

## FAMILY LAW COMMITTEE MINUTES

11 January 2011

Start: 5.30pm

At Martineau, No 1 Colmore Square, Birmingham.

### In attendance

Mary Kaye	Martineau	Chairperson
Jane Robson	Birmingham City Council	Vice Chairperson
District Judge Ingram	(In place of District Judge Dowding)	
John Akers	BDFM	
Cathy Price	Price Mistry	
Claire Darley	Martineau	
Fiona Farrell	Martineau	
Karen Moores	Sydney Mitchell	
Marc Saunderson	Mills & Reeve	
Marie Kilgallen	Martineau	Minutes
Marc Mansell	St Philips Chambers	
Philip Barnsley	Higgs & Sons	
Chris Allen Jones	George Green	
Janine Hall	Birmingham County Court	

### 1. APOLOGIES

Sue Daniels; Victoria Green; Kevin Harris-James; Helen Dickens; Susan Casey; Lorraine Bayliss, Elizabeth Isaacs; Joanna Keene, Stephanie Brown; Grant Bird; Vanessa Meachin; Jayne Mullen; Emma Gibson.

### 2. MATTERS ARISING

#### 2.1 Consultation Papers -The following documentation was distributed:

##### 2.1.1 Consultation paper number in respect of the proposals for reform of Legal Aid in England & Wales.

Practitioners need to respond to the Consultation paper regarding Legal Aid. The consultation is due to close in April 2011. Resolution are co-ordinating a response nationally and the Judges are also co-ordinating a response. As many professionals as possible need to respond to the Legal Aid Consultation as it impacts upon all areas of family law.

##### 2.1.2 Law Commission Marital Property Agreements - Executive Summary

A response also needs to be co-ordinated in relation to the Law Commission Consultation paper in respect of marital property agreement/pre-nups. Again, Resolution are co-ordinating a response nationally. Birmingham Family Group are responding and there will also be a Law Society response. Marc Saunderson will coordinate the response on behalf of Birmingham Law Society and will liaise with Mary Kaye.

## 2.2 Stakeholders meeting regarding delay in Children cases

The Local Performance Improvement Group has replaced the Delay Group within the Court. At the previous meeting, it was proposed that there needs be greater representation from the Bar and solicitors in private practice.

Mark Mansell will liaise with Ros Carter to ensure that there is a Barrister representative.

Jane Robson advised that Sally Jones, a solicitor with Tyndellwoods, has been co-opted onto the Local Performance Improvement Group. Philip Barnsley will liaise with Grant Bird and Sally Jones to ensure that there is a solicitor representative on the Local Performance Improvement Group and a list of action points on behalf of solicitors is co-ordinated.

The Local Performance Improvement Group is due to meet on 26 January 2011 and it was agreed that input is needed from both the bar and private practice solicitors. The Local Performance Improvement Plan will be submitted to the Ministry of Justice.

Ideally, action needs to be taken before the next meeting LPIG on 26 January 2011.

It is important that all professionals involved in the process have an input into proving delay.

## 2.3 Parenting Information Programmes

Resolution are running a Parenting Information Course at Higgs & Sons. There needs to be a cohesive list of the parenting information programme providers within the West Midlands. It is also felt that there needs to be an ability to use parenting information programmes without the need to issue Court proceedings and this is currently being investigated by Resolution.

Investigations also need to be made as to whether there is a domestic violence perpetrator provider in the West Midlands. This is one of the contact activity directions that the Court can order. It is thought that there is not because of the cost of running the programme.

## 3. DRAFT GUIDANCE FOR COMMITTEES

Birmingham Law Society have circulated the draft Guidance for Committees to ensure that all Committees understand what their role within BLS is and what is expected of them throughout the year.

Comments are welcomed. It will become formal guidance in April 2011 but none of the points will be mandatory. Any comments are to be forwarded to Mary Kaye by 1 March 2011.

## 4. RETIREMENT OF DISTRICT JUDGE DOWLING

The retirement of District Judge Dowling takes place in Court at Birmingham Civil Justice Centre on 14 January 2011. Liz McGrath of St Philips Chambers will be speaking on behalf of the Bar. Mary Kaye will be speaking on behalf of Solicitors. It is hoped that as many members of the profession will be in attendance on Friday 14 January 2011 as possible.

## 5. VOTING TO APPOINT NEW CHAIRPERSON

Jane Robson will take over as Chairperson from April 2011. A new Vice Chair will be appointed. Claire Darley (Martineau) and Karen Moores (Sydney Mitchell) have put themselves forward as potential Vice Chair and both made a short speech the Committee. Voting will take place by email and the outcome will be announced at the next meeting on 8 March 2011.

## 6. ANY OTHER BUSINESS

Discussion regarding inviting the Ministry of Justice to attend Birmingham to give a talk and possibly a question and answer session to local practitioners. An invitation is to be extended to the Junior Justice Minister, Jonathan Djanogly, to attend the West Midlands. The event would need to be co-ordinated by BLS Family Law Committee and Resolution. An invite could be extended to him after the outcome of the Family Justice review (interim report is due in June 2011 and final report due in October 2011).

The format of any event would need to be very carefully considered. This is to be reviewed at the next meeting.

