A more certain future –
Recognition of pre-marital agreements in England and Wales

Executive summary

Introduction

Resolution (formerly the Solicitors Family Law Association) is an organisation of over 5000 solicitors specialising in family law. Its members have extensive experience of dealing with the breakdown of families, both married and unmarried. In the course of their work with clients, members have found that an increasing number of couples wish to take steps to minimise the uncertainty of the court's approach to financial arrangements upon divorce and to decide for themselves what a fair settlement would be. The current law means that financial outcomes are unclear and uncertain which most families find unacceptable.

The Solicitors Family Law Association asked its Law Reform Committee to examine the current state of the law and to make recommendations for reform. The Committee's recently published proposals and recommendations represent Resolution policy.

The case for reform

It is an anomalous position that husbands and wives (and in the future registered same sex partners) are unable to bind themselves with a contractual pre-marital/partnership agreement, whereas cohabitants can. Instead, divorcing couples and separating registered partners face financial outcomes which represent a judicial lottery based on the exercise of statutory discretion. It is felt that the increased demand for pre-marital agreements reflects the higher number of second and subsequent marriages; the wider multicultural and multinational community in which we live and the general public being more attuned to the idea of self-ordering. With the media following high profile marriages and divorces, there is a greater desire towards self-ordering and the concept of preventative medicine to mitigate the cost of litigation.

The current law

The starting point is that pre-marital agreements are not currently enforceable in England and Wales. This is because they are seen to be contrary to public policy because they may undermine the institution of marriage and the ability of the courts to tailormake financial solutions for families upon marriage breakdown. In particular,

there appears to be no appetite to oust the power of the court. At present Section 25 of the Matrimonial Causes Act 1973 imposes a statutory obligation on the court to consider all the circumstances of the case. Pre-marital agreements are often argued as being either one of these circumstances or as a factor to be treated as conduct which it would be unfair for the court to ignore.

In the case of *X v X* in 2002 Mr Justice Munby acknowledged that pre-marital agreements were "an important factor" but the level of importance varied from case to case. In the most recently reported case regarding premarital agreements *of K v K* in 2003 Mr Roger Hayward-Smith QC (sitting as a Deputy High Court Judge) largely upheld a pre-marital agreement on the basis that:
- parties understood the agreement;
- were properly advised;
- were under no pressure to sign;
- knew that there was soon to be a child;
- there had been no unforeseen change of circumstances which would make it unfair to hold one party to the agreement; and
- there was no injustice to the other party.

The pre-marital agreement was treated as both "circumstances of the case" and "conduct" in the exercise of the court's discretion.

The Government's position

The Government's position was set out in its consultation document *Supporting Families* in March 1999. It aimed to raise the debate on measures to strengthen the family and bolster marriage as the best basis for raising children and for building strong and supportive communities. It recognised that some entered into pre-marital agreements to reduce the scope for conflict on divorce and the fact that the court was under no requirement to take any account of pre-marital agreements provided a lack of certainty, which may well discourage couples from making such agreements.

It wished to consider any advantage in making pre-marital agreements binding on divorce by providing people with more choice and to take more responsibility for order in their own lives. It also considered that it might allow parties to build a solid foundation for their marriage by encouraging them to look at financial issues they may face as husband and wife and reach agreement before they got married. Whilst it did not suggest that pre-marital agreements should become mandatory, it felt that they should be allowed subject to the six "safeguards".

If one or more of the following circumstances or safeguards were found to apply, a pre-marital agreement would not be legally binding:

(1) a child of the family, whether or not the child was alive or a child of the family at the time the agreement was made;

(2) where under the general rule of contract the agreement is unenforceable including if the contract attempted to lay an obligation on a third party who had not agreed in advance;

(3) where one or both of the couple did not receive independent legal advice before entering into the agreement;

(4) where the enforcement of the agreement, in a court's opinion, would cause significant injustice (to one or both of the couple or child of the marriage);

(5) where one or both of the couple failed to give full disclosure of assets and property before the agreement was made;

(6) where the agreement was made fewer than 21 days prior to the marriage.

The family judiciary (whilst strongly supporting the institution of the marriage) expressed concern that pre-marital agreements might condition the parties to the failure of their marriage and so help precipitate it. They suggested more research on pre-marital agreements. This research which has never taken place.

