.²⁴ Following consultation conducted by the Law Commission,²⁵ this objective was deleted.²⁶
- 2.16 Those adjudicating in ancillary relief disputes now had no specific objective. There was simply a wide discretion;²⁷ in *Hanlon v Law Society*, Lord Denning explained that the court:

¹⁹ Divorce Reform Act 1969, s 1 (now contained within section 1(1) of the Matrimonial Causes Act 1973). For a detailed discussion of the background to the Divorce Reform Act 1969 see S Cretney, *Family Law in the Twentieth Century, A History* (2005), ch 9.

²⁰ See Family Law: First Report on Family Property – A New Approach (1973) Law Com No 52.

²¹ The recommendation had strong public support: a national survey of married couples and divorced people, carried out by the Office of Population Censuses and Surveys (JE Todd and LM Jones, *Matrimonial Property* (1972)) found that of a sample of 1,877 people, 94% of respondents agreed that “the home and its contents should legally be jointly owned by the husband and wife irrespective of who paid for it” (at [22]). Note that the Scottish Law Commission later made a similar recommendation: *Matrimonial Property* (1983) Scottish Law Commission Memorandum No 57, and that calls for such reform have been made again recently: A Barlow and C Lind, “A Matter of Trust: the Allocation of Property Rights in the Family Home” (1999) 19 *Legal Studies* 468.

²² Matrimonial Proceedings and Property Act 1970, s 5.

²³ *Cowan v Cowan* [2001] EWCA Civ 679, [2002] Fam 97 at [25] by Lord Justice Thorpe.

²⁴ *Barrett v Barrett* [1981] 11 Fam Law 178, 179, by Lord Justice Cumming Bruce.

²⁵ Family Law: The Financial Consequences of Divorce: the Basic Policy – A Discussion Paper (1980) Law Com No 103.

²⁶ Matrimonial and Family Proceedings Act 1984, s 3.

²⁷ For a detailed discussion of the development of the Matrimonial Causes Act 1973 see S Cretney, *Family Law in the Twentieth Century: A History* (2005) ch 10.

... takes the rights and obligations of the parties all together and puts the pieces into a mixed bag The court hands them out without paying any too nice regard to their legal or equitable rights but simply according to what is the fairest provision for the future, for mother and father and the children.²⁸

- 2.17 But what were the courts trying to do? What sort of provision was regarded as “the fairest provision”?

The exercise of discretion in ancillary relief before *White v White*

- 2.18 District Judge Roger Bird, in an article written in 2000 but reflecting the approach taken from the early 1970s onwards, set out the priorities that the judges developed:²⁹

Housing is normally the most important issue; the housing of the parent with care of children normally takes priority over that of the other parent, although his/her needs must be met wherever possible. Once housing has been disposed of the reasonable needs of the parties should be considered. The clean break should only be imposed where there is no doubt that the parties will be self-sufficient. Attention must be given to pensions. Where the reasonable requirements of the parties have been met there is no justification for further adjustment by the court.³⁰

- 2.19 We need to examine three points in particular from that list: first, the primacy given to provision for any children; secondly, the courts’ approach to needs; and thirdly the absence of further property adjustment. We look at these in turn.

The first consideration: provision for minor children³¹

The interface between ancillary relief and child support

- 2.20 Approximately 50% of divorces in England and Wales each year are between parents with dependent children.³² Both the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 enable the courts to make provision for children as part of ancillary relief;³³ the court can require payments to be made or property to be transferred to or for the benefit of a child. However, the child support legislation makes a significant inroad into the courts’ powers to make orders in ancillary relief.

²⁸ [1981] AC 124, 147. The case was decided before the enactment of the child support legislation and therefore the day-to-day financial support of the children was as much part of the “mixed bag” as was financial provision for the parties themselves.

²⁹ The majority of those adjudicating in ancillary relief disputes are the District Judges in the county courts.

³⁰ R Bird, “Ancillary Relief Outcomes” (2000) 30 *Family Law* 831.

³¹ See generally, M Everall, P Waller, N Dyer and R Bailey-Harris (eds), *Rayden and Jackson on Divorce and Family Matters* (18th ed 2005) ch 22.

³² Office for National Statistics, *Divorces in England and Wales, Statistical Bulletin* (28 January 2010).

³³ Matrimonial Causes Act 1973, ss 23(1)(d), (e), and (f) and ss 24(1)(a), (b) and (c); and Civil Partnership Act 2004 sch 5, parts 1 and 2.

- 2.21 Every parent is responsible for maintaining his or her children, whether or not he or she lives with the child in question or was married to the other parent.³⁴ The Child Support Act 1991 quantifies that duty by prescribing levels of child support. By “child support” we mean the payments that must be made pursuant to that Act by a parent who does not live with a child to the parent with whom the child lives for that child’s financial support. It is sometimes referred to as child maintenance. It is calculated by a formula, using factors such as the income of the parent making payments, and any shared residence arrangements.
- 2.22 Parents can, and do, choose to make private agreements as to how they will finance the upbringing of their child, but the presence of such an agreement cannot prevent the person with whom the child lives from making an application under the Child Support Act 1991 for child support. Voluntary agreements will often reflect the level of child support that would be required under the Act.³⁵
- 2.23 The Child Support Act 1991 displaces the power of the court to make orders for periodical payments in favour of a child as part of ancillary relief;³⁶ child support payments under the Act take the place of such orders in most cases, except where the Child Support Act 1991 has no application,³⁷ or where the parties’ means fall above the threshold set out in the Child Support Act 1991.³⁸ Nothing in the child support legislation prevents the court from making an order in ancillary relief for a lump sum order or an order for the transfer or settlement of property for the benefit of a child, since child support concerns only periodical payments. But such orders are unusual in the context of divorce or dissolution because the children’s housing needs are generally addressed by making provision for housing for the parent with whom they live.

A different jurisdiction: schedule 1 to the Children Act 1989

- 2.24 It is worth noting that schedule 1 to the Children Act 1989 also enables any parent or guardian, or a person with whom a child lives pursuant to a residence order, whether he or she was married to the other parent or not, to seek financial provision for the child from the other parent – again subject to the provisions of the Child Support Act 1991. Schedule 1 to the Children Act 1989 is not usually relevant to the children of married parents, because their need for support arises in the context of divorce or dissolution and so will naturally be dealt with in ancillary relief proceedings under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004.
- 2.25 Generally therefore schedule 1 to the Children Act 1989 is used for financial provision for children whose parents are not married to each other. It therefore operates in a context in which the parents of the child have no obligations to each

³⁴ Child Support Act 1991, s 1; for background see *R (on the application of Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2006] 1 AC 42 at [50] to [77] by Lady Hale.

³⁵ Child Support Act 1991, s 9.

³⁶ Child Support Act 1991, s 8(3).

³⁷ For example where one of the parents lives abroad: Child Support Act 1991, s 44.

³⁸ Currently £2,000 net weekly income (to be amended to £3,000 gross in the forthcoming enactment bringing into force the Child Maintenance and Other Payments Act 2008, sch 4, para 10): Child Support Act 1991, sch 1, para 10(3).

other, and enables us to see the levels of provision that the court will make, when the assets of the parties permit it, for children in isolation from their parents. The available orders include not only the payment of a lump sum or periodical payments from a parent for the benefit of the child, but also the provision of housing for the child (until he or she turns 18 or finishes full-time education)³⁹ and the provision of a “carer’s allowance”.⁴⁰ The latter reflects the fact that a child needs to be looked after and, in effect, amounts to maintenance for the parent with whom the child lives, despite the fact that the two parents are not married, but only for so long as that parent is looking after the child.⁴¹

The courts’ approach to needs in ancillary relief

2.26 As we said above, there is no hierarchy in the section 25 factors. But the importance that the courts attach to the meeting of needs, and the breadth of their interpretation of that word, mean that the first of the factors takes priority and indeed, in the majority of cases, may even be the only factor that has practical relevance. We write here in the present tense because as we shall see, the primacy of needs remains a constant both before and after the decision in *White v White*.⁴²

2.27 In cases where there are children, the courts start in practice with their needs, and that of their primary carer, for a home and an income. A typical approach might be to look at the cost of housing required for the child and award a lump sum for furnishing and equipping that home, while settling the property so as to make it available for both child and carer until the child is of an age to leave home.⁴³ As Lord Justice Thorpe said, the judge can then:

... proceed to determine what budget the [parent] reasonably requires to fund ... expenditure in maintaining the home and its contents and in meeting other expenditure external to the home, such as school fees, holidays, routine travel expenses, entertainment, presents etc.⁴⁴

2.28 Where possible the court will look at the needs of both parties as well as those of the children. There is no definition of “needs” and there are no rules restricting the interpretation of the word. We can identify a number of distinctive features of the courts’ interpretation.

- (1) In looking at the parties’ income needs the courts are aware of the difficulties experienced by those who have given up work, wholly or in

³⁹ *T v S (Financial Provision for Children)* [1994] 2 FLR 883; *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865; *A v A (A Minor: Financial Provision)* [1994] 1 FLR 657.

⁴⁰ *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865.

⁴¹ The schedule, as the courts have interpreted it, gives no scope for support for a parent in isolation from the child’s needs or outside the period when the child is living with the parent; and it takes no account of the long-term disadvantage that a parent who gives up work to care for a child is likely to suffer; see para 2.28 below. It is therefore a very limited form of financial provision after family breakdown.

⁴² [2000] UKHL 54, [2001] 1 AC 596.

⁴³ *Radmacher v Granatino* [2008] EWCA Civ 649, [2009] 2 FLR 1181 at [45] and [46].

⁴⁴ *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865 at [47].

part, to look after children. It is not assumed that people can readily return to work in later years, nor that they can recover economically from years out of employment. Orders for periodical payments reflect this.⁴⁵

- (2) Needs encompasses the capital value of a home. We live in a society where owner-occupation is highly valued, and where the market for private rented accommodation is nowhere near so plentiful or so acceptable as it is, for the most part, in continental Europe. Considerable emphasis is therefore placed on the division of the capital value of the family home, whether immediately or at a later stage when the children leave home.⁴⁶
- (3) In assessing the parties' housing needs the courts are mindful of the ability of each party to obtain and support a mortgage loan. Someone who has given up work to care for children will often receive a larger share in the capital value of the family home when it is sold than will a parent who has not given up work and has therefore had a continuing (and perhaps growing) mortgage capacity.
- (4) So far as possible, the courts try to avoid allowing either party to leave the other dependent upon state benefits, on the basis that it is not acceptable to pass on one's individual responsibilities to the state. However, on occasions that is not possible,⁴⁷ and the courts will avoid making an order that leaves someone in a position where he or she would be better off not working.⁴⁸
- (5) The concept of needs is sufficiently long-term to encompass provision for retirement. Whilst the Matrimonial Causes Act 1973 as first enacted did not allow orders for pension sharing, the courts now have the power to make such orders and so can share an asset that was intended by the spouses originally as a joint provision for their old age.⁴⁹

2.29 The above points hold good today. And in most cases, despite the comprehensive nature of the concept of needs, the actual provision that can be made may be quite restricted, because usually there may be just enough to go around when one household splits into two. However, during the period from the early 1970s until the decision in *White v White*,⁵⁰ the courts developed a further concept which acted, in effect, as an extended version of "needs" in the more affluent cases. The courts took a more generous approach in these cases and

⁴⁵ In particular, the courts are most reluctant to impose a clean break when there are still minor children: *Suter v Suter & Jones* [1987] 3 WLR 9. Faced with an argument that a wife who has looked after children should receive periodical payments for only a limited period, to enable her to "get back on her feet", the courts may prefer to make an order for nominal periodical payments after the substantive payments have ceased, rather than imposing a deferred clean break: *G v G* [1998] Fam 1.

⁴⁶ *Mesher v Mesher and Hall* [1980] 1 All ER 126.

⁴⁷ *Delaney v Delaney* [1990] 2 FLR 457.

⁴⁸ *Furniss v Furniss* (1982) 3 FLR 46.

⁴⁹ M Rae, "Pensions and divorce: time for change" (1995) 145 *New Law Journal* 310.

⁵⁰ [2000] UKHL 54, [2001] 1 AC 596.

described what they were doing as meeting the applicant's "reasonable requirements".

- 2.30 Determining such requirements involved not only careful consideration of the sums required to maintain a home and care for any children of the marriage, but also provision for the applicant to continue to enjoy a lifestyle comparable with that of the family before divorce.⁵¹ But it would not give the applicant a fund that she might expect to bequeath to her children; and there was no element of sharing the fruits of the marriage, whether that was savings, or the profits of a business.
- 2.31 "Reasonable requirements" was really a generous interpretation of "needs". It went no further than what was required to maintain the claimant, for the rest of her life in wealthy cases, at the level to which she was accustomed. An applicant might actually receive less after a long marriage than after a short one, because the older divorcee, with consequently a lower life expectancy, had a lower level of "reasonable requirements" when these were capitalised.⁵²
- 2.32 The result of all this was that there was often frenzied litigation over the detail of the applicant's lifestyle needs:

... litigation too often became an exercise in constructing or demolishing exaggerated budgets of income and housing needs, and blackening the character of the other party, in the hope of influencing the court's mind.⁵³

The reason for the frenzy was that, for the rich wife, reasonable requirements were a ceiling:

In wealthier cases, 'needs' might be construed as 'reasonable requirements'; but nevertheless a point was reached where a wife's claims levelled off, however rich the husband.⁵⁴

- 2.33 The idea of "reasonable requirements" as a ceiling to provision came to an end with the decision of the House of Lords in *White v White*, as we explain below.

⁵¹ *Preston v Preston* [1982] Fam 17; *Gojkovic v Gojkovic* [1992] Fam 40; *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45.

⁵² *Duxbury v Duxbury* [1992] Fam 62.

⁵³ P Duckworth and D Hodson, "White v White – Bringing Section 25 Back to the People" (2001) 31 *Family Law* 24.

⁵⁴ P Duckworth and D Hodson, "White v White – Bringing Section 25 Back to the People" (2001) 31 *Family Law* 24 (referring to *Preston v Preston* [1982] Fam 17).

The pre-*White v White* approach to sharing

- 2.34 The third aspect of the pre-*White v White* law that we need to examine is the absence of a principle of sharing. It is clear from what we have already said that the courts' broad approach to needs, encompassing long-term capital provision for housing, meant that ancillary relief orders made in the pre-*White* era often involved what are known as property adjustment orders. The family home might be transferred to one party outright, perhaps to provide a home for the children and their carer; or it might be settled on terms that it be left unsold while the children remained at home and then sold and the proceeds divided so as to make provision for the housing needs of both parties. But what is also clear from the account of judicial priorities given above is that once needs – generously assessed as “reasonable requirements” in the very wealthy cases – had been met, no further adjustment was made.⁵⁵
- 2.35 Thus there was no parallel to the principle of equal division operated in community of property systems.⁵⁶ In the vast majority of cases this absence was invisible, because in most families there is barely enough – often not enough – to meet everyone's needs after divorce. In those cases the English system was generous to those with caring responsibilities. But in the minority of cases where assets exceeded needs the story was very different. In the “big money divorces” of affluent couples the courts would make an award that would meet the “reasonable requirements” of the applicant, but no more.
- 2.36 The overall effect was a “glass ceiling” that limited the maximum award to somewhere between £12 million and £15 million at most. Sir Terence Conran's fortune amounted to some £85 million in 1997 when he and his wife divorced; she received £10.5 million of which £2.1 million was awarded because of her contributions to her husband's business success. In *A v A (Financial Provision)*⁵⁷ the husband was worth over £200 million; the wife was awarded £4.4 million after a 14-year marriage. The position was explained starkly in *Thyssen-Bornemisza v Thyssen-Bornemisza (No 2)* by Lord Justice Griffiths:

Accordingly I believe that we should do a service to [the wife] if we were to state here and now that under English law she has no prospect of receiving a significantly higher award because her husband might turn out to have a fortune in the order of £1,000m rather than of £400m ...⁵⁸

- 2.37 In other words, the separation of property established in 1882⁵⁹ was observed on divorce once needs had been met. In the vast majority of families the provision made for needs meant that property entitlements were largely overridden and that careful provision was made for those with the day-to-day care of children and the employment disadvantage that that entailed. But in those families where assets exceeded needs the separation of property, and the absence of a principle

⁵⁵ See para 2.32 above.

⁵⁶ See paras 2.10 to 2.12 above.

⁵⁷ [1998] 3 FCR 421.

⁵⁸ [1985] FLR 1069, 1082.

⁵⁹ See para 2.9 above.

of redistribution beyond reasonable requirements, meant that a form of gender discrimination was entrenched in the law of ancillary relief – because as a matter of fact it was largely men who held assets and ran businesses rather than women, who by and large were responsible for homemaking and childcare.⁶⁰

2.38 The provision made by the English courts to meet needs on divorce is, we think, rather more generous than what is available in most European jurisdictions – although the comparison is a difficult one to make because of the need to bring in factors such as the availability of state benefits and the cost of housing. But it could be said that before *White v White*, a divorced wife was better off in England and Wales if she was poor, but far better off in the rest of Europe if her husband was rich.⁶¹

2.39 Judicial disquiet was expressed in the 1990s. In *Dart v Dart* Lord Justice Peter Gibson remarked:

I would have to say that I regard an award of £9m to a good wife in a marriage of 14 years and a good mother to the respondent's children out of the respondent's resources of £400m as on the low side.⁶²

2.40 There was a growing awareness among many legal professionals at the very end of the 20th century that something must change. But it was not agreed that the courts could make the change. Lady Justice Butler-Sloss said:

I am sure that any change in the way in which the courts should decide money cases ought to be by legislation. The practice in ancillary relief has become settled The Court of Appeal must not set the cat among the pigeons.⁶³

WHITE V WHITE AND THE CURRENT LAW

2.41 Nevertheless, there was no legislation; the change came from the House of Lords in *White v White*.⁶⁴ We turn now to look at that decision, and then at the House of Lords' later judgments in the conjoined appeals of *Miller v Miller*, *McFarlane v McFarlane*,⁶⁵ in order to get a picture of the current law.

Revolution: the decision in *White v White*

2.42 Mr and Mrs White were divorcing after a marriage of 34 years. Both had a farming background and they had farmed together throughout their marriage. They lived on a large farm in Somerset, which they had purchased early in their marriage, with a contribution towards the necessary financial deposit from Mr White's family. Mr White also owned the farm next door which was twice the size

⁶⁰ See Mr Justice Peter Singer's lecture to the Family Law Bar Association in 1992: P Singer, "Sexual discrimination in ancillary relief" (2001) 31 *Family Law* 115.

⁶¹ Absent a contractual arrangement that ousted the usual community of property rules. See Part 4.

⁶² *Dart v Dart* [1996] 2 FLR 286, 303.

⁶³ *Dart v Dart* [1996] 2 FLR 286, 305.

⁶⁴ [2000] UKHL 54, [2001] 1 AC 596.

⁶⁵ [2006] UKHL 24, [2006] 2 AC 618.

of the farm they lived on and which the couple also farmed together. In total the family had assets worth around £4.6 million, of which only 4% were held solely in Mrs White's name.

- 2.43 In the lower courts, applying the reasonable requirements test, Mrs White was awarded £800,000 (17% of the total assets). Mrs White had argued that she wanted to continue to farm after her marriage, but the judge at first instance considered that her reasonable requirements would be met by a sum of money which would provide her with an income for the remainder of her life, a home and some small area of land on which to keep horses.
- 2.44 Unsurprisingly, Mrs White was unhappy with this financial settlement and appealed. Indeed the result at first instance highlighted the benefits to women of being business partners rather than wives; Lord Justice Thorpe in the Court of Appeal noted that she would have fared better financially had she farmed in partnership with her husband instead of being his wife:

She would not have been exposed to such treatment had she not married her partner.⁶⁶

- 2.45 The Court of Appeal increased her award to £1.5 million (32% of the total assets). The Court of Appeal did not resile from the reasonable requirements test but acknowledged that it was not the appropriate test to apply in a case where the parties had been working partners (although it refused to award an equal share because of Mr White's family's contribution).
- 2.46 Mrs White appealed to the House of Lords, claiming an equal share of the family assets. Although their Lordships decided that the Court of Appeal's award to Mrs White should stand,⁶⁷ the case marked a revolution in ancillary relief, outlawing the reasonable requirements approach and introducing a new approach. Lord Nicholls said: "The present case is a good illustration of the unsatisfactory results which can flow from the reasonable requirements approach".⁶⁸
- 2.47 He stressed that:

⁶⁶ *White v White* [1999] Fam 304, 312.

⁶⁷ Misgivings were expressed about the value attributed to the gift from the paternal family and Lord Cooke felt that the award to Mrs White was "probably about the minimum that could have been awarded to Mrs White without exposing the award to further increase on appeal": [2000] UKHL 54, [2001] AC 596, 616.

⁶⁸ [2000] UKHL 54 at [45], [2001] 1 AC 596, 611.

... there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party.⁶⁹

2.48 Their Lordships asked: where the assets exceed the financial needs of the parties, why should the surplus belong solely to the husband? Lord Nicholls said:

I can see nothing, either in the statutory provisions or in the underlying objective of securing fair financial arrangements to lead me to suppose that the available assets of the respondent become immaterial once the claimant's wife's financial needs are satisfied. Why ever should they?⁷⁰

2.49 He also said:

Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion ... a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from if, and only to the extent that, there is good reason for doing so.⁷¹

2.50 Despite their Lordships' insistence that there was no starting point or principle of equal division,⁷² the House of Lords judgment in *White v White* marked a sea change in the way that the courts allocated money on divorce. Lord Nicholls later said that "the glass ceiling ... was shattered by the decision ... in the *White* case".⁷³ The decision ushered in a wholly new approach.

2.51 But it also created its own confusions. If equal division was not a principle, how did a "yardstick" operate? John Eekelaar noted at the time:

⁶⁹ [2000] UKHL 54 at [24], [2001] 1 AC 596, 605.

⁷⁰ [2000] UKHL 54 at [35], [2001] 1 AC 596, 608.

⁷¹ [2000] UKHL 54 at [25], [2001] 1 AC 596, 605.

⁷² In contrast to the principle enunciated in Family Law (Scotland) Act 1985, s 10.

⁷³ *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] AC 618 at [8].

... the proclamation of equality as a guide ... is only presented as a device for structuring the reasoning process: we are not told what reasons do or do not justify departing from it.⁷⁴

Development after *White v White*

- 2.52 A number of cases following *White v White* explored this uncertainty. It is now clear that where the party who generated the couple's assets – usually the husband – had shown exceptional talent or industry, he may take more than half on the basis of that exceptional contribution;⁷⁵ but the Court of Appeal stressed in *Charman v Charman* that these cases should be unusual.⁷⁶ Other cases have explored the extent to which assets acquired before the marriage might be regarded as “non-matrimonial” and therefore not to be shared.⁷⁷ It remains unclear how far a short marriage will justify a departure from equality.⁷⁸
- 2.53 In 2006 the House of Lords had the opportunity to give some further guidance in the conjoined cases of *Miller v Miller, McFarlane v McFarlane*.⁷⁹ Their judgments introduced the idea that there are three “elements” or “strands” which are “readily discernable” in a fair financial split: “the meeting of needs”, “the giving of compensation” and “sharing”.⁸⁰
- 2.54 The first two of those strands need not concern us at length here. The meeting of needs is familiar. It remains a priority in ancillary relief. Lord Nicholls confirmed that in many ancillary relief cases a fair split would only involve considering needs. As the assets would not stretch further than funding two homes, and sometimes not as far as that, there would be no need to consider “the giving of compensation” or “sharing”.⁸¹ He commended a broad view of needs, including not only those generated from the marriage but also those needs arising independently of the marriage, for example from age or disability.⁸² Lady Hale was not in agreement on this point, advocating a generous interpretation of needs but restricted to those generated by the marriage.⁸³ This difference in opinion was not resolved by any of the other judgments given.

⁷⁴ J Eekelaar, “Back to Basics and Forward into the Unknown” (2001) 31 *Family Law* 30,32.

⁷⁵ *Cowan v Cowan* [2001] EWCA Civ 679, [2002] Fam 97; *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] Fam 103; *G v G (Financial Provision: Equal Division)* [2002] EWHC 1339 (Fam), [2002] 2 FLR 1143; *H v H (Financial Provision – Special Contribution)* [2002] 2 FLR 1021.

⁷⁶ [2007] EWCA Civ 503, [2007] 1 FLR 1246.

⁷⁷ *S v S* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496; *J v J* [2009] EWHC 2654 (Fam), (2010) 40 *Family Law* 329; *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508.

⁷⁸ *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508.

⁷⁹ [2006] UKHL 24, [2006] 2 AC 618.

⁸⁰ [2006] UKHL 24, [2006] 2 AC 618.

⁸¹ In *Cordle v Cordle* [2001] EWCA Civ 1791, [2002] 1 WLR 1441 at [33] Lord Justice Thorpe gave some guidance to District Judges as to how best apply the *White v White* principles in lower value cases. See also E Hitchings “Everyday Cases in the Post-White Era” (2008) 38 *Family Law* 873.

⁸² [2006] UKHL 24, [2006] 2 AC 618 at [11].

⁸³ [2006] UKHL 24, [2006] 2 AC 618 at [138] and [144].

- 2.55 Compensation was said to be a way of “redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage”.⁸⁴ As Lady Hale put it, any award made under this strand would combat “relationship-generated disadvantage”.⁸⁵ There have been few cases since *Miller v Miller, McFarlane v McFarlane* in which compensation has played a distinct role. The courts have been particularly reluctant to develop the idea of compensation. Part of this reluctance may well stem from the difficulties of identifying the loss to be compensated; reluctance may also be traced to the difficulty of distinguishing it from the meeting of needs, since need within ancillary relief has always been a long-term concept encompassing disadvantage arising from not having been in employment.⁸⁶ Lord Nicholls acknowledged that the strands “often overlap in practice” and warned against “double counting”.⁸⁷ He noted that the overlap between the strands needed to be handled with flexibility and that there could be “no invariable rule” on the order in which they were to be applied.⁸⁸
- 2.56 The introduction of compensation as a distinct concept has made no difference in the level or the nature of the awards made. We think that it may be best regarded as a way of spelling out something that has always been regarded as an element of needs. The idea of making provision, on divorce, for the long-term financial consequences of the marriage is by no means new and forms an important part of any account of the pre-*White v White* law.⁸⁹ Having compensation articulated separately is useful because it draws attention to financial consequences that may not be obvious; but it may be that the corollary of this is that the courts may express the idea of “need” rather more narrowly, because its long-term aspect is now considered under a different head.
- 2.57 It may be that this is why the majority of the Supreme Court in *Radmacher v Granatino* recognised that “need” has been “generously interpreted”,⁹⁰ but also spoke of “real need”, which sounds rather narrower, while referring in the same paragraph to the *compensation* of long-term disadvantage generated by the devotion of one partner to the family and the home.⁹¹ That sort of disadvantage has always been regarded as part of the concept of need.
- 2.58 The recognition that an award focused on this type of disadvantage is a form of compensation may help the courts to focus their attention upon the real value of what has been lost. It is arguable that the introduction of compensation as a

⁸⁴ [2006] UKHL 24, [2006] 2 AC 618 at [13] by Lord Nicholls.

⁸⁵ [2006] UKHL 24, [2006] 2 AC 618 at [140].

⁸⁶ See the comments of Potter J in *VB v JP* [2008] EWHC 112 (Fam), [2008] 1 FLR 742 at [59].

⁸⁷ [2006] UKHL 24, [2006] 2 AC 618 at [15].

⁸⁸ [2006] UKHL 24, [2006] 2 AC 618 at [29].

⁸⁹ See paras 2.26 to 2.40 above.

⁹⁰ [2010] UKSC 42 at [28].

⁹¹ [2010] UKSC 42 at [81]. The majority in *Radmacher v Granatino* took the view that there was no question of compensating Mr Granatino for the economic effects of his career change, on the basis that his was an individual choice, not a family decision; see [121], but see also the comments of Lady Hale at [194].

separate concept is simply a teasing out of the complex notion of “needs generously interpreted”, at least in the way that the courts have applied it so far.

- 2.59 The third strand is “sharing”, and this is the element that was absent before *White v White*. Lord Nicholls repeated that, unless there was good reason to the contrary (for example if the property was required to meet needs),⁹² each of the parties was entitled to an equal share of the assets of the relationship. However, the uncertainties set out above remain,⁹³ and the House of Lords’ judgments in *Miller v Miller, McFarlane v McFarlane* carefully repeat the warning given in *White v White* that the yardstick of equality is to be applied as an aid not a rule.
- 2.60 Of those uncertainties, non-matrimonial property is a particular puzzle. The idea was originally discussed in *White v White*, when the gift of money from Mr White’s father meant that Mrs White could not have an equal share in the family assets. Assets which are frequently said to be non-matrimonial include money received as inheritance, gifts, and assets acquired after the couple separated. Lady Hale, in *Miller v Miller, McFarlane v McFarlane*, took a wider view and said that in some circumstances business or investment assets generated solely or mainly by the efforts of one party should be considered non-matrimonial property.⁹⁴ The Court of Appeal in *Charman v Charman* has since stressed that all property is subject to the sharing principle.⁹⁵ It seems that property that was initially non-matrimonial may become, over time, liable to be shared.⁹⁶ Where the parties’ standard of living has been afforded by and enhanced by drawing down on inherited wealth it may also be more liable to be shared on divorce.⁹⁷
- 2.61 So while sharing is now a central principle in ancillary relief, at least once needs have been met, its limits are unclear.

The evolved discretion: taking stock

- 2.62 If we look back at the pragmatic judicial priorities set out by District Judge Bird, we find that what has changed is the final item.⁹⁸ We still have a system that gives priority to meeting needs, but it is no longer the case that once needs have been addressed there is no scope for further redistribution. Stephen Cretney went so far as to say that *White v White* inaugurated a system of community of

⁹² [2001] 1 AC 596, 610.

⁹³ See paras 2.26 to 2.40 above.

⁹⁴ [2006] UKHL 24, [2006] 2 AC 618 at [152].

⁹⁵ [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [66]: “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 court will, in any event, have recourse to non-matrimonial property, if necessary, to meet needs: *H v H (Financial Provision)* [2009] EWHC 494 (Fam), [2009] 2 FLR 795.

⁹⁶ *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [25] by Lord Nicholls. See also, for instance, *C v C* [2007] EWHC 2033 (Fam), [2009] 1 FLR 8 where “the court was not required to identify assets as being specifically ‘matrimonial’ or ‘non-matrimonial’ and it was foolish to expect a party to produce a detailed account of his financial affairs so long ago”: P Moor, “After the love has gone: Recent developments in ancillary relief” (2010) 40 *Family Law* 146.

⁹⁷ *Robson v Robson* [2010] EWCA Civ 1171 at [8].

⁹⁸ See para 2.18 above.

property, whereby the couple's pool of assets would normally be divided equally once needs have been addressed.⁹⁹

- 2.63 That is a contentious view. In *Miller v Miller, McFarlane v McFarlane*, Lady Hale said that we do not have a community of property, either immediate or deferred;¹⁰⁰ and in *Radmacher v Granatino* Lord Phillips, giving the judgment of the majority, said that "... although the economic effect of *Miller/Macfarlane* may have much in common with community of property, it is clear that the exercise under the 1973 Act does not relate to a matrimonial property regime".¹⁰¹
- 2.64 Neither of those is a binding statement of law,¹⁰² and it is worth articulating the reasons why it might be said that we do not have a community of property regime. Certainly *White v White* brought English law closer to the majority of European jurisdictions, where such sharing is the norm (while needs are dealt with under separate maintenance provisions). However, there are at least two significant differences between the law of ancillary relief in England and Wales following *White v White*, and the community of property jurisdictions of continental Europe.¹⁰³
- 2.65 The first is that there is far less certainty here than in the majority of community of property jurisdictions about the extent of the property that is subject to sharing. Our system is discretionary whereas the community systems are rule-based,¹⁰⁴ and the courts in enunciating the "yardstick of equality" have retained the flexibility to order unequal division for a variety of reasons, as we have discussed. Moreover, most community of property systems define non-matrimonial property and provide that it cannot be shared,¹⁰⁵ whereas non-matrimonial property in this country is an uncertain concept the extent and destination of which cannot be predicted.
- 2.66 So in the minority of cases where assets exceed needs we have a less-than-clear principle of equal sharing, subject to considerable uncertainties that leave a great deal of room for argument, especially where there has been a short marriage, or

⁹⁹ S Cretney, "Community of property imposed by judicial decision" (2003) 119 *Law Quarterly Review* 349.

¹⁰⁰ *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [151].

¹⁰¹ [2010] UKSC 42 at [107].

¹⁰² Both are *obiter dicta*, that is, statements that were not necessary for the resolution of the issue before the court.

¹⁰³ And elsewhere: see para 2.10 above.

¹⁰⁴ There are elements of flexibility in property division in some community systems. In the Nordic countries, for example, there is provision for flexibility after short marriages, see: J Scherpe, "Matrimonial causes for concern? A comparative analysis of *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24" (2007) 18(2) *King's Law Journal* 348, 351 to 353. But none of the community systems operates such an unfettered discretion as to the division of property such as that found in the Matrimonial Causes Act 1973.

¹⁰⁵ See, K Boele-Woelki, B Braat and I Curry-Sumner (eds), *European Family Law in Action: Volume IV: Property Relations between Spouses* (2009) pp 359 to 365.

any form of unusual property – whether pre-acquired, gifted, inherited, or generated by the exceptional and solo business efforts of one party.¹⁰⁶

2.67 This gives rise to concern about uncertainty. In the majority of cases where all the assets, from whatever source, fall to be divided up so as to meet needs – in very much the way that Lord Denning described in the *Hanlon* case,¹⁰⁷ the uncertainty is not in the objective to be met, but in the way that it is to be met. What has to be done very often amounts to:

... nothing more than rough horse-trading, with only a very passing shadow of reference to case law In 9,999 cases out of a thousand it's all down to a wing and a prayer and what you can deal with off the back of a truck.¹⁰⁸

Despite the developments since *White v White*, this remains the practical reality of the ancillary relief process in the large majority of cases.