## 7. ACTION POINTS

- BLS Family Committee response to the Law Commission Pre-Nuptial Consultation - Marc Saunderson - by next meeting 8 March 2011.
- Solicitors input into the Local Performance Improvement Group - Philip Barnsley and Grant Bird to liaise with Sally Jones of Tyndallwoods - by 26 January 2011 ideally.
- Barristers input into the Local Performance Improvement Group - Mark Mansell to liaise with Vanessa Meachin - by 26 January 2011 ideally.
- Comments on draft Guidance for Committees - comments to be received for consideration 1 week before the date of next meeting (1 March 2011)

## 8. NEXT MEETING

8 March 2011 at 5.30pm at Martineau

## **BLS Guidance Note**

**(Draft)**

### **Legal Practice Committee**

#### **A. General**

- (1) Committees should meet at least 6 times each year (1 Jan - 31 Dec);
- (2) Targets need to be set by each Committee on or before January of each year and these targets should be sent to BLS office (by no later than 31 January);
- (3) Committees should consider assisting BLS Learning and Development with a view to putting on an annual conference each year;
- (4) A minimum of 3 articles (between 400 and 900 words) should be prepared and published each year;
- (5) Committees should consider arranging guest speakers to speak at Committee meetings and this could be followed up with an event to BLS members;

#### **B. Role of Committee**

- (1) Keep under review and promote to members changes in practice area/substantive law;
- (2) Provide regular support to BLS Learning and Development Program by identifying areas of interest, suitable speakers and topic ideas for courses;
- (3) Raise profile of Committee/BLS wherever possible;
- (4) Forge closer links (if relevant) with external organisations, courts/tribunals;
- (5) Promote wherever possible the work being undertaken by the Committee;
- (6) Committees should try to support any request from the BLS Bulletin for material/articles;
- (7) Respond to all relevant Consultation Papers;
- (8) Each Committee should be managed by at least a Chair and Vice Chair;
- (9) Try to support BLS and its events (including its training program)

#### **C. Role of Chair**

- (1) Identify agenda items for Committee meetings;
- (2) Ensure there is a good mix of experience (e.g. types of practice areas and size of firm) amongst members within the Committee;

- (3) Ensure good attendance at Committee meetings
- (4) Report to BLS Officers any non attendance by a Committee member for a 6 month consecutive period;
- (5) Identify whether there are outside organisations with which it would be relevant and appropriate to establish closer links;
- (6) Devise a strategy to work with such external organisations;
- (7) Attend all Chair Liaison Meetings each year which should be between 2 and 4 meetings;
- (8) Submit minutes to BLS office of each Committee meeting at least 3 working days before the Council meeting;
- (9) Assign responsibilities/targets for Committee members;
- (10) Act as a general point of contact with BLS office, Council and Consultation Committee Chair;
- (11) Chairs shall be required to stand for re-election each year (voting shall be by way of the relevant Committee) and this will be subject of approval by Council;
- (12) Chairs will be required to step down at the end of a three year term unless there is no replacement for the Chair (whereupon the term shall continue on a year by year basis).

11 January 2011

BIRMINGHAM LAW SOCIETY



**Law  
Commission**  
Reforming the law

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# **Marital Property Agreements**

## **Executive Summary**

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**Consultation Paper No 198 (Summary)**  
**11 January 2011**

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THE LAW COMMISSION

**MARITAL PROPERTY AGREEMENTS**

**EXECUTIVE SUMMARY**

**INTRODUCTION**

1. Every year more than 100,000 marriages end in divorce (and an increasing number of civil partnerships are dissolved). Among the many issues that need to be resolved when that happens are the financial consequences of the end of the relationship.
2. Many couples resolve these issues without legal advice, others consult lawyers and some apply to the courts, which have wide statutory powers to distribute money and other assets between the parties. A small number of couples attempt to agree in advance – perhaps even before they marry – how their resources should be allocated in the event of divorce or dissolution. We refer to such agreements as “marital property agreements”.
3. Although the use of such agreements is not widespread, there has been increasing legal and public interest in them as a result of recent high profile cases, in particular a decision of the Supreme Court delivered in October 2010.
4. The Law Commission has reviewed the law in this area. Our findings are set out in a consultation paper, *Marital Property Agreements*, published on 11 January 2011. This can be downloaded at [www.lawcom.gov.uk/marital\\_property.htm](http://www.lawcom.gov.uk/marital_property.htm). The paper does not presuppose that reform is needed; after reviewing the way in which the current law resolves financial disputes in divorce and treats marital property agreements, we set out the main arguments for and against reform. We ask whether couples should be able to make agreements which exclude the courts' powers to allocate property on divorce, and whether such agreements should be restricted to certain types of property (acquired before the marriage or inherited, for example).
5. Throughout the consultation paper we stress the need to balance the desire of some couples for the law to respect their agreements, with the need to ensure that vulnerable spouses and their children are not financially disadvantaged. An agreement made many years before it takes effect is inherently risky, because circumstances may change in a way that the couple could not have foreseen when then made the agreement. We ask whether that means that the courts should always have a role in the resolution of the financial consequences of divorce or dissolution, or whether it should nevertheless be possible for marital property agreements to be enforced without adjustment by the courts.
6. We invite responses to the consultation paper from members of the public, the legal profession and any other interested parties by 11 April 2011.

## **THE CURRENT LAW**

7. In order to set out the background to the questions being asked in this consultation paper, we explain the current law concerning the resolution of financial disputes on divorce or dissolution of a civil partnership, and we discuss the development of the law relating to marital property agreements.