On balance, the majority of the judges at the time (the make up of which will now have changed) were slightly in favour of the pre-marital agreements being given more prominence and suggested that it be an additional matter to be added into the discretionary task the court had to carry out, namely adding to section 25(2)(i) namely that "terms of any agreement reached between the parties in contemplation of (or) subsequent to their marriage" be inserted.

Other jurisdictions

It is recognised that there are significant differences in law between England and Wales and other civil law communities where community of property is common (for example, France and the rest of Europe) and where enforceable pre-marital agreements are more common than in England. They are also enforceable in many of the accession states that joined the European Community in May 2004. Not all such agreements deal with maintenance, marital property and other financial provision. In many countries, even if proceedings take place in a country which was not anticipated by the parties at the time of the marriage, the contents of a pre-marital agreement are likely to be given some consideration by the judge when making a decision. This differs from the English judicial approach.

The purpose of reform

The purpose of reform is to address the lack of clarity and certainty of outcome for parties and to meet a general desire to self-order. It is hoped that pre-marital agreements would also protect children, inherited wealth and allow a consistency of approach with treatment of other social groups. It is also hoped to impact upon the cost of litigation on the fairness of outcome. It may also look to harmonisation with other jurisdictions.

Whilst the judiciary retain the ability to exercise discretion on a case by case basis, even the Court of Appeal (Thorpe LJ October 2002), describing the Supporting Families proposals as "well pitched", added "more emphasis should be placed on self

ordering by elevating the effect of pre-marital contracts in any straightforward situation". He himself suggested "a clearer definition of the judicial task".

Proposed reform

The Committee considered maintaining the status quo or the introduction of a Practice Direction or a rule change. None of these did more than the existing law permits. The Committee also considered making pre-marital agreements compulsory, subject to an option to opt out but this was considered too bold a step.

The Committee also considered pre-marital agreements becoming legally binding subject to safeguards (those safeguards being those contained above within the Government's consultation paper Supporting Families).

An alternative was there should be added as a separate Section 25 of the Matrimonial Causes Act 1973 factor the terms of any agreement reached between the parties in contemplation of or subsequent to their marriage and, where an agreement had been entered into by the parties under the laws of a foreign jurisdiction, the legal effect which that agreement would have in that jurisdiction. However, it was again felt that the law would not really be advanced beyond where it is now.

On balance, the Committee felt that pre-marital agreements should become legally binding subject to an overriding safeguard of significant injustice and also be added as a separate section 25 Matrimonial Causes Act 1973 factor.

The Committee considered the satellite litigation that might flow to define what "significant injustice" was, but concluded that it was a small price to pay for the certainty of legally binding pre-marital agreements.

Thus it was proposed that s 25 be amended so that the court is directed to have regard to:-

> *any agreement entered into between the parties to the marriage, in contemplation of or after the marriage for the purpose of regulating their affairs on the breakdown of their marriage, which shall be considered binding upon them unless to do so will cause significant injustice to either party or to any [such] minor child of the family.*

This would cover pre-marital agreements entered into in all countries that an English court might need to adjudicate upon. It is proposed that there be a good practice guide in relation to the drafting and financial disclosure which should accompany such agreements.

The courts will retain the ability to use other discretionary factors to mitigate the need for satellite litigation on significant injustice.

The proposed amendment benefits both those who are entitled to public funding upon the breakdown of their marriage, as well as those who fund costs privately. The

more assets and income that are left intact within the family and not spent on post-marital litigation, the more likely families will not need to turn to other social security benefits such as housing and health care.

The public would, if these proposals were to be implemented, have greater clarity and certainty of outcome as well as choice at the outset of married relationships or registered civil partnerships. If they wished to enter into such agreements to avoid the fear of uncertain outcomes, it might encourage more to choose marriage as an option for family life.

These proposals are consistent with statements made by Lord Filkin, the former Family Justice Minister, who confirmed that the Government was committed to supporting marriage and families when relationships failed especially when there were children involved. The Committee believes that the proposals are consistent with this stance and promote conciliatory divorces and encourage positive relationships between children and parents who separate. The Government, in support of its Civil Partnership Bill, has
in principle given a green light to self ordering and these proposals extend this concept to the wider community who have chosen marriage, but whose marriages have failed.

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Introduction

Resolution is an organisation of 5,000 lawyers and family justice professionals who believe in a constructive, non confrontational approach to family law matters. Resolution also seeks to improve the family justice system. We provide education and training for lawyers and mediators to improve their knowledge of the law and their understanding of the emotional and practical issues of family breakdown. Resolution encourages the use of other dispute resolution methods, such as mediation and collaborative law, where appropriate.