2.68 In the higher value cases, uncertainty is of a different nature. Once needs are met, the court is directed to find a fair, and non-discriminatory solution, and certainly far larger awards are generated than was the case before the decision in *White v White*. The uncertainty lies in the fact that equal division is not an absolute rule. Legal advisers find genuine difficulty in advising clients on settlement. Flexibility may be achieving fair solutions, but at considerable cost.

2.69 As a result, there have been calls for the reform of ancillary relief.¹⁰⁹ But if the difficulty with the law of ancillary relief – at least for the very rich – is its uncertainty, one solution may be to look closely at the potential for couples to contract out of uncertainty. Here is the other major difference between our law of ancillary relief and the community of property jurisdictions – and indeed the many other jurisdictions that share assets on divorce without having a formal community system.¹¹⁰ As we noted in Part 1, under our current law a marital property agreement is not a sure way out of discretion. Technically, an agreement remains simply one of the circumstances the court will take into account in the exercise of its discretion;¹¹¹ the Supreme Court in *Radmacher v Granatino* has confirmed that, although an agreement still cannot be used to oust the jurisdiction of the court, the court will exercise its discretion in accordance with the agreement's terms if it was freely entered into, unless it would be unfair to do so.¹¹² The assessment of whether or not it was freely entered into may depend upon a wide range of factors; and unfairness in outcome is a very open-textured concept, as we discuss in Part 3.¹¹³ But in many other jurisdictions

¹⁰⁶ *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [147] by Lady Hale.

¹⁰⁷ See para 2.16 above.

¹⁰⁸ G Davies, S Cretney and J Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (1994) p 106 (quoting a solicitor based in Newport).

¹⁰⁹ *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [106] to [126].

¹¹⁰ See Part 4.

¹¹¹ *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FCR 323.

¹¹² See para 1.10 above.

¹¹³ See paras 3.47 to 3.54 below.

where assets are shared on divorce – beyond what is required to meet needs – a marital property agreement is not subject to a discretionary assessment of this nature.¹¹⁴ Having explored ancillary relief law and the consequences of discretion we need to turn to look at the law relating to marital property agreements in more detail.

¹¹⁴ See the discussion in Part 4.

PART 3

MARITAL PROPERTY AGREEMENTS: THE LAW AND ITS EVOLUTION

INTRODUCTION

- 3.1 We have used the term “marital property agreements” to refer to agreements that seek to determine by agreement the financial consequences of separation, divorce and dissolution. A marital property agreement made in response to relationship breakdown, and at a point when the couple has already separated or is planning to do so imminently, is known as a separation agreement. Agreements made at a time when the parties have not separated and are not planning immediately to do so are known as pre-nuptial and post-nuptial agreements, depending whether they were made before or during the marriage or civil partnership.
- 3.2 The context in which all three types of agreement have to be considered is the law of ancillary relief, which gives the court an unfettered discretion to make orders for financial provision (save for the fact that the welfare of the parties’ minor children is to be the court’s first consideration). As the majority in the Supreme Court in *Radmacher v Granatino* put it:

Under English law it is the court that is the arbiter of the financial arrangements between the parties when it brings a marriage to an end. A prior agreement between the parties is only one of the matters to which the court will have regard.¹

- 3.3 The development of the law relating to separation agreements has been distinct, and we discuss that first. We then look at the way that the law relating to pre- and post-nuptial agreements has developed, culminating in the recent Supreme Court decision, and we explore the reasons for that change.² Finally we analyse the implications of the decision in *Radmacher v Granatino*, which represents the most authoritative statement of the current law.

SEPARATION AGREEMENTS

- 3.4 A separation agreement may be made before or after ancillary relief proceedings have been commenced. It may be made with or without legal advice. It may be a settlement of litigation at the door of the court, or concluded before any application has been made. In most areas of family law parties are encouraged –

¹ [2010] UKSC 42 at [3].

² We are not concerned here with ante-nuptial or post-nuptial settlements made on the parties to a marriage or a relevant settlement made on the parties to a civil partnership: Matrimonial Causes Act 1973, s 24(1)(c); Civil Partnership Act 2004, sch 5, para 7(1)(c).

by lawyers,³ by statutory provisions,⁴ and by procedural rules⁵ – to settle matters by agreement. A good example of this is the provision for a Financial Dispute Resolution hearing in all ancillary relief litigation. This is a mediation-based appointment which the parties must attend in person and where a judge with no other involvement in the case will try to help them reach a fair solution.⁶ This currently saves costs (both to the parties themselves and sometimes to the court service and the legal aid budget) and avoids the emotional stress of court proceedings.

3.5 The legal status of separation agreements was summed up by Lord Justice Thorpe in *Xydhias v Xydhias*:

... an agreement for the compromise of an ancillary relief application does not give rise to a contract enforceable in law. The parties seeking to uphold a concluded agreement for the compromise of such an application cannot sue for specific performance. The only way of rendering the bargain enforceable, whether to ensure that the applicant obtains the agreed transfers and payments or whether to protect the respondent from future claims, is to convert the concluded agreement into an order of the court.⁷

3.6 In other words, the agreement cannot exclude, or oust, the jurisdiction of the court in ancillary relief. Despite having made an agreement, either party can apply to the court for ancillary relief and ask the judge to ignore some, or all, of the terms of the separation agreement and make a different order. Only the presence of a final order will conclude the matter, and so it is advisable for couples who make a separation agreement to have it enshrined in a consent order. They will present the terms of their agreement to the court and ask for it to be expressed as an order; the judge in doing so is exercising the discretion in ancillary relief and so will not simply “rubber stamp” it, but will assess it on its merits.

3.7 The origins of this lie well before the 1970 reforms.⁸ In *Hyman v Hyman*⁹ the House of Lords had to assess a husband’s claim that the existence of a separation agreement, that made provision for maintenance payments for his wife, precluded her from seeking an order for maintenance payments. Their

³ Resolution’s *Code of Practice* requires members to “inform clients of the options e.g. counselling, family therapy, round table negotiations, mediation, collaborative law and court proceedings” (available at http://www.resolution.org.uk/editorial.asp?page_id=26). See also Resolution’s *Guide to Good Practice* (2009).

⁴ For example, the Children Act 1989, s 1(5) indirectly encourages parents to agree issues relating to the care of their children.

⁵ Family Proceedings Rules 1991, SI 1991 No 1247.

⁶ Family Proceedings Rules 1991, SI 1991 No 1247, r 2.61E.

⁷ [1999] 1 FLR 683, 691.

⁸ See paras 2.9 to 2.17 above.

⁹ [1929] AC 601.

Lordships concluded that the statutory language¹⁰ ruled out any possibility of the parties' contracting out of the court's discretion. Lord Hailsham stated that:

... the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that discretion.¹¹

- 3.8 The House of Lords also identified an important point of public policy. As Lord Hailsham put it:

[The statutory] provision is not made solely in the interests of the wife, but also in the interests of third parties who may deal with the wife or who may, as in the case of Poor Law Guardians, become responsible for her sustenance. If this be the proper inference from the language of the statute, I am prepared to hold that the parties cannot validly make an agreement either (1) not to invoke the jurisdiction of the Court, or (2) to control the powers of the Court when its jurisdiction is invoked.¹²

- 3.9 The concern expressed here is not for the individual but for the state and for the public as a whole; the objective of the courts' insistence on retaining control of provision is to prevent spouses from passing their responsibilities to the state.

- 3.10 Although the courts are not bound by separation agreements, in practice such agreements are encouraged and the orders made usually reflect their terms. The Court of Appeal has warned of the dangers of being too eager to look behind the terms of a separation agreement:

Officious inquiry may uncover an injustice, but it is more likely to disturb a delicate negotiation and produce the very costly litigation and the recrimination which the conciliation is designed to avoid.¹³

- 3.11 In *Edgar v Edgar* the Court of Appeal held that it was:

... a general proposition that formal agreements, properly and fairly arrived at with competent legal advice should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding parties to the terms of their agreement.¹⁴

- 3.12 In *Edgar v Edgar* the Court of Appeal looked at the approach to be taken by the courts when faced, not with an application for a consent order, but with an application for financial provision by a party who no longer wishes to abide by the agreement. In *Edgar*, the wife of a multi-millionaire argued that she should no longer be held to her agreement to give up her entitlement to a lump sum

¹⁰ Contained within the Supreme Court of Judicature (Consolidation) Act 1925 (the statute gave the court discretion to make an order for maintenance).

¹¹ *Hyman v Hyman* [1929] AC 601, 614.

¹² *Hyman v Hyman* [1929] AC 601, 608.

¹³ *Harris v Manahan* [1996] 4 All ER 454, 462 by Ward LJ.

¹⁴ [1980] 1 WLR 1410, 1417.

because it would be “unjust” to do so. The Court of Appeal examined the circumstances which might surround the making of such an agreement and which could be considered relevant in deciding whether it should be upheld. Lord Justice Ormrod noted that:

... undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties.¹⁵

- 3.13 The approach taken by the Court of Appeal in *Edgar v Edgar* is still followed.¹⁶ The courts have justified their willingness to implement the terms of separation agreements by reference to the section 25 factors. In *Brockwell v Brockwell*, Lord Justice Ormrod considered that “agreement was a very important piece of conduct under section 25 of the 1973 Act”.¹⁷ The presence of a separation agreement has been described as the factor which should be afforded the “greatest weight” by the judge.¹⁸
- 3.14 There are no specific practical limits to the type of separation agreement that the courts might enforce. We can be sure in the light of *Hyman v Hyman*¹⁹ that they would not countenance an agreement that left either party dependent upon state benefits if that could be avoided by the making of an order in ancillary relief. It is not known whether the courts would uphold an agreement that, without leaving either party on state benefits, did not meet a party’s needs in circumstances where they could have been met from the parties’ resources. There have been no reported cases, so far as we are aware, of such agreements being upheld, and we think it unlikely that the courts would do so.²⁰ Nor would the courts approve an agreement that made inadequate provision for the children of the family.²¹
- 3.15 We are not aware of dissatisfaction either with the practice of the courts in making consent orders in accordance with the terms of separation agreements, or with the *Edgar* principles.

PRE- AND POST-NUPTIAL AGREEMENTS

- 3.16 In what follows we look at the law relating to pre- and post-nuptial agreements in England and Wales under four heads: first, their traditional legal position, then

¹⁵ [1980] 1 WLR 1410, 1417. Lady Hale cited these factors with approval in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 at [25].

¹⁶ *X v X (Y and Z intervening)* [2002] 1 FLR 508; *Brockwell and Brockwell* (1976) 6 *Family Law* 46.

¹⁷ (1976) 6 *Family Law* 46, 48.

¹⁸ *G v G (Financial Provision: Separation Agreement)* [2000] 2 FLR 18, 34 by Mr Justice Connell.

¹⁹ [1929] AC 601, 614.

²⁰ Compare the approach of Mrs Justice Baron at first instance to the prenuptial agreement in *NG v KR (Pre-Nuptial Contract)* [2008] EWHC 1532 (Fam), [2009] 1 FLR 1478 at [38]: “The most obvious unfairness of the [pre-nuptial contract] is that it provides no prospect of any financial settlement even in the case of real need”.

²¹ See para 3.26 below.

developments in recent years, and thirdly the decision in *Radmacher v Granatino*.²² We then consider why the courts' approach has changed.

The traditional position in the law of England and Wales

- 3.17 Historically the law has been "exceedingly wary" of pre- and post-nuptial agreements.²³ Both have been regarded as void and contrary to public policy, and it is only relatively recently that the courts have begun to recognise and attribute weight to them. Thus in *F v F*, in 1995, Lord Justice Thorpe said that a pre-nuptial contract "must be of very limited significance".²⁴ Similarly, in *N v N*, in 1997, Mr Justice Cazalet said that a pre-nuptial agreement that would be binding in Sweden would be "no more than a material consideration in this court under section 25 Matrimonial Causes Act 1973".²⁵
- 3.18 The law's wariness arose from a number of factors; we can identify three major concerns developed by the courts.
- 3.19 First, in the nineteenth century a group of cases established that an agreement about the financial consequences of a future separation was void, because it was felt to jeopardise the parties' duty to cohabit.²⁶ As Joanna Miles put it:

The old cases take a judgmental, Old Testament tone based on a (public) duty to stay living together faithfully as husband and wife: thou shalt not seek by contract to compromise the common law duty of spouses to live together; thou shalt not give thy spouse any financial incentive to commit cost-free adultery or thyself an incentive to condone it; and so on.²⁷

- 3.20 This reasoning is scarcely recognisable today; the duty to cohabit has gone, a husband is no longer allowed to confine his wife, and divorce is available by consent.²⁸ Nevertheless we can trace back to those cases the rule that a marital property agreement that provides for a future separation is contrary to public

²² [2010] UKSC 42.

²³ I Harris and R Spicer, *Prenuptial Agreements – A Practical Guide* (2008) p xiii, Foreword by Lord Justice Wilson.

²⁴ *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45, 66.

²⁵ *N v N (Foreign Divorce: Financial Relief)* [1997] 1 FCR 573, 586 to 587.

²⁶ *Cocksedge v Cocksedge* (1844) 14 Sim 244; *Cartwright v Cartwright* (1853) 3 de GM & G 982; and *H v W* (1857) 3 K & J 382. The same principle was applied to a pre-nuptial agreement re-signed immediately after marriage in *Brodie v Brodie* [1917] P 271.

²⁷ J Miles, "Radmacher v Granatino [2009] EWCA Civ 649: Upping the antenuptial agreement" (2009) 21(4) *Child and Family Law Quarterly* 513, 520.

²⁸ Matrimonial Causes Act 1973, s 1(2)(d).

policy and void;²⁹ and it has been referred to by the courts as a real concern relatively recently.³⁰

3.21 A more relevant issue today is the second concern, expressed by the House of Lords in the 1920s in *Hyman v Hyman*:³¹ the need to ensure that parties to a marriage did not pass their responsibilities on to the state. We have discussed *Hyman v Hyman* in the context of separation agreements, for such was the agreement in the case; but it remains authority for the general proposition, applying to pre- and post-nuptial agreements as much as to separation agreements, that the parties to a marriage cannot contract out of the court's discretion in ancillary relief.

3.22 Since the reforms of 1970,³² pre- and post-nuptial agreements have been regarded as part of the circumstances of the case to be considered in ancillary relief cases, despite being contrary to public policy and therefore (in terms of contract law) void.³³ The courts' approach since then reveals a third concern, focused on the effect of the agreement upon the parties. Joanna Miles puts it this way:³⁴

... the contemporary case law has largely protective, New Testament overtones, concerned to safeguard potentially vulnerable parties' (private) rights to financial relief in the event of divorce: we cannot possibly allow you to make a binding agreement waiving or otherwise diminishing your right to seek financial relief from the court, particularly when you are so anxious to seize the prize of marriage that you might agree to anything your intended spouse puts in front of you.³⁵

3.23 The courts have expressed concern that financial agreements made before marriage might not adequately cater for financial needs or wealth which emerge years later in the marriage. As Lady Hale cautioned in *Miller v Miller, McFarlane v McFarlane*, "what seems fair and sensible at the outset of a relationship may seem much less fair and sensible when it ends".³⁶ There is a fear that engaged couples might make imprudent financial agreements as they find themselves at

²⁹ As we shall discuss in Part 4, that appears no longer to be the case for post-nuptial agreements following the Privy Council's decision in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 29.

³⁰ "An agreement made prior to marriage which contemplates the steps the parties will take in the event of divorce or separation is perceived as being contrary to public policy because it undermines the concept of marriage as a life-long union": *N v N (Jurisdiction: Pre-nuptial Agreement)* [1999] 2 FLR 745, 752 by Wall J.

³¹ [1929] AC 601, 629.

³² See paras 2.9 to 2.17 above.

³³ *X v X (Y and Z intervening)* [2002] 1 FLR 508 at [80].

³⁴ Contrast *Hyman v Hyman* [1929] AC 601 and the earlier cases where the courts' concern was with principle.

³⁵ J Miles, "*Radmacher v Granatino* [2009] EWCA Civ 649: Upping the antenuptial agreement" (2009) 21(4) *Child and Family Law Quarterly* 513, 520.

³⁶ [2006] UKHL 24, [2006] 2 AC 618 at [153].

“the emotional moment when legal advice is easily brushed aside”.³⁷ Most importantly, parties may not have equal bargaining power at the time they negotiate the agreement. The court, it has been said, “should not be blind to human frailty and susceptibility when love and separation are involved. The need for careful safeguards to protect the weaker party and ensure fairness remains”.³⁸

- 3.24 There is a gendered aspect to this concern; wives have in general been more adversely affected financially by divorce than husbands.³⁹
- 3.25 So we see three concerns developed by the courts: the first is a public policy concern about the effect of pre- and post-nuptial agreements upon marriage; the second is a concern for the public purse; and the third is the more protective concern about the welfare of the parties. The result is that until recently, a party to ancillary relief proceedings who sought to have the outcome determined in accordance with the terms of a pre- or post-nuptial agreement faced an uphill struggle.
- 3.26 A further theme of the law relating to marital property agreements, whenever made, is that currently no parents, however rich or poor, can contract out of their financial responsibilities towards their children. It would be wholly wrong to allow a pre-nuptial contract to absolve parents of their financial responsibilities towards children, and we are not aware of any cases where the courts have allowed this.⁴⁰

Recent developments

- 3.27 Over the last 15 years or so we have seen a movement in the courts’ approach to pre- and post-nuptial agreements, from entrenched caution, bordering on hostility, to a growing acceptance.
- 3.28 In *F v F* (Ancillary Relief: Substantial Assets) Mr Justice Thorpe said:

The rights and responsibilities of those whose financial affairs are regulated by statute cannot be much influenced by contractual terms which were devised for the control and limitation of standards that are intended to be of universal application throughout our society.⁴¹

³⁷ N Wilson, “Ancillary Relief Reform: Response of the Judges of the Family Division to the Government Proposals (made by way of submission to the Lord Chancellor’s Ancillary Relief Advisory Group)” (1999) 29 *Family Law* 159, 162.

³⁸ *NG v KR (Pre-nuptial contract)* [2008] EWHC 1532 (Fam), [2009] 1 FLR 1478 at [129] by Baron J.

³⁹ Institute for Social & Economic Research: S Jenkins, *Marital splits and income changes over the long term* (2008), No 2008-07, pp 7 to 20. Note Lady Hale’s comment on the gender dimension to the issue in *Radmacher v Granatino* [2010] UKSC 42 at [137].

⁴⁰ In *Morgan v Hill* [2006] EWCA Civ 1602, [2007] 1 WLR 855, the Court of Appeal made it clear that where an agreement made in settlement of a parent’s responsibilities under the Children Act 1989, sch 1 (see paras 2.24 and 2.25 above), made inadequate provision for the child, the court could make an order in more generous terms.

⁴¹ [1995] 2 FLR 45, 66.

3.29 In 1998 the Government Green Paper *Supporting Families* recommended that pre-nuptial agreements should be made available.⁴² Such agreements were considered to have many potential benefits, including requiring parties to think about significant issues prior to marriage, or possibly reducing conflict in the event of divorce. The Government concluded, however, that agreements should only be binding in certain limited circumstances. Pre-nuptial agreements would not be binding if there was a child of the family, if one or both parties did not receive legal advice when the agreement was made, if there had been a failure to provide full disclosure, if the enforcement of the agreement would cause significant injustice, or if the agreement had been made fewer than 21 days before the marriage.

3.30 That Government proposal was modest, in the sense that the safeguards it suggested were so many and so comprehensive that it is hard to see that legislation enacted along those lines would have had any great effect on practice.⁴³ Even so, in 1998, the response of the Family Division judges to *Supporting Families* voiced a “unanimous lack of enthusiasm for the pre-nuptial agreements”.⁴⁴

3.31 Yet already at that date, despite the background of concern about pre- and post-nuptial agreements, something of a change in attitude was discernible. Even in 1997, in *S v S*, Mr Justice Wilson said:

I can find nothing in section 25 to compel a conclusion, so much at odds with personal freedoms to make arrangements for ourselves, that escape from solemn bargains, carefully struck by informed adults, is readily available here. It all depends.⁴⁵

3.32 Over the following years the judiciary have been willing to afford greater weight to agreements. There is a growing concern for the parties’ autonomy and for the importance of predictability, and a tendency to look at pre- and post-nuptial contracts in the light of the *Edgar* principles for separation agreements.⁴⁶ In *K v K (Ancillary Relief: Pre-nuptial Agreement)* an agreement was upheld as “conduct which it would be inequitable to disregard”.⁴⁷ The husband had been under great pressure to marry the wife, who was pregnant at the time, and he had done so on the basis of a pre-nuptial agreement that restricted any capital claim she might make in the event of divorce. The wife now applied for financial provision beyond what the agreement gave her. It was held that she had understood the agreement and had not been under pressure to sign it, and that there had been no unforeseen circumstances that would make it unfair to hold her to it so far as

⁴² Home Office, *Supporting Families: A Consultation Document* (1998).

⁴³ N Lowe, *Pre-nuptial agreements: the English position*, text of the address prepared for the International Society of Family Law’s Colloquium on Family Law delivered on 11 October 2007 in Toledo, Spain, p 10 (available online at http://www.indret.com/pdf/508_en.pdf).

⁴⁴ N Wilson, “Ancillary Relief Reform: Response of the Judges of the Family Division to the Government Proposals (made by way of submission to the Lord Chancellor’s Ancillary Relief Advisory Group)” (1999) 29 *Family Law* 159, 162.

⁴⁵ *S v S (Matrimonial Proceedings: Appropriate Forum)* [1997] 1 WLR 1200, 1203.

⁴⁶ See paras 3.4 to 3.15 above.

⁴⁷ [2003] 1 FLR 120, 132, by Roger Hayward Smith QC. See: Matrimonial Causes Act 1973, s 25(2)(g).

capital provision was concerned. But the judge also held that she was entitled to ongoing maintenance payments in order to enable her comfortably to bring up the child of the marriage. In *NA v MA* the *Edgar* principles were applied by the court in the case of a post-nuptial agreement, made in circumstances where the relationship was in severe difficulties and the agreement was, in effect, the price of reconciliation.⁴⁸

3.33 The courts have thus moved from regarding pre- and post-nuptial contracts as merely a minor factor in the section 25 exercise to giving them considerable weight in some cases. Such contracts may even determine its outcome. A particularly striking example of the evolution in judicial views was seen in the Court of Appeal's decision in *Crossley v Crossley*.⁴⁹

3.34 Before their marriage, Mr and Mrs Crossley were each independently wealthy. Each had been married before; he was a 62-year-old property developer with a fortune which he declared to be in the order of £45m, and she was around 50 years of age and declared her fortune to be worth some £18m. Before the wedding they entered into a contract with each other which said that in the event of divorce:

Neither party shall apply to any court in any jurisdiction for any order for financial provision of any kind based on the marriage.

3.35 The marriage ended not long afterwards; in 2007 Mrs Crossley applied for ancillary relief and Mr Crossley sought to establish that the financial consequences of divorce should be determined by the contract. The case reached the Court of Appeal on a procedural point; Lord Justice Thorpe expressed the view that the making of the pre-nuptial agreement had been "an entirely appropriate step for the parties to take",⁵⁰ and said:

All these cases are fact dependent and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case.⁵¹

3.36 We have therefore seen something of a sea-change in the courts' approach to marital property agreements, from a position of deep suspicion to one where agreements are treated with respect. The final milestone prior to the Supreme Court's decision in *Radmacher v Granatino* is one with an interesting status, because it is the Privy Council decision in *MacLeod v MacLeod*,⁵² about the law in the Isle of Man, but on provisions identical to English law. Although decisions of the Judicial Committee of the Privy Council are not binding on English courts, they are treated as being of highly persuasive authority.⁵³ The Privy Council held

⁴⁸ [2006] EWHC 2900 (Fam), [2007] 1 FLR 1760.

⁴⁹ [2007] EWCA Civ 1491, [2008] 1 FLR 1467.

⁵⁰ *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467 at [2].

⁵¹ *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467 at [15].

⁵² [2008] UKPC 64, [2010] 1 AC 298.

⁵³ See *Halsbury's Laws of England*, vol 11 (5th ed 2009) para 103.

that such agreements are no longer void for the reasons of public policy set out in the nineteenth century. The decision was expressly limited to post-nuptial agreements, for two reasons. The first was the existence of a statutory jurisdiction to vary such agreements outside the context of ancillary relief proceedings, in sections 34 and 35 of the Matrimonial Causes Act 1973. The second reason was the emotional context. The Privy Council's view was that post-nuptial agreements are safer because they are no longer the price of a wedding and that therefore the parties are far less vulnerable to pressure.

- 3.37 Both of those reasons have been the subject of debate, and we revert to them later. They have to be seen now in the light of the Supreme Court's decision in *Radmacher v Granatino*,⁵⁴ which can be regarded as the culmination of this story of the evolution of judicial views.

The decision in *Radmacher v Granatino*

The background

- 3.38 Katrin Radmacher was a German heiress; Nicholas Granatino was French, and an investment banker earning about £120,000 a year in 1998. The couple were at that date engaged to be married and they entered into a German pre-nuptial contract, contracting out of the German community of property regime, providing that each was to manage his or her property independently, and waiving both financial provision on divorce and the right (under German law) of each to inherit from the other. The agreement was drawn up in German by a notary who, as is the practice in continental Europe, advised both parties. He explained the agreement to Mr Granatino but it was not translated for him, and Mr Granatino chose neither to take his own legal advice nor to have the agreement translated. The couple married in England in October 1998. In reliance on the agreement, Ms Radmacher's family subsequently transferred substantial wealth to her.
- 3.39 During the marriage, the couple spent most of their time in London. They had two daughters, born in 1999 and 2002. In 2003, when he had been earning some £200,000 per annum, Mr Granatino left his banking job to become a research student in biotechnology at Oxford University. His decision to leave his job seems to have been a unilateral one; but both parties agreed that he should undertake a PhD at Oxford on the basis that his research would enable him to earn substantially more in the future.⁵⁵ The recession, as well as the fact that his PhD took longer than anticipated, put paid to that expectation. In 2006 the marriage broke down, and the couple divorced in London in 2007. Ms Radmacher was by then worth around £100 million. Mr Granatino applied for financial provision, despite the agreement that he would not do so.
- 3.40 Mr Granatino's application was for a sum of £6.9 million to buy a home for himself in London and a property near the girls' main residence with their mother in Germany, to pay off his debts,⁵⁶ and to provide him with a long-term income. In other words, he applied for a needs-based order, within the generous meaning of

⁵⁴ [2010] UKSC 42.

⁵⁵ *NG v KR (Pre-nuptial contract)* [2008] EWHC 1532 (Fam), [2009] 1 FLR 1478 at [50] and [73].

⁵⁶ Incurred in the ancillary relief proceedings and also in proceedings relating to the children.

“needs” in the law of ancillary relief, but not for a share in Ms Radmacher’s wealth beyond that. So while he argued that the agreement should not be relevant to the determination of his application, it cannot be said that the agreement was wholly ignored. Far from it. It is not clear to what extent Ms Radmacher would have been required to share her wealth had Mr Granatino asked to do so, absent the agreement, because of the uncertainty surrounding the status of inherited and gifted property;⁵⁷ but it is unrealistic to suppose that a spouse of nine years would have had no share at all in the post-*White v White* era.

3.41 Mrs Justice Baron, at first instance, rejected the argument that the agreement should preclude any order. She found that the agreement had been flawed because Mr Granatino had not known the full extent of his wife’s wealth and had not had independent legal advice. She also held that the contract was “manifestly unfair” as it deprived Mr Granatino of all claims against his former wife, even in a situation of want. Moreover, the circumstances had changed due to the birth of two children during the marriage. Equally, she rejected Ms Radmacher’s argument that the section 25 discretionary exercise contravened Ms Radmacher’s right to the peaceful enjoyment of her possessions under Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The article was engaged, but the section 25 exercise provided adequate safeguards. The judge assessed Mr Granatino’s needs at £5,560,000 and made an order to that effect.

3.42 Ms Radmacher appealed successfully to the Court of Appeal, which took the view that the judge had given insufficient weight to the agreement. In particular, it was held that Mr Granatino had made his own choice not to take legal advice and not to have full disclosure and so the agreement was not vitiated for those reasons.⁵⁸

The decision in the Supreme Court

3.43 Mr Granatino appealed to the Supreme Court, and the case was heard by a bench of nine justices in March 2010. Judgment was handed down on 20 October 2010. The appeal was dismissed. The majority held that the public policy rule that makes void a contract providing for future divorce,⁵⁹ “is obsolete and should be swept away”.⁶⁰ They held that while the discretionary jurisdiction of section 25 of the Matrimonial Causes Act 1973 remains intact,⁶¹ so that only the court can determine the effect that an agreement is to have, the court should uphold an agreement freely entered into, unless it would be unfair to do so. They gave the following main statement of principle:

⁵⁷ See para 2.60 above.

⁵⁸ [2009] EWCA Civ 649, [2009] 2 FLR 1181 at [137] to [141] by Wilson LJ.

⁵⁹ See para 3.19 above.

⁶⁰ [2010] UKSC 42 at [52].

⁶¹ And therefore the equivalent provisions in the Civil Partnership Act 2004.

The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.⁶²

- 3.44 Lady Hale, in a dissenting judgment, differed from the majority on a number of points. At a general level, she felt that reform of the law might better be left to Parliament, advised by the Law Commission. She emphasised the multifaceted and complex nature of the issues at stake. In particular, she cautioned that ante-nuptial agreements are often used to “deny the economically weaker spouse the provision to which she – it is usually although by no means invariably she – would otherwise be entitled”, highlighting a “gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman”.⁶³
- 3.45 More specifically, Lady Hale was concerned that the test formulated by the majority came close to introducing a presumption in favour of upholding the agreement, which would be an “impermissible gloss” on the wide discretion given to the courts under section 25 of the Matrimonial Causes Act 1973 to reallocate the couple’s property on a claim for ancillary relief.⁶⁴ She stressed the overriding nature of this discretion, and would have the courts ask:

Did each party freely enter into an agreement, intending it to have legal effect and with a full appreciation of its implications? If so, in the circumstances as they are now, would it be fair to hold them to their agreement?

- 3.46 Lord Mance expressed the view that there would be no practical difference between the test that Lady Hale set out, and the one of the majority on that point.

Would it be unfair to hold the parties to their agreement?

- 3.47 The majority made it clear that in asking this question, the court has a complex task:

The difficult question of the circumstances in which it will not be fair to hold the parties to their agreement ... will necessarily depend upon the facts of the particular case, and it would not be desirable to lay down rules that would fetter the flexibility that the court requires to reach a fair result.⁶⁵

... Where the agreement makes provisions which conflict with what the court would otherwise consider to be the requirements of fairness ... the fact of the agreement is capable of altering what is fair.⁶⁶

⁶² [2010] UKSC 42 at [75].

⁶³ [2010] UKSC 42 at [137] by Lady Hale.

⁶⁴ [2010] UKSC 42 at [166].

⁶⁵ [2010] UKSC 42 at [76].

⁶⁶ [2010] UKSC 42 at [75].

- 3.48 The majority in the Supreme Court discussed under a number of heads the factors that might detract from, or enhance, the weight to be accorded to the agreement. Those factors might arise at the time the agreement was made, or at the time it was sought to be enforced.
- 3.49 Factors relevant at the time the agreement was made included “*material* lack of disclosure, information or advice” (emphasis in original) and whether or not the parties had “sound legal advice”, as well as the contract vitiating factors of fraud, duress and misrepresentation, and also conduct falling short of these, such as exploitation of a dominant position, or undue emotional pressure.⁶⁷
- 3.50 The court might take into account factors such as the emotional state of the parties, their age, and their previous marital history. It may also ask whether the marriage would have gone ahead without an agreement, or without the terms agreed; it was said that this “may cut either way”, but we are not told how the court will assess which way it cuts in an individual case. The terms of the agreement might also “reduce its weight” if these are “unfair from the start”, but their Lordships thought that this question would merge into the examination of the “prevailing circumstances”, as these are also relevant to the fairness of the agreement.⁶⁸
- 3.51 Their Lordships said that foreign elements in a case could provide evidence of the parties’ intention to be bound by their agreement, especially where an agreement was made at a time when the position in English law was more hostile to such agreements but the parties themselves were from jurisdictions where pre-nuptial agreements are the norm. But their Lordships also said that, following their decision, “the question of whether the parties intended their agreement to take effect is unlikely to be in issue”.⁶⁹
- 3.52 Other circumstances affecting the weight to be afforded to the agreement relate to the circumstances prevailing at the time it is sought to be relied upon. Their Lordships drew explicitly on the text and reasoning of *Supporting Families*;⁷⁰ they explained that the factors that could influence the assessment of fairness would include the presence of children, the autonomy of the parties (“It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best”), the existence of non-matrimonial property, the length of time that has passed and the extent to which circumstances have changed since the agreement was made.⁷¹
- 3.53 Of the three strands of fairness – needs, compensation and sharing – identified in *Miller v Miller, McFarlane v McFarlane*,⁷² needs and compensation were deemed by the Supreme Court to be the factors “which can most readily render it unfair to hold the parties to an ante-nuptial agreement”.

⁶⁷ [2010] UKSC 42 at [69], endorsing the Court of Appeal's view.

⁶⁸ [2010] UKSC 42 at [72] and [73].

⁶⁹ [2010] UKSC 42 at [74].

⁷⁰ See para 1.44 above.

⁷¹ [2010] UKSC 42 at [76] to [80].

⁷² [2006] UKHL 24, [2006] 2 AC 618.

- 3.54 We discuss further below the practical implications of that test of fairness, and look more closely at some of the more technical consequences of the decision. What is certainly true is that the courts' approach to marital property agreements is now radically different from the position taken by the judiciary in the mid-1990s.