### **The current law of “ancillary relief”**

8. Many couples resolve the financial consequences of the end of their relationship without going to court. But where they have legal advice or some understanding of the relevant law, any agreed settlement may be said to be reached “in the shadow of the law” and based on an understanding of what each might expect to be awarded if the matter was resolved by a court.
9. If one of the parties applies to court to resolve a financial dispute on divorce or dissolution, the court has wide powers to make financial provision for the parties and for any children of the relationship. The judge can order one party to transfer specific property to the other, or to make payments (as a lump sum or as regular payments), and even to share a current or future pension. This exercise is known as ancillary relief because it is ancillary to – that is, subordinate to and exercised as a consequence of – the courts’ powers to terminate the marriage or civil partnership by granting a decree of divorce or by dissolving a civil partnership.
10. The key statutory provision is section 25 of the Matrimonial Proceedings Act 1973 (there are equivalent provisions in the Civil Partnership Act 2004 which govern ancillary relief claims on the dissolution of a civil partnership). Section 25 sets out the matters to which the court is to have regard when exercising its powers. The court has a duty “to have regard to all the circumstances of the case”, but its first consideration must be for the welfare of any child of the family under 18. The statute then lists a number of matters to which the court should pay particular regard. They are not listed in order of priority; different factors may be particularly influential in different cases, depending upon their facts. The court must also consider whether it is possible to achieve a “clean break” between the couple, meaning that they would have no continuing financial claims upon, or responsibilities towards, one another following the making of an order allocating their property (section 25A).
11. In many cases, the financial resources of a couple are barely sufficient to support both parties – and any children – when one household splits into two. The court will give priority to ensuring that the children, and the parent with whom they will live, are adequately housed, and there is often very little left.
12. In some cases, however, the parties do have more substantial resources. In these cases, particularly “big money” cases where one party has assets that extend well beyond what is needed to meet the needs of the couple and the children, the approach taken by the courts has changed radically in recent years.

### ***The law before and after White v White***

13. Before 2000, ancillary relief awards were based on the principle that the "reasonable requirements" (as the courts termed them) of the financially weaker party must be met. That meant that needs were generously assessed, so that a spouse who had enjoyed a high standard of living could continue to do so after a divorce. But this might still represent only a fraction of the richer partner's total wealth, even after a long marriage in which the financially weaker spouse had given up work to look after the couple's children. Many commentators, including a number of judges, felt this to be unfair.
14. In 2000, the House of Lords (which has since been replaced by the Supreme Court as the highest court in England and Wales) decided in a case called *White v White* that, where one party to a marriage primarily looks after the home and children and the other is the "money-earner", the court should not discriminate between these roles when making financial provision on divorce. Where the resources of a couple exceed their needs, there is no obvious reason why the "money earner" should retain the surplus. Rather, the courts should depart from equality only where there are good reasons to. That represented a major change in the courts' approach to the law in the "big money" cases.
15. In subsequent cases the courts have explored the implications of what the Court of Appeal has called the "sharing principle". In two joined cases, *Miller v Miller, McFarlane v McFarlane* (2006), the House of Lords identified three strands in the search for fairness: the meeting of needs, compensation for financial sacrifice, and sharing. One area of uncertainty which remains is the extent to which certain property owned by one party can be considered "non-matrimonial" and therefore not liable to be shared with the other party on divorce. It has been suggested that wealth built up or assets acquired before the marriage, or after separation, might be regarded in this way, and likewise inherited wealth and gifts. But the courts have also stressed that the sharing principle applies to all of a couple's property, though the presence of non-matrimonial property may justify a departure from equal sharing.
16. None of this affects the majority of cases, where the combined resources of the couple are only sufficient (and are often insufficient) to fund two households after divorce. In such cases, resources are exhausted in meeting the needs of the parties and the children, and there is no question of a surplus left to be shared.
17. But where the couple have more than enough to meet their needs and those of any children, *White v White* represented a break with the previous law and significantly increased the amount of financial provision that the spouse of a wealthy individual could hope for on divorce (whether awarded by the court or negotiated "in the shadow of the law").
18. As a result of this change English law has come to be perceived as more generous than the law elsewhere and press reports have described London as the "divorce capital of the world". Yet the principle that matrimonial property should be shared equally on divorce has been well-established in other jurisdictions for many decades. Where the law of England and Wales is perhaps unusual is in its approach to marital property agreements, to which we now turn.