The committee

The SFLA National Committee approved the formation of the Law Reform Committee in the Spring of 2003. The paper was approved by the National Committee on 20 July 2004. The Committee members are:

Sarah Anticoni	Charles Russell
Charlotte Bradley	Kingsley Napley (International Committee)
Simon Bruce	Farrer & Co
Martin Davis	Battens
Nicholas Longford	Rustons & Lloyd
Philippa Pearson	Family Law in Partnership
David Salter	Addleshaw Goddard (Chairman)
Mark Saunderson	Keelys
Simon Smith [now District Judge Smith]	(formerly of HFT Gough & Co until 09.06.04)
Philip Thorneycroft	Wolferstans

A. Remit

To prepare a paper explaining the current state of the law relating to pre-marital agreements, the particular issues which arise and possible options for reform including statutory reform. It is not the Committee's remit to include exploration of cohabitation contracts, nor the effect of post-nuptial separation agreements. The Resolution Cohabitation Committee will be invited to consider the impact of the paper on their work. It is also not intended to deal specifically with ante-nuptial settlements (where parties seek to regularise the financial affairs of spouses on and during marriage, but does not contemplate the dissolution of a marriage). No separate comment is to be made in relation to what might be termed "pre-partnership agreements" in the case of registered civil partnerships under the Civil Partnership Bill. It is suggested, however, that similar considerations should apply to such agreements.

B. Definition

The Committee would not seek to restrict the definition of a pre-marital agreement. A pre-marital agreement will therefore include:

(a) an ante-nuptial settlement as described in A above; and

(b) a pre-marital agreement by which a man and a woman or same sex partners, who are about to marry or register a registered civil partnership, seek to regulate their affairs in the event of relationship breakdown;

(c) an agreement of the types referred to at (a) and (b) which involves a third party;

(d) a mid-nuptial agreement whether an initial agreement or a variation agreement.

C. Format of paper

1. The current state of English law
2. The Government's position
3. Law Society and other organisations: current position
4. The Resolution position
5. Other jurisdictions
6. Issues to address
7. Proposed policies for reform

1. The current state of English Law

1.1 The English courts have traditionally held the view that pre-marital agreements (as opposed to ante-nuptial settlements or deeds of gift) are not enforceable (see for example *N v N* [1999] 2FLR 745 and *Hyman v Hyman* [1929] AC 601).

1.2 Attempts by parties to control the outcome of future financial claims have been considered contrary to public policy because:

(a) they undermine the institution of marriage by contemplating or providing for divorce;

(b) there is public interest in ensuring that upon breakdown parties receive appropriate financial provision assessed judicially in the absence of agreement; and

(c) the jurisdiction of the courts cannot be ousted by the parties.

1.3 Dr Stephen Cretney (The Family & the Law - Status or Contract C&FLQ Vol.15 No.4 2003) at p 413 talks about "the remarkable anomaly" and 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". He goes on to say "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* [1980] 1 WLR 1410). You cannot make such an agreement proof against the exercise of the overriding judicial discretion. On one view, this 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".

1.4 Notwithstanding the orthodox starting point of non-enforceability, practitioners continue to be asked to provide advice on the area and clients enter into such agreements. The Grant Thornton survey of 2003 revealed that where 92% of the respondent family practitioners advised upon pre-maritals; 57% of those noted an increase in such work.

1.5 Outcomes are subject to the lottery of different views of judges with an increasing number of the judiciary taking the more progressive view by acknowledging that, where appropriate, the main factor in determining financial relief can be the pre-marital agreement.

1.6 "Whether this is a satisfactory approach, bearing in mind the [clients'] desire for certainty, is a question on which opinions will differ," Gareth Miller (PC Business 2003 page 426). The demand for agreements has increased because of the higher number of second and subsequent marriages; a wider multi-cultural, multi-national community with foreign nationals more attuned to their availability; the publicity that pre-marital agreements have had in the media; a greater desire towards parties self-determining outcomes; the fear of failing to protect wealth and taking the step as preventive medicine together with the costs that any litigation might entail. The courts may be turning in favour of attaching more weight to the agreements, subject to an assessment in each case as to (1) whether the agreement was procedurally fair when it was made; (2) whether the agreement was substantively fair when it was made; and (3) whether or not if its terms were "enforced" the agreement would provide fairly for both parties in light of *White v White* [2000] 2 FLR 981

1.7 The starting point for any division of assets is section 25 of the Matrimonial Causes Act 1973, which governs the court's decision and cannot be avoided. The court cannot ignore the matters in the section or be bound by the terms of the pre-marital agreement because the section imposes on the court (section 25(1)) the duty to, "have regard to all circumstances of the case" and among other factors section 25(2)(f), "the conduct of each of the parties, if that conduct is such that in the opinion of the court it would be inequitable to disregard it". The most cogent example is the decision in *Edgar v Edgar*

[1981] FLR 19, which treated a post-marital interspousal agreement as "conduct" within the meaning of s.25(2)(f).