Reasons for change

- 3.55 Why has the courts' attitude evolved in this way? To some extent, familiarity must have had an effect; there have been rather more reported cases in recent years and pre- and post-nuptial agreements may have begun to seem more "normal". Agreements made abroad and enforceable there are nowadays more familiar, and no longer feel so alien; the contrast between judicial views about foreign agreements expressed in the 1990s to those expressed in the last few years is striking.⁷³
- 3.56 A major factor in the change must be the effect of the decision in *White v White*.⁷⁴ Although that decision had no effect upon the vast majority of decisions made at county court level or settlements made out of court, it marked a profound change in the "big money" cases. Awards made to applicants for ancillary relief post-*White v White* are, rightly, higher than the figure that would have been ordered pre-*White v White*. In 2007, the family courts dealt with a case in which the wife received a lump sum payment of £48 million.⁷⁵ It remains the largest payment ever ordered in England and Wales after a marriage breakdown.⁷⁶ Sir Mark Potter, giving the judgment of the Court, said that "London is regularly described in the press as the 'divorce capital of the world'".⁷⁷ That is a fair reflection of what has been said in the press;⁷⁸ yet the decision in *White v White*, by introducing the idea of the sharing of assets at the dissolution of the marriage partnership and thereby breaking the glass ceiling of reasonable requirements, brought England and Wales into line with other jurisdictions. It made us less unusual so far as the redistribution of capital assets was concerned.
- 3.57 We suggest that there are two reasons for the media perception to which Sir Mark referred. One is a response to the culture change that *White v White* imposed; the post-*White* awards may look surprisingly big, if looked at without an understanding of the reason for the change in the law. The other – and much more serious – reason is the absence of clear law on marital property agreements and the inability to make a pre- or post-nuptial agreement that will determine the distribution of capital on divorce. In this respect England and Wales has been unusual in Europe and when compared with some jurisdictions beyond Europe. It may indeed be regarded by some, for that reason, as a

⁷³ See for example the observations quoted at para 3.28 above.

⁷⁴ [2000] UKHL 54, [2001] 1 AC 596.

⁷⁵ *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246.

⁷⁶ There have been press reports of out-of-court divorce settlements for higher sums, but they cannot be verified.

⁷⁷ *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [123].

⁷⁸ R Labi, "Why family lawyers want an overhaul of the divorce laws" *The Times*, 5 October 2007; C Bothwell, "The real cost of divorce" *BBC Money Programme*, 25 October 2006; "Prenuptial agreements - For poorer: English courts used to ignore prenuptial agreements. Not any more" *The Economist*, 27 March 2010; J Croft, "Judge attacks wealthy divorce tourists" *Financial Times*, 13 July 2010.

favourable venue for divorce proceedings, and fears have been expressed that parties engage in “forum-shopping” – choosing to come here for their divorce proceedings⁷⁹ – although it is not clear that this is as prevalent as has been suggested. We noted in Part 2 that “before *White v White*, a divorced wife was better off in England and Wales if she was poor, but far better off in the rest of Europe if her husband was rich” – absent, of course a marital property agreement.⁸⁰ Today, absent a marital property agreement, the wife of a rich man may do as well here as elsewhere in Europe.⁸¹ Indeed, she may do rather better than she would in a jurisdiction where equal sharing is strictly limited to the marital acquest,⁸² if pre-acquired property is regarded as non-matrimonial.⁸³ The change in attitude to marital property agreements does mean that a wealthy spouse who has one is more likely to be successful in protecting him- or herself from an application for ancillary relief.

3.58 So the decision in *White v White* is likely to have increased the demand for reliable pre- and post-nuptial contracts.⁸⁴ Divorce now involves substantial sharing of property, which is not welcome to all. To some extent that increased demand stems from a natural wish to hold on to one’s own, and perhaps a resistance to the ideas of equality expressed in *White v White*.⁸⁵ If that were the only motivation for the increased demand we might have little sympathy. But we think it is not. Two more factors combine to make that demand legitimate. One is that equality and fairness are not clearly expressed in *White v White*. As we set out in Part 2, the boundaries of equal sharing are not clear; we do not know exactly what will constitute non-matrimonial property. A marital property agreement might seek to make that clear. The other is that equality and fairness are not unitary concepts; there are cases in which it might be clear to both parties before or during marriage that the outcome that might be reached following *White v White* would not be right for them. Such a couple would not be resisting the principle of equality; their view arises from the fact that equality is not a simple concept.

⁷⁹ See *Golubovich v Golubovich* [2010] EWCA Civ 810.

⁸⁰ See para 2.38 above.

⁸¹ Although it may be that our generous view of needs means that where assets do not exceed needs the provision made here may be more generous. As we note at para 4.3 below, that argument has to be treated with caution because it has to be assessed against the financial context in which the award is made.

⁸² See para 4.8 above.

⁸³ See the discussion of non-matrimonial property at para 2.60 above.

⁸⁴ See E Hitchings, *A study of the views and approaches of family practitioners concerning marital property agreements* (2011) p 2: “... after *White* it was suggested that one of the mechanisms that practitioners and their clients would embrace in order to attempt to regain some element of certainty was to draft an agreement, normally prior to the marriage, in an attempt to regulate the differing asset pools and incomes prior to and after the marriage” (citing S Bruce “Premarital agreements following *White v White*” (2001) 31 *Family Law* 304). However, it is difficult to find conclusive evidence for increased demand, and note the view of Lord Justice Thorpe in *Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 2 FLR 1181 at [27] that he would not accept that the “genesis of the call for legislative provision for ante-nuptial contracts was the decision of the House of Lords in *White*”.

⁸⁵ Lady Hale, in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 at [33], suggested that the desire for pre-nuptial agreements might be motivated by “a perception that equality in marriage is wrong in principle”.

- 3.59 So the sea-change marked by *White v White* has meant that there are now new reasons why a pre- or post-nuptial agreement might be made and should be able to be relied upon if one of the parties seeks later to have it set aside. And that has no doubt contributed to the courts' more receptive attitude to such contracts and to the Supreme Court's clear enunciation of principle in *Radmacher v Granatino*.⁸⁶ We now turn to a closer analysis of the implications of that decision.

THE IMPLICATIONS OF THE DECISION IN *RADMACHER V GRANATINO*

- 3.60 Earlier in this Part we looked at the decision on the facts and at the general principles that the Supreme Court enunciated. We turn here to some of the legal detail of the majority and minority judgments; we look first at the contractual status of marital property agreements and then at the consequences of the decision for ancillary relief proceedings.

The contractual status of marital property agreements

- 3.61 The law of contract imposes no restriction upon the ability of spouses to make contracts with each other. The requirements for the formation of a valid contract are agreement, consideration, and intention to enter legal relations;⁸⁷ there have been cases involving married couples where intention has been called into question, but provided that that is not in doubt spouses can make contracts with each other. A contract may be rendered void or voidable because of mistake, duress, undue influence and misrepresentation; some of the law on those matters has been developed specifically in the context of agreements between spouses (in particular in the context of the law of mortgages, where one spouse may provide security for the other's debt), We discuss those safeguards in Part 6.
- 3.62 However, until 2008 the position was that any contract that made provision for future separation (and, therefore, for divorce or dissolution on the basis that separation is a pre-condition for both) was void for public policy reasons, namely the public policy developed in the nineteenth century that such a contract might encourage separation or divorce.⁸⁸ That led to the curious position that, as Lord Justice Rix put it in the Court of Appeal in *Radmacher v Granatino*:

pre-nuptial agreements are at one and the same time *both* unenforceable and invalid as being against public policy *and* matters which the court is prepared to take into account (and possibly decisively) for the purposes of its s 25 jurisdiction.⁸⁹

- 3.63 In *MacLeod v MacLeod* the Privy Council held that that rule was no longer applicable to post-nuptial agreements.⁹⁰ That meant that an agreement made after marriage, that made provision for separation, divorce or dissolution, was not void for that reason in the absence of any other factor that might make it void

⁸⁶ [2010] UKSC 42.

⁸⁷ HG Beale (ed), *Chitty on Contracts, Volume 1: General Principles* (30th ed 2008) para 2-001. These requirements are discussed at greater length in Part 6.

⁸⁸ See para 3.19 above.

⁸⁹ [2009] EWCA Civ 649, [2009] 2 FLR 1181 at [64].

⁹⁰ [2008] UKPC 64, [2010] 1 AC 298.

(such as mistake),⁹¹ and assuming the presence of the requirements for a valid contract, such an agreement is a valid contract. It could not, however, oust the jurisdiction of the court either to vary it during marriage⁹² or to order ancillary relief on divorce or dissolution. Nor would any term within it that purported to contract out of responsibilities to children be enforceable.⁹³ So the post-nuptial contract, post-*MacLeod*, was a valid contract that nevertheless could not do certain things. We come to the implications of that in a moment.

3.64 In *Radmacher v Granatino*, the majority stated (albeit *obiter*)⁹⁴ that:

We wholeheartedly endorse the conclusion of the Board in paras 38 and 39 [of *MacLeod v MacLeod*] that the old rule that agreements providing for future separation are contrary to public policy is obsolete and should be swept away, for the reasons given by the Board. But for reasons that we shall explain, this should not be restricted to postnuptial agreements.⁹⁵

3.65 We take the view that this is a clear statement that the rule of public policy that renders void a contract that makes financial provision for a future separation or divorce is no more;⁹⁶ pre-nuptial agreements join post-nuptial agreements in being no longer void for that reason.⁹⁷ In view of the authority of that statement we think it unlikely that any lower court would treat such a contract as being void for that reason. Nevertheless, such contracts are still subject to the rules that it is not possible to oust the jurisdiction of the court in ancillary relief, nor to contract out of one's responsibilities to one's children.

3.66 We now look at the implications of contractual validity, and then briefly at the decision in *MacLeod*, before making a provisional proposal that the Supreme Court's decision on contractual validity be confirmed in statute.

The consequences of contractual validity

3.67 This has a number of implications.

3.68 The first point to highlight is that contractual validity will make no difference to the parties themselves in an ancillary relief context because the agreement, following *Radmacher v Granatino*, remains subject to the court's discretionary jurisdiction. Suppose the contract states that "on divorce, H will transfer to W his house in Somerset". On divorce, if H is content to transfer the house then W will not need to sue on the contract; but if he is not, any attempt by her to enforce the contract by an order for specific performance will be met by the defence that the court's

⁹¹ See para 6.19 below.

⁹² Matrimonial Causes Act 1973, s 35.

⁹³ Children Act 1989, s 1; and Matrimonial Causes Act 1973, s 25.

⁹⁴ That is, the decision on this point was not necessary for the resolution of the case before the court, and therefore strictly is not a binding precedent.

⁹⁵ [2010] UKSC 42 at [52].

⁹⁶ Unlike the other rules that certain types of term cannot be enforced, in particular those that oust the jurisdiction of the court or that seek to contract out of responsibility for children.

⁹⁷ Lord Mance at [128] and Lady Hale at [136] took the same view of what the majority intended, but disagreed; Lady Hale stressed that the majority's view was *obiter*.

jurisdiction in ancillary relief can override the contract, and H will be able to apply for a different financial settlement in ancillary relief.

3.69 Second, a third party who wishes to rely upon the validity of the contract will not be able to do so in a situation where the court's discretion in ancillary relief is engaged. In the example above, suppose that W wishes to mortgage her equitable interest in the house,⁹⁸ following divorce but before a transfer has taken place. It will not be accepted as security, (even if W has protected the contract with a Land Charge or by a notice on the register, as appropriate) because H is free at that point to apply for ancillary relief and the court may not uphold the contract.

3.70 However, where ancillary relief is not a possibility then either party, or a third party, can enforce it. Take two examples:

(1) The contract is as above, but H has died. There is no ancillary relief discretion to oust, because ancillary relief is no longer a possibility. The only difficulty for W in claiming specific performance, or a third party purchasing her equitable interest, would be the possibility of a claim in family provision, perhaps by any children of H.⁹⁹

(2) Take a different contract, which states that six months after marriage H shall transfer to W his house in Somerset, and that if there is a later divorce she will receive no further provision. Seven months later W can enforce the contract. She can claim specific performance; she can mortgage her equitable interest; and so on. She is not, of course, debarred from asking for more on divorce, because the rule that a contract cannot oust the jurisdiction of the court in ancillary relief remains intact.¹⁰⁰

3.71 Arguably, the law as to that second example has not changed; despite the public policy rule against contracts that make provision for future separation, the term requiring transfer of the house could have been regarded as severable from the term providing for divorce, and therefore valid. But it is unlikely that the risk of drafting the contract in that way would have been taken. It may be that the disappearance of the public policy rule may make it more likely that contractual terms that do not relate to divorce and dissolution will be mingled with terms that do so relate; and that the decision in *Radmacher v Granatino* may therefore have practical consequences outside the context of ancillary relief.

3.72 The removal of that public policy rule has been achieved by different routes and in different, highly authoritative, courts for pre-nuptial and post-nuptial agreements, and the decision of the Supreme Court is at odds with that of the

⁹⁸ A contract to transfer land confers an equitable interest on the purchaser: *Lysaght v Edwards* (1876) 2 Ch D 499.

⁹⁹ "Family provision" refers to the provision that a court may make under the Inheritance (Provision for Family and Dependents) Act 1975 in cases where the distribution of a deceased person's estate does not make adequate provision for one or more of a limited range of claimants.

¹⁰⁰ Note also that an agreement made after marriage and falling within the definition of a "maintenance agreement" under the Matrimonial Causes Act 1973, s 34, would remain subject to the jurisdiction to vary such agreements in section 35 of that Act.

Privy Council. We pause here to evaluate the differences between the two decisions, and we then make a provisional proposal about contractual validity.

Pre- and post-nuptial agreements and the decision in MacLeod

- 3.73 The decision of the Privy Council in *MacLeod v MacLeod*¹⁰¹ concerned a post-nuptial agreement, which the Privy Council could have upheld in the exercise of its section 25 discretion.¹⁰² But it took a different approach. It overturned the long-standing rule that agreements made in anticipation of a future separation are contrary to public policy and therefore void, for reasons with which the Supreme Court later agreed,¹⁰³ namely that the reasoning of the nineteenth century cases no longer holds good.¹⁰⁴ However, it took that step only for post-nuptial agreements, for two reasons with which the Supreme Court later disagreed, one technical and one a matter of more general evaluation.¹⁰⁵
- 3.74 The technical reason was that the Privy Council held that post-nuptial agreements, but not pre-nuptial ones, can be varied outside the context of ancillary relief, pursuant to sections 34 and 35 of the Matrimonial Causes Act 1973,¹⁰⁶ and that without that jurisdiction pre-nuptial agreements could not safely be regarded as enforceable contracts.
- 3.75 Sections 34 and 35 of the Matrimonial Causes Act 1973 apply to agreements containing financial arrangements made “between the parties to a marriage”, and enable the court to vary them in the light of a change of circumstances or if the agreement does not make proper provision for the children of the family. The sections derive from the Matrimonial Causes Act 1965, enacted at a time when agreements that amounted to financial planning for divorce were clearly contrary to public policy.¹⁰⁷ So there was originally no intention that the sections should apply to marital post-nuptial contracts in the modern sense. Their importance lay in the fact that in the days when divorce might be impossible, or distasteful to the parties, an enforceable separation agreement was vital, particularly for wives.¹⁰⁸
- 3.76 Read literally, the sections encompass modern marital property agreements. The Privy Council felt that it is important to have a way to vary agreements outside the context of ancillary relief, and that only by using sections 34 and 35 for that purpose was it safe to say that post-nuptial agreements are valid contracts. Lady

¹⁰¹ Appeals from the High Court of Justice of the Isle of Man are heard by the Judicial Committee of the Privy Council.

¹⁰² The decision in *MacLeod* was of course made under the Manx Matrimonial Proceedings Act 2003. Its relevant terms match the corresponding sections of the Matrimonial Causes Act 1973 and of the Civil Partnership Act 2004, and the relevant background law was regarded as being equivalent to the law of England and Wales; we refer to the 1973 Act provisions throughout our discussion here.

¹⁰³ But compare the position for separation agreements discussed at para 3.13 above.

¹⁰⁴ *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 at [38] to [39].

¹⁰⁵ [2010] UKSC 42 at [54] to [61].

¹⁰⁶ Manx Matrimonial Property Act 2003, ss 49 to 50.

¹⁰⁷ [2010] UKSC 42 at [55].

¹⁰⁸ See Lady Hale’s comments in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 at [40]: “Countless wives and mothers benefited from such agreements at a time when it was difficult for them to take their husbands to court to ask for maintenance.”

Hale, in *Radmacher v Granatino*, explained that spouses should be able to apply for the variation of agreements without being forced to divorce.¹⁰⁹

3.77 We wonder how realistic it is today to suppose that spouses will litigate financial agreements while remaining married. A very few may find that preferable to divorce, but for them the section 25 jurisdiction ancillary to a decree of judicial separation will provide the necessary judicial control. So we are not convinced that the existence of sections 34 and 35 justifies giving post-nuptial agreements a status different from pre-nuptial ones.

3.78 The other reason given by the Privy Council for its differential treatment of post-nuptial agreements was a concern about the vulnerability of the parties to a pre-nuptial agreement, when compared with their position after marriage:

Post-nuptial agreements ... are very different from pre-nuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry.¹¹⁰

3.79 We agree that before marriage there may be great pressure to sign an agreement rather than having a wedding cancelled. Equally, either party is still free to walk away. After the wedding the financially weaker party has ancillary relief rights and thereby considerable protection; but he or she may not know this; and the pressure to comply may be tremendous. He or she may be unwilling to displease a dearly-loved spouse. The parties may have now made the emotional as well as financial investment of buying a home together and having children. The agreement may be the price of the continuation of the marriage or civil partnership at a point when one party would otherwise be willing to contemplate divorce or dissolution.¹¹¹

3.80 For these reasons, some jurisdictions regard post-nuptial agreements as far more risky, and far more in need of judicial control, than those made before marriage. In France a post-nuptial marital property agreement generally requires the approval of the court.¹¹² In some US states, post-nuptial agreements are less likely to be enforceable than pre-nuptial agreements.¹¹³

3.81 After the decision in *MacLeod* some practitioners have advised clients to make their pre-nuptial agreement in a two-stage process, completing it before the wedding and then returning soon afterwards to sign a post-nuptial agreement in the same terms, in order to give the agreement a better chance of being binding.¹¹⁴ It is hard to see that the vulnerability of the parties differs at the

¹⁰⁹ [2010] UKSC 42 at [158].

¹¹⁰ *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 at [36].

¹¹¹ *NA v MA* [2006] EWHC 2900 (Fam), [2007] 1 FLR 1760.

¹¹² French Code Civil, arts 1391 and 1397.

¹¹³ See IM Ellman (reporting on the United States) in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2011, forthcoming) and JT Oldham, *Divorce, Separation, and the Distribution of Property* (2010) p 4-53, § 4.06, n 3.

¹¹⁴ E Hitchings, *Marital Property Agreements: A supplemental enquiry* (2011) p 17.

different stages of that process. It is also worth noting that in some circumstances it may be difficult to say whether terms agreed during marriage and civil partnership should be described as a post-nuptial agreement, or as a variation of a pre-nuptial agreement.¹¹⁵

- 3.82 The risk to the parties and their vulnerability at the time the agreement is formed depends upon the circumstances. Sometimes a pre-nuptial agreement is a free choice, sometimes it is not; and the same must be true of a post-nuptial agreement. So the justifications given for the different treatment of pre- and post-nuptial agreements seems to us to be unsatisfactory. Accordingly, we agree with the majority in the Supreme Court that there is no reason for different principles to apply to pre-nuptial and post-nuptial agreements.

Contractual validity: a provisional proposal

- 3.83 The decision of the Privy Council in *MacLeod v MacLeod* is of highly persuasive authority but is not strictly binding upon the courts in England and Wales; the views of the majority of the Supreme Court in *Radmacher v Granatino* as to contractual validity were *obiter* and it would be possible for a lower court to disregard them although we think that very unlikely. We take the view that the matter should be placed beyond doubt.

- 3.84 **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.**

Do consultees agree?

- 3.85 Clearly, in making that proposal we are not thereby making any proposal that such agreements should oust the court's discretion in ancillary relief. The rule in *Hyman v Hyman*¹¹⁶ prevents that, in the absence of further reform.

Ancillary relief: how much has changed?

- 3.86 So much for the law of contract. It is agreed that contractual validity makes no practical difference in the context of ancillary relief.¹¹⁷ So what will be the impact of the decision in that context? Since the Supreme Court's decision was handed down, there has been considerable debate about this.
- 3.87 We saw earlier in this Part the extent to which the courts, including the Court of Appeal, have moved from a position where marital property agreements were regarded with suspicion, to one where they are afforded considerable weight in ancillary relief proceedings and may be decisive in appropriate cases. So in *Radmacher v Granatino* at first instance Mrs Justice Baron stated the law as follows:

¹¹⁵ As, perhaps, in *MacLeod* itself.

¹¹⁶ [1929] AC 601. See para 3.17 above.

¹¹⁷ [2010] UKSC 42 at [52].

Over the years, Judges have become increasingly minded to look at the precise terms of agreements and will seek to implement their terms provided the circumstances reveal that the agreement is fair ... Upon divorce, when a party is seeking quantification of a claim for financial relief, it is the Court that determines the result after applying the Act. The Court grants the award and formulates the order with the parties' agreement being but one factor in the process and perhaps, in the right case, it being the most compelling factor.¹¹⁸

- 3.88 If we place that statement beside the two statements of principle that we have already quoted from the majority judgment in the Supreme Court, it is not clear that there has been anything more than a change in emphasis. Lord Phillips said:

A court when considering the grant of ancillary relief is not obliged to give effect to nuptial agreements – whether they are ante-nuptial or post-nuptial. The parties cannot, by agreement, oust the jurisdiction of the court. The court must, however, give appropriate weight to the agreement.¹¹⁹

At paragraph [75] he said:

... The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.¹²⁰

- 3.89 There is no change of principle here, although clearly the Supreme Court's formulation of the weight to be given to marital property agreements will encourage the lower courts to regard them positively. But the underlying law is the same, the statute remains unamended, and therefore a marital property agreement remains something that influences discretion. It is not in reality enforceable as a contract, despite its new status as such.¹²¹
- 3.90 Some of the media coverage of the Supreme Court's decision in *Radmacher v Granatino* may have given the impression that the law was now settled, that pre-nuptial agreements were now valid, and that there was no need for further debate. Ms Radmacher's own statement, handed out after the judgment was given, said "it is important to me that no-one else should have to go through this". Yet nothing in the decision takes the issue out of court, because nothing detracts from the court's unfettered discretion to assess the fairness of marital property agreements.
- 3.91 We take the view that the decision of the Supreme Court has taken the law as far as it can go towards enforceable marital property agreements within the current statutory framework, and has done so decisively and clearly despite the unusual facts of the case before it. However, there is a strong argument that the decision

¹¹⁸ *NG v KR (Pre-nuptial Contract)* [2008] EWHC 1532 (Fam), [2009] 1 FLR 1478 at [118] and [119].

¹¹⁹ [2010] UKSC 42 at [2].

¹²⁰ [2010] UKSC 42 at [75].

¹²¹ [2010] UKSC 42 at [52].

adds emphasis to the current law, and reveals how far judicial attitudes have swung in the last 15 years or so, but makes no great change. In particular, it is hard to see that it takes the law any further in the direction of predictability. It may be that the scope for making truly binding agreements on which confident predictions can be built is scarcely any greater than it was prior to the decision.

- 3.92 The question for our project remains: should there be statutory reform so as to enable couples to contract out of the court's discretion in ancillary relief? If so, what form should reform take?
- 3.93 A first step in asking those questions is to appreciate the differences between our current law of marital property agreements and the position in other jurisdictions, and we turn to an examination of the alternatives found elsewhere before asking, in Part 5, whether further reform is required and, if so, how it should be structured.

PART 4

PRE- AND POST-NUPTIAL AGREEMENTS: THE COMPARATIVE PICTURE

INTRODUCTION

4.1 In 2007 Nigel Lowe commented:

English law almost alone not only in Europe but also among other common law jurisdictions has hitherto refused to recognise [pre- and post-nuptial] agreements as binding.¹

4.2 Nearly four years later, as we have seen, English law has moved on. Pre- and post-nuptial agreements will be upheld by the court unless they fall outside the range of solutions that a court would regard as fair. In this Part we look abroad, at a number of different jurisdictions, ranging from Scotland to the other side of the world. The objective is not so much to emphasise that English law is unusual – it is, at least, less unusual than it was a few years ago – but to explain the alternatives to our own law.

4.3 The jurisdictions we look at here fall into two major groups. There are the civil law jurisdictions in Europe and elsewhere. These have codified legal systems, derived ultimately from Roman law. They operate marital property regimes, to which we referred briefly in Part 2 and which we explore in more detail here. For these jurisdictions, agreements are not a way of contracting out of discretion, as they are in England and Wales, but a way of choosing a regime. The other major group comprises the common law jurisdictions, which inherited their legal systems from England but have developed independently. For the most part they moved to a principle of what is often called “equitable distribution” on divorce some time before the decision in *White v White*² brought about that change for us. In many of these jurisdictions – most notably Australia – marital property agreements are a reliable way to contract out of the discretionary distribution of property. For some, however, agreements are a factor for the courts to take into account.

4.4 The fact that the law of England and Wales is unusual does not mean that it should change. But a choice should be made in the knowledge of the alternative approaches available, and it is in that spirit that we look overseas. In doing so we have to be aware of misleading comparisons; what works well in one social system may not work so well in another with different social security law or a different housing market and culture. So we look overseas with caution. What we can see is that England and Wales is indeed unusual, although not unique, and that law and practice elsewhere do offer alternatives worth our consideration.

4.5 In looking at overseas legal systems we have not attempted to give a comprehensive catalogue, but rather to point to significant groups of systems and

¹ N Lowe, *Pre-nuptial agreements: the English position*, text of the address prepared for the International Society of Family Law’s Colloquium on Family Law delivered on 11 October 2007 in Toledo, Spain, p 5 (available online at http://www.indret.com/pdf/508_en.pdf).

² [2000] UKHL 54, [2001] 1 AC 596.

pervasive features. In recent years English-language accounts of foreign systems, with detailed country-by-country explanation, have become more readily accessible.³

CONTINENTAL EUROPE: COMMUNITY OF PROPERTY AND THE CONCEPT OF REGIMES

- 4.6 We have already noted that the vast majority of European countries operate marital property regimes.⁴ These share three features. One is that they are systems of rules for the division of property on death, divorce or bankruptcy. That division is equal unless a couple have made it otherwise by contract. Another is that they are not concerned with what is usually referred to in the European context as maintenance, or income provision for spouses and children after divorce. The third is that they all involve the facility for couples to opt for a change of regime, before or after marriage, by contract.
- 4.7 The European marital property regimes take a number of different forms. They can be divided into two groups in two different ways. First, we can distinguish immediate and deferred systems of community. Immediate community involves automatic joint ownership of the community property from marriage onwards; it also involves a community of liability.⁵ By contrast, a number of European countries operate a default system not of immediate but of deferred community of property; this means that the two spouses keep their separate ownership of property during marriage, but that on death, bankruptcy or divorce their property is pooled and regarded at that point as a community, which is then divided equally.
- 4.8 Second we can distinguish systems of total community from those that can be broadly characterised as communities of acquests. In a system of total community, all the property of the couple is jointly owned, subject in some systems to very limited exceptions; in a community of acquests, property acquired before marriage or by gift or inheritance afterwards is excluded from the community.
- 4.9 The two classifications cut across each other. So the Netherlands, for example, has a system of immediate and total community of property; the most prominent examples of deferred community systems are those of the Scandinavian countries whose systems are all of deferred but total community – so everything is shared when the community is brought to an end. In France, by contrast, the default regime is immediate community of acquests – so the community operates during marriage, but extends only to property acquired after the marriage took

³ See, for instance, K Boele-Woelki, B Braat and I Curry-Sumner (eds), *European Family Law in Action: Volume IV: Property Relations between Spouses* (2009); C Hamilton and A Perry (eds), *Family Law in Europe* (2nd ed 2002); and J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2011, forthcoming).

⁴ See para 2.10 above.

⁵ Different legal systems have different rules for the extent of shared liability; see para 2.10 above.

place.⁶ Germany deserves special mention; its system is known as an accruals system, similar to a deferred community of acquests, whereby the couple shares the increase in value of their assets during the marriage.⁷

- 4.10 We have used the word “default”; the regimes prescribed by law in the European countries do not proclaim themselves as the only fair solution. They are simply the arrangements that the law of any particular jurisdiction prescribes in the absence of any other arrangement made by a marital property agreement between the spouses. Contracting out of the default regime is not commonplace; it is more frequent in some countries than others.⁸
- 4.11 For the most part a marital property agreement, if properly made,⁹ is binding and there is little or no scope for the court to go behind it. We are not aware of any country with a community regime that does not allow a couple to contract into another regime. The range of choice of alternative regime differs from country to country; in France, for example, there is almost unrestricted choice,¹⁰ but that is not the case everywhere.
- 4.12 There are a number of reasons for contracting out of the default regime. One that applies only to regimes of immediate community is the avoidance of joint liability for debts where one of the parties runs his or her own business. A French or Dutch couple can contract out of community when one of them goes into

⁶ W Pintens (reporting on France and Belgium), in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2011, forthcoming); and see generally P Malaurie and L Aynès, *Les Régimes Matrimoniaux* (2004). In Spain, Galicia, the Basque Country, Navarre, Aragon and those regions of Spain in which the Spanish Civil Code applies all have a default regime of “*sociedad de gananciales*” (community of acquisitions). The default regime is set out in Spanish Civil Code, arts 1344 to 1410: J Riba (reporting on Spain), in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2011, forthcoming). In Italy the default community of property regime applies to all assets purchased during the marriage except for any personal assets deriving from the professional activities of the spouses: K Boele-Woelki, B Braat, and I Curry-Sumner (eds), *European Family Law in Action: Volume IV: Property Relations between Spouses* (2009) p 246.

⁷ A Dutta (reporting on Germany) in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2011, forthcoming); and K Boele-Woelki, B Braat, and I Curry-Sumner (eds), *European Family Law in Action: Volume IV: Property Relations between Spouses* (2009) p 246.

⁸ Some statistical work has been done in France and in the Netherlands: MP Champenois-Marmier and M Faucheux, Centre d'Etude de Recherche en Sociologie Juridique, *Les Régimes Matrimoniaux* (1979); A Barthez and A Laferrere, “Contrats de mariage et régimes matrimoniaux” (1996) 296-297 *INSEE, Economie et Statistiques* 127; K Boele-Woelki, *Huwelijksvermogensrecht in rechtsvergelijkend perspectief: Denemarken, Duitsland, Engeland, Frankrijk, Italië, Zweden* (2000).

⁹ We say more at para 6.101 below about the contractual formalities prevalent in Europe; most jurisdictions require agreements to be notarised, that is, made with the formal assistance of the notary who will advise both parties. In England and Wales, a notary is a qualified lawyer “primarily concerned with the authentication and certification of signatures and documents for use abroad” (see <http://www.thenotariessociety.org.uk/what-is-a-notary> for more information). In civil law jurisdictions, notaries often undertake many of the roles traditionally undertaken by solicitors in England and Wales, including giving legal advice.

¹⁰ French Civil Code, arts 1387 and 1497.

business,¹¹ and into a regime of separation of property, so that if the business incurs debts or the spouse running the business becomes bankrupt, the property of the other spouse will be safe. Such a couple might well contract back into community upon retirement. Retirement itself may provide a reason for changing regime; a French couple, for example, may contract so as to change the proportions in which their property will be divided when the community is brought to an end by death, for example by providing that the survivor will take the whole of the other's property.¹²

4.13 Where the default regime is a system of total community – as in the Netherlands and the Scandinavian countries – a couple may contract into a regime of community of acquests, so that any pre-acquired property is kept out of the community. People with inherited wealth may choose to do this, as may those who have built up a business before marriage. It is also possible in some systems for a gift to one member of a couple to be kept outside the community if the giver so specifies.¹³

4.14 As we noted above, marital property agreements in Europe are not concerned with maintenance. Entitlement to maintenance varies from one jurisdiction to another in terms of the level of periodical payments available and the time for which they can be paid. Maintenance is a matter of providing income, and so does not correspond exactly to our concept of “needs” in ancillary relief; but in some jurisdictions some capital payment is also available by way of compensation for losses sustained as a result of the marriage.¹⁴ Of the European jurisdictions that we have looked at, only Germany allows couples to deal with maintenance by contract.¹⁵ The rest set a clear demarcation between the couple's property regime – which is determined by default or by contract – and the availability of maintenance, which cannot be the subject of contract. This is in marked contrast to the treatment of income and capital together in ancillary relief in England and Wales, and indeed to the culture of contracting here; marital

¹¹ See E Cooke, A Barlow and T Callus, *Community of Property: A regime for England and Wales?* Nuffield Foundation Report (2006) p 8. Available online at: http://www.reading.ac.uk/web/FILES/law/CommunityofProperty_Version021106.pdf.

¹² See the guide produced by Notaires de France, *Choisir son contrat de mariage* (http://www.notaires.fr/notaires/page/kiosque/memos-thematiques?page_id=51), of which a translation can be found at <http://www.reading.ac.uk/nmsruntime/saveasdialog.aspx?IID=7017&sID=34870>.

¹³ Dutch Civil Code, Title 7, s 1, art 94.

¹⁴ W Pintens (reporting on France and Belgium), and J Riba (reporting on Spain) in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2011, forthcoming).

¹⁵ The German *Bürgerliches Gesetzbuch* (BGB), at section 1585(c) allows a spouse to modify the default rules with regard to post-divorce maintenance and even to exclude post-divorce maintenance in its entirety, but there is court discretion: A Dutta (reporting on Germany) in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2011, forthcoming). The German courts place increasing emphasis on the compensation of “marriage-caused disadvantages [Which] shows that compensating disadvantages caused by the marriage and meeting the spouse's needs are considered important in German caselaw”: A Sanders, “Private Autonomy and Marital Property Agreements” (2010) *International and Comparative Law Quarterly* vol 59 (3) pp 571 to 603, at p 596, citing BGH [2005] *Zeitschrift für das gesamte Familienrecht* 691, and BGH [2008] *Neue Juristische Wochenschrift* 1083.

property agreements here are as likely to deal with income provision as with capital.