### **The current law of marital property agreements**

19. We use the term "marital property agreements" to refer collectively to pre-nuptial, post-nuptial and separation agreements. Pre-nuptial and post-nuptial agreements (often referred to simply as "pre-nups" and "post-nups") are agreements made, respectively, before or during a marriage or civil partnership which seek 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. Separation agreements are made in contemplation of imminent separation or following separation and seek to make financial arrangements for the period of separation and any subsequent divorce or dissolution.
20. In examining marital property agreements, we have to engage with a number of legal rules that have been developed by the courts for reasons of public policy.
  - (1) The rule that a contract that makes provision for the future separation of spouses is not a valid contract and cannot be enforced by the courts.
  - (2) The rule that the courts will not enforce an agreement that tries to exclude the jurisdiction of the court to determine the financial consequences of divorce or dissolution.
  - (3) The rule that it is not possible to contract out of responsibilities to one's children.
21. Pre-nuptial and post-nuptial agreements were historically treated with particular suspicion. At a time when spouses had a duty to live together and marriages could not be terminated by divorce, except in very restricted circumstances, agreements which made provision for future separation and divorce were considered to be immoral. Such agreements were therefore treated as void – that is they could not be enforced as contracts even if they met all of the other conditions for a valid contract.
22. Separation agreements were treated with much less suspicion because they catered for the situation where the relationship had already run its course. Although they were (and still are) subject to the second rule set out above – and therefore cannot be used to exclude the possibility of the court considering an ancillary relief claim – the courts often made ancillary relief orders which reflected the terms of the separation agreement. In *Edgar v Edgar* (1980), the Court of Appeal held that a formal separation agreement, entered into with competent legal advice, should generally be enforced unless there are "good and substantial grounds for concluding that an injustice will be done by holding parties to the terms of their agreement".
23. Historically, therefore, the law distinguished between pre-nuptial and post-nuptial agreements on the one hand, and separation agreements on the other. However, the existence of a pre-nuptial or post-nuptial agreement could still be one of the circumstances of the case to which the court has regard in considering an ancillary relief claim. Until relatively recently, the courts accorded little weight to such agreements but over the past few years they have come to play an increasingly significant role in the outcome of some cases. Indeed, it has been said that in the right circumstances, a pre-nuptial or post-nuptial agreement may be a factor of "magnetic importance" which will decide the outcome of the case.

24. This apparent contradiction – agreements that were formally void as contracts for reasons of public policy nevertheless having a decisive influence in some cases – was not lost on the courts or on commentators.
25. The law in this area has developed quite rapidly in a series of recent cases. A key case was an appeal from the courts of the Isle of Man, *MacLeod v MacLeod* (2008); it was heard by the Judicial Committee of the Privy Council, and so the decision was not strictly binding on courts in England and Wales but likely to be followed. The Privy Council decided that post-nuptial agreements – but not pre-nuptial agreements – were no longer void, although they could not exclude the discretion of the courts and were likely to be varied if they made insufficient provision for the children of the relationship or were “manifestly unjust”. That meant that financial agreements entered into by couples after marriage – post-nuptial agreements and separation agreements – had a similar status in law, whereas pre-nuptial agreements were treated very differently.

#### ***Radmacher v Granatino***

26. The Supreme Court’s decision in *Radmacher v Granatino*, delivered in October 2010, has moved the law on further. We delayed publication of our consultation paper to await the decision and consider its implications.
27. Simply stated, the facts of the case are that a German heiress and her French husband entered into a pre-nuptial agreement in 1998 to the effect that neither would have a claim on the other’s wealth in the event of a divorce. The agreement was written in German and signed in Germany. Had the couple divorced in Germany or France, it is highly likely that the agreement would have been binding. But the couple lived for most of their married life in England and Ms Radmacher petitioned for divorce here in 2007.
28. The ancillary relief proceedings were heard in the High Court, then appealed to the Court of Appeal and the Supreme Court. The High Court awarded Mr Granatino £5.56 million. Although the Judge paid some regard to the pre-nuptial agreement, she was particularly critical of the circumstances in which it was entered into – it was not translated into a language Mr Granatino could read, he did not have independent legal advice and he was not told of the extent of Ms Radmacher’s wealth and the family wealth she expected to acquire. The Court of Appeal took a different view: it said that the judge should have given the agreement much greater significance and greatly reduced Mr Granatino’s award. The amount ordered was intended to fund his housing and support only until the couple’s two daughters (who were to have frequent staying contact with him) had grown up. The Supreme Court upheld the Court of Appeal’s decision (though one of the judges, Lady Hale, delivered a strong dissenting judgment).
29. The key points from the Supreme Court’s decision, set out by Lord Philips who spoke for the majority, can be briefly summarised.
  - (1) The rule of public policy that pre-nuptial contracts are void because they anticipate a future separation is obsolete and should be swept away.
  - (2) No distinction should be drawn between the legal treatment of pre-nuptial and post-nuptial agreements.

- (3) Marital property agreements (the Supreme Court used the term "nuptial agreements") still cannot exclude the jurisdiction of the court in ancillary relief.
30. Of those three points, the first two were, technically, *obiter*. That is, they were not necessary for the determination of the case. But the status of the judgment is such that these principles are certain to be adopted by the lower courts. The third point, that the courts' jurisdiction cannot be supplemented, is a necessary conclusion from the provisions of the Matrimonial Causes Act 1973.
31. Most importantly, in terms of the legal status of marital property agreements, Lord Phillips set out the following statement of principle:
- 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.
32. Their Lordships discussed a number of circumstances that might render an agreement unfair. These included the circumstances in which the agreement was made (for example, material lack of disclosure of the parties' financial assets or a failure to obtain legal advice), and circumstances prevailing at the end of the relationship (including the existence of non-matrimonial property, the passage of time and unexpected events). It was also suggested that the court might take into account the parties' ages, emotional state and previous relationship history.
33. We take the view that this statement of principle gives clear guidance that the courts should give marital property agreements significant weight when they are exercising the wide discretion that they have under the existing statutory framework to resolve financial disputes on divorce. But the Supreme Court did not and could not suggest that the presence of a marital property agreement can ever prevent the court from exercising those statutory powers. Contrary to some reports, it does not make pre-nuptial agreements or any marital property agreement binding. Either party can still apply to the court for ancillary relief, despite the existence of an agreement, and the court must make its own assessment of whether it would be unfair to hold the parties to its terms.
34. The subject of our consultation is whether the law should go further by permitting some agreements to exclude the jurisdiction of the court to grant ancillary relief. This is a step which cannot be taken by the courts; new legislation would be required.