Overview of recent cases

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

Both husband and wife were German. They entered into two pre-marital agreements, one under Swiss/German law, the other under US law whereby the wife would receive fixed life income, pegged at the pension payable to a retired German judge. The wife had been training as a lawyer at the start of the relationship and, whilst the proposed income might have provided for her reasonable needs (which was pre-White the relevant factor), it did not reflect the super rich level of standard of living enjoyed during the marriage (£1.75m per annum). The wife could not be sustained on the income proposed in the agreement. In addition, there were 3 young children who would observe a disparity between the standard of living enjoyed by their parents unless the agreement was avoided. The husband sought to rely on the agreement. Thorpe J referred to the ante-nuptial contract as a … "special condition which has to be considered…". He acknowledged that contracts were common place in society from which the parties had come, but if strictly applied would have the "ridiculous result of confining the wife to the pension". He then added, "in this jurisdiction they must be of very limited significance [emphasis added]. 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…". It is unclear as to whether or not these judicial comments related solely to this particular case or generally. It was clear that he "did not attach any significant weight to the contracts".

1.9 In *Dart v Dart* [1996] 2 FLR 286, the wife drew the court's attention to what she would have received under the law of equitable distribution in the state of Michigan. Thorpe LJ did not find in favour with this line of argument, comparing it to pre-marital agreements implying that, whilst both could be considered under section 25, neither carried much weight.

1.10 In *N v N (Foreign Divorce and Financial Relief)* [1997] 1 FLR 900, Cazalet J noted that a pre-marital agreement would be binding in Sweden as against being no more than a material consideration for this court under section 25 MCA.

1.11 In *S v S (Matrimonial Proceedings: Appropriate Forum)* [1997] 2 FLR 100, Wilson J noted in what might be seen as something of a watershed that he was "aware of the growing belief that no significant weight will be afforded to a pre-marital agreement, whatever the circumstances". He referred to sounding a "cautionary note in that respect". After stating respect for Thorpe

LJ's comments in *F v F* and in particular with regard to section 25(1) [all circumstances of the case], he added:

> "there will come a case … where the circumstances surrounding the pre-marital agreement and the provision therein contained might, when viewed in the context of the other circumstances of the case prove influential or even crucial".

Interestingly, he referred to other jurisdictions (US and EU) and the fact that on occasion justice could only be served by confining parties to the rights under pre-marital agreements and whilst addressing caution about being too to assert the contrary. He concluded with:

"I can find nothing in Section 25 to compel a conclusion, so much at odds with personal freedom to make arrangements for ourselves, that escape from solemn bargains, carefully struck by informed adults, is readily available here. It all depends. The matter must be left open…".

1.12 In *Haneef v Haneef* [1999] 17th February (unreported) Court of Appeal, a pre-marital agreement was entered into by the parties in India prior to their coming to England. The fact that this agreement was made abroad and at a time when the parties lived abroad might have been a relevant factor in assessing the importance to be attached to it. The agreement made very little provision for the wife. The Court held that it was not appropriate to take into account under the Matrimonial Causes Act 1973 an agreement based on the approach in the Indian sub-continent.

1.13 Further, in *N v N (Jurisdiction: Pre-marital Agreement)* [1999] 2 FLR 745, the wife sought to argue specific enforceability of parts of pre-marital agreement (relating to a Get) as a matter of contract. Wall J rejected the argument stating:

> "one cannot, in my judgment, avoid the fundamental proposition that each [clause] is part of an agreement entered into before marriage to regulate the parties' affairs in the event of divorce. The public policy therefore continues to apply".

What was not addressed (because it was irrelevant in that case) is what evidential weight the Court should place on such an agreement in exercising its discretion on Section 25.