- 4.15 Another marked contrast is the fact that a marital property agreement in England and Wales is made in order to contract out of judicial discretion; there is no European equivalent to the ancillary relief discretion, and European contracts are about a very different choice: between regimes. But there are useful comparisons to be made nevertheless. Once it is appreciated that there are several different default community of property regimes available in continental Europe, it can be seen that marital property agreements are not a matter of contracting out of a fair system. The great patchwork of European regimes and contractual options can be said to illustrate the fact that marital property agreements are an expression of diversity, and about the different decisions that families may reasonably make. It is unrealistic to say that any one system is fair. In Scandinavia, the default rule is to share everything on divorce; in France, pre-acquired property is not shared. Neither is the “right” or “wrong” system; accordingly, each gives spouses the option to choose between alternatives that suit different families, and between different versions of fairness. And some of the considerations that prompt people to make choices about regimes are relevant to England and Wales, in particular the desire to keep certain categories of property outside the scope of equal division, in some families.

BEYOND EUROPE

- 4.16 We turn now to the systems outside Europe. Community of property regimes are found throughout the world; South Africa is a particularly interesting example, as it has a system of immediate total community, derived largely from Dutch law; couples have the option of contracting into community of acquests or into separation of property.¹⁶
- 4.17 Very different from the community of property systems are those derived from the common law, that is, derived at some stage in the past from the law of England and Wales but then developing on their own after independence from British rule. In common law systems we find almost universally¹⁷ that the division of property on divorce or dissolution (where applicable) involves substantial redistribution (rather than allowing ownership of separate property to stand), subject usually to provision for maintenance, and that contractual arrangements can override that capital redistribution but not, in most cases, provision for maintenance.

Community of property and equitable distribution in the United States

- 4.18 Civil law and common law jurisdictions can be compared directly in the United States.¹⁸ A group of nine states have a system of community of property. Eight of these states derive their regime from French or Spanish law,¹⁹ and in these states it is therefore unsurprising that couples are free to change their marital property regime by contract. Wisconsin also has a community of property system,

¹⁶ D Cronjé and J Heaton, *South African Family Law* (2nd ed 2004).

¹⁷ The Republic of Ireland is an exception; see para 4.26 below.

¹⁸ JT Oldham, *Texas Marital Property Rights* (4th ed 2003) ch 15.

¹⁹ Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

but derives its regime from the Uniform Marital Property Act.²⁰ Alaska permits couples to opt into a community of property regime modelled in part on the Uniform Marital Property Act.²¹

- 4.19 The remaining states operate systems of distribution on divorce that derive from the common law and are based upon discretion; they are generally described as systems of equitable distribution. They all moved away, some time ago, from distribution on the basis of separation of property – roughly matching the pre-*White v White* position in England and Wales – and instead operate a substantive form of sharing, modifying equality so as to be able to take into account contribution and other factors. Accordingly it has been said that “all [the equitable distribution states] accept some type of deferred community at divorce”.²²
- 4.20 Of the community of property states, five operate equitable distribution rather than a strict division of the community of property into equal shares.²³ Accordingly, when we look across the United States as a whole, while we find considerable differences in detail, there is no great gulf between the community of property states and the equitable distribution states.
- 4.21 In the equitable distribution states pre-nuptial contracts were regarded with some wariness²⁴ until the decision of the Supreme Court of Florida in *Posner v Posner*, which held that pre-nuptial contracts were no longer to be regarded as contrary to public policy and were therefore no longer void.²⁵ Following that decision the use of marital property agreements has increased.²⁶ In 1983 the Uniform Premarital Agreement Act was published by the National Conference of Commissioners on Uniform State Laws in the United States;²⁷ it has no legal force, but 26 states have adopted it or versions of it.²⁸ In 2000 the American Law Institute produced

²⁰ W Reppy and C Samuel, *Community Property in the United States* (6th ed 2003).

²¹ Alaska Statutes, Title 34 (Property), ch 77 (Community Property Act).

²² JT Oldham, “What if the Beckhams Move to L.A. and Divorce? Marital Property Rights of Mobile Spouses When They Divorce in the U.S.” (2008) 42 *Family Law Quarterly* 263, 267.

²³ Arizona, Idaho, Nevada, Texas and Washington: S Katz, *Family Law in America* (2003) p 87.

²⁴ *Cumming v Cumming* 102 SE 572 (Va 1920); *Wyant v Leshner* 23 Pa.338 (Pa 1854); *Fricke v Fricke* 42 NW 2d 500 (Wis 1950); *Cohn v Cohn* 121 A 2d 704 (Md 1956); and *Crouch v Crouch* 385 SW 2d 288 (Tenn Ct App 1964).

²⁵ 257 So 2d 530 (Fla 1972).

²⁶ J Franck, “‘So hedge therefore, who join forever’: understanding the interrelation of no-fault divorce and premarital contracts” (2009) 23 *International Journal of Law, Policy and the Family* 235 links this to the availability of no-fault divorce, which many states adopted from the 1970s onwards.

²⁷ The National Conference of Commissioners on Uniform State Laws is a not for profit unincorporated association established in 1982 and is made up of over 300 commissioners. Its purpose is to promote uniformity in the laws of each state. For more information see: http://www.nccusl.org/update/AboutNCCUSL_desktopdefault.aspx.

²⁸ The National Conference of Commissioners on Uniform State Laws cites 26 states and the District of Columbia, and adds that Bills have been introduced in four states in 2010: see http://nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upaa.asp.

its *Principles of the Law of Family Dissolution*²⁹ of which chapter 7 is concerned with pre-marital agreements and on which, again, states are free to model their individual statutes.³⁰

- 4.22 So we can say that in the vast patchwork of different United States jurisdictions, there are many variants but all are on the same theme, namely substantial sharing of marital assets along with the freedom, to a greater or lesser degree, to regulate sharing by contract. A considerable body of jurisprudence has built up around contracting,³¹ and we can learn a lot from the experience in the United States about pre-contract formalities and about the criteria for setting agreements aside.³²

Other common law systems

- 4.23 When we look at other common law systems we find, generally, that assets are substantively shared on divorce and that there has been a move towards an enforceable status for marital property agreements in recent decades. Singapore, for example, is a common law system, and since 1980 the courts have been able to order a division of assets between the spouses on divorce. The courts have interpreted this as a system of deferred community of property.³³ Agreements with contractual validity, whether made before or after marriage, are regarded as valid; they cannot oust the jurisdiction of the court, but the statute requires that the court take them into consideration.³⁴
- 4.24 In Australia, we see a much more dramatic development. Financial provision on divorce again follows an equitable distribution model, with the courts having a wide discretionary power to redistribute assets. The Family Law Amendment Act 2000 amended the Family Law Act 1975 so as to provide for pre- and post-nuptial agreements, executed under certain conditions, to be enforceable save where unforeseen circumstances make that impracticable or where a child or carer would suffer hardship as a result of a material change in circumstances that has arisen since the agreement.³⁵ Perhaps the most interesting aspect of the

²⁹ The American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002). This has no legal force but is designed to act as a guide to courts and legislators in determining issues relating to the dissolution of family relationships.

³⁰ The American Law Institute is an independent not for profit organisation with a membership comprising 4,000 legal professionals, which produces recommendations to clarify, modernise, and improve the law. For more information, see: <http://www.ali.org/index.cfm?fuseaction=about.overview>.

³¹ JT Oldham, *Texas Marital Property Rights* (4th ed 2003) ch 19.

³² A similar picture can be seen in Canada, again with a mixture of common law and civil law jurisdictions; see J Morley, "Enforceable pre-nuptial agreements: the world view" [2006] *International Family Law Journal* 195.

³³ Leong Wai Kum "Division of matrimonial assets: recent cases and thoughts for reform" [1993] *Singapore Journal of Legal Studies* 351; and see the judicial approval of that description at *Lock Yeng Fun v Chua Hock Chye* [2007] 3 Singapore Law Reports 520.

³⁴ Women's Charter 1961, s 112(2)(e). Leong Wai Kum (reporting on Singapore) in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2011, forthcoming) explains that the statute's title derives from the process, begun in 1961, of legislative moves to equality for women.

³⁵ Family Law Act 1975, s 90K(1)(d).

Australian experience from the point of view of this consultation is to note that the legislation has, since 2000, been amended several times to meet perceived shortcomings. We shall have to look more closely at Australia when we come to consider contractual formalities. Most significantly however, Australia is one of the more recent common law jurisdictions to have introduced marital property agreements that can oust the jurisdiction of the court.³⁶ Where a couple has a Binding Financial Agreement, that agreement operates independently and no court order is needed. The grounds for setting agreements aside are noticeably narrow; we can compare the provisions in New Zealand, which allows for the agreement to be set aside if it would cause “serious injustice”.³⁷

- 4.25 Looking much closer to home, section 10 of the Family Law (Scotland) Act 1985 states that matrimonial property is taken to be shared fairly on divorce or dissolution when it is shared equally, or in such proportions as are justified by “special circumstances”. Scotland accordingly operates a form of deferred community of property, albeit with a discretionary element. The special circumstances that can permit a departure from equality include “the terms of any agreement between the parties on the ownership or division of any of the matrimonial property”.³⁸ Such agreements have never been regarded as contrary to public policy; the courts are reluctant to overturn them.³⁹
- 4.26 Judicial divorce has been available in Scotland since 1530, whereas in the Republic of Ireland it was only after a referendum 1995 that the constitutional ban on divorce was lifted. By contrast with the other common law jurisdictions we have looked at, the equivalent of ancillary relief in Ireland adjusts the parties’ separate property only so as to provide for needs. In December 2006 a Study Group on Pre-Nuptial Agreements was formed by the then Irish Minister for Justice, Equality and Law Reform, and it published a Report in 2007 recommending a provision in the Family Law (Divorce) Act 1996 requiring the courts to have regard to pre-marital agreements.⁴⁰

CONCLUSION

- 4.27 We have taken a journey through our own legal system in Parts 2 and 3, and here through a number of others, and what we have found is that until recently the system of ancillary relief in England and Wales was unusual both in not

³⁶ B Fehlberg and B Smyth, “Binding Pre-Nuptial Agreements in Australia: The First Year” (2002) 16 *International Journal of Law, Policy and the Family* 127; and P Parkinson, “Setting aside financial agreements” (2001) 15 *Australian Journal of Family Law* 26.

³⁷ Property (Relationships) Act 1976, s 21J.

³⁸ Family Law (Scotland) Act 1985, s 10(6)(a). For an empirical study of the use of (largely) separation agreements, see F Wasoff, L Edwards and A McGuckin, *Mutual Consent: Written Agreements in Family Law* (1998) (available at <http://www.scotland.gov.uk/Publications/1998/12/05d486ab-fb97-42b4-887f-9751fd80b720>).

³⁹ In *Milne v Milne* [1987] SLT 45, 47 Lord Kincaid set out the general position saying “in my opinion parties may by agreement oust the jurisdiction of the court to pronounce upon the pursuer’s entitlement to payment of a capital sum.” Compare *Inglis v Inglis* [1999] SLT (Sh Ct) 59; see J Thompson, *Family Law in Scotland* (5th ed 2006), pp 192 to 194; and K Norrie, *Stair Memorial Encyclopaedia of the Laws of Scotland: Child and Family Law* (2004) paras 678 to 679.

⁴⁰ Irish Department of Justice, Equality and Law Reform, *Report of Study Group on Pre-nuptial Agreements* (2007).

providing for sharing of property (beyond what is required for needs or “maintenance”) on divorce and in not recognising and enforcing pre- and post-nuptial agreements. One of those incongruities is now remedied; in the “big money” cases property not required for the meeting of needs is shared more or less equally. The priority given to needs means that the housing and day-to-day needs of the parties are catered for, particularly those of any children and those who are caring for them; the focus on both needs and compensation ensures that due attention is given to the needs, later in life, of those whose financial independence has been compromised by their childcare responsibilities. But where those needs are met, we have a system, in a very loose sense, of equal sharing.

- 4.28 But it is a discretionary system. It is, of course, open to couples in England and Wales to order their affairs by making a marital property agreement, but such contracts cannot operate as a choice of regime, as they can in Europe; nor can they oust the jurisdiction of the court as they do in Australia.
- 4.29 We noted in Part 3 that marital property agreements are therefore vulnerable to uncertainty. Even their contractual validity is, as Lord Phillips put it in *Radmacher v Granatino*, “nugatory”.⁴¹ With the comparative picture and the available alternatives in mind we now turn to the central issue for this project: should there be statutory reform so as to enable marital property agreements to oust the discretionary jurisdiction of the court in ancillary relief?

⁴¹ [2010] UKSC 42 at [52].

PART 5

THE ARGUMENTS FOR AND AGAINST THE INTRODUCTION OF QUALIFYING NUPTIAL AGREEMENTS

INTRODUCTION

- 5.1 The Supreme Court in *Radmacher v Granatino* made it clear that marital property agreements, whenever made, are not contrary to public policy if they make provision for a future separation, divorce or dissolution.¹ They will continue to be taken into account by the court on an application for an order for financial provision in ancillary relief, and indeed will be upheld unless it would be unfair to do so. That will be the case whether the application to the court is for a consent order to confirm the terms of the agreement, or for an order in different terms.
- 5.2 The assessment of fairness depends, potentially, upon a wide range of factors.² And although the decision in *Radmacher v Granatino* established that marital property agreements are no longer contractually void for public policy reasons, they will not be able to be enforced as contracts, because an attempt to enforce one as a contract could always be thwarted by an application for ancillary relief.³
- 5.3 For many people, therefore, the emerging acceptance of marital property agreements by the courts, which we charted in Part 3, culminating in the decision in *Radmacher v Granatino*, will not go far enough. The fact that the terms of a marital property agreement are always subject to the court's review means that it is never possible to be certain, in advance, that an agreement will determine the outcome of the ancillary relief process. We explored in Part 3 the reasons that might, according to the majority in the Supreme Court, make an agreement unfair. There is a long list. Many are highly subjective. Some are unusual factors; others, such as the presence of children, are part of the normal circumstances of marriage and civil partnership. Some of them are outside the control of the parties – for example, whether either of them has had a relationship before.
- 5.4 An agreement may be carefully drafted by lawyers familiar with the case law, in the hope that it will survive scrutiny. Separation agreements will normally do so, because they are formulated at the point when separation is about to happen rather than contemplating a possible future event. But couples can never be sure that their agreement will determine the financial consequences of divorce or dissolution; and legal advisers providing an expensive service in the negotiation of pre- or post-nuptial agreements cannot predict with any confidence the eventual success or otherwise of an agreement entered into on the advice they have given.

¹ [2010] UKSC 42 at [52].

² The decision may make it more likely that parties who make a contract subsequently intend to be legally bound, at least if they have been properly advised: see *Radmacher v Granatino* [2010] UKSC 42 at [70].

³ [2010] UKSC 42 at [52].

- 5.5 There have therefore been a number of calls for the reform of marital property agreements in the interests of autonomy and certainty. In order to achieve any significantly greater degree of certainty than is now available marital property agreements would have to be able to exclude the discretionary jurisdiction of the court. Whether there should be such reform is the major issue for this consultation, and it is to that question that we now turn.

SHOULD IT BE POSSIBLE TO EXCLUDE THE JURISDICTION OF THE COURT?

The background to the arguments

- 5.6 We set out below some arguments for and against reform. We group them under a number of headings which describe both sides of the argument; for example, reform can be said to support marriage, and so can the absence of reform. Before we do so, we make some observations about the extent and effect of reform, by way of a framework for discussion of the arguments.

Agreements that would fall within the reform: “qualifying nuptial agreements”

- 5.7 Marital property agreements take many forms and are of varying degrees of formality. Reform to the effect that agreements can exclude the court’s discretion might apply to all such agreements, but we consider it essential that it should apply only to agreements that pass a certain threshold level of formal validity. As Lord Phillips explained in *Radmacher v Granatino*, that is unnecessary when the agreement is assessed in the round by the court; but if that discretion is to be bypassed there have to be “black and white rules” to determine which agreements can do so.⁴ How high the threshold should be is a matter for debate and we address that in Part 6. For the purposes of this discussion we take it that there will be pre-requisites, so that for an agreement to exclude the court’s discretion it must:

- (1) be contractually valid; and
- (2) satisfy certain further tests, relating to its physical form⁵ and to the circumstances in which it was made.⁶

- 5.8 For the purpose of this consultation we label an agreement that meets those pre-requisites a “qualifying nuptial agreement”.

- 5.9 That means that if there were further reform, there would nevertheless remain many agreements that did not fall within its scope because they were not qualifying nuptial agreements. They would remain part of the section 25 exercise and if challenged, or presented to court as an application for a consent order, they would be among the circumstances of the case that the court would consider in the exercise of its discretion in ancillary relief, and would no doubt be enforced

⁴ [2010] UKSC 42 at [69].

⁵ We suggest at para 6.55 below that it must be in writing but need not be by deed.

⁶ We discuss in Part 6 whether it should be necessary for the parties to take legal advice, and whether there should be any requirement for a pre-nuptial agreement to be concluded at a point no less than a minimum period before the wedding.

if they had been freely entered into and it was not unfair to do so, as the current case law prescribes. They might well be upheld, therefore, but that could not be predicted with certainty.

The enforceability of qualifying nuptial agreements

5.10 Next, we have to look at the practical effect of reform. There might be various ways of managing this procedurally. We take it as obvious that one of the objectives of reform must be to enable a couple to resolve the financial consequences of their separation, divorce or dissolution without requiring them to go through the process of ancillary relief. We therefore take the view that if qualifying nuptial agreements were to be introduced, they:

- (1) could be enforced as contracts; and
- (2) would provide a defence to an application for ancillary relief. That defence might be complete, if the agreement covered every aspect of financial provision, or partial if it made provision for only part of the couple's property.⁷

5.11 Accordingly, if the qualifying nuptial agreement provided, for example, that within the six months following divorce the husband would transfer to the wife their holiday cottage in Wales, that would be a specifically enforceable contract.⁸ Equally, if the husband in that example were to apply for a property adjustment order in respect of that cottage under the Matrimonial Causes Act 1973, the agreement would be a defence to that application unless he could show that it was not in fact a qualifying nuptial agreement because it did not meet the requirements discussed in Part 6, and unless the agreement fell foul of any of the limitations to the enforceability of such agreements, analysed in Part 7.⁹

5.12 It follows from this that there would be no need for the couple to apply to have the agreement enshrined in a consent order.¹⁰ This might require provision as to the tax implications of transfers pursuant to a qualifying nuptial agreement in the absence of a consent order.¹¹

⁷ It might, for example, and as we discuss in Part 7, deal only with inherited property, or only with one specific special item.

⁸ We note that if the agreement was a contract (conditional or otherwise) for the creation or transfer of an interest in land, it would have to conform to the requirements of the Law of Property (Miscellaneous Provisions) Act 1989, s 2.

⁹ The agreement would not provide a defence to an application for contact with a child no matter what its terms; see para 6.124 below.

¹⁰ As in Australia, where the introduction of binding Financial Agreements in 2000 has meant that, subject to compliance with the requirements of section 90G of the Family Law Act 1975, parties can reach an agreement as to how their assets will be divided on divorce without having those agreements registered or approved by the courts.

¹¹ In particular, at present the date of a court order may determine the date of disposal of the relevant assets for capital gains tax purposes, on the basis that the legal effect of a financial agreement between the spouses derives from the order, and not from that agreement; see *Aspden (Inspector of Taxes) v Hildesley* [1982] STC 206.

The extent of reform: what is excluded?

- 5.13 An agreement that excludes the court's discretion in ancillary relief does not thereby exclude it in any other context. The most obvious example is the court's jurisdiction (under the Children Act 1989) to make orders in relation to the upbringing of children; the duty to regard the welfare of the child as paramount when making an order cannot be excluded by the terms of a marital property agreement. We also take it as obvious that a qualifying nuptial agreement would not override rules of public policy. There is now no public policy preventing an agreement that makes plans for future separation; but that does not permit the agreement to override other rules of law. We take the view that the courts would not enforce an agreement that restricted a party's religious freedom, for example, or the circumstances in which he or she could initiate divorce or dissolution proceedings.
- 5.14 We defer to Part 6 discussion of whether the inclusion of provisions that the courts will not enforce will prevent the agreement from being a qualifying nuptial agreement.
- 5.15 What we do consider in this Part is whether a qualifying nuptial agreement should be able to make provision for every aspect of financial provision between the couple, or should be limited to a model that would enable spouses just to safeguard pre-acquired property, along with property received as a gift or an inheritance. As we explain below, such a model would respond to some of the most persuasive arguments for reform, as well as being immune from some of the worst risks that are associated with the increased enforceability of marital property agreements.

The remaining scope for discretion

- 5.16 We ask consultees at the end of this Part if qualifying nuptial agreements should be introduced; a positive response to that question will not be taken to mean that such an agreement could never in any circumstances, and whatever its effect, be reviewed by the court. It would be possible to provide that the discretion was excluded *unless* the qualifying nuptial agreement has a certain effect; some reform proposals have expressed it in terms of unfairness (the agreement excludes the court's discretion unless, for example, it causes "significant injustice") or in terms of practical consequences (the agreement excludes the court's discretion unless it gives rise to a particular level of hardship). There are various possibilities; the choice between the various options is, again, a matter for debate, and we address it in Part 7.¹² Of course, some of the arguments that we rehearse here have greater weight for and against particular versions of reform. Our eventual recommendations will take that into account; if we recommend that qualifying nuptial agreements should be introduced, we shall recommend a version of reform that commands support in our consultation and in which we have confidence.

¹² One point that must be beyond dispute must be that the discretion in ancillary relief could not be excluded insofar as an agreement avoidably failed to prevent one party's becoming reliant on state benefits; another is that the court must retain its jurisdiction to make orders for financial provision for children regardless of the terms of their parents' qualifying nuptial agreement. See para 7.10 below.

- 5.17 We turn now to the issue of whether or not qualifying nuptial agreements should be introduced.

The arguments for and against reform

Supporting marriage

- 5.18 Both those who advocate reform and those who oppose it argue that their position supports the institution of marriage.
- 5.19 Proponents of reform point to couples who will not marry because the law as it stands does not allow them to make conclusive decisions about the eventual ownership of their property in the event of divorce or dissolution. We have heard considerable anecdotal evidence that this is of great concern to individuals who come from countries where marital property regimes, and the ability to contract into a regime of choice, are commonplace and who find that their expectations simply cannot be met here. It is unlikely that such concerns are unique to people from abroad. We have heard evidence of people who have already gone through a divorce and are unwilling to re-marry through fear of having to go through ancillary relief again should the second marriage fail.
- 5.20 Indeed, we have heard from a number of solicitors who have been obliged to point out to their clients that the only way to achieve their objective of preserving certain assets is to cohabit rather than to marry. Some have told us of clients who, as a result, did not marry. The availability of qualifying nuptial agreements could encourage marriage in such cases.
- 5.21 It is also argued that the ability to make a conclusive agreement encourages open discussion before marriage. So it may. But the absence of that ability cannot be said to prevent that discussion, and it is arguable that a couple's energies might be better spent in discussing the financial aspects of their shared lives. A different point is the fact that the current state of the law of ancillary relief may make marriage into a financial lottery for some, and that time spent discussing the uncertainties of the future may be a useful exercise.
- 5.22 On the other side of the argument are those who say that marriage is not about money,¹³ and that the ability to contract about the consequences of divorce is a devaluing of marriage. We are not persuaded by this, but of course the point cannot be tested. Nor can the related view that the ability to make conclusive contracts may in fact encourage divorce.¹⁴ We think it unlikely, and the courts have not taken that view in recent years. Pre- and post-nuptial agreements are made, and are regarded as important by the courts; orders are frequently made in terms that follow those of the agreement.

¹³ Arguably, this is a very modern view of marriage. Traditionally, marriage and money have been viewed as intertwined; as Jane Austen noted in the opening lines of *Pride and Prejudice* (first published 1813): "It is a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife."

¹⁴ As the judges of the Family Division argued in their response to Supporting Families: N Wilson, "Ancillary Relief Reform: Response of the Judges of the Family Division to the Government Proposals (made by way of submission to the Lord Chancellor's Ancillary Relief Advisory Group)" (1999) 29 *Family Law* 159, 162.

- 5.23 We take the view that the introduction of qualifying nuptial agreements would not devalue or discourage marriage; and we think that those who make that argument may be overlooking the fact that the decision in *White v White*¹⁵ changed the implications of marriage, dramatically, for a minority and may indeed be a serious disincentive to marriage for some. Before that decision, property did not have to be shared on divorce except insofar as it was needed to meet “reasonable requirements”; after *White v White*,¹⁶ a decision to marry is, for the rich, potentially a decision to put a large part of one’s wealth at risk.

Autonomy

- 5.24 The argument most frequently heard in favour of reform is autonomy. Why should it not be possible for a couple to choose the financial consequences of the ending of their relationship, rather than having those consequences imposed upon them? Resolution, in their 2005 policy paper,¹⁷ quoted Stephen Cretney, who referred to:

[the] distinctive character of marriage in English law which will not allow husband and wife by contract (whether pre or post nuptial) to exercise the right, which [is afforded] virtually all other partners, to make their own agreement as to the terms. [The] husband and wife are stuck with equality, however inappropriate they may both agree it to be and you must leave it to the judge who dissolves the partnership (if it should come to that) to decide whether the circumstances – which led you both to agree that equality was not for you, should determine the outcome or not. No doubt the judge will apply the principle that a formal and freely negotiated agreement made by a couple with full knowledge of the circumstances is not lightly to be set aside (see *Edgar v Edgar*). You cannot make such an agreement proof against the exercise of the overriding judicial discretion. On one view, that is to have the worst of all possible worlds. It is almost as if we insist that every time a business or professional partnership is dissolved, the terms should be approved by the court.¹⁸

- 5.25 Those who enter into marital property agreements have the capacity for marriage or civil partnership, and indeed to enter into other contracts between themselves;¹⁹ why should they not have capacity to enter into an agreement about their future financial status? The paternalism of the law of ancillary relief is said to be inappropriate in a modern world. In 2009 the Court of Appeal suggested that to assume one party is “unduly susceptible to the other’s

¹⁵ [2000] UKHL 54, [2001] 1 AC 596.

¹⁶ [2000] UKHL 54, [2001] 1 AC 596.

¹⁷ Resolution, *A more certain future – Recognition of pre-marital agreements in England and Wales* (2005) para 1.3.

¹⁸ S Cretney, “The Family and the Law – Status or Contract?” (2003) 15(4) *Child and Family Law Quarterly* 403, 413.

¹⁹ Subject to the law’s concerns about intention to enter into legal relationships where the parties are close family members: see, for example, *Balfour v Balfour* [1919] 2 KB 571, and H Beale (ed), *Chitty on Contracts, Volume 1: General Principles* (30th ed 2008) paras 2-169 to 2-174; and Lady Hale’s comment in *Radmacher v Granatino* at [154].

demands ... is patronising, in particular to women”.²⁰ Lord Justice Wilson suggested that it would be preferable for the “starting point to be for both parties to be required to accept the consequences of whatever they have freely and knowingly agreed”.²¹

- 5.26 The argument from autonomy has to be regarded with caution for two reasons.
- 5.27 The first is that autonomy may be illusory, or at least vitiated. Those who marry or form civil partnerships are adults and can take their own decisions, but it is a matter of experience that most people are willing to agree, when they are in love, to things that they would not otherwise contemplate. A fiancé(e) may enter into an agreement at the other’s request, in the firm belief that the relationship will never end. He or she may not really want the agreement to take effect, or may not have thought through the consequences of doing so. A spouse may agree to something for the sake of peace, particularly if it has no immediate effect.
- 5.28 Furthermore there may be pressure. Love itself can be a pressure, without there being any intention to pressurise. Or pressure may be deliberate; it is arguable that a fiancé(e) who is asked to sign a pre-nuptial contract once a wedding has been arranged has far less choice than one who is asked to enter into an agreement as a pre-condition to engagement. The same can be said of a spouse who is asked to enter into a post-nuptial agreement; the agreement can no longer be the price of a wedding, but if the alternative is the displeasure of a much-loved partner, or perhaps even divorce, then again there can scarcely be said to be any choice. The law already recognises the possibility of pressure within a close relationship, in the context of the law relating to undue influence in contracts, and we have more to say about this in Part 6.
- 5.29 Deliberate pressure need not be malevolent. It may arise from a particular view of family property. It may come not from one’s partner but from that partner’s family, particularly parents. It may come from a community with a racial or religious tradition of marriage contracts; and while some people may be particularly vulnerable to pressure because of their own personality, others may be especially vulnerable because the pressure arises from family or community members.
- 5.30 It is possible, to some extent, for the law to counteract pressure by imposing certain pre-conditions for the validity of a qualifying nuptial agreement. The law might prescribe that each party must take legal advice, for example, or it might impose obligations as to information or disclosure. But we do not believe that any legal pre-conditions to validity can eliminate the probability that some people would enter into contracts that they would later regret.
- 5.31 The other reason for caution is that we have to be very clear what is the autonomy, or freedom, in question. All couples, under the current law, have the freedom to agree whatever they like by way of financial settlement when their relationship comes to an end. The autonomy that is prayed in aid of binding marital property agreements is not simply the freedom to make an agreement, nor simply the freedom to do as one wishes. It is the freedom to force one’s partner to abide by an agreement when he or she no longer wishes to do so. It is

²⁰ *Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 2 FLR 1181 at [127].

²¹ *Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 2 FLR 1181 at [127].

freedom of contract, but it is therefore freedom to use a contract to restrict one's partner's choices.

- 5.32 So the autonomy argument is a strong one, but cannot by itself provide an irresistible argument for reform.

Certainty and the cost of discretion

- 5.33 Much stronger than the argument for autonomy is the argument for certainty. Many commentators have said, and we are told that many couples feel, that the outcomes of ancillary relief are so uncertain that it must be better, less stressful, and cheaper, to deal with outcomes by agreement.

- 5.34 Again, of course, that freedom exists under the current law, provided there is agreement at the point when the relationship ends. What is being argued is that it is important for the parties to have certainty in advance that their partner will not be able to re-open the financial agreement by resorting to the court, and that that limitation upon their partner's freedom is justified in the interests of both by ensuring that neither will be involved in the uncertainty, stress and cost of litigation. It may also ease the burden on the courts.

- 5.35 This is a powerful argument, and the more so because it is well-recognised that there are significant unresolved issues of principle within the law of ancillary relief. We do not know exactly how needs, compensation and sharing relate to each other under the current law.²² We cannot be sure what may count as non-matrimonial property,²³ nor when and for what reason non-matrimonial property may become matrimonial property with the passage of time.²⁴ Lawyers have told us that they find it extremely difficult to advise on outcomes.²⁵

- 5.36 So we have considerable sympathy with this argument. However, it has to be added that for the vast majority of divorces there is no uncertainty at all so far as legal principle is concerned. In cases where resources do not exceed needs the only objective pursued by the courts – and by parties bargaining “in the shadow of the law”²⁶ – is to meet the needs of the parties insofar as that is possible, giving priority to the children and to the parent responsible for their day-to-day care. There are no other possibilities. There is indeed uncertainty as to how that will be achieved; and it is possible for a contract to resolve that uncertainty. But such a contract is itself a risk, because assets can change, as can the

²² *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618; see para 2.60 above.

²³ See para 2.60 above.

²⁴ *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [25] by Lord Nicholls. We discuss at paras 5.49 to 5.61 below a limited form of qualifying nuptial agreement that would resolve just this uncertainty by enabling pre-acquired, inherited or gifted property to be safeguarded.

²⁵ This generates problems in connection with professional indemnity insurance. We have heard of a QC in England who was quoted a premium of £100,000 to take out insurance cover for work on one pre-nuptial agreement. See E Hitchings, *A study of the views and approaches of family practitioners concerning marital property agreements* (2011) p 66.

²⁶ RH Mnookin and L Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 *Yale Law Review* 950.

employment market or the value of a house. Absent any possibility of scrutiny, such agreements may be a dangerous gamble.

The international perspective

- 5.37 Another argument frequently made is that a short journey across the English Channel takes us to the many European jurisdictions where marital property agreements have determinative effect provided that proper formalities have been met.²⁷ The same is true of many common law jurisdictions, particularly the majority of US states and Australia. Why should we be different?
- 5.38 The European analogy is flawed, as will be clear from a reading of Part 4, because agreements in those jurisdictions are made against the background of a default matrimonial property regime and operate as a choice to adopt another regime. We have no equivalent of immediate community of property, such as is the default regime in France or the Netherlands for example, or of deferred community such as that of the Scandinavian countries. In none of these cases is anyone opting out of a discretionary regime and into certainty;²⁸ instead, they are opting for different sets of rules.
- 5.39 In the continental European jurisdictions a choice of marital regime is not in general a choice not to provide for one's spouse. For one thing, the European regimes do not generally allow contracting out of maintenance obligations.²⁹ For another, while a contract may be intended to safeguard inherited family property from the other party, that is arguably done against a very different cultural background which may place more weight upon keeping family money within a blood-line.
- 5.40 In those countries where there is an immediate community regime there is also a community of liability. Accordingly, a spouse who owns his or her own business can contract out of community not for their own sake but in order to safeguard shared assets from the debts of the business. Those who make that choice during their working lives will often contract back into community upon retirement.
- 5.41 So the legal background to, and the motives for, marital property agreements in Europe are different from those that operate here. The picture is different again when we look at, for example, the United States and Australia. The US community property states have naturally allowed marital property contracts as part of their European legal background,³⁰ and that tradition has been adopted by the other states just as equitable distribution has been adopted by most of the community states. The process led naturally to the Uniform Pre-Marital Agreements Act. The US precedents, and the Australian, are much stronger for us than are the European ones, because they operate against a background of judicial discretion. They can be said to have adapted the European model for a

²⁷ As discussed in Part 4.

²⁸ With the very limited exception of Germany; see para 4.14 above.

²⁹ Albeit that the extent of those obligations varies from country to country – as does the extent of the social security safety-net that underpins them.

³⁰ See paras 4.18 to 4.22. As has South Africa with its Roman-Dutch system; see para 4.16 above.

common law system, and accordingly should play a large part in the consideration of options for reform here.