#### **THE LAW IN OTHER PARTS OF THE WORLD**

35. We noted above the fact that the law of England and Wales is in line with many other jurisdictions in operating a principle of sharing matrimonial property equally on divorce or dissolution; where it is unusual is its reluctance, until recently, to allow couples to contract out of equal sharing. In Part 4 of the consultation paper we look at the law in a number of other jurisdictions; but we are wary of making misleading comparisons. Much can depend on the different legal and social context in which each country's laws have developed.

36. The jurisdictions we look at fall into two major groups: civil law and common law. The civil law jurisdictions operate on the general principle that a married couple's property is to be held jointly, known as a "community of property". A community of property can either be "immediate", meaning that the couple own their property jointly from the outset of their marriage, or "deferred", meaning that their property is only shared on divorce, bankruptcy or death. There is also a distinction between "total community", where all the couple's property is jointly owned, and a "community of acquests", where property acquired before the marriage, or as a gift or inheritance to one of the spouses, is never jointly owned and is not shared with the other spouse at the end of the relationship.
37. Different countries adopt different combinations of these elements as their default law for married couples. In France, for example, the default regime is immediate community of acquests: from the outset of the marriage, the couple share property acquired after the marriage took place. Scandinavian countries, on the other hand, operate deferred but total community: all property is shared but only after the marriage comes to an end.
38. Couples may use a marital property agreement to opt in and out of the default marital property regime. For example, in France many couples opt out of the immediate community regime to avoid being liable for one another's business debts (they may well opt back in on retirement or when the business is sold). By contrast, there is no immediate community of property and liability in English law – so property and liabilities are not automatically shared during marriage or civil partnership. Marital property agreements therefore have no role to play in the management of debt during the currency of the relationship. Another significant difference is that most European jurisdictions do not allow couples to opt out of their obligations to maintain one another after a divorce; again, therefore, marital property agreements play a different role than they do in England and Wales, where agreements often deal with both the division of capital assets and provision for future maintenance.
39. Common law systems are derived from English law and, as in England, couples hold their property separately during marriage (unless they choose to own an asset jointly, for example the family home). The courts also have wide powers to redistribute a couple's property on divorce. However, unlike the current law of England and Wales, many of these jurisdictions do allow couples to agree to exclude the courts' discretionary powers. In Australia, for example, it is possible to make a "binding financial agreement" which, as the name suggests, will be effective to bind the parties to their agreement.

#### **SHOULD THERE BE REFORM AT ALL?**

40. In Part 5 of the consultation paper we set out some of the arguments for and against reform of the current law. Under the current law, there is nothing to prevent couples making any agreement they like but it will not be effective to exclude the court's powers to grant ancillary relief. The agreement will be treated as one of the circumstances that the court takes into account in deciding what orders to make (if any) and, following *Radmacher v Granatino*, it will be given decisive weight unless other circumstances make it unfair to do so.

41. The fundamental question is whether and to what extent a couple should be able to enter into a binding agreement not to seek ancillary relief in the event of divorce or dissolution. We consider below some key arguments for and against reform. One answer is that this dramatic effect should be possible only in respect of certain types of property, and we consider below the case for recognising only those agreements that relate to pre-acquired, gifted and inherited property that under the current law might be treated as non-matrimonial.

### **Supporting marriage**

42. Both those who advocate reform and those who oppose it argue that their position supports the institution of marriage. There is anecdotal evidence that the prospect of sharing their wealth on divorce, particularly if it was acquired before the marriage or inherited, is for some a disincentive to marry (because under current law it is more financially advantageous to cohabit without marrying). Others argue that the ability to contract out of the consequences of divorce even before the wedding itself devalues marriage. These arguments simply cannot be tested, but we doubt that reform of the law would have the dramatic effects suggested by some on both sides of the debate.

### **Autonomy**

43. A common argument in favour of reform is that the current law is paternalistic and even patronising in refusing to enforce agreements freely entered into by adults. The law fails, it is said, to recognise their autonomy.
44. We can see force in this argument but there are reasons to be cautious. In particular, the circumstances in which marital property agreements are entered into mean that an act that appears to be autonomous may in fact be tainted by pressure – from a fiancé(e) or spouse, from the wider family and community, or simply from the circumstances surrounding preparations for a wedding. Moreover, autonomous adults may fail to foresee the events of many years of years of marriage; an agreement that was entered into freely, but in ignorance of the future, may not be one that they would have entered had they known how life would unfold.
45. To some extent, the imposition of the sort of formality requirements we discuss in Part 6 of the consultation paper, in particular a requirement to take legal advice, may protect vulnerable parties from the effects of pressure. But autonomy is still limited by the invisibility of the future. We take the view that respect for the autonomy of capable adults does not, by itself, make the case for reform of the law of marital property agreements overwhelming.

### **Certainty**

46. It is well-recognised that there are significant unresolved issues of principle within the law of ancillary relief. There is continuing uncertainty over how the three strands of fairness set out above (needs, compensation and sharing) interrelate, and over the definition and treatment of non-matrimonial property. Lawyers have told us that they find it difficult to advise clients what the likely outcome of ancillary relief proceedings will be.