5.42 We shall have more to say about the Australian experience in Part 6; Binding Financial Agreements in Australia have already had an extraordinary legislative history, with the relevant provisions being amended several times as problems with their pre-requisites have become apparent.³¹ More relevant here is the fact that Binding Financial Agreements are regarded with great caution by lawyers where the parties have not already separated.

5.43 In other words, Binding Financial Agreements are popular and effective as substitutes for separation agreements; once finalised, no consent order is required and the Binding Financial Agreement itself has the same force as a court order. But there is great reluctance among Australian lawyers to advise clients to take the risk of entering into a binding agreement to provide for a future separation, where the circumstances are unknown. One Australian lawyer based in New South Wales has remarked to us that:

Many solicitors refuse to even advise parties [before marriage]. It is felt that the chance of overlooking something, changes in the circumstances of the parties, changes in the law itself, changes in the values of assets and the like make the issue very problematic.³²

Hardship and the social cost of reform

5.44 If the argument for autonomy were pushed to its furthest, it would be possible to contract out of all the responsibilities imposed by the law of ancillary relief, subject to the clear public policy consideration that a spouse should not be left dependent upon state benefits. If autonomy, in the sense of freedom to make and then rely upon a contract, is valued above all other considerations then that must be its conclusion.

5.45 Lawyers who are passionately in favour of autonomy have argued strongly, in discussion with us, in favour of that conclusion. Others use the same argument to demonstrate that conclusive agreements are oppressive (particularly of women) and should therefore not be permitted. It is argued that the purpose of a marital property agreement is to ensure that the other party receives less than he or she would otherwise have done in ancillary relief, and that that is by its nature oppressive. Under the current law, an agreement that left one spouse with money to spare and a former spouse just above social security levels would not be regarded as fair, and so would not be given much weight by the court when determining ancillary relief;³³ why should the law of marital property agreements be reformed so as to make it possible?

³¹ O Jessep, "Section 90G and Pt VIIIA of the Family Law Act 1975 (Cth)" (2010) 24(1) *Australian Journal of Family Law* 104.

³² Justin Dowd, Watts McCray (Sydney).

³³ Of course, there are many cases where the outcome of ancillary relief is that one spouse is left on state benefits or just above that level, where there is scarcely enough to provide for the other spouse and the children. That is the unavoidable consequence, in many cases, of the endeavour to "get a quart out of a pint pot": *Thyssen-Bornemisza v Thyssen-Bornemisza (No. 2)* [1985] FLR 1069, 1082 by Lord Justice Griffiths.

- 5.46 As we shall see in Part 7, reform does not have to have that effect. And the marital property regimes available in Europe do not do so.³⁴ But some models would. Their proponents argue that if people want to contract out of their rights and to agree to accept little or nothing for themselves, they should be free to do so. We have expressed doubt about that argument because there is real concern about the reality of autonomy in this situation. We are also troubled by the social cost involved; it is not a matter of indifference to society if a parent who has given up employment to look after the children is left to a bedsit and the vagaries of the labour market in his or her fifties because of an agreement made in happier times. That sort of outcome would damage society both materially and morally.
- 5.47 We are also mindful of the potential effect of conclusive agreements upon children. We have taken it as beyond argument that parents should not be able to contract out of their responsibilities to their children. But the effect upon children of their parents contracting out of responsibilities to each other may be considerable. Children may find that their parents have dramatically differing lifestyles – an outcome that the courts have striven to avoid.³⁵ Worse, children may become a financial prize. If parents have contracted out (subject to social security levels) of provision for each other, then only way that the economically weaker party may hope for comfortable housing after divorce may be to have the child living with him or her. They may then force that outcome, perhaps to the detriment of the child.
- 5.48 As we said, reform does not have to have this effect. These points are arguments not against reform, but against reform that allows contracts to have a conclusive effect in all areas of ancillary relief. As we shall be explaining in Part 7 we have grave doubts about such reform; we think that it might benefit a few at the expense of many.

Special property and a community of acquests

- 5.49 The introduction of qualifying nuptial agreements may be valuable as a way of enabling people to protect what we might call “special property.”
- 5.50 Many of those who seek advice on marital agreements do so because they wish to ensure that certain property is not vulnerable to sharing on divorce or dissolution. This is understandable and in many cases arouses sympathy. The circumstances may vary widely. We have heard a great deal of concern from those who act for clients who own family businesses, perhaps inherited or jointly owned with other family members, and who do not want to have to sell or divide the business in order to meet the claims of an estranged spouse.³⁶ Such clients want to preserve those assets for themselves, but in doing so they are protecting the labour and investment of their own families, perhaps for many generations. Family farms are often a focus of this concern, as are other businesses that are liable to collapse if partitioned.

³⁴ See para 4.14 above.

³⁵ See, for instance the comment of Lady Hale in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 at [44] that “the general view taken in English law is that children are entitled to a suitable home, to an upbringing, and to an education which is appropriate to their family’s circumstances and standard of living”.

³⁶ See para 1.25 above.

- 5.51 A different form of special property – which may have a very high or very low value – is that which one or both parties may bring with them from a previous relationship. There are couples who will not marry because one or both has been through divorce before and does not wish to put their property at risk again. Others may not wish to have to share with a future partner anything that they owned as a couple before being widowed, so as to keep it as an inheritance for their children. Still others may not wish to share what they have already earned and saved.
- 5.52 There may also be a desire for contractual certainty where parents make provision for their child and his or her partner. They may want to ensure, and indeed the couple themselves may agree, that that property should not be shared in the event of divorce or dissolution.³⁷ To this we may add a general concern for inherited or gifted property.
- 5.53 This can be presented as a concern to prevent “gold-digging” behaviour,³⁸ where a person marries for money and indeed may have targeted an older and wealthy spouse. But the concern is much broader than that. It may be completely mutual; both partners may have pre-acquired property to protect.
- 5.54 It is worth noting that in France, or in any country operating a form of community of acquests (whether immediate or deferred), all the forms of special property just mentioned would fall outside the default matrimonial regime and would be automatically exempt from sharing on divorce, unless the couple opted by contract into total community.
- 5.55 Some French couples do that. And in default regimes of total community, as in the Scandinavian countries, the Netherlands and South Africa, such property is shared unless the couple determine otherwise by contract; some do, but many do not. So it is not an answer to these concerns that the underlying law should be changed and that pre-acquired, or inherited or gifted property, should always be exempt from sharing. It is not the case that such property always should or always should not be shared; arguably there is no inequality, and no gender dimension, either way.³⁹ There is a strong argument that there should be a choice.
- 5.56 We think that this argument is so strong that, in asking consultees whether or not qualifying nuptial agreements should be introduced, we give two options. One is a broad model for such agreements. They would be unlimited in the scope of their financial terms, offering (if couples so wish) a comprehensive package.⁴⁰ The other is a narrow model, which could encompass *only* any or all of the following:

- (1) property acquired before the marriage or civil partnership;

³⁷ Although there is a concern that an agreement may be driven by the concerns of parents rather than by the will of the contracting parties; this is relevant to our observations about pressure at para 6.28 above.

³⁸ See, for example, *Clark v Clark* [1999] 2 FLR 498.

³⁹ Compare Lady Hale’s comments in *Radmacher v Granatino* [2010] UKSC 42 at [178].

⁴⁰ Only if couples so wished; it would still be open to them to contract only about a particular asset or group of assets.

- (2) property inherited by either party, before or during the marriage or civil partnership;
 - (3) property given to either party before or during the marriage or civil partnership.⁴¹
- 5.57 The introduction of qualifying nuptial agreements in that narrow form would create an optional “community of acquests”. Anything acquired by either party during the marriage or civil partnership would remain subject to ancillary relief – and potentially also subject to a marital property agreement, which the court would consider under the current law. But pre-acquired, inherited or gifted property⁴² could be excluded from the scope of ancillary relief by a qualifying nuptial agreement.
- 5.58 Arguments based on hardship and social cost would seem to carry far less weight against that version of reform, since it would not normally encompass the whole of a couple’s resources. Nothing earned during or after the marriage or civil partnership would be exempted from the reach of the court’s discretion in ancillary relief, subject to the requirement not to leave either party reliant on state benefits.⁴³ The provision of a “community of acquests” arrangement, whether as an opt-in or an opt-out, is well-established throughout Europe. Indeed, it could be said to be a clearer version of our current law, since the concept of non-matrimonial property is recognised by the courts but very uncertain in its extent.⁴⁴
- 5.59 So we think that this narrow version of qualifying nuptial agreement is likely to be far less controversial than a wider model, and attended by far fewer risks. Accordingly we ask consultees, below, to consider this model as an alternative to more far-reaching reform.
- 5.60 Inherited, pre-acquired and gifted property, that might be protected by a narrow model of qualifying nuptial agreement, are arguably rather different from business assets that someone expects to acquire in the future, or indeed the future profits of a business. Many who want to enter into marital property agreements seek to protect their future wealth. This is a more speculative concern. It is an understandable one; in some ways it is perhaps less sympathetic than a concern to protect pre-acquired assets. Does the fencing off of future property amount to a sensible, albeit individualistic move, or does it amount to “marriage-lite”, a form of relationship that does not incorporate what we currently regard as the implications of marriage – or at least, that we have so regarded since *White v White*?⁴⁵

⁴¹ By which we mean gifts from third parties and not gifts given by one spouse to the other.

⁴² We use that expression now as shorthand for the property listed at points (1) to (3) above.

⁴³ Whether any other safeguards (such as the protection of needs) should be imposed on a “community of acquests” model, or whether its limited scope means that no other safeguards are needed, is a question we debate in Part 7.

⁴⁴ See para 2.60 above. The idea that only property generated during the marriage should have to be shared also resonates with the idea, expressed by Lady Hale in *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [140], that the needs to be met in ancillary relief are only those generated by the relationship.

⁴⁵ [2000] UKHL 54, [2001] 1 AC 596.

5.61 As matters stand, in the absence of qualifying nuptial agreements, we understand from practitioners that other measures are used to safeguard assets. Some methods are legitimate but there are concerns among practitioners that some may involve concealment. It may be that dishonesty is encouraged by the law's failure to allow something that is regarded as straightforward and respectable in the rest of Europe.

The reform of ancillary relief

5.62 The major question for this project is whether or not the law relating to marital property agreements should be changed so as to allow such agreements to oust the jurisdiction of the courts in ancillary relief, and if so to what extent. As discussed, many voices can be heard arguing for or against such reform. But there are those from both sides of that debate who argue that what is really wanted is reform of the underlying law of ancillary relief.

5.63 That is an obvious corollary of the argument, rehearsed above, from uncertainty. If the law of ancillary relief is uncertain, and marital property agreements are desired so as to remedy that, then perhaps the underlying law should be changed instead. If we can achieve certainty and fairness that way, the need for contracts could be avoided; alternatively, contracts could do a better job against the background of better underlying law.

5.64 Reform of ancillary relief would be a major undertaking. A consultation upon such a reform would have to address such issues as:

- (1) the overall objective of the discretion within section 25 of the Matrimonial Causes Act 1973;
- (2) the extent of the "needs", if any, to be met after the ending of a marriage and for how long they should be met;
- (3) the extent of matrimonial and non-matrimonial property;
- (4) the role of conduct;
- (5) whether the law of England and Wales should provide a European-style matrimonial property regime; and
- (6) the role, within a new law of ancillary relief, of marital property agreements.

5.65 Such a review is not within the scope of this project.⁴⁶ But we would like consultees to tell us if they think that the reform of marital property agreements should await a wider review of the law of ancillary relief.

5.66 An alternative viewpoint is that reform of marital property agreements now would avoid the need for a review of ancillary relief later. If the major problem with ancillary relief is the uncertainty resulting from *White v White*,⁴⁷ then the ability to

⁴⁶ See para 1.13 above.

⁴⁷ [2000] UKHL 54, [2001] 1 AC 596.

contract out of that uncertainty might well solve the problem. We see considerable force in that argument.

Questions for consultees

- 5.67 In the light of the discussion set out above, we would like to hear the views of consultees on the following questions.
- 5.68 We ask first about reform in principle, leaving for Parts 6 and 7 a discussion of the details of reform (in terms of the pre-requisites for qualifying nuptial agreements, and the extent to which they might ever be opened to the scrutiny of the court).
- 5.69 **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?**
- 5.70 **If so, should such agreements be able to contain only terms relating to pre-acquired, gifted or inherited property?**
- 5.71 We also ask consultees about the following alternative:
- 5.72 **Should the reform of the law relating to marital property agreements be postponed to await a wider review of the law of ancillary relief?**

PART 6

THE REQUIREMENTS FOR THE FORMATION OF A QUALIFYING NUPTIAL AGREEMENT

INTRODUCTION

- 6.1 In Part 5 we asked whether qualifying nuptial agreements should be introduced. Such agreement would exclude the court's discretion in ancillary relief. We mooted two possibilities: qualifying nuptial agreements that could include an unlimited range of financial terms (subject to the safeguards discussed in Part 7), or a limited form that would protect only pre-acquired, gifted or inherited property so as to enable a couple to opt into a "community of acquests".
- 6.2 As we explained in Part 5, such a reform would not mean that all marital property agreements would be qualifying nuptial agreements; an agreement that could exclude the court's discretion would have to be subject to formal requirements determining its validity, since the exclusion of discretion would mean there could be no overall examination of the agreement in the round to assess its weight.¹ Agreements that did not meet the pre-requisites for that status would continue to be part of the circumstances of the case to which the court would have regard within the section 25 exercise and might well be enforced in the light of the principle enunciated in *Radmacher v Granatino*.² Failure to meet those pre-requisites might be unintentional; an agreement that the parties, at the time, intended to be a qualifying nuptial agreement might later be found, when challenged by one of the parties, to fail because one of the criteria was not met. But failure might be deliberate; not everyone entering a pre- or post-nuptial agreement will want to exclude the discretion of the court in ancillary relief.
- 6.3 In this Part we ask: if qualifying nuptial agreements were to be introduced – whether an unlimited version, or a narrower model to enable a "community of acquests" – what should be the pre-requisites for their validity? In asking that question we are, obviously, asking about what happens at the time when the agreement is made and not about the effect that it has if, later, the couple divorce or dissolve their civil partnership.³ In looking at the requirements surrounding the formation of the agreement, we have to bear in mind the objectives of imposing pre-requisites, which must be to ensure, by requiring a certain level of formality, some level of protection.
- 6.4 Formal requirements may alert both parties to the seriousness of the step they are taking. They may provide information or education, through disclosure and legal advice; at the very least, if misrepresentation is penalised that will provide some safeguard against deception. And the pre-requisites will provide some measure of protection for the stronger party by enabling them to counter suggestions that they have behaved improperly towards the more vulnerable party. None of this is improper paternalism. The law of contract already provides

¹ See para 5.8 above.

² [2010] UKSC 42.

³ Or at whatever point it is designed to take effect: that might be divorce or dissolution of a civil partnership or it might be separation.

some safeguards against improper pressure or misinformation, particularly where the parties are in a close relationship with each other.⁴ If qualifying nuptial agreements are introduced in response to calls for the protection of autonomy, it is appropriate for the law to take steps to ensure that agreement is indeed autonomous. The steps that the law requires may go beyond those found in the general law of contract because of the emotional context in which these agreements are made.

- 6.5 No amount of pre-requisites can provide absolute protection against pressure, foolishness, carelessness or love, and there is no need for the law to seek to provide absolute protection in facilitating agreement between adults. What is needed is a level of formality that provides a proportionate level of protection, without making qualifying nuptial agreements unacceptable to those who might use them. There is no point in imposing burdens that appear to outweigh the benefits that such agreements might confer. Nor should the law provide so many safeguards that reform becomes pointless because the agreement is too easy to challenge. It has been observed that the protections proposed in *Supporting Families*⁵ were so comprehensive that reform would have produced results no different from the cases decided under the current law.⁶ So there is a balance to be struck between protection and utility. If reform takes place it will be because it is felt that adults are generally competent to make these agreements, and in designing protection we have to take that competence seriously.⁷
- 6.6 We suggest that the appropriate pre-requisites for a qualifying nuptial agreement would be the same, broadly, for both the versions of reform we have asked about in Part 5 (that is, both the unlimited model and the narrower “community of acquests” version), and that they fall into two groups.
- 6.7 If qualifying nuptial agreements are to enable couples to bypass ancillary relief, then it goes almost without saying that a fundamental pre-requisite must be contractual validity. There must be a legal basis upon which they can be enforced. Contractual validity involves a group of requirements, some of them designed to protect the parties against pressure. We say more about the contractual requirements below, in the first section of this Part. We then move on to ask what, if any, further pre-requisites should be imposed. We explain why that is likely to be desirable – why contractual principles alone will not be adequate – and explore what might be required.
- 6.8 Generally, this discussion is about the conditions necessary for a marital property agreement to have the status of a qualifying nuptial agreement if such agreements were to be introduced. An agreement that did not meet those conditions would not be a qualifying nuptial agreement; it therefore would not be

⁴ See, for example, *Balfour v Balfour* [1919] 2 KB 571; and see the discussion of contract vitiating factors at paras 6.18 to 6.45 below.

⁵ Home Office, *Supporting Families: A Consultation Document* (1998).

⁶ N Lowe, *Pre-nuptial agreements: the English position*, text of the address prepared for the International Society of Family Law’s Colloquium on Family Law delivered on 11 October 2007 in Toledo, Spain, p 10 (available online at http://www.indret.com/pdf/508_en.pdf).

⁷ It is of course possible to marry or form a civil partnership while still a minor: Marriage Act 1949, s 2; and Civil Partnership Act 2004, s 3(1)(c); we think it unlikely that reform would allow minors to make qualifying nuptial agreements.

enforceable as a contract (even if it met the conditions for contractual validity) because it would not oust the court's discretion in ancillary relief.⁸ The proviso to be added to that is that some requirements are by their nature one-sided. So if legal advice or disclosure were to be imposed as pre-requisites,⁹ then the agreement would not be able to be treated as a qualifying nuptial agreement against the party who had not received advice, or disclosure, as the case might be.

- 6.9 Finally, we also propose that any variation of a qualifying nuptial agreement must comply with the same pre-requisites as the original agreement.

CONTRACTUAL VALIDITY

The agreement

- 6.10 A contract is an agreement, made with the intention to create legal relations and supported by consideration, that the law will enforce.¹⁰ We look at those requirements in turn to examine their relevance to marital property agreements.
- 6.11 There is nothing to prevent spouses from making contracts with each other, though agreements between family members have on occasion been found to have been made without the intention to create legal relations.¹¹ We think it unlikely that a marital property agreement would fail for that reason; as the majority observed in *Radmacher v Granatino*, the courts' willingness to uphold marital property agreements within the context of ancillary relief now makes it unlikely that a party to such an agreement would make it without intending it to have legal effect.¹² And one of the reasons for the safeguards provisionally proposed in this Part, in particular the requirement of legal advice, is to ensure that the parties to a qualifying nuptial agreement are in no doubt that it is legally binding.
- 6.12 English contract law, unlike that in most European jurisdictions, requires consideration for a contractual promise; in other words, a contract is a bargain, and each party must give something in return for the benefit that the agreement confers on him or her.
- 6.13 However, not all couples will wish to make a bilateral agreement or bargain; the agreement might simply state that one particular item of property will remain the property of the wife, or will be transferred to the husband, on divorce. It is not clear that the marriage or civil partnership itself would be consideration for a pre-nuptial contract; and it is rather harder to regard staying married as consideration for a post-nuptial agreement. Some common law jurisdictions whose law of contract, like ours, requires consideration have therefore enacted provisions to the effect that no consideration is required for the validity of marital property

⁸ *Radmacher v Granatino* [2010] UKSC 42 at [52].

⁹ See paras 6.57 and 6.78 below.

¹⁰ HG Beale (ed), *Chitty on Contracts, Volume 1: General Principles* (30th ed 2008) para 2-001.

¹¹ For an example see *Balfour v Balfour* [1919] 2 KB 571, and Lady Hale's discussion of the case in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 at para [36].

¹² [2010] UKSC 42 at [70].

agreements.¹³ The alternative is for the parties to make the agreement in the form of a deed if there is any doubt about the presence of consideration.¹⁴

- 6.14 Not all agreements made with the intention to create legal relations, and supported by consideration, will be valid contracts; agreements that are contrary to public policy will fall outside the law of contract. We take the view that the pronouncement of the majority in *Radmacher v Granatino*, albeit *obiter*,¹⁵ has the effect that the rule of public policy that rendered pre- and post-nuptial contracts void has been abolished. But a marital property contract might fall foul of other rules of public policy, for example if it restricted someone's right to petition for divorce or dissolution. Nor could the introduction of qualifying nuptial agreements exclude the court's discretion or jurisdiction except in the matter of ancillary relief and between adults: an agreement that made a provision for contact with a child could always be re-opened, because the presence of the marital property agreement could not change the principle, in section 1 of the Children Act 1989, that the court is to regard the child's welfare as paramount when making decisions about a child's upbringing.
- 6.15 If the contract included such a term, clearly the courts would not enforce it; it might be severable, leaving the rest of the agreement to stand as a qualifying nuptial agreement if the other pre-requisites were met. More often, such a term would not be severable but would be, explicitly or otherwise, part of the deal. In that event, the inclusion of the term would render the whole contract void. The agreement might be taken into consideration in the adjudication of an ancillary relief application, but it could not be a qualifying nuptial agreement. Clearly, professionally drafted agreements would not normally include such terms, since legal advisers would be alive to the danger of including terms that went outside the scope of ancillary relief and therefore might fall foul of public policy, or fall within areas of discretion that the agreement could not exclude.

The form of the agreement

- 6.16 There is no general requirement that contracts be in writing. Certain contracts do have to meet special formal requirements; the one most likely to be relevant to qualifying nuptial agreements applies to contracts for the creation or transfer of an interest in land, which must be in writing and conform to all the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. A qualifying nuptial agreement might be a conditional contract for the transfer of land; it might state, for example, that the parties' holiday cottage in Wales would be transferred to one or other of them within six months of a divorce. The effect of section 2 is that such an agreement would be void if it were not in writing.¹⁶ As the law stands, that is not an issue for marital property agreements because they

¹³ See for instance, the US Uniform Premarital Agreement Act 1983, s 2.

¹⁴ The limitation period for breach of an ordinary contract is six years; for breach of a deed, the limitation period is 12 years: Limitation Act 1980, ss 5 and 8.

¹⁵ That is, the decision on this point was not necessary for the resolution of the case before the court, and therefore strictly is not a binding precedent.

¹⁶ It is well-established that the requirements of the Law of Property (Miscellaneous Provisions) Act 1989, s 2, apply to conditional contracts as they do to any other: *Spiro v Glencrown Properties Ltd* [1991] Ch 537.

do not take effect as contracts;¹⁷ if they are to do so, the provisions of section 2 of the 1989 Act will become important.

- 6.17 In practice, it is unlikely that a marital property agreement made with the intention to create legal relations would be made orally, and we suggest below that in any event they should be made in writing even where the law of contract does not otherwise require this.

Vitiating factors

- 6.18 A contract may be void or voidable for one of a number of reasons. A “contract” that is in fact void has never existed; a contract that is voidable is one that is flawed for a reason that gives the parties the right to apply to the court to have it set aside.¹⁸ The factors that may make a contract void or voidable are those that cast doubt upon the free will of one or more of the parties to make the agreement, or upon the level of information they had when they did so. Thus a contract may be void for mistake, or it may be voidable as a result of duress, undue influence or misrepresentation. These are all legal doctrines that may be used by someone who wishes to prove that an agreement was not a qualifying nuptial agreement, despite its apparent validity as such. At the time of the formation of the agreement, therefore, parties who are anxious that the agreement should be upheld in the future will want to ensure that these vitiating factors are absent.

Mistake

- 6.19 The doctrine of mistake is unlikely to stand in the way of a party who seeks to enforce a marital property agreement as a qualifying nuptial agreement. For a mistake to render a contract void it must be a mistake about the nature of the transaction or about the identity (but not the characteristics) of the other party.¹⁹ A mistake about the nature of the transaction could only be established if it could be shown that one of the parties actually did not know that this was a marital property agreement.

Misrepresentation

- 6.20 A misrepresentation that affects contractual validity must be a misrepresentation of existing fact made by one party to the other before the contract is made; it may be innocent, negligent or fraudulent. The fact misstated must be “material” to the formation of the contract; in other words, it must be one that would have induced a reasonable person to enter the contract. Finally, the misrepresentation must

¹⁷ *Xydhias v Xydhias* [1999] 2 All ER 386, 394 to 397. Note also that a contract, albeit conditional, for the creation or transfer of an interest in land will not bind third parties unless it is registered, on the register of title or the Land Charges Register as applicable: K Gray and SF Gray, *Elements of Land Law* (5th ed 2009), para 8.1.71. If qualifying nuptial agreements were to be introduced, the parties and their advisers would have to take a view as to whether such registration was desirable at the point the agreement was made. Registration of interests in land would certainly be essential for separation agreements, where the parties’ relationship has already broken down.

¹⁸ HG Beale (ed), *Chitty on Contracts, Volume 1: General Principles* (30th ed 2008) paras 1-082 and 6-114.

¹⁹ *Saunders v Anglia Building Society* [1971] AC 1004; see also HG Beale (ed), *Chitty on Contracts, Volume 1: General Principles* (30th ed 2008) para 5-005.

have been intended to be relied upon, and in fact relied upon, by the person to whom it is made, when entering into the agreement.²⁰

- 6.21 Clearly, therefore, not every misstatement made in the course of the negotiation of a marital property agreement will render the contract voidable. Many will not be material, or will not have been relied upon. Of those that are, most are likely to be financial, but they might concern other, more personal matters.
- 6.22 We think that the courts will be wary of finding that non-financial misrepresentations are material in the sense described above. Someone who lied about the extent of their assets, their job, or whether or not they had been bankrupt, might well find that the agreement could be rescinded; someone who lied about their religion, their politics or virginity would not, whatever the feelings of the other party on that subject. A lie about whether or not one had been married before might be a material misrepresentation if it had financial implications – for example, in connection with an ongoing liability to pay maintenance – as might a lie about whether or not one had children, if that were going to make a difference financially.
- 6.23 A more difficult issue in this context is non-disclosure. The law of contractual misrepresentation imposes a duty not to say things that are untrue; but it does not impose a positive duty of disclosure, except where silence is actually misleading.²¹ On the other hand, the failure to disclose a material fact has been held to amount to undue influence.²² We look more generally at non-disclosure of financial information below, when we examine the need for pre-requisites that go beyond the general law of contract.²³

Duress and undue influence

- 6.24 The courts have long been concerned with the possibility that contracts made between spouses will be formed under pressure. In 1931, Mr Justice Maughan said that a young woman engaged to be married “reposes the greatest confidence in her future husband; otherwise she would not marry him. In many, if not most, cases she would sign almost anything he put before her”.²⁴ Eight decades later the courts remain concerned about bargains reached between family members of either sex. Lady Hale remarked in *MacLeod v Macleod* that “family relationships are not like straightforward commercial relationships. They are often characterised by inequality of bargaining power”.²⁵ Yet at the same time, in other cases, we hear a much more robust view. In 2009 the Court of

²⁰ HG Beale (ed), *Chitty on Contracts, Volume 1: General Principles* (30th ed 2008) paras 6-006, 6-028 and 6-032.

²¹ HG Beale (ed), *Chitty on Contracts, Volume 1: General Principles* (30th ed 2008) paras 6-014 and 6-017.

²² See para 6.44 below.

²³ See para 6.57 below.

²⁴ *Re Lloyds Bank Ltd* [1931] 1 Ch 289, 302.

²⁵ *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 at para [42].

Appeal suggested that to assume that one party is “unduly susceptible to the other’s demands ... is patronising, in particular to women”.²⁶

- 6.25 The contractual doctrines of duress and undue influence are designed to protect the parties against pressure; they may both arise on the same facts, although the emphases of the two doctrines are different. In their modern form they focus not on stereotypical relationships, nor on gender, but upon particular types of pressure in the formation of a given contract.

DURESS

- 6.26 The “classical case of duress is ... the victim’s intentional submission arising from the realisation that there is no other practical choice open to him”.²⁷ The doctrine extends not only to threats of violence but also to economic and other forms of pressure.²⁸ The basis of the doctrine is not that the contract was made without consent, but that the pressure exerted was improper and that the victim felt he or she had no choice.
- 6.27 Some pre-nuptial agreements will be, in effect, the price of the wedding. Is that duress? We think not, except in very exceptional circumstances where unusual factors combined to make the victim feel that he or she had no choice but to get married or enter into a civil partnership.²⁹ Normally, both parties in such a case retain the right to refuse to reach an agreement and to walk away. Almost all United States courts have similarly rejected the idea that a threat to break off the engagement generally constitutes duress; but if the consequences of not signing a pre-nuptial agreement are, from the victim’s point of view, truly unbearable, then duress may be proved.³⁰
- 6.28 Post-nuptial agreements may be made under more stable conditions;³¹ equally, they may not. An American academic has pointed out that “post marital agreements could present more intricate issues of duress. For example, one spouse might threaten to sue for divorce unless the other accepts the terms of a proposed post-marital agreement”.³²
- 6.29 However, some of these concerns appear to amount to a claim that the very fact that the contract is a pre-nuptial or post-nuptial agreement amounts to duress. The idea that the very situation of planning, or of being committed to, a marriage

²⁶ *Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 2 FLR 1181 at [127].

²⁷ *Universe Tankships of Monrovia Inc. v International Transport Workers’ Federation* [1982] 2 All ER 67, 88 by Lord Scarman. See more generally: HG Beale (ed), *Chitty on Contracts, Volume 1: General Principles* (30th ed 2008) ch 7.

²⁸ See the comments of Lord Goff in *The Evia Luck* [1992] 2 AC 152, 165: “... it is now accepted that economic pressure may be sufficient to amount to duress.... Provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause in inducing the plaintiff to enter into the relevant contract”.

²⁹ For a fuller discussion see J Miller, “Does insistence on a pre-nuptial agreement constitute duress?” [2009] 47(9) *Law Society Journal (New South Wales, Australia)* 52.

³⁰ In *Azarova v Schmitt* [2007] *Ohio* 653 the consequence of not marrying would have been deportation.

³¹ *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 at [31] and [36] by Lady Hale.

³² JT Oldham, *Divorce, Separation, and the Distribution of Property* (2010), § 4.06, n 3.

or civil partnership, whether or not there are children, would amount to duress would be unnecessary and patronising, as well as being unfair to those who have negotiated an agreement in good faith.

- 6.30 So we think that the courts will be slow to find duress from circumstances that amount to no more than the inevitable context in which marital property agreements are made. But they will be alert to the possibility of deliberate and improper pressure, which in effect leaves the victim with no choice but to sign. As we discuss below, that might arise, for example, out of timing; someone who was asked to sign an agreement on the morning of the wedding, or even during the last month beforehand, might well feel that they had no alternative but to do so.
- 6.31 In *NA v MA* the High Court had to look at a post-nuptial agreement reached in very difficult circumstances and as the price of the continuation of the marriage; it was held that the contract was vitiated not by duress but by undue influence.³³

UNDUE INFLUENCE

- 6.32 The objective of the doctrine of undue influence is to “ensure that the influence of one person over another is not abused”.³⁴ It is not necessary to show that the victim made no decision of his or her own, or that the decision was forced in the sense required for duress;³⁵ the focus is on pressure.
- 6.33 It is well-established that there are two ways to establish undue influence. One is to show that it happened, and this is known as actual undue influence. In *NA v MA* we have an example of undue influence being found in the context of a post-nuptial agreement.³⁶
- 6.34 The agreement was not, of course, being enforced as a contract; the wife was applying for ancillary relief and argued that the terms of the agreement should be disregarded because she was pressurised into signing it. The husband argued that the agreement should be assessed in the same way that the court would examine a contract for undue influence,³⁷ and Mrs Justice Baron did so. In this case the post-nuptial agreement was not an amicable plan for the future, but was a package proposed by the husband with an ultimatum: sign or end the marriage. Mrs Justice Baron found that this, together with the husband’s bullying behaviour over a period of months, put the wife under “severe, undue and unacceptable pressure”,³⁸ and she disregarded the agreement in making ancillary relief orders.
- 6.35 We take the view that marital property agreements concluded in circumstances akin to these, whether before or after marriage, are very likely to be negotiated in circumstances of pressure and without real autonomy or consent; *NA v MA* demonstrates that such agreements are unlikely to be upheld by the courts. The

³³ [2006] EWHC 2900 (Fam), [2007] 1 FLR 1760.

³⁴ *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 at [6], by Lord Nicholls.

³⁵ *Jayne Hewett v First Plus Financial Group Plc* [2010] EWCA Civ 312 at [25].

³⁶ [2006] EWHC 2900 (Fam), [2007] 1 FLR 1760.

³⁷ [2006] EWHC 2900 (Fam), [2007] 1 FLR 1760 at [16].

³⁸ [2006] EWHC 2900 (Fam), [2007] 1 FLR 1760 at [28].

arguments for reform of the law of marital property agreements are not aimed at validating this kind of agreement but at upholding truly consensual agreements.

- 6.36 Clear bullying such as that seen in *NA v MA* may be quite unusual; and sometimes undue influence may consist of quite subtle pressure which can be hard to prove. The courts have therefore developed a second way to establish undue influence, in the doctrine of “presumed undue influence”. If the victim can prove that he or she was in a particular kind of relationship with the other party to the contract, and that the transaction had certain characteristics, then the burden of proof shifts to the other party to show that there was no undue influence. That party then has to prove a negative, which of course may be a difficult challenge.
- 6.37 The law relating to presumed undue influence is now as stated in the House of Lords’ decision in *Royal Bank of Scotland Plc v Etridge (No 2)*.³⁹ The person claiming to be the victim of undue influence has to show that the two parties were in a relationship of trust and confidence, and that the transaction “calls for explanation” in the sense of being something that is, if not manifestly disadvantageous, at least not readily explicable by the relationship itself.⁴⁰ That will be enough to support a finding of undue influence, unless the other party can produce evidence to counter the inference that the court has drawn.
- 6.38 The development of the law of undue influence has taken place in the context not of marital property agreements but of situations where one spouse takes on the risk of liability for the other’s debts. The context is therefore a very different one from that of marital property agreements. What we have to ask in this context is whether the introduction of qualifying nuptial agreements would be pointless because the courts would almost always find that there was a presumption of undue influence in such a transaction?
- 6.39 Clearly there will not always be such a finding.⁴¹ There has to be, first, a relationship of trust and confidence *in the management of the claimant’s financial affairs*. It is not necessary to show that one party always followed the other’s instructions, or had no mind of his or her own, in order to raise the presumption; but the courts are looking for something asymmetrical, involving some reliance.⁴² In some relationships of spouses or fiancés there will be such a finding. A rather more difficult question is whether the courts will find that a marital property agreement is something that is readily explicable by the relationship itself; that

³⁹ [2001] UKHL 44, [2002] 2 AC 773; see in particular Lord Nicholls’ explanation at [14].

⁴⁰ The old law relating to categories of relationships that always gave rise to undue influence appears to have been swept aside by the decision in *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773: see M Thompson, “Mortgages and Undue Influence” in E Cooke (ed), *Modern Studies in Property Law: Volume 2* (2003).

⁴¹ Prior to the decision in *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, the relationship of husband and wife was not one of “the category 2A relationships” that always gave rise to the presumption: *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, 953.

⁴² See, for instance, the judgment of Mr Justice Briggs in *Jayne Hewett v First Plus Financial Group Plc* [2010] EWCA Civ 312 at [10], where a relationship of trust and confidence was found on the basis that the wife regarded her husband as primarily responsible for the family’s finances, although she was “not a lady who left every aspect of finance to her husband and stayed at home looking after the children”. The decision has to be regarded with some caution, however, since it was not decided on the basis of presumed undue influence.

may depend very much upon the terms of the agreement and upon whether or not it obviously puts one party at a disadvantage.

- 6.40 We ask consultees, below, whether they think that any special provision should be made for qualifying nuptial agreements, so as to ensure that they are not unduly vulnerable to challenge on the grounds of undue influence. What we have in mind is the possibility of a provision that, in the context of a qualifying nuptial agreement, undue influence can be established only on an actual and not on a presumed basis. In answering that question, we ask consultees to bear in mind that we also discuss, later, the possibility of requiring the parties to take legal advice before making the agreement; such a requirement could not ensure that no undue influence had taken place, but it would provide some measure of protection by ensuring that the parties each had access to an impartial adviser.
- 6.41 One further development in the context of undue influence calls for comment, namely the issue of non-disclosure of material information.⁴³
- 6.42 In *Jayne Hewett v First Plus Financial Group Plc* the Court of Appeal had to assess whether or not undue influence had been exercised by a husband in asking his wife to agree to remortgage their home in order to re-finance his very considerable debt.⁴⁴ That is not an unusual context for undue influence. In this case, the wife had serious misgivings about the remortgage, and indeed it was a risky transaction. The husband persuaded her by swearing on their children's lives that he would pay all the mortgage instalments and behave responsibly for the future. What he did not tell her was that he was having an affair. It was found that he did not at the time the remortgage took place intend to leave his wife; but some months later he did so. He then lost his job and was made bankrupt, and so the mortgagee took possession proceedings.⁴⁵
- 6.43 The Court of Appeal held that the fact that a husband was having an affair was "something which his obligation of fairness and candour towards his wife required him to disclose" when he asked her to agree to remortgage the family home.⁴⁶ Mr Justice Briggs said:

⁴³ Other than financial information, which is not a requirement of contract law and which we discuss separately at para 6.57 below.

⁴⁴ It seems that both misrepresentation and undue influence were pleaded, but the Court of Appeal discussed only undue influence: [2010] EWCA Civ 312 at [2].

⁴⁵ It was not in dispute that if there was undue influence or misrepresentation, the mortgage was tainted with that, since the mortgagee had not taken the prescribed steps to safeguard itself against that possibility: [2010] EWCA Civ 312 at [2].

⁴⁶ *Jayne Hewett v First Plus Financial Group Plc* [2010] EWCA Civ 312 at [31].

It is evident that Mrs Hewett's decision to accede to her husband's request was based upon an assumption on her part that he was as committed as she was to the marriage, to the family and to the preservation of their home life in the future. The truth was that he had already embarked upon an affair which, although by no means a certainty, carried with it the serious risk that it would lead in due course to Mr Hewett's departure from the family and withdrawal of both emotional and financial support, as eventually occurred. On that analysis of the decision facing Mrs Hewett, I consider that Mr Hewett's affair cried out for disclosure.⁴⁷

6.44 It was therefore held that the transaction was entered into as a result of the husband's undue influence.

6.45 It is not clear to what extent the decision enunciates new law. We take the view that it is a decision about materiality;⁴⁸ that is, the decision depends heavily upon the relevance of the lie to the decision being made. The transaction was a risky one, and the wife needed to know her husband's position; the affair was clearly relevant, because even though it was found as a fact that the husband, at that stage, did not intend to leave his wife and children, it cast doubt upon his good faith and his commitment – without which the remortgage was clearly a very bad risk.⁴⁹ Again, we have to ask whether the risk of a finding of undue influence is so great as a result of this case that the introduction of qualifying nuptial agreements could be rendered pointless. We take the view that it would not, because of the requirement of a very close link between the non-disclosure and the transaction under consideration. It is not every non-disclosure that will vitiate a marital property agreement, and the decision about a marital property agreement is very different from the one Mrs Hewett had to take. However, we would, again, like to hear consultees' views on this in response to our questions, set out below.

Provisional proposals about contractual validity

6.46 Contractual validity would have to be an essential pre-requisite for the validity of a qualifying nuptial agreement, for the practical reason that it has to be capable of being enforced as a contract in the civil courts. The discussion above has highlighted various factors involved in contractual validity, and has highlighted some potentially difficult issues surrounding undue influence. So our questions to consultees are as follows:

6.47 **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.**

Do consultees agree?

⁴⁷ *Jayne Hewett v First Plus Financial Group Plc* [2010] EWCA Civ 312 at [33].

⁴⁸ See also the discussion on misrepresentation at para 6.20 above.

⁴⁹ The Court of Appeal held that it was not necessary to show that the wife would not have entered into the re-mortgage had she known of the affair; the test was rather whether or not the failure to disclose was an abuse of the relationship: [2010] EWCA Civ 312 at [34].

- 6.48 **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?**

ADDITIONAL PRE-REQUISITES

Why go beyond the law of contract?

- 6.49 In the light of all that has been said so far, it would be possible to argue that the law of contract provides all the protection that is needed in the context of qualifying nuptial agreements, and that we need go no further. But we think that further pre-requisites would be a proportionate response to the special nature of marital property agreements and to the context in which these agreements are made.
- 6.50 We take that view because the relationship between the parties to a qualifying nuptial agreement is very different from the relationship between the parties to a commercial contract. It is an emotional one as well as a financial one, and that is likely to make people behave differently. That goes for all contracts between spouses of course, and the general law of contract – in particular the law relating to duress and undue influence – addresses the emotional qualities of the relationship. But provision for future relationship breakdown takes the contract into the realms of the unknown and the unexpected. It seems likely that couples tend to enter into marital property agreements, particularly pre-nuptial agreements, with less realism, and more optimism, about the consequences of the contract than do most commercial negotiators:

Nearly all premarital agreements involve special difficulties arising from unrealistic optimism about marital success, the human tendency to treat low probabilities as zero probabilities...⁵⁰

- 6.51 It has been noted that marital property agreements may also involve more risk to the parties than do many commercial contracts: “it is unusual for all the assets of the company or other entity to be affected by the one contract”.⁵¹ They are certainly a gamble in a different sense in that they are made as a plan for something that has not yet happened; it is not known in exactly what circumstances, or when, the agreement will take effect. They are perhaps not unlike insurance contracts in that they provide for unforeseen future contingencies; but the provision made will, in many cases, amount to a contracting out of the law’s protection for one party while providing for extra protection for the other.
- 6.52 All these points are open to debate and will depend, in an individual case, upon the personalities of the individuals involved, and upon their financial circumstances. But they indicate, taken together, that marital property agreements are different. As one American commentator puts it:

⁵⁰ IM Ellman (reporting on the United States of America) in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2011, forthcoming).

⁵¹ P Parkinson, “Setting aside financial arrangements” (2001) 15 *Australian Journal of Family Law* 26, 27.

One may treat premarital agreements differently than ordinary contracts by imposing special procedural requirements or special tests of substantive fairness.⁵²

- 6.53 Carefully framed procedural requirements that affect the way the agreement has to be made may eliminate some disputes at the later stage when the agreement comes into effect. We are not aware of any jurisdiction in which the pre-requisites for marital property agreements go no further than those for any other contract, and we agree that something more than the contractual requirements is needed. In asking how much more is needed, we have drawn on the requirements imposed by the law for some other types of agreement.⁵³ We have also drawn upon those that have been proposed by others already⁵⁴ and upon the factors to which the courts currently look when deciding what weight to give to an agreement under the current law.⁵⁵ Valuable lessons can be learned from jurisdictions which have already introduced binding marital property agreements and have worked through some of the pitfalls that surround the issue of pre-requisites.⁵⁶
- 6.54 We look now at the possibilities that seem to us to be feasible: namely writing, disclosure, some requirements as to content, and legal advice; we then consider some other possibilities.

Signed writing

- 6.55 We have noted that an agreement that purports to create or transfer an interest in land, whether or not it does so conditionally, must be in writing.⁵⁷ We think that it is essential that all qualifying nuptial agreements must be in writing and signed by both parties.⁵⁸ We acknowledge that in the US some states will recognise and enforce an oral marital property agreement if its terms are fully or partly

⁵² IM Ellman (reporting on the United States of America) in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2011, forthcoming).

⁵³ For example, the formalities for the sale of land prescribed in the Law of Property (Miscellaneous Provisions) Act 1989, s 2, and the requirements set out by the House of Lords in *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 for the protection of banks when a guarantee is given for a mortgage.

⁵⁴ Considering in particular: Home Office, *Supporting Families: A Consultation Document* (1998); Resolution, *A more certain future – Recognition of pre-marital agreements in England and Wales* (2005); Resolution, *Family Agreements – Seeking Certainty to Reduce Disputes: the Recognition and Enforcement of pre-nuptial and post-nuptial agreements in England and Wales* (2009); and The Centre for Social Justice, *Every Family Matters: An in-depth review of family law in Britain* (2009).

⁵⁵ A helpful list of factors was set out by Roger Hayward Smith QC (sitting as a Deputy High Court judge) in *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120, 131 to 132.

⁵⁶ For further information see P Parkinson, “Setting aside financial arrangements” (2001) 15 *Australian Journal of Family Law* 26; IM Ellman (reporting on the United States of America) in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2011, forthcoming).

⁵⁷ See para 6.16 above.

⁵⁸ We note that section 34 of the Matrimonial Causes Act 1973 and sch 5, part 13, para 67 of the Civil Partnership Act 2004 require maintenance agreements to be made in writing.

performed,⁵⁹ but we no longer have a contractual doctrine of part-performance and we take the view that only a written agreement, embodying all its express terms,⁶⁰ will provide an appropriate level of formality. There is of course nothing to stop parties reaching an oral agreement which is later embodied in a written qualifying nuptial agreement.

- 6.56 **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.**

Do consultees agree?

Financial disclosure

- 6.57 A qualifying nuptial agreement, whether a pre- or post-nuptial agreement or a separation agreement, would be intended to enable the parties to resolve the financial consequences of separation on divorce or dissolution without recourse to the process of ancillary relief – either entirely, or with respect only to the property that the agreement covers. It would therefore take the parties – wholly, or with respect to a particular asset or group of assets – outside the reach of judicial scrutiny and outside the protection that the section 25 exercise affords. The introduction of qualifying nuptial agreements would be an acknowledgement that adults can make that choice; but if that choice were made without knowledge of its financial implications, there would be a concern about enforcing it.
- 6.58 One of the consequences of that concern may be that there should be a requirement for the parties to give each other information about their financial circumstances before making the agreement.⁶¹ Nothing in the general law of contract requires this,⁶² and so any requirement for financial disclosure would have to be specially crafted for this context. It would, however, be a very familiar requirement; detailed disclosure is an important element of ancillary relief proceedings,⁶³ where the parties must make “full and frank” disclosure of their financial circumstances by completing a Form E.⁶⁴ It is therefore an essential element in the making of many separation agreements, and in the making of orders in cases where there are pre- and post-nuptial agreements, whether or not

⁵⁹ The Uniform Premarital Agreement Act 1983, s 2 requires contracts to be made in writing but some states will allow oral contracts. See for example *Dewberry v George* 115 Wash App 351, 62 P.3d 525.

⁶⁰ Compare the terms of the Law of Property (Miscellaneous Provisions) Act 1989, s 2.

⁶¹ The other consequence is the need either for legal advice or for the opportunity to take legal advice, which we discuss below at para 6.78.

⁶² Outside special contexts such as contracts of utmost good faith, the main group of which are contracts of insurance: HG Beale (ed), *Chitty on Contracts, Volume 1: General Principles* (30th ed 2008) paras 6-142 to 6-164. Failure to disclose material facts, however, may amount to misrepresentation or undue influence: see para 6.23 above.

⁶³ For a full discussion of the practicalities of disclosure in ancillary relief see G Howell and J Montgomery, *Butterworths Family Law Service*, part 4A(6)(l).

⁶⁴ The Pre-Application Protocol annexed to *Practice Direction (Ancillary Relief: Procedure)* [2000] 1 WLR 1480 at [3.5] makes it clear that the parties are not specifically required to use the Form E itself but it should be used as a “guide to the format of the disclosure”.

the order is made by consent.⁶⁵ An order may be set aside or varied if it was made without proper disclosure having been made.⁶⁶

- 6.59 Is a requirement for disclosure in the negotiation of a marital property agreement – particularly a pre- or post-nuptial agreement that is not made in the context of relationship breakdown – really necessary? One leading practitioner who deals exclusively with big money cases told us that negotiating a qualifying nuptial agreement without disclosure would amount to “operating blindfolded”. Certainly disclosure could make a difference; a party who agreed to forego any possibility of sharing their partner’s inheritance, for example, in the belief that that inheritance might be worth, say, £500,000 might have taken a very different view if he or she had known that it would be worth £50 million. And it is not only a party who potentially foregoes something of significant value who might benefit from a disclosure requirement. Practitioners have told us that they already advise prospective spouses to disclose on a voluntary basis as much financial information as possible when negotiating a marital property agreement, so as to make clear the extent of property acquired before the marriage⁶⁷ and also to minimise the risk that they will later be accused of having concealed assets.⁶⁸
- 6.60 Some prospective spouses may see disclosure as “unromantic”; others, who have lived together for years and know all about each other’s financial circumstances already, may see it as unnecessary. Disclosure may be expensive if there are assets that have to be professionally valued. One participant in Dr Hitchings’ focus groups told us “it is very difficult to persuade somebody to spend money on a full-blown disclosure exercise when they are trusting each other and hoping it [divorce] will never happen”.⁶⁹
- 6.61 Other jurisdictions have taken a variety of approaches to disclosure. Australian law makes full and frank disclosure of all material financial facts a pre-requisite for the validity of Binding Financial Agreements.⁷⁰ Any non-disclosure of a material matter may result in the court setting aside the entire agreement if the court is convinced that the non-disclosure was motivated by desire to deceive. The important word here is “material”; it is open to the court to find that a particular non-disclosure was immaterial.

⁶⁵ The Court of Appeal has said that judges must now always produce a schedule of assets as part of their judgments on applications for ancillary relief: *Behzadi v Behzadi* [2008] EWCA Civ 1070, [2009] 2 FLR 649.

⁶⁶ *Jenkins v Livesey (formerly Jenkins)* [1985] FLR 813. See also *Crossley v Crossley* [2008] 1 FLR 1467, which provides an example of where non-disclosure did not result in the agreement being set aside. For a recent case where additional provision was made after non-disclosure came to light see *Kingdon v Kingdon* [2010] EWCA Civ 1251.

⁶⁷ So as to maximise the chances of this being regarded as non-matrimonial property in the context of the exercise of the discretion under s 25 of the Matrimonial Causes Act 1973 and sch 5, part 5, paras 20- 21 of the Civil Partnership Act 2004.

⁶⁸ *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467.

⁶⁹ E Hitchings, *A study of the views and approaches of family practitioners concerning marital property agreements* (2011) p 47; see para 1.49 above.

⁷⁰ Family Law Act 1975, s 90K. See also *Blackmore v Webber* [2009] FMCA Fam 154.

6.62 In most US states, a two-pronged test applies. Failure to make disclosure will not vitiate an agreement unless there is also unconscionability. Section 6 of the Uniform Premarital Agreement Act 1983 provides that:

(a) a premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

...

(2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

6.63 Unconscionability is not defined in the Uniform Premarital Agreement Act 1983; however, the comments in the Act accompanying section 6 provide a number of examples of the use of a standard of unconscionability in other areas of the law, including commercial and family law. An academic has noted that, in practice, section 6(2) has the surprising effect that “an unconscionably unfair agreement could be enforced against a party who was uninformed because she waived disclosure”.⁷¹

6.64 We are not aware of any organisation which has put forward proposals for enforceable marital property agreements without a disclosure requirement. *Supporting Families*, advocated “full disclosure”,⁷² and in their 2009 paper, Resolution recommended “substantially full and frank disclosure”.⁷³

Might disclosure be waived?

6.65 If disclosure is a requirement, might the parties waive it? In the United States, the American Law Institute’s *Principles of the Law of Family Dissolution* do not permit waiver of disclosure. They require either disclosure of assets and income or for the party seeking to enforce the agreement to prove that disclosure was not necessary because the other party was already aware of such matters as would

⁷¹ IM Ellman (reporting on the United States of America) in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2011, forthcoming).

⁷² Home Office, *Supporting Families: A Consultation Document* (1998) para 4.23.

⁷³ Resolution, *Family Agreements – Seeking Certainty to Reduce Disputes: the Recognition and Enforcement of pre-nuptial and post-nuptial agreements in England and Wales* (2009) para 5.10.

have required disclosure.⁷⁴ By contrast, the Uniform Premarital Agreement Act 1983 does permit waiver of disclosure.⁷⁵ Permitting waiver of disclosure has been described as “puzzling”, and a number of states that have otherwise adopted the Uniform Premarital Agreement Act 1983 have “changed its language to avoid the implication that disclosure can be waived”.⁷⁶

- 6.66 To permit waiver of disclosure may be to permit one party to agree to limited financial provision without knowing the extent, perhaps not even roughly, of the other’s resources. It is easy to say that autonomy should extend that far; equally it can be argued that a decision made in ignorance is not autonomous, because it is hard to see that an agreement is freely negotiated unless disclosure is made. To allow waiver may invite satellite litigation about whether or not a waiver was in fact freely given. However, where both parties are content to reach agreement on the basis of reasonable assumptions about each other’s resources, without any detailed investigation, the courts are under the current law slow to interfere.⁷⁷
- 6.67 However, agreements may vary in scope; they may extend only to a specific item of property or range of assets; accordingly, there are circumstances where the parties may themselves choose the extent of disclosure needed, by choosing the scope of their agreement. One concern about “full and frank” disclosure is that it may be a disproportionate exercise – in terms of the time taken and its expense. An agreement that sought only to protect an inheritance would have to be preceded by disclosure of the value of that inheritance (if already received), or its prospective value, but it may be right in such circumstances to allow the parties to waive further disclosure if they choose to do so.

How would disclosure be made

- 6.68 Disclosure in the course of the negotiation, or litigation, of ancillary relief is a detailed exercise, and Form E with its detailed provision for listing and valuing assets is almost invariably used. Some practitioners favour using Form E when negotiating marital property agreements.⁷⁸ However, practice varies; many practitioners use a schedule of assets, in varying levels of detail.⁷⁹
- 6.69 We have been told by practitioners that the negotiations for pre-nuptial agreements closely resemble negotiations of ancillary relief. However there will always be clear practical differences between the way disclosure operates in ancillary relief proceedings and the way that it operates in relation to pre- and post-nuptial agreements.

⁷⁴ American Law Institute, *Principles of the Law of Family Dissolution* (2002), § 7.04(5).

⁷⁵ Uniform Premarital Agreement Act 1983, s 6(2)(ii).

⁷⁶ Connecticut, Iowa and New Jersey: IM Ellman (reporting on the United States of America) in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2011, forthcoming).

⁷⁷ *X v X* [2002] 1 FLR 508 at [62].

⁷⁸ E Hitchings, *A study of the views and approaches of family practitioners concerning marital property agreements* (2011) p 114.

⁷⁹ The schedule “encompassed at one end, a schedule with documentary evidence, to a bare schedule of assets at the other”: E Hitchings, *A study of the views and approaches of family practitioners concerning marital property agreements* (2011) p 46.

6.70 The main difference must be that in ancillary relief proceedings the court is under a statutory obligation to “actively manage cases”.⁸⁰ This includes “regulating the extent of disclosure of documents so that they are proportionate to the issues in question”.⁸¹ In practice this means that the parties will often request further disclosure from the other side, only for the other side to ask the judge to disallow it because it is not proportionate to the issues before the court. As marital property agreements will be agreed outside the court there will be no judge to make a decision about which requests are appropriate and which are excessive. The management of disclosure is down to the parties, who will have to decide – often with legal advice – how much detail they need about particular assets.

The consequences of failure to make disclosure

6.71 It is not practicable simply to provide that a marital property agreement made without full disclosure of each party’s assets cannot be a qualifying nuptial agreement. To do so might be to penalise parties for failing to disclose minor assets or those that could have made no difference to the agreement.⁸² Moreover, for the reasons just given, it is not possible to say precisely what disclosure is, in a way that enables all concerned to check that it has been done. Who is to say whether proper disclosure of the worth of a family company, for example, requires production of three years’ accounts or of five? Essentially that will be a matter of judgement for the parties. The consequences of failure to make disclosure must, therefore, be framed in terms of the practical effect of that failure.

6.72 We think that failure to make disclosure will take, in general, one of two forms. It may be simply a failure to disclose an item of property in existence at the time of the agreement, or to say how valuable it is.⁸³ In that event it is not clear that the whole agreement should fail. A requirement of *material* full and frank disclosure, mirroring the Australian provision, leaves room for assessment of the importance of a particular omission. If the undisclosed asset was particularly important or valuable then that might cause the entire agreement to fail; but the court in then assessing a claim for ancillary relief, treating the agreement on *Radmacher* principles, might well reach the conclusion that an appropriate response to the non-disclosure might be simply for the agreement not to be treated as a qualifying nuptial agreement in respect of an asset that has not been disclosed. So if the agreement was that the husband would forego any capital provision from his wife, she would not be able to enforce that agreement to the extent that she had not disclosed her wealth at the time of the agreement; he would be able to claim capital provision from her undisclosed wealth.

⁸⁰ Family Proceedings Rules 1991, SI 1991 No 1247, r 2.51D(5).

⁸¹ Family Proceedings Rules 1991, SI 1991 No 1247, r 2.51D(6)(d).

⁸² Resolution recommended that parties should be required to provide “substantially full and frank disclosure” so that a requirement of disclosure could “not be misused so that any error or omission ... however, minor, can be relied upon in an attempt to escape its terms”: Resolution, *Family Agreements – Seeking Certainty to Reduce Disputes: the Recognition and Enforcement of pre-nuptial and post-nuptial agreements in England and Wales* (2009) para 5.10.

⁸³ Clearly if there is a misrepresentation of value then, that would fall to be dealt with as a contractual misrepresentation: see paras 6.20 to 6.23 above.

6.73 Alternatively, there might be a failure to disclose material financial information, other than the existence or value of property, that would have made a difference to the other party's decision to enter the agreement or to the terms that he or she was willing to agree. What falls into that category will depend upon the terms of the agreement; not every non-disclosure will be relevant. Examples might be an intention or plan to give up work, a pregnancy,⁸⁴ or an impending promotion or redundancy. Where such information was material, the consequence must be that the agreement as a whole should not have the status of a qualifying nuptial agreement. In some instances, as we have seen, a lack of candour about one's intentions, activities or relationships might be part of a pattern of undue influence, in which case the agreement would be voidable in any event on contractual principles. In such cases we would expect that it would be unusual for a court to come to a conclusion, in ancillary relief proceedings, that it would not be unfair to hold the parties to their agreement.

6.74 **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.**

Do consultees agree?

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

6.76 The message that goes with these provisional proposals is that disclosure is neither to be feared nor resisted, but is in fact a protection as much for the party who makes it as for the one to whom it is made.

6.77 Finally, there will of course be instances – and there may be many – where a requirement of material full and frank disclosure will not be at all troublesome, because the agreement relates not to all of an individual's property, nor to a generic category of asset (for example, an inheritance), but to a specific item or items. An agreement that the wife's car, or the husband's drum kit, shall remain their own property in any event, accompanied by disclosure of the value of the item or items, does not require any further disclosure of other items, and it is hard to imagine that there would be other material facts that required disclosure in the context of such an agreement.

A requirement of legal advice

Advice, or an opportunity?

6.78 Should it be a pre-requisite for the status of qualifying nuptial agreement that the parties received legal advice before they entered into it?

⁸⁴ This is a very good example of a fact that might or might not be a material non-disclosure; if the agreement made provision for the arrival of children it would be hard to argue that failure to disclose a pregnancy was a problem; yet if the agreement was negotiated on the understanding that the parties would both be earning substantially for some years, a failure to disclose a pregnancy and the intention to give up employment could be said to be problematic.

- 6.79 For many people contemplating a marital property agreement, this is not an issue because they choose to negotiate the terms of the agreement through lawyers. Many lawyers have spoken to us about those negotiations and the tension that may be involved; the formation of an agreement is clearly not always a pleasant experience.
- 6.80 But for some, a marital property agreement may reflect a common desire – for example, to safeguard property recovered after a previous divorce or dissolution. The couple may be of one mind. They may not have extensive assets, but rather be concerned with preserving what they have. Should they be obliged, nevertheless, to pay lawyers to advise them on what they have already agreed between themselves?
- 6.81 This is a contentious area. We have already noted that autonomy presupposes a certain level of information, and clearly there are considerable risks involved in entering into a marital property agreement without clear knowledge of what is involved in that decision and in the absence of advice about what might perhaps be being given up. But to force people to take legal advice is an extreme step to take, and might be resisted because there is a natural reluctance to pay money to lawyers.
- 6.82 Legal advice is a pre-requisite to the enforceability of marital property agreements in a number of common law jurisdictions;⁸⁵ and most continental European jurisdictions require agreements to be notarised. English law does not normally insist on anyone taking legal advice, nor on their being legally represented. The exceptions to that arise when someone is giving up a legal protection. Thus in the law of mortgages, a mortgagee's ability to enforce a security may depend upon its having ensured that someone in a close relationship to a borrower took legal advice before allowing their own property to be used as security for the other's debts,⁸⁶ and in employment law, legal advice must be taken in the context of a compromise agreement on redundancy.⁸⁷ Marital property agreements in England and Wales (in contrast to many of those made in continental Europe) are primarily focused on divorce or dissolution. They can almost always be regarded as a contracting out of protection; sometimes mutually, where both spouses are wealthy, but often unilaterally, where one

⁸⁵ See for example the Property (Relationships) Act 1976 (New Zealand). In Australia, section 90G of the Family Law Act 1986 requires parties to receive independent legal advice. The American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) § 7.04(3) suggests that both parties should explicitly receive advice to obtain independent legal counsel and have reasonable opportunity to do so, in order to invoke a rebuttable presumption that consent has been obtained without duress. The commentary to section 6 of the Uniform Premarital Agreement Act 1983 suggests that "lack of [independent legal counsel] may well be a factor in determining whether the conditions [required for enforceability] may have existed".

⁸⁶ *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773.

⁸⁷ See for example Employment Rights Act 1996, s 203(3)(c) where to make an effective compromise agreement on redundancy the employee or worker must have received "independent legal advice from a qualified lawyer as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an industrial tribunal".

spouse is, or is clearly going to be, richer than the other.⁸⁸ By consenting to a qualifying nuptial agreement the parties are agreeing to oust or restrict the jurisdiction of the court if their relationship eventually breaks down. The repercussions of reaching such an agreement may last a lifetime.⁸⁹

- 6.83 It is no surprise therefore that the major policy proposals which have supported the introduction of binding pre-nuptial agreements in England and Wales have all considered that some form of legal advice should be mandated. In *Supporting Families* the Government advocated that both parties should receive independent legal advice.⁹⁰ The judiciary, in their response to those proposals, echoed the calls for separate legal advice for both parties.⁹¹ More recently Lord Justice Wilson has expanded on the benefits of independent legal advice for the party who is giving up something under the agreement:

In most cases it is necessary and in every case it is desirable that the party against whose claim a pre-nuptial contract is raised should have received independent legal advice prior to entry into it. Why so? Because proof of receipt of independent legal advice is often the only, and always the simplest, way of demonstrating that the party entered into it knowingly

... It may be that ... any legislative reform of the law's treatment of nuptial agreement will include ... a requirement that independent legal advice should – in every case, irrespective of its surrounding circumstances have been received in relation to [the agreement(s)] by both parties prior to execution.⁹²

- 6.84 The Centre for Social Justice has recommended that only agreements reached with separate legal representation should be binding. They concluded that separate representation is “fundamental to the basic concepts in English culture of fairness and justice”.⁹³

⁸⁸ One of the solicitors we have talked to takes the view that all marital property agreements are oppressive of the economically vulnerable party, typically women. We think that this is an extreme view, but it has force.

⁸⁹ Preliminary data from research being conducted by Professor Anne Barlow and Dr Janet Smithson indicates that a large majority of those interviewed felt that it was important for both parties to have legal advice before signing a marital property agreement; see para 1.52 above.

⁹⁰ Home Office, *Supporting Families: A Consultation Document* (1998) para 4.23.

⁹¹ N Wilson, “Ancillary Relief Reform: Response of the Judges of the Family Division to the Government Proposals (made by way of submission to the Lord Chancellor’s Ancillary Relief Advisory Group)” (1999) 29 *Family Law* 159, 162.

⁹² *Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 2 FLR 1181 at [137] and [140]. Many other Judges have emphasised the presence of competent legal advice as adding weight to the agreement, for example, Ormrod LJ in *Edgar v Edgar* [1980] 1 WLR 1410, Munby J in *X v X (Y and Z intervening)* [2002] 1 FLR 508.

⁹³ The Centre for Social Justice, *Every Family Matters: An in-depth review of family law in Britain* (2009) p 196.

- 6.85 By contrast Resolution advocate that the parties should merely have a “reasonable opportunity to obtain legal advice” but acknowledge that the point is a “finely balanced” one.⁹⁴
- 6.86 We are not convinced that the idea of a “reasonable opportunity” will provide any benefit at all. Arguably, everyone has opportunity if they have the means; but most of us can think of things on which we would rather spend our money, particularly while getting ready for a wedding. Moreover, people commonly approach marriage with what has been termed “defective risk-evaluation”; they tend to see their relationship as being “above average” and unlikely to end in divorce.⁹⁵ We take the view that a requirement that parties merely have the opportunity to take legal advice will at best be meaningless, and at worst will provide a fertile opportunity to contest the validity of the agreement because there is so much scope for dispute about the meaning of “opportunity”.
- 6.87 Resolution argues that a requirement that the parties take legal advice will allow “mischievous” parties to deliberately not obtain it and thereby vitiate the agreement.⁹⁶ Clearly, individuals have a choice whether or not to take advice. They also have a choice whether or not to enter a qualifying nuptial agreement; if either party prefers not to meet the pre-requisites, and so not to exclude the jurisdiction of the court, they should have that option.
- 6.88 Accordingly we take the view that one of the pre-requisites for the validity of a qualifying nuptial agreement should be that the parties have taken legal advice before its execution. However, what would not be helpful would be to open the door to dispute as to whether or not advice has in fact been taken. The Australian solution to this is to require lawyers to certify that advice has been given; we go on to discuss the content of that certificate below, since there is an issue of just how much the lawyer has to be shown to have done.⁹⁷

The content of the advice

- 6.89 In requiring that the parties take legal advice, the law must not place too great a burden upon legal advisers. Legal advice cannot ensure that there has been no pressure upon the parties, though it may go some way to counter that possibility; nor can a lawyer tell his or her client whether or not the agreement will, in the

⁹⁴ Resolution, *Family Agreements – Seeking Certainty to Reduce Disputes: the Recognition and Enforcement of pre-nuptial and post-nuptial agreements in England and Wales* (2009) para 5.9.

⁹⁵ MA Eisenberg, “The Limits of Cognition and the Limits of Contract” (1995) 47 *Stanford Law Review* 211, 224 to 225; and L Baker and R Emery, “When every relationship is above average: Perceptions and Expectations of Divorce at the Time of Marriage” (1993) 17 *Law and Human Behaviour* 439.

⁹⁶ Resolution, *Family Agreements – Seeking Certainty to Reduce Disputes: the Recognition and Enforcement of pre-nuptial and post-nuptial agreements in England and Wales* (2009) para 5.9.

⁹⁷ We also note the Australian experience that too much formality in the requirements for certification is a mistake; see *Black v Black* [2006] FamCA 972 (and on appeal at [2008] FamCAFC 7), and the amended section 90G of the Family Law Act 1975. We do not go into drafting possibilities here, but merely note that what is wanted is a requirement that the lawyer certify that he or she has given the required advice, rather than any prescribed form of words for that certificate.

event of divorce or dissolution at a much later date, deliver a satisfactory outcome.