47. Some couples may prefer to avoid this potential uncertainty, with the attendant financial and emotional costs, by agreeing in advance how their property will be distributed in the event of their divorce or the dissolution of their civil partnership.
48. We have considerable sympathy with this argument. However, we would again stress that for the majority of couples who do not have significant surplus resources, the law applicable to ancillary relief proceedings is not uncertain: the court will apportion what limited resources there are in order to meet the parties' needs, with priority given to housing any children and the parent they will live with. Uncertainty arises only in the practical difficulty of sorting out how to achieve this with limited resources. Any agreement would be futile, as the courts would not enforce it if it did not provide for the needs of both parties and their children.
49. Reform would therefore bring welcome certainty for some, and we do not discount that benefit, but we do not anticipate that agreements could or should be used by everyone. In many cases they will remain inappropriate.

#### **Special property**

50. In many cases, those who would like to be able to enter into a binding marital property agreement are not motivated by a desire to prevent their partner getting any of their assets on divorce or dissolution.
51. Rather, they would like to protect only certain types of property. For example, they may feel that they should not have to share wealth built up or assets acquired before the marriage, or they may be concerned to protect the integrity of a family farm or business that might not survive if it was partitioned on divorce. In other cases, there may be a desire to retain assets inherited from family or from a previous partner, or property recovered from an earlier divorce, particularly if they have children from a previous relationship who they would like to benefit.
52. As we noted above, there is uncertainty in the current law of ancillary relief over what property will be considered to be "non-matrimonial" and what the consequences of such a designation will be. The ability to agree in advance what property is non-matrimonial and to "ring fence" it in a binding marital property agreement may be attractive to some people.
53. We also noted above that in those civil law jurisdictions which operate a "community of acquests" matrimonial property regime, non-matrimonial property is not shared on divorce (unless the couple have agreed to opt into a "total community of property"). So there is international precedent for an approach which distinguishes matrimonial property from non-matrimonial property.

#### **Our questions for consultees**

54. The consultation paper therefore asks, first, whether couples should be able to enter into a binding agreement not to seek ancillary relief in the event of divorce or dissolution and, secondly, whether such agreements should be able to encompass all of a couple's property or to contain only terms relating to pre-acquired, gifted or inherited property. This latter approach might be characterised as a "community of acquests" model, although it is not intended to replicate the law in any of the European community of property jurisdictions.

55. We make no assumption about the answers to those questions. But our consultation paper goes on to look at some of the detail of the law that would have to be framed if such reform were to take place.
56. We look first at the formalities that might be required for an agreement to have that effect, and then we ask whether there should be any circumstances in which the court might nevertheless have a role to play. For the purposes of this discussion we have coined the term "qualifying nuptial agreement" to denote an agreement, post-reform, that is capable of excluding the court's discretionary power and so bypassing the law of ancillary relief. Such an agreement would be able to be enforced as a contract.

#### **WHAT FORMALITIES SHOULD BE REQUIRED?**

57. We take the view that certain formality requirements must be met before a marital property agreement can be treated as a qualifying nuptial agreement. We consider those formalities in Part 6 of the consultation paper and summarise them briefly now.

#### **Contractual safeguards**

58. If a qualifying nuptial agreement is to be enforceable as a contract, it must meet certain requirements derived from the law of contract and not from family law. There must be an agreement, each party to that agreement must intend to be legally bound by it, and each party must get something from the bargain. Where the agreement is one-sided, that last requirement may be met by having the terms set out in a deed.
59. Even if all of these features are present, the contract may be invalidated if one of the parties was mistaken about the fundamental nature of the agreement, or was compelled to enter into it under duress or the undue influence of another party, or if one party misrepresented key information (though there is no general duty to disclose all facts relevant to the transaction).
60. These contractual safeguards ensure that the courts only enforce contracts which are entered into freely. They are, however, developed largely in the context of commercial transactions. By their nature, marital property agreements are entered into in a very different context. The potential for one party to feel pressured, whether by the overt acts of a partner or the pressure of the situation, is great. The risks are also greater, relatively, than in many commercial contracts; a marital property agreement potentially governs a couple's entire assets, which would be unusual in a business agreement. In the consultation paper we set out a number of additional safeguards that might be appropriate if qualifying nuptial agreements were to be permitted.

#### **Signed writing**

61. Some contracts may be entered into orally. We take the view, however, that a qualifying nuptial agreement must be in writing and signed by both parties and the consultation paper makes a provisional proposal to that effect.

### **Financial disclosure**

62. Detailed disclosure of assets is a routine aspect of ancillary relief proceedings. Should a similar exercise be required when entering into a qualifying nuptial agreement? It has been suggested to us that making an agreement without a reasonable understanding of what the other party is worth would amount to "operating blindfolded". We can see the force in that argument, although we appreciate that some couples might regard a disclosure requirement as intrusive, unnecessary or unnecessarily expensive.
63. Practice in other jurisdictions where it is possible to enter into binding marital property agreements varies; in particular, whether the requirement for one party to disclose assets can be waived (that is, dispensed with) by the other party.
64. We set out in the consultation paper our provisional proposal that a marital property agreement would not be enforceable against a party as a qualifying nuptial agreement unless that party had received material full and frank disclosure of the other party's financial situation. The emphasis on disclosure of material financial information means that, for example, failure to disclose a particular asset would mean that the agreement would not be binding in relation to that asset. The court would therefore still be able to award ancillary relief from that asset. We also ask consultees whether parties should be able to waive the need for disclosure.