- 6.90 In Australia, the legislation relating to Binding Financial Agreements, as initially enacted, required lawyers to give advice not only on the legal effect of any agreement but also on whether the agreement was financially advantageous and one that was prudent for that party to make.⁹⁸ Many family lawyers refused to give such advice, considering that they were not qualified – or insured - to give financial recommendations.⁹⁹ As a result the law has been amended, so as to require lawyers to certify only that they have advised on the “effect of the agreement on the rights of [the party] and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement”.¹⁰⁰ We think that that is the right approach and does not expose lawyers to unacceptable risk.
- 6.91 That approach requires the legal adviser to explain the effect of the agreement. That would, of course, involve an explanation of the nature of ancillary relief, including both the protection it affords and the uncertainties it involves, as well as an explanation of the terms of the agreement itself. Where the effect of the agreement was that the party being advised would be giving up an entitlement, or taking a risk, we would expect that to be made clear. The lawyer might well make reference, by way of contrast, to the alternative of cohabitation rather than marriage and the financial consequences of that choice.
- 6.92 The advice, therefore, cannot be formalistic. It must involve an element of evaluation, while stopping short of advising the client whether or not to sign.
- 6.93 It is inevitable that in some cases one party will pay for the other to have legal advice. That is the case under the current law, where an agreement will have more chance of being upheld if there has been independent advice, and that would continue to be the case if receipt of legal advice were a formal pre-requisite for qualifying nuptial agreements. In itself, that is unobjectionable. But on occasions it leads to abuse. We have been very struck by the tactics brought to our attention by a number of practitioners, and also highlighted in Dr Hitchings’ research,¹⁰¹ whereby one party pays for the other to have inadequate legal advice by funding only a limited time with a solicitor.
- 6.94 Such tactics under the current law are self-defeating, because they are likely to lead to the court finding that there has been pressure, or that the party who had only limited advice did not enter freely into the agreement. If legal advice were a formal requirement, it would have to be clear to all concerned that the advice given must be adequate. We think that this issue will be covered in the

⁹⁸ Family Law Act 1975, 90G(1)(b) (later amended by the Family Law Amendment Act 2003 and further amended by the Federal Justice System Amendment (Efficiency Measures) Act 2009).

⁹⁹ B Fehlberg and B Smyth, “Binding Pre-Nuptial Agreements in Australia: The First Year” (2002) 16 *International Journal of Law, Policy and the Family* 127, 135 to 136.

¹⁰⁰ Family Law Act 1975, 90G(1) (as amended by the Federal Justice System Amendment (Efficiency Measures) Act 2009).

¹⁰¹ E Hitchings, *A study of the views and approaches of family practitioners concerning marital property agreements* (2011) p 49.

requirement that the legal adviser certify that advice has been given; he or she will owe a duty of care to the client and will not be able to certify that the advice has been given unless an adequate explanation of the agreement and its effect has been provided.

The effect of failure to take advice

- 6.95 We suggest that where a party to the agreement has not taken legal advice, it will not be able to be treated as a qualifying nuptial agreement against that party.
- 6.96 Normally, of course, where the parties are both keen for the agreement to have binding status and where the agreement makes provision for both of them, both will take legal advice and the agreement will be accompanied or endorsed by certificates from the lawyer or lawyers concerned. However, there will be cases where one asset or group of assets is being protected rather than an agreement being made that deals with the whole of the financial consequences of divorce or dissolution.¹⁰² In this case, it will be rational for the parties to decide that only one of them will take advice because the agreement is designed to be enforceable only against one of them. In such cases it would make no sense for the agreement to be invalidated because the party who is seeking to preserve his or her property has not been advised.

Provisional proposals

- 6.97 We make the following provisional proposals.
- 6.98 **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.**

Do consultees agree?

- 6.99 **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.**

Do consultees agree?

Joint legal advice?

- 6.100 Most continental European jurisdictions require marital property agreements to be notarised. The couple see a notary together; the notary gives advice for the benefit of the couple and of their family, draws up the agreement, and presides

¹⁰² This would be particularly relevant if qualifying nuptial agreements were introduced in the narrow format to enable a “community of acquests”.

over its execution.¹⁰³ The making of a marital property agreement is not seen as one that generally involves a conflict of interest.¹⁰⁴

- 6.101 Marital property agreements made in this country are rather different. There may well be a conflict of interest between the parties, even where they are of one mind. Is it possible nevertheless to allow the couple to take advice from the same solicitor?
- 6.102 We do not suggest that it should be possible for the requirement for legal advice to be satisfied by the couple seeing a lawyer together. It may be very important for a prospective party to a marital property agreement to speak to an independent third party without the other party present, and this may be a useful protection against undue influence. But a couple might wish to save costs by separately seeing the same lawyer, thereby not duplicating the cost of the solicitor's preparation.¹⁰⁵ This would be extremely unusual in our legal tradition,¹⁰⁶ but we think that it is worth discussion. In theory, there is a strong argument that separate legal advice by one lawyer should be sufficient. Although in many cases couples will want to engage lawyers to represent their interests in the negotiation of the agreement, the advice that should be a pre-requisite for a qualifying nuptial agreement would not involve representation or negotiation, but explanation and information. It can be seen as similar to the function of a notary in continental Europe, rather than to the role of a lawyer in ancillary relief negotiations.
- 6.103 We note that many common law jurisdictions require the parties to take independent legal advice. However, the cost of legal advice is likely to be a major factor in the availability of qualifying nuptial agreements. While we do not think that such agreements should be cheap at the expense of necessary protection, it is equally important that they do not involve unnecessary cost. So we ask consultees to consider the point.
- 6.104 **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

- 6.105 Unlike the other formalities discussed above, timing is an issue that relates uniquely to pre-nuptial agreements which by definition are agreed before a marriage takes place. How far in advance of a marriage should such agreements

¹⁰³ *Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 2 FLR 1181 at [104] to [113].

¹⁰⁴ See the guide produced by Notaires de France, *Choisir son contrat de mariage* (http://www.notaires.fr/notaires/page/kiosque/memos-thematiques?page_id=51), of which a translation can be found at <http://www.reading.ac.uk/nmsruntime/saveasdialog.aspx?IID=7017&SID=34870>.

¹⁰⁵ It would not be acceptable to have legal advice given to both parties by a lawyer who had a close connection with one of them, so that he or she was unable to advise impartially; see Australian case of *Fitzpatrick v Griffin* [2008] FMCA Fam 55.

¹⁰⁶ The only obvious parallel is where a wife (or other closely connected person) allows her interest in the family home to be used to secure her husband's business loan; the same solicitor may act for her, her husband and the lender: *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 at [69] to [74] by Lord Nicholls.

be made? Should there be a requirement that the agreement be executed no less than a prescribed period before the ceremony?

- 6.106 Many of the proposals made regarding pre-nuptial agreements in the last decade have suggested possible time limits for the making of pre-nuptial agreements, including 21, 28 or 42 days before the marriage itself.¹⁰⁷ The courts have never directly commented on the issue of timing but they have expressed a reluctance to uphold agreements made on the eve of the wedding day itself.¹⁰⁸
- 6.107 The practitioners at the focus groups held by Dr Hitchings had a range of experiences. Generally it was felt that clients did not appreciate the work required in negotiating a pre-nuptial agreement. Concerns were repeatedly expressed that “clients have unrealistic expectations of what is required when drafting a pre-nuptial agreement, which can lead to them coming to see a solicitor for the first time only a matter of weeks before the wedding”.¹⁰⁹
- 6.108 The obvious purpose of separating the pre-nuptial agreement from the wedding day itself is to diminish the possibility of pressure to sign an agreement because of the impending wedding; there may be a feeling of compulsion to get the agreement signed (and therefore perhaps insufficient thought given to it), and equally it may be felt impossibly embarrassing to cancel the wedding. There are two major difficulties in the way of reducing that pressure by imposing a timing requirement.
- 6.109 The first is a practical problem: with ceremonies commonly arranged – and deposits paid, for example, on reception venues – many months in advance, it would be hard to find an acceptable legal time limit that really addressed the issue of pressure. The second is a logical problem: any deadline for the making of prenuptial agreements simply diverts the pressure to another day. Rather than it being argued that one of the parties was compelled to sign on the day before the wedding, it could be argued with equal force that they felt compelled to sign the day before the deadline.¹¹⁰
- 6.110 Other common law jurisdictions generally do not mandate time limits for the making of pre-nuptial agreements. Cases turn on their individual facts. Sometimes negotiating an agreement in the final moments of the engagement will be done in such a way that the signing party is put under duress, or may amount to undue influence, and therefore the agreement will be a voidable contract.¹¹¹ In other cases, the fact that the agreement is signed immediately

¹⁰⁷ *Supporting Families* advocated a 21 day time limit: Home Office, *Supporting Families: A Consultation Document* (1998) para 4.23. Resolution in their 2009 paper support a 42 day time limit: Resolution, *Family Agreements – Seeking Certainty to Reduce Disputes: the Recognition and Enforcement of pre-nuptial and post-nuptial agreements in England and Wales* (2009). The Centre for Social Justice recommended 28 days in 2009: The Centre for Social Justice, *Every Family Matters: An in-depth review of family law in Britain* (2009).

¹⁰⁸ *J v J (Disclosure: Offshore Corporations)* [2003] EWHC 3110 (Fam); but contrast *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120; and see para 6.111 below.

¹⁰⁹ E Hitchings, *A study of the views and approaches of family practitioners concerning marital property agreements* (2011) p 58.

¹¹⁰ B Hooker, “Prenuptial Contracts and Safeguards” (2001) 31 *Family Law* 56, 57.

¹¹¹ See the Australian case of *Blackmore v Webber* (2009) FMCA Fam 154.

before the marriage does not mean that there has been any pressure at all.¹¹² Often the parties will have been discussing the contract for many months and the mere act of signature is not particularly significant.¹¹³

- 6.111 So we think that the imposition of a timing requirement will not provide any useful protection, and that existing contractual doctrines are well able to cope with this issue. But we ask consultees to tell us if they disagree.
- 6.112 **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.**

Do consultees agree?

- 6.113 The foregoing discussion assumes that timing is relevant only to pre-nuptial agreements. In one context it may also be relevant to post-nuptial agreements. There may be a concern that such agreements may be negotiated by one party with a view to imminent divorce or dissolution, but without disclosing that motivation. This is a particular risk for agreements like that in *NA v MA*,¹¹⁴ which we can term “reconciliation agreements”; and we have already noted that such agreements are attended by additional risks.¹¹⁵ It has been pointed out that “if the reconciliation is fairly quickly unsuccessful this could suggest that the spouse demanding economic concessions before reconciliation was not attempting reconciliation in good faith, but was merely trying to structure a favourable divorce settlement”.¹¹⁶ In at least one US state this has proved sufficient to invalidate the agreement.¹¹⁷ Additionally, in Minnesota, the courts are unable to uphold any post-nuptial agreement which is negotiated less than two years before divorce is initiated, unless it would be “fair and equitable” to do so.¹¹⁸
- 6.114 We make no provisional proposals about timing requirements for post-nuptial agreements, but would like to hear from consultees if they think that any such requirements would be useful.

Further requirements

- 6.115 So far, we have provisionally proposed that a qualifying nuptial agreement – if such agreements were to be introduced – should be contractually valid (and therefore not vitiated by duress, undue influence or misrepresentation) and

¹¹² For example, *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120 where the agreement was signed one day before the wedding but the court concluded the parties had had ample time to consider its content.

¹¹³ For example in the Floridian case of *Francavilla v Francavilla* (2007) 969 So 2d 522, the parties signed the final agreement less than one hour before the wedding ceremony. Nevertheless, the court concluded that there had been no duress, noting that the agreement had been preceded by three months of negotiation, substantial disclosure, and the appointment of independent counsel for the wife.

¹¹⁴ [2006] EWHC 2900 (Fam), [2007] 1 FLR 1760.

¹¹⁵ See para 6.31 above.

¹¹⁶ JT Oldham, *Divorce, Separation, and the Distribution of Property* (2010) § 4.06.

¹¹⁷ *Fogg v Fogg* (1991) 409 Mass 531, 567 NE2d 921.

¹¹⁸ Minnesota Statutes, s 519.11d.

should be made in writing and preceded by legal advice and disclosure. In the light of those safeguards, is anything more needed? Two related possibilities require consideration. One is the more general requirement, found in a number of jurisdictions, of fairness in the process of making of the agreement. The other is to impose restrictions upon the content of the agreement.

A requirement of fair process

- 6.116 We look first at fairness in the making of the agreement. In Australia, agreements will be disregarded if one of the parties engaged in “unconscionable” conduct “in respect of the making of a financial agreement”.¹¹⁹ In New Zealand, the court retains the right to set aside agreements on the basis that they “were unfair or unreasonable in the light of all the circumstances at the time it was made”.¹²⁰
- 6.117 We take the view that the only reason that such a provision might be needed would be to provide protection from pressure that came, not from the other party to the contract, but from the family, friends, or culture of either party. Such pressure can be huge, and might manifest itself across all sectors of society. One practitioner told us about a prospective spouse compelled to sign a pre-nuptial agreement, against the explicit advice of her lawyers, by her relatives who had spent over £100,000 on the wedding and who would not tolerate a cancellation; there may be many other such examples.
- 6.118 In many cases, particularly where pressure comes from a family or community, the other party will also be involved in the pressure and the law of contract will provide the necessary protection from duress or undue influence. Do we need an additional provision to cater for those cases where it will not? It may be that the other party was unaware of the pressure (which might have come from the victim's own family), or was also under pressure to make the agreement or to get married.¹²¹
- 6.119 In the United States, some states deal with this by recognising that coercion sufficient to constitute duress can emanate from outside the relationship. For example, when a young unmarried woman signed an unfavourable pre-nuptial agreement, the court in Alabama refused simply to uphold it by way of summary judgment, noting that the conservative atmosphere of the town in which the woman lived and the lack of acceptance of unmarried mothers might have created a coercive atmosphere which compelled her to sign.¹²² In another example the Ohio courts concluded that a Muslim man who was presented with a contract by the Imam two hours before the ceremony, and hurriedly agreed that he would pay his prospective spouse \$25,000 on divorce, had been coerced.¹²³
- 6.120 A requirement of fairness in the formation of the agreement would have the merit of providing protection in this kind of case. It could be framed generally, in which case it could well develop so as to encompass cases that would otherwise be

¹¹⁹ Family Law Act 1975, s 90K(1)(e) (as amended).

¹²⁰ Property (Relationships) Act 1976, s 21J(4)(c).

¹²¹ See *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120, 131.

¹²² *Ex parte Williams* (1992) 617 So 2d 1032.

¹²³ *Zawahiri v Alwattar* [2008] Ohio 3473.

dealt with in the contractual doctrines of duress and undue influence; or it could be framed specifically to refer to pressure emanating otherwise than from the other party to the contract.

- 6.121 The disadvantage of such a provision would be that it might be far too open an invitation to challenges made in bad faith. A husband who claimed he was pressurised by his own mother into entering the agreement might be able to escape the consequences of an agreement if his mother were prepared to give evidence to support his claim. It may be that there is just too much scope for collusion here. It may also be the case that a wider requirement of fairness, going beyond the law of contract, is too protective and gives too little credence to the parties' ability, as adults, to make their own decisions. There is no similar protection within the broader law of contract, where bad decisions may equally be made under pressure from third parties.

The content of the agreement

- 6.122 A different issue is whether there should be any restriction upon the content of the agreement, beyond what is imposed by the general law of contract. American pre-nuptial agreements are notorious for their non-financial provisions; examples include a promise to give a dinner party twice a week, or to accompany the other spouse to the ballet once a month.¹²⁴ American courts cannot enforce such clauses;¹²⁵ if included in a marital property agreement here under the current law they would simply be ignored when the agreement was considered within the ancillary relief exercise.
- 6.123 We have already noted that terms that were contrary to public policy, or that encroached upon other aspects of family law such as the grounds for divorce or dissolution, or the provisions of section 1 of the Children Act 1989, would not be enforced by the courts. Such terms, unless they were clearly severable, could invalidate the agreement. Should the law go further and expressly forbid such terms?
- 6.124 We think that it would be unnecessary to take such a step because the law of contract will provide the relevant "policing": those who draft agreements will take care not to include within them terms that might invalidate the whole agreement. So we make no provisional proposal to that effect, but we seek consultees' views generally as to whether further rules are needed to control the content of qualifying nuptial agreements.

¹²⁴ LJ Weitzman, *The Marriage Contract: Spouses, Lovers and the Law* (1983) pp 298 and 438.

¹²⁵ AA Marston "Planning for love: the politics of prenuptial agreements" (1997) 49 *Stanford Law Review* 887, 900. Such clauses are also unenforceable in, for instance, Germany: A Sanders, "Private Autonomy and Marital Property Agreements" [2010] *International and Comparative Law Quarterly*, 571.

6.125 **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.

6.126 We note finally one further option suggested to us, namely that it should be possible for a couple to seek prior approval of their qualifying nuptial agreement by the court. Such a procedure could not be made compulsory, but the purpose of seeking approval, for those who could afford it, might be to certify that it had been formed fairly, or that it contained no inappropriate provisions. However, we doubt that the court would be able to certify that there had been no duress or undue influence in the forming of the agreement. Nor could such approval guarantee that the effect of the agreement – at an unknown date in the future – would be appropriate; a judge is arguably no better equipped than the parties themselves to foretell what financial triumph or disaster might befall them in the future. We doubt whether the judiciary would relish the task; the judges of the Family Division have told us that they would be opposed to such a procedure. Accordingly we make no proposal about prior court approval of agreements.

VARIATION OF A QUALIFYING NUPTIAL AGREEMENT

6.127 Agreements may be updated or re-negotiated, before or after the wedding or civil partnership ceremony – perhaps years after.¹²⁶ Sometimes that process will result in a fresh agreement; sometimes all that is needed will be a variation of the existing agreement. In either case, we take the view that whatever pre-requisites were imposed for qualifying nuptial agreements would have to be complied with if the agreement were to retain that status. The need for the parties to understand the legal implications of what is happening, and the need for full disclosure, are as relevant to a variation as to the original agreement. The process of meeting the requirements is likely to be quicker and easier for a variation than for the making of an initial agreement; disclosure, for example, would merely need to be updated.

6.128 **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.**

¹²⁶ *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298.

PART 7

THE EFFECT OF A QUALIFYING NUPTIAL AGREEMENT

INTRODUCTION

- 7.1 We have asked consultees, in Part 5 above, if they think that the law should be changed so as to introduce “qualifying nuptial agreements”. Such agreements would exclude the court’s discretionary jurisdiction in ancillary relief and could be enforced as contracts. We offered two models for reform: a “broad” version that could encompass an unlimited range of financial provisions, and a “community of acquests” model that could protect only pre-acquired, inherited and gifted property. Without expressing a view as to whether or not either reform should take place, we discussed in Part 6 the possible requirements – including those imposed by the law of contract and some possible additional safeguards – for the validity of a qualifying nuptial agreement; we explained why we agree with the approach taken in other jurisdictions, namely that more than the law of contract is needed if agreements are to have the dramatic effect of ousting the court’s jurisdiction in ancillary relief.¹
- 7.2 In this Part we take the hypothesis one step further and look at the effect that a qualifying nuptial agreement might have in the event of separation, divorce or dissolution:² what is to happen at this point if either party is not now content with the agreement?
- 7.3 Clearly one approach will be to contest its status as a qualifying nuptial agreement. We noted in Part 6 that no agreement can be immune from challenge. A successful challenge might have the effect of partially invalidating the agreement. If the problem was failure to disclose an asset, for example, that would mean that the agreement could not be treated as a qualifying nuptial agreement so far as that asset was concerned, and that there could be an application to court for ancillary relief in respect of that asset. Alternatively, if there was a more fundamental flaw in the agreement – contractual invalidity, perhaps – it would not be a qualifying nuptial agreement at all. However, it would not disappear. An attempt to enforce it as a contract would fail, leaving the other party free to make an application for ancillary relief; if the challenge came by way of an ancillary relief application, the application would be allowed to proceed. Either way, the existence of the agreement would fall to be considered as part of all the circumstances of the case and might still be given considerable weight by the court, in accordance with the principle enunciated by the Supreme Court in *Radmacher v Granatino*.³
- 7.4 But assuming that it is not disputed that the agreement is a qualifying nuptial agreement, or that any challenge to that status is unsuccessful, should that be

¹ See para 6.49 above.

² Depending upon whether the relationship is a marriage or a civil partnership, and upon whether the agreement is expressed to take effect on the formal ending of the relationship or on separation.

³ [2010] UKSC 42 at [75].

the end of the story? Should the agreement be enforceable, whatever it says? Or might there still be some scope for the operation of ancillary relief, not because of the way the agreement was formed, but because of the effect it would have if it were enforced? All of the proposals for reform of the law of marital property agreements put forward to date have suggested that there should be circumstances where the agreement can be modified or set aside if its effect were, for example, to cause “significant injustice” or “substantial hardship”.⁴

- 7.5 One of the objectives of our project is to ask consultees to stand back from the specific reform proposals currently in the public domain and examine the alternative generic approaches and their strengths and weaknesses as a matter of principle, and to ask how they would work in practice. It is to that examination that we now turn.
- 7.6 We discuss in this Part a number of options which we believe cover the available possibilities. They may be combined, and they may be expressed in terms that make them “harder” or “softer”, as we discuss below. But we think that any possible reform can be analysed in terms of the ideas we present here. They are not expressed in the same terms as those put forward by others, although readers will be able to work out whereabouts particular published models fall within the range of options we describe.
- 7.7 The rest of this Part falls into three sections. The first looks at two things that we think, as a matter of public policy, a qualifying nuptial agreement must achieve, so that the court could make an order in ancillary relief to the extent – but only to the extent – that the agreement failed to do so. We take the view that those two requirements are essential, whatever the permitted scope of the qualifying nuptial agreement – whether it is unlimited in scope or only permits a “community of acquests”.
- 7.8 The second is a discussion of possible further safeguards. We ask consultees to consider what sort of provision might be made to enable an application for ancillary relief despite the existence of a qualifying agreement. Such a provision would not mean that the agreement was no longer a qualifying nuptial agreement in the circumstances prescribed, nor that the court could set aside the agreement or make an order for ancillary relief without reference to it. It would still be a qualifying nuptial agreement, but the court would be able to make an order, supplementing or supplanting it only insofar as it failed to meet the prescribed criteria. Which safeguards are appropriate may depend heavily upon which model for reform – the broad version or the narrow version – is chosen. We suggested in Part 5 that, whilst the idea of ousting the court’s discretion does raise significant concerns about social cost, a “community of acquests” model might be less vulnerable to those concerns. It might therefore merit fewer safeguards (and offer more certainty).
- 7.9 Finally we look at a number of further issues that we think arise from this discussion, namely:

- (1) identifying property that has changed over time;

⁴ See paras 1.46 and 1.47 above.

- (2) agreements that seek to exclude applications under the Inheritance (Provision for Family and Dependents) Act 1975; and
- (3) the implications of reform for “international couples”.

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

- 7.10 We take the view that the court’s jurisdiction in ancillary relief must always remain available to supplement a qualifying nuptial agreement – whatever its scope – in two circumstances determined by broader legal and social considerations. Those considerations transcend the interests and autonomy of the parties to the agreement. They are, first, the financial responsibilities of parents towards their children and, secondly, the principle that one cannot ask the state to shoulder one’s financial responsibilities for one’s partner.
- 7.11 We have looked at both these issues in our discussion of the current law. Among the purposes of the court’s discretion in the ancillary relief exercise is to protect interests beyond those of the parties, including the interests of children and the public purse.⁵
- 7.12 We take the view that it would be wrong for the terms of a qualifying nuptial agreement to enable either party to contract out of their financial responsibilities to their children. As Lord Phillips said in *Radmacher v Granatino*:
- A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family.⁶
- 7.13 Of course, some contractual arrangements between parents will deal not with the level of provision that is to be made for the children, but with the way in which it is to be made – for example, which asset is to be liquidated to support a child at university. That is essentially an arrangement between the parents about the way in which their property is to be used, and should not jeopardise the status of the qualifying nuptial agreement.
- 7.14 Equally, we find it hard to imagine any circumstances under the current law where the court would follow the terms of a marital property agreement that left either party dependant upon state benefits where that could have been avoided by making a different order in ancillary relief; certainly we are aware of no cases where the court has done so.⁷ A number of other jurisdictions, including Australia, make a similar provision in the relevant statute.⁸

⁵ J Herring, “Why Financial Orders on Divorce Should be Unfair” (2005) 19 *International Journal of Law, Policy and the Family*, 218, 220 to 223.

⁶ [2010] UKSC 42 at [77].

⁷ There will nevertheless be cases where resort to social security is inevitable; our point is that if that situation would be the result of the terms of the marital property agreement, then the agreement cannot oust the court’s discretion. Either party must be free to make an ancillary relief application in order to prevent that outcome.

⁸ Family Law Act 1975, ss 90F(1) and (1A); similarly, a number of the US jurisdictions that have adopted section 6(b) of the Uniform Premarital Agreement Act 1983.

- 7.15 So far as a qualifying nuptial agreement is concerned, those two points should be explicitly set out in the statute.
- 7.16 **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.**
- 7.17 The practical effect of these provisions would be to enable either party to make an application for ancillary relief if the qualifying nuptial agreement failed to make proper provision for the children,⁹ or if he or she was going to be dependent upon state benefits as a result of the agreement. The court's role would be, in effect, to supplement the agreement by doing what it failed to do. There would be no need, on the basis of the provisional proposals we have made here, for the court to re-open the entire agreement.¹⁰
- 7.18 In practice we think that these provisions would function as a warning to the parties not to conclude an agreement that left either party below subsistence level, or failed to provide for the children what the courts in ancillary relief would give. Negotiators would aim to avoid the risk of ancillary relief proceedings; these provisions would protect the children, but would also provide something of a limited protection for the parties themselves. They would very rarely have any practical effect at the point when an agreement came to be enforced, because a sensibly negotiated agreement would not leave open that possibility, except where unexpected circumstances – bankruptcy, failure of a business, dramatic loss in value of an asset – meant that the effect of an agreement was quite different from what the parties had intended or anticipated. And the requirement that the parties take legal advice, discussed in Part 6,¹¹ would mean that they would be warned if the terms of their agreement were such that there was a risk of unenforceability.
- 7.19 The public interest, therefore, provides a basic safety net for the parties. How much further, if at all, should the law go in protecting people from the consequences of their agreement?

FURTHER SAFEGUARDS: THE OPTIONS

- 7.20 In looking at the different available safeguards we are asking how “strong” a qualifying nuptial agreement should be. Again, we make no assumption about

⁹ See, for example, *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 at [44] where it was not disputed that the agreement “did not contain ... proper financial arrangements for the children [and that] the court had to intervene to provide for them”.

¹⁰ Note that, of course, no agreement between parents could prevent an application by a child himself or herself the Children Act 1989, sch1; see the discussion at paras 2.24 and 2.25 above.

¹¹ See para 6.78 below.

this, although it will be clear that we find some models more persuasive than others. It will also be clear that some options are suitable for a “community of acquests” model of qualifying nuptial agreement, while others are more suited to an unlimited version.

- 7.21 We are very conscious of the danger that the incorporation of too many safeguards will render reform pointless; it has been observed, for example, that there were so many “get-outs” in the proposals in *Supporting Families* that, had those proposals been enacted, the results of the subsequent ancillary relief cases would have been no different.¹² So while we value the protections built into ancillary relief, we understand that the introduction of qualifying nuptial agreements would enable people to opt for predictability rather than protection. The question is, how far should that be allowed to go?
- 7.22 In the discussion that follows we assume that the two provisions mentioned above (regarding children and social security)¹³ are not engaged, because the qualifying nuptial agreement in question neither dilutes the parties’ financial responsibility to their children nor casts a burden on the public purse.

1. No further safeguards: a “cast-iron” agreement

- 7.23 It would in theory be possible to go no further. The law might impose no provisos at all and open no door to discretion beyond that we have just set out. So long as the agreement was a qualifying nuptial agreement, made proper provision for the children and did not leave either party reliant on state benefits, it would stand, however disastrous the effect upon the parties, however unforeseen subsequent events.
- 7.24 Some of the people who have talked to us advocated such a model; but when pressed as to particularly difficult outcomes they retreated from it. It would not prevent disagreement or litigation; but it would focus that litigation upon the status of the qualifying nuptial agreement.
- 7.25 This would, essentially, be a contractual dispute: the party wanting to enforce the agreement would seek specific performance of its terms, while the party seeking to avoid the agreement would raise as a defence the presence of some vitiating factor (for example, mistake, duress or undue influence) or the absence or inadequacy of one of the additional safeguards discussed in Part 6 (disclosure and legal advice). It would be for the party bringing the claim to decide the appropriate venue to commence the litigation but, as a contractual dispute, this is likely to be a county court or the Queen’s Bench or Chancery Divisions of the High Court, depending on the value of the claim. It is also possible that one party may seek ancillary relief, despite the existence of a pre- or post-nuptial agreement. It would be for the other party to raise the agreement as a defence.

¹² N Lowe, *Pre-nuptial agreements: the English position*, text of the address prepared for the International Society of Family Law’s Colloquium on Family Law delivered on 11 October 2007 in Toledo, Spain, p 10 (available online at http://www.indret.com/pdf/508_en.pdf).

¹³ See para 7.16 above.

Ancillary relief claims must be commenced in a divorce county court, which has discretion to transfer the case to a different court.¹⁴

- 7.26 We note that although most of the European jurisdictions appear to follow something like a “cast-iron” format, because their marital property agreements determine the ownership of property with little or no possibility of escape, for the most part they do not allow for maintenance to be determined by agreement. They are therefore not all-encompassing agreements, and issues such as hardship and compensation remain open for consideration by the courts.¹⁵
- 7.27 It may be that this “cast-iron” model is the one demanded by the logic of autonomy. But it is almost certainly unacceptable as a matter of public policy, and alien to the culture of our family law, unless qualifying nuptial agreements are restricted to a “community of acquests” model.
- 7.28 In other words, if qualifying nuptial agreements were to be unlimited in their scope, more safeguards would be needed. But for a “community of acquests” model, which could encompass only pre-acquired, gifted or inherited property, it is arguable that no safeguards would be needed beyond the requirements discussed above, to safeguard children and the public purse. Equally it is arguable that something more is needed to protect the parties’ needs, as we discuss below.

2. Safeguards based on time and events

- 7.29 The simplest type of safeguard might be time: it would be possible to provide an automatic “sunset clause” so that agreements would cease to have effect after a certain period. That seems arbitrary, but it recognises the fact that as time goes on, an agreement may well become less and less appropriate.¹⁶
- 7.30 A better approach might involve a provision that a qualifying nuptial agreement excludes the court’s jurisdiction in ancillary relief except insofar as it fails to provide for a specified event, or type of event that takes place after the agreement is made.
- 7.31 *Supporting Families* did something rather more far-reaching.¹⁷ It was proposed that after the birth of a child the agreement would be of no effect; if the parties still wanted to determine by contract the financial consequences of the ending of the relationship, they would have to make a fresh agreement. The difficulty with that approach is its dramatic effect in wiping out the whole agreement. It might do so in just the circumstances in which the couple wanted it to take effect, and it might do so even if it made generous provision for the child and both parents.

¹⁴ Matrimonial and Family Proceedings Act 1984, ss 33 (3), 36A(6), 39.

¹⁵ See para 4.14 above.

¹⁶ Most of the people interviewed by Professor Anne Barlow and Dr Janet Smithson for their public attitudes research agreed that the longer the marriage, the less influence a pre-nuptial agreement should have on the financial outcome of divorce; see para 1.52 above. See also *Radmacher v Granatino* [2010] UKSC 42 at [80].

¹⁷ See para 1.44 above.

- 7.32 We think that that would not be acceptable. Under discussion here is a somewhat softer safeguard, enabling orders to be made in ancillary relief, despite the existence of the agreement, but only to the extent that the agreement did not make provision, or did not make adequate provision, for one of a list of events or an event of a particular kind. That might be very effective in rescuing people from the unexpected consequences of an agreement, while assuring them of its validity in the circumstances for which it makes provision. The agreement would be “cast-iron” unless something from the list happens.
- 7.33 Formulating the list would be difficult. Few events are so easily and objectively verifiable as the birth of a child. Other possibilities include serious disability of either of the parties, or serious financial disaster – particularly bankruptcy, but perhaps extended to significant loss of value in a business or other asset. The less clearly defined these events are, the less useful is the qualifying nuptial agreement in providing certainty or respecting autonomy, because there is scope for dispute as to whether the event has occurred.
- 7.34 It would also be necessary to state what sort of failure would re-open the possibility of ancillary relief. Would the supervening event have to make the agreement impossible to perform? Or would the agreement stand unless it made specific provision for that event? Or unless it made fair or adequate provision?
- 7.35 Safeguards based on events are therefore rather more difficult to formulate than might at first sight be supposed. They are unlikely to be useful for a “community of acquests” model of qualifying nuptial agreement. An objective of such agreements would be to counter the problems of uncertainty posed by the current law, where apparently non-matrimonial property can become subject to sharing as time goes on; it would therefore be appropriate that agreements in that form should be durable.
- 7.36 For a broader version of qualifying nuptial agreements, safeguards based on the passage of time or the occurrence of certain events might be appropriate, although, as discussed, difficult to formulate.

3. Fairness as a safeguard

- 7.37 For many, the most intuitively attractive safeguard would be to provide that the agreement is enforceable unless it turns out to be unfair (or “unjust”; we take both terms in this context to mean the same, and to refer to the effect of the agreement and not to the circumstances in which it was made).
- 7.38 Clearly a provision that a qualifying nuptial agreement was enforceable unless it was unfair would make reform ineffective, because that is the basis of the court’s discretion in any event.¹⁸ So there would be no difference between a qualifying nuptial agreement and any other marital property agreement.
- 7.39 Should the law provide, instead, that a qualifying nuptial agreement is enforceable unless it causes something that might be described as serious, or manifest, unfairness? In other words, a qualifying nuptial agreement might be

¹⁸ See para 1.10 above.

regarded as unfair but still be enforced. Only if it caused *serious* unfairness would it be vulnerable to the court's discretion.