### **Legal advice**

65. English law does not normally insist on a party being legally advised or represented when entering into a contract. But the consequence of entering into a qualifying nuptial agreement is to forego the financial protection of the law on divorce or dissolution. Legal advice is a pre-requisite to the enforceability of marital property agreements in a number of common law jurisdictions, and other organisations that have made proposals for the introduction of binding marital property agreements in England and Wales have required legal advice or at least the opportunity to obtain legal advice.
66. We agree that legal advice should be required (and not just an opportunity to obtain advice) and we make a provisional proposal in the consultation paper to that effect. Where a party has not received legal advice, the agreement would not be treated as a qualifying nuptial agreement against that party. As a minimum, we provisionally propose that the advice should include an explanation of the effect of the agreement on the legal rights of the party being advised and the advantages and disadvantages of the agreement.

### **Timing requirements**

67. A number of existing law reform proposals include a requirement that a pre-nuptial agreement must not be entered into too soon before the wedding or civil partnership ceremony itself (the suggested time limits range from 21 to 42 days). The courts have not commented directly on this question but have shown reluctance to enforce agreements entered into on the eve of a wedding.

68. The rationale for a timing requirement of this sort is to reduce the pressure on parties to sign a pre-nuptial agreement simply because the wedding or civil partnership ceremony is imminent. But where there is a timing requirement, pressure is simply transferred to the deadline that that requirement creates. Where an agreement is invalid if it is signed more than 21 days, say, before a wedding, the pressure to sign an agreement presented 22 days beforehand may be considerable. So we provisionally propose that there should be no such time limits that would automatically invalidate a qualifying nuptial agreement.

#### **THE EFFECT OF A QUALIFYING NUPTIAL AGREEMENT**

69. Part 6 looked at the formal requirements that might need to be met for an agreement to acquire the status of a qualifying nuptial agreement. Part 7 of the consultation paper looks at the effect these agreements would have when they come to be enforced at the end of the relationship. We have said that, if introduced, a qualifying nuptial agreement would be enforceable as a contract and would exclude the court's discretion to make an order in response to an application for ancillary relief. We nevertheless take the view that certain outcomes should be unacceptable. We ask consultees for their views on possible restrictions to the enforceability of qualifying nuptial agreements.
70. First, we take the view that a marital property agreement, even if it met the formal requirements for validity as a qualifying nuptial agreement, should not be enforceable to the extent that failed to provide for the needs of any children of the family. This is consistent with the third of the longstanding rules of public policy set out above and echoes the concerns expressed by Lord Phillips in *Radmacher v Granatino*, who said: "A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family."
71. We also take the view that the same approach should be adopted towards agreements which leave one spouse reliant on state benefits, at least where that could be avoided by distributing the couple's resources in a different way on divorce or dissolution. It would be wrong, we think, for the public to be required to support those whose basic need for support could be met by their former spouse (and would have been had they not entered into a qualifying nuptial agreement). The consultation paper therefore makes provisional proposals to this effect.
72. Beyond these two clear provisos, we ask consultees to consider what other outcomes should be restricted.

#### **A "cast-iron" agreement**

73. It would be possible to go no further than we have described. An agreement which met the formal requirements for a qualifying nuptial agreement, which made proper provision for any children and did not leave either party on state benefits would therefore be enforceable. This would be the case no matter how disastrous the effect upon the parties, either because the agreement was so one-sided from the outset or as a result of unforeseen subsequent events.

74. We explain in the consultation paper that we do not consider that this stark approach would be appropriate in English law unless the model of reform ultimately adopted was restricted to the type of "community of acquests" model seen elsewhere in Europe and discussed above. If agreements were limited to pre-acquired, inherited and gifted property only – leaving the rest of a couple's property to be divided according to conventional ancillary relief principles - then we can see some force in the argument that further restrictions may be unnecessary. We ask consultees for their views on this.

#### **Safeguards based on time and events**

75. One criticism of marital property agreements – particularly those entered into early in the relationship – is that the parties may not contemplate at the outset of a marriage or civil partnership the consequences of the passage of time or significant events. An agreement that may be appropriate for a young couple at the start of their relationship may be far less appropriate after the birth of a child or if one of the parties suffers serious illness, unemployment or a business failure. Recent research indicates a common public attitude that pre-nuptial agreements should be accorded less significance the longer a marriage lasts.
76. The consultation paper explores the idea that it would be possible for a qualifying nuptial agreement to cease to have effect after a certain period of time (what might be termed an automatic "sunset clause"), or on the happening of a specified event (the birth of a child of the marriage or civil partnership being the obvious example). But we also point out some of the difficulties in formulating such a restriction. Few events are so easily and objectively verifiable as the birth of a child. It would also need to be decided whether such an event should make the agreement unenforceable, even if the event was in fact anticipated in the agreement. We therefore seek consultees' views.

#### **Fairness as a safeguard**

77. For many, it is intuitively attractive to provide that an agreement should be enforced unless the outcome would be "unfair" or "unjust" and indeed this has featured in previous reform proposals by other organisations. Reform to this effect would, we think, be unnecessary as it would closely match the decision of the Supreme Court in *Radmacher v Granatino*. But it might be possible to formulate a restriction based on some more stringent test of fairness: "manifest unfairness" or "serious injustice" perhaps.
78. The consultation paper explores this question in more detail, looking at the law in other jurisdictions and reform proposals made by other organisations. On balance, we doubt whether any such test would give any more certainty than does the current law. We nevertheless ask consultees for their views.

#### **Compensation and the protection of needs**

79. An alternative approach would be to allow qualifying nuptial agreements to be enforced except to the extent that the needs of either spouse were not met. Provision for a partner's needs can be seen as the bed-rock of ancillary relief: by entering into a marriage or civil partnership, spouses become responsible for one another's needs, and that responsibility continues after the termination of the relationship.

80. Clearly, there is room for debate over how needs should be assessed. In the consultation paper we explain that needs, in the context of ancillary relief, means more than simply ensuring that a former spouse is not left reliant on state benefits (at least where there are sufficient resources to avoid that).
81. In recent years, the concept of compensating a partner for financial disadvantage suffered as a result of the relationship (typically, giving up employment to look after children) has become detached from the definition of needs and acquired its own status as a separate strand of "fairness" in ancillary relief awards. In the consultation paper we consider whether reform based on the concept of needs should incorporate this compensation element, or should use a narrower concept of needs. Clearly, adopting a narrow definition of needs would lead to less generous outcomes for the financially weaker spouse. We are therefore cautious about this approach but we ask consultees for their views.
82. The risk that an agreement will fail to meet the needs of one of the parties is obviously greater where it encompasses all of a couple's assets. One advantage of a "community of acquests" model of reform (discussed above and in Part 5 of the consultation paper) is that only pre-acquired, inherited and gifted property is excluded from the reach of the court's powers to award ancillary relief. If there is sufficient matrimonial property to meet the needs of both parties (however needs are assessed), then there would be no need to have recourse to property governed by the terms of the qualifying nuptial agreement.

#### **RESPONDING TO OUR CONSULTATION PAPER**

83. Copies of the Consultation Paper are available to download free of charge from our website at [www.lawcom.gov.uk/marital\\_property.htm](http://www.lawcom.gov.uk/marital_property.htm). We seek responses to the Consultation Paper by 11 April 2011:
- (1) by email to: [prenups@lawcommission.gsi.gov.uk](mailto:prenups@lawcommission.gsi.gov.uk); or
  - (2) by post to: Eleanor Sanders, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ
84. 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).
85. 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. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission. The Law Commission will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.



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**Press Release**

**Embargoed until 00:01 hours on**

**Tuesday, 11 January 2011**

## **The future for pre-nuptial agreements**

Should a couple be able to make a firm agreement – before they get married or enter a civil partnership – about what should happen to their property if their relationship ends? Or should the law remain as it stands, that the courts can decide if their agreement is enforceable?

In a consultation launched today, the Law Commission is asking the public's views on a range of potential options for reforming the law of pre-nuptial, post-nuptial and separation agreements – contracts made by couples before or during their marriage or civil partnership that are intended to govern their financial arrangements if the relationship ends.

Such agreements have attracted considerable attention in recent months after the judgment of the Supreme Court in *Radmacher v Granatino*, which went further than ever before in recognising their significance.

But the Supreme Court's decision was made in the context of the existing legislation. As it stands, the law does not allow a couple to prevent each other from asking the courts to decide how their property should be shared. And it is still down to the courts to decide on a case-by-case basis how much weight to give to any agreement the couple may have made. In many cases this can offer important protection but it can also lead to uncertainty and expensive litigation and there have been calls for statutory reform.

In its consultation, the Law Commission is asking whether the current legislation – which is a generation old – provides the right basis for determining the effect of marital property agreements, or whether a new approach is needed. Could reform bring more autonomy and certainty to couples who want to enter into such agreements, while retaining sufficient safeguards to protect vulnerable spouses and children?

Professor Elizabeth Cooke, the Law Commissioner leading the project, said today:

“Pre-nups are a topical issue. Under the current law the starting point for the resolution of financial division on divorce is the discretion of the court. Some feel that where couples have reached agreement, the courts should not be involved; yet the courts' approach is primarily protective, and some feel that they should not be wholly excluded.

“Our consultation paper considers the arguments for and against reform and examines how a new approach might balance the desire of some couples to plot their own future with more certainty against the need for safeguards against exploitation and the creation of hardship. This is an issue that needs to be handled with care.”

A summary of the proposals is attached. The full consultation paper is available at [www.lawcom.gov.uk/marital\\_property.htm](http://www.lawcom.gov.uk/marital_property.htm). The consultation closes on 11 April 2011.

## Notes for Editors

1. The Law Commission is a non-political independent body, set up by Parliament in 1965 to keep all the law of England and Wales under review, and to recommend reform where it is needed.
2. The Law Commission was asked by Government to examine the law relating to pre- and post-nuptial agreements, and separation agreements – see Law Commission Tenth Programme of Law Reform (2008) pp 13 to 14. The Commission delayed publication of this Consultation Paper pending the decision of the Supreme Court in *Radmacher v Granatino* [2010] UKSC 42.
3. For further details on this project visit [www.lawcom.gov.uk/marital\\_property.htm](http://www.lawcom.gov.uk/marital_property.htm) or email [propertyandtrust@lawcommission.gsi.gov.uk](mailto:propertyandtrust@lawcommission.gsi.gov.uk).
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