- 7.40 In New Zealand, the legislation provides that the court “may set the agreement aside if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice”.¹⁹ Although the legislation does not define “serious injustice” it does provide a list of matters to which the court must have regard, including “whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties)”.²⁰
- 7.41 Domestic proposals for reform have all recommended making the enforcement of prenuptial agreements conditional on meeting standards of fairness by assessing, for example, whether enforcement would cause “significant injustice”,²¹ or “substantial hardship”.²² Courts have in the past adopted similar standards in deciding how much weight to give to prenuptial agreements in the context of section 25 of the Matrimonial Causes Act 1973.²³
- 7.42 A safeguard referring to “serious injustice” or similar appears to allay many misgivings about marital property agreements, by allowing free rein to contractual autonomy while retaining a safeguard in case things go too badly wrong and, of course, deterring the negotiation of significantly unfair agreements.²⁴ The idea of significant or serious injustice responds readily to concerns about hardship or unforeseen effects; it is certainly not confined to financial considerations. Many lawyers, particularly judges, say that this is something they know when they see it.
- 7.43 There are some downsides to this safeguard. One is the inherent uncertainty in words such as “manifest” or “serious”. When is it “unjust”, and when is it “significantly unjust”, to expect a former spouse to accept provision for needs at a level less than the current law provides? And is that level absolute – so that it would mean the same amount of income in all cases – or is it relative to the lifestyle enjoyed during the marriage?

¹⁹ New Zealand Property (Relationships) Act 1976, s 21J(1).

²⁰ New Zealand Property (Relationships) Act 1976, s 21J(4)(d).

²¹ Home Office, *Supporting Families: A Consultation Document* (1998) para 4.23; Resolution, *A more certain future – Recognition of pre-marital agreements in England and Wales* (2005) para 7.7; The Centre for Social Justice, *Every Family Matters: An in-depth review of family law in Britain* (2009) p 34.

²² Resolution, *Family Agreements – Seeking Certainty to Reduce Disputes: the Recognition and Enforcement of pre-nuptial and post-nuptial agreements in England and Wales* (2009) para 5.5.

²³ See, for instance, the comments of Baron J in *NA v MA* [2006] EWHC 2900 (Fam) at [12] noting the application of a test of “fairness/manifest unfairness”.

²⁴ One solicitor interviewed at Dr Hitchings' focus groups told us “the trick is to be mean ... but not so mean as to be outrageous or to offend the judge and the judge feel [sic] he has to get involved”. E Hitchings, *A study of the views and approaches of family practitioners concerning marital property agreements* (2011) p 75.

- 7.44 Another concern is that injustice is not a unitary concept.²⁵ It is not always obviously fair or unfair to share inherited or gifted property, for example. The basic assumptions of, for example, French law and Dutch law differ on precisely this point.²⁶ So any provision involving the idea of fair or just outcomes is arguably irrelevant to the narrow “community of acquests” model of qualifying nuptial agreement. If it is to be applied to an unrestricted model of agreement, it may have to be developed further so as to enable different ideas of fairness to be accommodated by the courts.
- 7.45 A fairness safeguard would have to accommodate the view that injustice may not be only financial. In some cultures it is regarded as clearly fair that men and women should be treated unequally and that financial provision for women on divorce may be minimal because they can return to their parents’ homes. Any reform model that rests on the concept of injustice may have to be developed so as to spell out the limits of fairness; what is to happen if a contract generates a result that is regarded as fair in a particular community but would not be so regarded elsewhere?
- 7.46 We also wonder if the use of injustice, however “manifest” or “significant”, is really satisfactory as a reform model in terms of preventing litigation. If there is to be reform, there has to be provision that places the parties clearly beyond the reach of discretion except in reasonably well-defined circumstances. There is a danger that if there is provision for the agreement to be modified or set aside on the grounds of fairness or justice there may be simply too much scope for the parties to litigate. And while the court would be able to make orders in ancillary relief only to the extent that the agreement was substantially unfair, unfairness is such a broad concept that it must be able to open up all aspects of the agreement, capital and income, needs, sharing and compensation.
- 7.47 Overall, it is not clear that a safeguard of “manifest injustice”, or the like, offers any more certainty than does the principle in *Radmacher v Granatino*.²⁷

4. The protection of needs and compensation

- 7.48 An alternative safeguard would be a provision that a qualifying nuptial agreement excluded the jurisdiction of the court in ancillary relief except insofar as either party’s needs were not met; it might also enable the court to intervene to provide compensation. This model duplicates, but goes beyond, the requirement that the contract should not leave either party dependent upon state benefits.²⁸
- 7.49 We discussed in Part 2 both the jurisprudence surrounding provision for needs, and the threefold objectives of ancillary relief, namely:
- (1) provision for needs;
 - (2) payment of compensation; and

²⁵ See para 3.58 above.

²⁶ See para 4.15 above.

²⁷ [2010] UKSC 42.

²⁸ See para 7.16 above.

(3) sharing.

The presence of a qualifying nuptial agreement could mean that the court's jurisdiction is excluded so far as one or two, but not all three, of those objectives are concerned. That would allow a couple to opt out of sharing with certainty.

- 7.50 In Part 2 we described provision for needs as one of the most characteristic strengths of ancillary relief. The courts have gone to considerable lengths over the years to ensure that needs are adequately provided for after divorce, giving priority to those of the children, if any, and to those of the parent with whom they live. Provision for needs is not limited to an income stream, but encompasses the long-term provision of a home; it also includes provision for a former spouse whose career sacrifice during the marriage means that he or she is now not able readily to obtain employment. And "needs" is a relative concept, measured with reference to the couple's lifestyle during the marriage.²⁹
- 7.51 Provision for a partner's needs can be seen as the bed-rock of ancillary relief in this jurisdiction; it is currently a responsibility that, where assets allow, people cannot escape if they have taken the step of marriage.³⁰ In a context where women and those with caring responsibilities generally do less well after divorce,³¹ provision for needs is a major social concern. There is a great deal to be said for a safeguard to ensure that it is not possible to contract out of either making or receiving provision for needs following divorce or dissolution.
- 7.52 Compensation, as we discussed above,³² is not a clearly defined concept, and it is arguable that it simply lifts one particular form of provision out of "needs". So a safeguard that referred to both needs and compensation would be a more reliable protection from serious economic disadvantage. We noted that both Lord Phillips, speaking for the majority, and Lady Hale, in *Radmacher v Granatino*, identified provision for both needs and compensation as important elements in the assessment of the fairness of an agreement.³³
- 7.53 A provision that ring-fenced needs, or needs and compensation, would leave open considerable discretion for the court to supplement the agreement where it fell short of this requirement. The model is therefore vulnerable to criticism that there would be too much potential for litigation and insufficient certainty.

²⁹ See para 2.26 above.

³⁰ In addition, of course, to providing for the children of the relationship; see para 7.16 above.

³¹ K Rake (ed), *Women's Incomes over the Lifetime: Report to the Women's Unit, Cabinet Office* (2000). See also S Jenkins, *Marital splits and income changes over the long term* (Institute for Social & Economic Research, No 2008-07, 2008) pp 7 to 20.

³² See paras 2.55 and 2.56 above.

³³ [2010] UKSC 42 at [81] and [178].

7.54 We take the view that the effect of such a model would, again, be to police negotiations and deter the making of agreements that gave rise to hardship or to great inequality of lifestyle. Under the current law, agreements that depart too far from what the courts see as a fair outcome will not be given great weight in ancillary relief proceedings, and it is well-established that that acts as a check on particularly inequitable agreements. In the same way, if the scope of enforceable agreements were widened by the introduction of qualifying nuptial agreements, subject to the requirement that needs be met, we take the view that for the most part the desire not to jeopardise the agreement and not to have to go through litigation would itself ensure that needs were sensibly provided for. On the occasions when litigation was necessary it would be narrow in scope, because the agreement would be re-opened only insofar as needs were not met. And of course in cases where each party is able to meet his or her own needs following divorce or dissolution, this model would give considerable freedom.

7.55 So a qualifying nuptial agreement following this model (if not combined with any of the other safeguards) allows the parties free rein to make whatever arrangement they wish provided that needs are not in issue (and provided, of course, that assets do outstrip needs); or provided that neither needs nor compensation are in issue. A strength of this model is that it leaves no scope for an agreement that provides, to put it bluntly, that one or other party gets nothing or very little. Nor would there be any point in concluding an agreement in the general run of cases where there is barely enough to go round. To provide for such a model safeguards the vast majority of couples – and in particular the economically weaker party in each such couple – from a reform that takes protection away from them, while meeting some of the greatest concerns of those who argue for reform. It would mean that the following types of agreements – for all of which there appears to be some public desire – could be relied upon with certainty provided that needs (or needs and compensation requirements) were met:

- (1) an agreement that either or both parties' pre-acquired or inherited property would not pass to the other party;
- (2) an agreement that property recovered by one party in ancillary relief following a previous marriage or civil partnership will not be shared with the new partner;
- (3) an agreement that the future profits of a particular business will not be shared; and
- (4) an agreement that the parties' property will all be non-matrimonial, so that none of it is shared in the event of divorce or dissolution.

7.56 We have asked consultees who favour the introduction of qualifying nuptial agreements to choose whether such agreements should permit all four of the arrangements just listed, and indeed other arrangements too, or only the first two – those first two being characteristic of the “community of acquests” model. A safeguard that referred to needs and compensation could be applied to either model.

7.57 A similar approach is followed in most continental European jurisdictions, where a choice of matrimonial property regime (which might be one of total community,

one of “community of acquests”, or of separation of property) has no bearing on the issue of maintenance; very few jurisdictions allow spouses to contract out of maintenance or to make a contract regarding maintenance other than as a separation agreement.³⁴ “Maintenance” in the continental European context may mean something rather narrower than “needs” in the context of ancillary relief, and in particular is unlikely to include long-term capital provision for housing.³⁵ So maintenance is a rather different concept from “needs”; it may be somewhat less generous, but that is not easy to determine without detailed analysis of the housing market and culture, the labour market, and the social security regimes with which the law operates. But the structural similarity is obvious. The French *prestation compensatoire* is a provision for compensation which a marital property agreement cannot exclude.³⁶ Common law jurisdictions, by contrast, do not operate the clear distinction between capital and income that lies behind the continental regimes. Nevertheless, a number of American states mirror the European approach by providing not only that it is not possible to contract out of one’s responsibilities to one’s children, but also that it is not possible to contract out of “alimony”, which generally refers to provision for needs/maintenance by way of periodical payments.³⁷

4a. A variant: a more limited protection of needs

- 7.58 The safeguard we have just described works on the basis of a particular view of the extent of “needs” in section 25 of the Matrimonial Causes Act 1973 and schedule 5, part 5, paragraph 21 of the Civil Partnership Act 2004. This is not the only possible way to safeguard needs, because it is not the only possible view of needs. It would be possible to construct a less generous view of needs, but nevertheless something more generous than the basic responsibility at subsistence level. This would involve setting some formal limits on the provision of needs.
- 7.59 Devising a limited version of needs without setting arbitrary limits is difficult. One way to do so would be to limit the period for which they could be met – thus mirroring the provisions in some continental jurisdictions that maintenance payments may be made only for a maximum number of years.³⁸ But for how long after the end of a marriage should needs be met? Would that period be absolute, or relative to the length of the marriage, or to the ages of the children? Are there other ways of limiting the provision of needs?

³⁴ See K Boele-Woelki, B Braat and I Sumner (eds), *European Family Law in Action: Volume II: Maintenance Between Former Spouses* (2003) pp 461 to 485.

³⁵ J Scherpe, “Matrimonial Causes for Concern? A Comparative Analysis of *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24” (2007) 18(2) *King’s Law Journal* 348.

³⁶ French *Code Civil* art 270; the payment makes compensation for the “disparity created by the termination of the marriage in the former spouses’ respective standards of living”.

³⁷ Some of the states that have adopted the Uniform Premarital Agreement Act have omitted its provision allowing waiver of spousal support: s 3(a)(4).

³⁸ For example, in Sweden, maintenance will “as a rule, only be granted for a transitional period, in the form of periodical payments, or exceptionally, as a lump sum”: M Jänträ-Jareborg (reporting on Sweden) in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2011, forthcoming). In Scotland, maintenance can only be awarded for three years from the date of divorce: Family Law (Scotland) Act 1985, s 9(1)(d). See generally, K Boele-Woelki, B Braat and I Sumner (eds), *European Family Law in Action: Volume II: Maintenance Between Former Spouses* (2003) pp 157 to 174.

- 7.60 It is, therefore, possible to provide a more limited protection of needs. It is worth considering the motivation for doing so. We are unhappy with a model that appears to be designed to cause hardship, albeit short of subsistence level.³⁹
- 7.61 We are particularly concerned about the social consequences of enforcing qualifying nuptial agreements subject only to a narrow version of needs – particularly if the chosen model of qualifying nuptial agreement were to be the unrestricted version rather than the “community of acquests” model. The current law takes into account the difficulties likely to be encountered in the labour market by a wife, for example, of 30 years, who has given up her job to look after the children. To permit qualifying nuptial agreements that do not embody that protection and could leave a former spouse in inadequate accommodation, not far above social security levels, is unattractive. It would allow a spouse to be left in hardship, albeit not on state benefits, and that does not seem to us to be good law reform; the value of increased choice does not outweigh the social cost.

Questions for consultees

- 7.62 We asked consultees, in Part 5, to tell us whether or not they favour the introduction of qualifying nuptial agreements that would exclude the court’s jurisdiction in ancillary relief. We then asked consultees to tell us whether (if there were to be such reform) they would prefer an unrestricted model of qualifying nuptial agreement, or a narrower version that would simply provide a reliable way to contract into a “community of acquests”.
- 7.63 In Part 6 we asked consultees about the pre-requisites for such agreements, if they were to be introduced. In this Part we consider the circumstances in which the court might still have discretion to award ancillary relief, despite the existence of a qualifying nuptial agreement. We take the view that a qualifying nuptial agreement should not enable anyone to contract out of their responsibilities for their children, or to cast their responsibilities for their partner avoidably on the state. We now ask consultees to tell us what other safeguards, if any, should be imposed for the model of qualifying nuptial agreement (unlimited or narrow) that they favour.
- 7.64 In responding to that question, we ask consultees to bear in mind that if reform is wanted at all, then some protection is being sacrificed. The construction of appropriate reform is a matter of risk assessment, and of finding a model that respects contractual provision and provides benefits that are not outweighed by social cost. We repeat that the wider the range of safeguards, the less certainty an agreement could give and the less effect reform would have. With that in mind we suggest that consultees evaluate all the options we set out below but express a preference for one of them, rather than favouring several safeguards, even though all have their merits and disadvantages.

³⁹ The public attitudes research being conducted by Professor Anne Barlow and Dr Janet Smithson (see para 1.52 above) includes a scenario involving a woman who had cared for the family’s children and had been out of employment for some years as a result. Preliminary findings show that most of those interviewed were unhappy about holding her to the terms of a pre-nuptial agreement that would have left her with very limited resources.

7.65 **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.**

FURTHER PROVISIONS

7.66 The legislative introduction of qualifying nuptial agreements raises some consequential issues which we discuss here, without proposing fully developed solutions to them at this stage.

Identifying property over time

7.67 We have asked whether consultees think that qualifying nuptial agreements should be unlimited in their scope (subject to the safeguards discussed in this Part) or whether they should be limited to the protection of pre-acquired, gifted and inherited property. Whichever model were to be introduced, there would be some agreements that identified specific property. Certainly the “community of acquests” model would do so unless it referred only to property to be inherited in the future.

7.68 An agreement that relies upon the identification of particular property may or may not give rise to a practical problem of identification. The property might never change; an agreement that provided that a particular house was to remain the wife’s property is unlikely to cause confusion later if the house remains unsold. But in other cases there may be a need to identify or trace the property at a later stage when it might have been sold or replaced, or might have appreciated in value thanks to the efforts of both spouses.

7.69 Suppose that an agreement excepted a shareholding, let us say the wife’s 25% stake in her family company, from ancillary relief claims. The shareholding might be identified in the agreement as a certain number of shares or, perhaps more likely, as a proportion of the ownership of a company. By the time of divorce, it may be that both husband and wife have invested in the company, thus making the shareholding much more valuable. Or it might have been sold, and the proceeds used to buy a substitute property or investment, or perhaps mixed with the husband’s money.

- 7.70 Numerous possibilities can be imagined; the more complex the property the more difficult the possibilities. However complex or simple the problem, some provision will have to be made for the identification of property that has changed.
- 7.71 The same problem arises under the current law following the introduction of the concept of non-matrimonial property following *White v White*.⁴⁰ The concept is not clearly defined,⁴¹ and one of the criticisms of the current law is that it may be difficult to determine from the outset what non-matrimonial property an individual has; moreover, it appears to be the law that property that was at one stage non-matrimonial may become matrimonial and more likely to be shared with the passage of time.⁴²
- 7.72 But an additional difficulty, even if non-matrimonial property can be identified, arises from the lack of clear rules to say when development or investment in a property during marriage may result in a change in its status. There is little authority to date; *S v S*⁴³ concerned a portfolio of properties that formed part of the husband's business assets before marriage. The case is not a reassuring one for anyone whose concern is to safeguard pre-acquired property, since the outcome seems to be that if non-matrimonial property is worked on or invested in even by its owner during the marriage, and even without the other spouse's involvement, it may thereby become matrimonial property and liable to be shared. The only safeguard seems to be to leave the property lying fallow.⁴⁴
- 7.73 Those continental European jurisdictions that operate a regime of community of acquests have addressed this problem by specific provision.⁴⁵ Otherwise the regime would be unworkable, since it is essential to be able to identify pre-acquired or inherited property much later on at the point of divorce.
- 7.74 Something of this nature would be essential, we think, if binding marital property agreements were introduced.
- 7.75 **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.**

Do consultees agree?

⁴⁰ [2000] UKHL 54, [2001] 1 AC 596.

⁴¹ See para 2.60 above.

⁴² Note the Court of Appeal's insistence in *Charman v Charman* [2007] EWCA Civ 503; [2007] 1 FLR 1246 that all property, matrimonial or non-matrimonial, is nevertheless subject to the sharing regime, but to a greater or lesser extent in some circumstances: at [65] to [70]; see para 2.60 above. See also *Robson v Robson* [2010] EWCA Civ 1171.

⁴³ *S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496.

⁴⁴ See also *Rossi v Rossi* [2006] EWHC 1482 (Fam), [2007] 1 FLR 790.

⁴⁵ Articles 1433 to 1437 of the French *Code Civil*, for example. Similarly, there are clear rules in number of American states: the Californian Family Code, s 2640, for example.

- 7.76 **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.**

Binding marital property agreements and the Inheritance (Provision for Family and Dependants) Act 1975

- 7.77 One of the orders that the court can make in ancillary relief is an order that neither party shall be entitled to apply for provision from the estate of the other under the Inheritance (Provision for Family and Dependants) Act 1975.⁴⁶ Without such an order, when one of the parties subsequently dies, the other may be eligible to claim against his or her estate under that Act.
- 7.78 Under the Act, some family members and dependants can in certain circumstances make an application to court for financial provision out of a deceased person's estate. This is known as a family provision application, and it can be made whether the deceased died intestate or left a will – and whether or not that will makes provision for the applicant.
- 7.79 It is not an unlimited facility. An application can only be made by a former spouse if he or she has not remarried or formed another civil partnership since the divorce or dissolution.⁴⁷ The general rule is that an order will only be made if the will, or the effect of the intestacy rules, is such that reasonable provision has not been made for the applicant's "maintenance".⁴⁸ In most cases the former spouse will not benefit from the estate, since he or she cannot inherit under either the intestacy rules or a will made before the divorce or dissolution,⁴⁹ and therefore the question will be whether that constitutes in all the circumstances failure to make reasonable provision for his or her maintenance.
- 7.80 Maintenance has been strictly interpreted; an application by a former spouse might be most likely to succeed when he or she had been in receipt of periodical payments intended to meet need, which ceased on the payer's death.⁵⁰ On the other hand, where the parties had made what they intended to be a clean break, the absence of provision by the will may well be found to be reasonable.⁵¹
- 7.81 When a clean break is being devised in ancillary relief, an order preventing future applications under the Inheritance (Provision for Family and Dependants) Act

⁴⁶ Inheritance (Provision for Family and Dependants) Act 1975, ss 15 to 15B.

⁴⁷ Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(b).

⁴⁸ Inheritance (Provision for Family and Dependants) Act 1975, s 1(2). Where the death occurred within 12 months of the divorce or dissolution, and any application for ancillary relief has not been determined at the date of death, the court may exercise its discretion under sections 14 and 14A to treat the application as though the divorce or dissolution had not occurred, in which case the restriction to maintenance would not apply. The court must have regard to the factors set out at section 3 of the Act.

⁴⁹ Such a will is read (unless a contrary intention appears) as though the former spouse had died on the date of the divorce or dissolution: Wills Act 1837, ss 18A and 18C.

⁵⁰ See, for example, *Re Farrow* [1987] 1 FLR 205.

⁵¹ *Re Fullard* [1982] Fam 42; even where the applicant is in straitened circumstances (*Barrass v Harding* [2001] 1 FLR 138) or the estate will otherwise pass to the Crown as *bona vacantia* (*Cameron v Treasury Solicitor* [1996] 2 FLR 716). The same may apply even without a decree absolute: *Parish v Sharman* [2001] WTLR 593.

1975 should be made; a break is not “clean” unless all possible future applications are precluded.⁵²

- 7.82 A marital property agreement might well make a similar provision. The court would consider the effect of that provision when taking the decision whether or not to uphold the agreement. Clearly it must be equally possible for qualifying nuptial agreements to make such provision in the context of what is to happen after divorce or dissolution.
- 7.83 But we have to ask a further question: should it be possible for a qualifying nuptial agreement to include such a provision, to take effect after the death of one or other party in the absence of divorce or dissolution?
- 7.84 A widow or widower can apply for family provision and the award that the court can make is not limited to what that person requires for his or her maintenance.⁵³ Instead, the standard of provision is such financial provision as it would be reasonable in the circumstances for a spouse to receive. The court is directed to consider, among other factors, the length of the marriage or civil partnership and the applicant’s contribution to it, and to have regard to what would have been awarded in ancillary relief on its termination in lifetime.⁵⁴ Thus the family provision award should usually comprise at least as much as the claimant would have received on divorce or dissolution.⁵⁵ On occasions such awards have stood between a widow or widower and homelessness.⁵⁶ It is not currently possible to contract out of the ability to apply under the Inheritance (Provision for Family and Dependents) Act 1975.
- 7.85 So our question here is whether or not the scope of qualifying nuptial agreements should go beyond what we have so far discussed: should it be possible to contract out, not only of the court’s discretion in ancillary relief, but also of the court’s discretion in family provision? The advantage of doing so would be the protection of those whose concern for their property is not about divorce but about death. There may well be couples, perhaps in advanced years, whose concern is to safeguard their children’s inheritance, and who may wish to include *only* provision about applications under the Inheritance (Provision for Family and Dependents) Act 1975. They may not wish to contemplate divorce, and indeed may feel very confident that they will not need to, but they may appreciate that it is difficult to predict what may happen after a bereavement.

⁵² M Everall, P Waller, N Dyer and R Bailey-Harris (eds), *Rayden and Jackson on Divorce and Family Matters* (18th ed 2005) para 16.29.

⁵³ Inheritance (Provision for Family and Dependents) Act 1975, s 1(2)(a) and 1(2)(aa).

⁵⁴ Inheritance (Provision for Family and Dependents) Act 1975, s 3. This “deemed divorce” test does not automatically apply if the parties were judicially separated.

⁵⁵ See Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191, paras 3.146 to 3.149.

⁵⁶ See, for example, *Stephanides v Cohen* [2002] EWHC 1869 (Fam), [2002] WTLR 1373; *Moody v Stephenson* [1992] Ch 486. See also *Adams v Lewis* [2001] WTLR 493.

- 7.86 It is hard to see why such agreements should not be possible if it becomes possible to contract out of ancillary relief.⁵⁷ The same considerations of autonomy arise; and the ability to make such agreements and to rely upon their enforceability may well encourage marriage in circumstances where the parties might otherwise be reluctant to commit themselves and, potentially, to put at the risk the inheritance of the children from a previous relationship. To permit such terms would be to take reform one step further than we have suggested so far, so as to exclude the court's discretion not only in ancillary relief but also in family provision claims. We think that the arguments for allowing this are at least as strong as those that point to the introduction of qualifying nuptial agreements to exclude the court's discretion in ancillary relief.
- 7.87 However, widowhood may be far harder than the parties anticipated, and real hardship might be the result of such an agreement. Some of the safeguards that could be imposed upon qualifying nuptial agreements and discussed in this Part might well meet that possibility. Qualifying nuptial agreements might be introduced on the basis that they could not exclude provision for needs, for example, and that would safeguard the widow or widower from total exclusion of the ability to apply for family provision on death. However, a better approach to the potential effect of a term in a qualifying nuptial agreement that related to family provision for a widow or widower would be to use the concepts of the Inheritance (Provision for Family and Dependants) Act 1975 itself. The statute embodies the concept of two levels of provision: the maintenance standard for all applicants, and the much more generous standard for surviving spouses.
- 7.88 It would therefore be possible to provide that a qualifying nuptial agreement might contain a term preventing a future application for family provision by a widow or widower, except insofar as provision was required for the applicant's maintenance. It should be borne in mind that the Inheritance (Provision for Family and Dependants) Act 1975 fulfils a public role in preventing hardship, and that in doing so it constitutes a limit on freedom of testation. In other words, we do not have complete freedom in determining the destination of our property on death. It would be consistent with that for the law to place limits on the extent to which it is possible to contract out of the Inheritance (Provision for Family and Dependants) Act 1975.
- 7.89 **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).**

Do consultees agree?

⁵⁷ In *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007) Law Com No 307) we made no such recommendation for cohabitants (see paras 6.45 to 6.49 of that Report). One of our arguments was that it would be odd for cohabitants to be able to contract out of the Inheritance (Provision for Family and Dependants) Act 1975 when no-one else could. But for spouses to be able to contract out when no-one else could would be entirely consistent with the facility to make binding marital property agreements, if such agreements were introduced.

The implications of reform for international couples

- 7.90 Our current law on marital property agreements has implications for couples from abroad, or perhaps where one member is from abroad, and from a jurisdiction where marital property agreements are binding.⁵⁸ Such couples may have problems with our law, whether they are marrying here or divorcing here.
- 7.91 Such a couple planning to get married here may be dismayed to find that they can do nothing to ensure that pre-acquired or gifted property is safeguarded from the consequences of divorce, due to the uncertainty in the meaning of “non-matrimonial property” and due to the inability to make binding marital property agreements. We have heard anecdotal evidence that many are deterred from marriage here for that reason, or deterred from moving here or continuing to live here. Others engage lawyers to draft an agreement, but have to take the risk that it may not ultimately be effective, and we have heard a lot from practitioners about the complexity, expense and risk that that involves.
- 7.92 To some extent, the strong statement of principle given by the Supreme Court in *Radmacher v Granatino*⁵⁹ will assist such couples; but it does not provide certainty. The introduction of qualifying nuptial agreements would go further towards solving the difficulty that international couples face.
- 7.93 What it would not resolve are the problems arising where one party to a divorce heard in this jurisdiction relies upon a marital property agreement made in conformity with local requirements in a jurisdiction where it would determine the financial consequences of divorce or dissolution.
- 7.94 The Court of Appeal in *Radmacher v Granatino*⁶⁰ encouraged the lower courts to give weight to such agreements, and the Supreme Court was not troubled – on the particular facts of the case – by the lack of independent advice inherent in the system of notarised agreements (nor by other difficulties, such as the fact that Mr Granatino had not seen a translation of the agreement). But the introduction of qualifying nuptial agreements in England and Wales would not enable a foreign agreement to oust the jurisdiction of the court in ancillary relief unless the foreign agreement happened also to be an English qualifying nuptial agreement. This is unlikely since the formalities required for, say, a French agreement would be quite different from whatever English pre-requisites were imposed.
- 7.95 That may or may not be the right result, depending upon the circumstances of the case. There may well have been pressure, or non-disclosure, that the English pre-requisites could have prevented. It would not be acceptable for all valid foreign marital property agreements to be regarded as qualifying nuptial agreements; rather, they should remain as they are at present, one of the factors

⁵⁸ For a discussion of the approach taken to prenuptial agreements with a foreign element in the United States, see JT Oldham, “What if the Beckhams move to LA and divorce? Marital property rights of mobile spouses when they divorce in the US?” (2008) 42 *Family Law Quarterly* 263.

⁵⁹ [2010] UKSC 42.

⁶⁰ *Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 2 FLR 1181.

to be taken into consideration within the section 25 exercise.⁶¹ They should be given considerable weight by the courts, and the Supreme Court's decision in *Radmacher v Granatino* is likely to encourage the courts to do that.

- 7.96 However, in view of what we have said in Part 4 about the nature and purpose of agreements entered into in other jurisdictions, it makes no sense for our courts to take into account foreign agreements without also being alive to foreign regimes. The vast majority of European citizens are married (or have entered the equivalent of civil partnership) subject to a legal regime which they have chosen not to change.
- 7.97 We are aware, of course, that in some cases no choice is made; just as many English couples marry without giving any thought to the legal consequences of doing so,⁶² so do many overseas couples. So in many cases there has been no choice of regime. In many others there will have been a conscious choice to make no change to what is regarded as appropriate and fair.⁶³ In still other cases there may be only partial understanding, or a misunderstanding, of the local law. In all these cases, an individual divorcing in this country may take advice about the consequences of divorce and may be dismayed to find that the property rights that he or she could rely on in his or her country of origin have no validity in this country.⁶⁴
- 7.98 In all these cases the foreign regime would determine the ownership of property on divorce or dissolution if that took place in continental Europe. It would be unrealistic to suggest that the English courts should feel bound to follow the consequences of such a regime without flexibility; but the regime, where it exists and can be explained to the court, should be one of the circumstances of the case. It is not rational to have the court bear in mind the contractual regime of a Dutch couple who chose to marry in community of acquests and made a contract

⁶¹ It would still be open to the court to attach decisive weight to a foreign agreement which did not comply with the requirements for an English qualifying nuptial agreement, and it may be that the court would be influenced by the fact that the agreement would have been determinative under the law of the jurisdiction in which it was drafted and executed.

⁶² M Hibbs, C Barton and J Beswick, "Why Marry? – Perceptions of the Affianced" (2001) 31 *Family Law* 197.

⁶³ See the discussion of the unsuccessful attempt to reform the law in the Netherlands in 2001 in M Antokolskaia and K Boele-Woelki, "Dutch family law in the 21st century: trend-setting and straggling behind at the same time" (2002) 6(4) *Electronic Journal of Comparative Law*.

⁶⁴ This may have implications under Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms. It was argued by counsel for the wife in *NG v KR (Pre-nuptial Contract)* [2008] EWHC 1532 (Fam), [2009] 1 FLR 1478 that the prenuptial agreement "had been nullified by no reason other than the parties' move from one EU jurisdiction to another and such interference constituted a vertical interference by the state in the parties' freedom to contract" and consequentially interfered with her rights under Article 8 (right for respect for private and family life) and under Article 1 of the First Protocol. However, after remarking that "there has been an unnecessary focus upon this aspect of the matter", Baron J concluded that Article 1 of the First Protocol "is not breached as a result of the method by which the English Courts resolve financial applications on divorce pursuant to the Act": at [96] to [135].

to that effect⁶⁵ without affording consideration to the community of acquests under which a French couple married without the need for a contract.

- 7.99 This would not be a revolutionary change. In other areas of the law the courts are willing to take the existence of foreign regimes into account;⁶⁶ evidence of the regime would need to be adduced,⁶⁷ but we are not persuaded that that would be impossibly difficult or expensive. We make no proposal to change the law in this respect; our point is rather that it is already the law that the court must consider “all the circumstances of the case”.⁶⁸ The courts have shown a growing awareness of, and willingness to take into account, the importance of foreign marital property agreements; foreign marital property regimes are every bit as relevant to the divorce or dissolution of a couple who married under such a regime.
- 7.100 There is, of course, much more to say about the difficulties that arise when divorce or dissolution takes place in a country that is not the country of origin of one or both individuals involved. We have discussed the issue, above, in accordance with the English rules on conflicts of law, which have the effect that on divorce or dissolution the courts follow English law. This is known as the *lex fori* principle.⁶⁹ Other countries have different conflicts rules; in some European countries the courts would determine the property consequences of the divorce or dissolution of an English couple law in accordance with English law.⁷⁰ The interaction of the various conflicts rules within the European Union gives rise to significant problems, as it is not always clear which court will have jurisdiction in a particular case, nor what law it will apply.
- 7.101 In Part 1, we mentioned the proposed European Regulation on Marital Property Regimes, known as Brussels III; a draft regulation is still awaited. It is not known whether the UK would opt into the Regulation; nor is it clear that the Regulation will be compatible with a common law jurisdiction’s law and practice.
- 7.102 It is important to appreciate that the introduction of qualifying nuptial agreements would have no effect upon the UK’s position as regards Brussels III. It would not make foreign agreements binding on the English courts. The English courts are unlikely to abandon the *lex fori* principle, and it may be that the UK takes no part in the development of the Regulation. Nevertheless, there will still be an increasing number of divorces and dissolutions involving what the European Commission has called “overseas couples”.

⁶⁵ As opposed to the total community which is the default option in Dutch law: see para 4.9 above.

⁶⁶ See, for instance, the Canadian case of *Beaudoin v Trudel* [1937] 1 DLR 216 where the Ontario Court of Appeal applied aspects of the law of Ontario and Quebec in the context of intestate succession.

⁶⁷ In an English court, foreign law has to be proved by evidence: see the comments of Scott LJ in *A/S Tallinna Laevauhisus v Estonian State Steamship Line* (1947) 80 Lloyd’s Rep 99, 107.

⁶⁸ Matrimonial Causes Act 1973, s 25(1); and Civil Partnership Act 2004, sch 5, part 5, para 20.

⁶⁹ Literally “the law of the forum”, meaning the law of the country where the matter is decided.

⁷⁰ Although it is not clear that English law is always applied accurately in these circumstances.

7.103 We make no proposal about the European Regulation or about the conflicts rules operated by the English courts. But we take the view that it is unrealistic for the 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. We do not suggest that that should be at the expense of the priorities of English ancillary relief, in particular the meeting of needs.

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 NUPTIAL 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.

[paragraph 6.104]

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.

[paragraph 6.112]

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.

[paragraph 6.125]

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.

[paragraph 6.128]

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.

[paragraph 7.16]

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]