1.14 *G v G (Financial Provision: Separation Agreement)* [2000] 2 FLR 18, Connell J; sub nom *Wyatt-Jones v Goldsmith* [2000] WL 976036, CA, was a case of a mid-nuptial agreement. At the time of the hearing before the Court of Appeal, the husband was 63 and the wife was 44. Each had previous

marriages and children by those marriages. The parties had entered into a pre-marital agreement on the eve of their marriage. The wife entered into a further agreement at her suggestion in 1994 seemingly to mark the husband's birthday confirming her limited rights in the event of marriage breakdown. The parties separated in August 1996, the separation being preceded by a Separation Agreement dated six days earlier, which reaffirmed the pre-existing pre-marital agreement. Neither party took any legal advice in relation to the Separation Agreement.

At first instance, Connell J found that "the aspect of the case which should be afforded the greatest weight is the bargain that the parties themselves struck just before their separation".

On appeal, Thorpe L J found that:

"I would emphasise that this was a couple who had each had previous experience of marital breakdown. Each of them had, from the outset of their relationship, elected to regulate their future affairs contractually. The agreement of [July] 1996 was only a supplement to the two prior pre-nuptial contracts".

After accounting how the husband had acted upon the agreements, Thorpe L J added:

"In those circumstances in my opinion it was entirely a matter for the Judge to set this factor [the agreement] into its proper perspective. I cannot see that the weight he elected to give to this agreement, having seen and heard the parties, is open to criticism in this Court".

1.15 And so it did until *C v C (Divorce: Stay of English Proceedings)* [2001] 1 FLR 624 where Johnson J was persuaded that the existence of a French pre-marital was a significant factor to stay English proceedings which he did.

1.16 In July 2001 in *M v M* [2002] 1 FLR 654 Connell J noted that "the existence of a pre-[marital] agreement can do more to obscure rather than clarify the underlying justice of the case". He spoke of the agreement as being "one of the more relevant circumstances" of the case. It was determinative of the lump sum.

The courts have always been at pains to show that all criteria of section 25 are relevant, but not in any particular order. Connell J's order made here was substantially more than had been contained in the agreement, but less than had there not been one. (Lump sum order £875K as opposed to £275K in agreement – 5 year marriage, 5 year old child. H's net assets £6.5m, W's

£300,000k). He also cast doubts on any public policy objection to agreements with divorce being "commonplace".

1.17 In the case of *X v X (Y and Z intervening)* [2002] 1 FLR 508 where a financial agreement had been made in divorce proceedings which was then reneged upon by one party, Munby J observed about pre-marital agreements (at 530 para [79]): "It remains the rule that any agreement or arrangement entered into by a husband and wife, whether before or during the marriage, which contemplates or provides for the separation of husband and wife at a future time is against public policy and void."
Later at 531 para [81] he held:

> "the contract which purports to deprive the court of a jurisdiction which it would otherwise have, is contrary to public policy. Thus, a spouse cannot bilaterally agree, whether expressly or impliedly, not to apply to the court for maintenance or forms of ancillary relief. Such a stipulation is contrary to public policy and unenforceable".

At para. [103] Munby J helpfully "teased out" propositions of significance from earlier authorities.

- "The fact that the parties have made their own agreement is a "very important" factor in considering what is a just and fair outcome. The amount of importance will vary from case to case.

- The Court will not lightly permit parties who have made an agreement between themselves to depart from it. The Court should be slow to invade the contractual territory, for as a matter of general policy what the parties have themselves agreed should, unless on the face of it or in fact contrary to public policy or subject to some vitiating feature….. be upheld by the courts.

- A formal agreement, properly and fairly arrived at with competent legal advice, should be upheld by the Court unless there are "good and substantial grounds" for concluding that an "injustice" will be done by upholding the parties to it.

- The mere fact that one party might have done better by going to Court is not of itself generally a ground for permitting that party to resile from what was agreed.
- The Court would nonetheless have regard to all the circumstances. The circumstances are to be judged in their totality and with a broad perspective rather than individually one by one.

- In particular the Court must have regard to the circumstances surrounding the making of the agreement, the extent to which the parties

themselves attached importance to it and the extent to which the parties themselves have acted upon it.

- The relevant circumstances are not limited to the purely financial aspects of the agreement; social, personal and, I would add, religious and cultural considerations, all have to be taken into account.

- The Court should bear in mind the undesirability of stirring up problems with parties who have come to an agreement.

- On the contrary, the Court should if possible and consistent with its duty under section 25, seek to bring about family peace and finality."

1.18 In *K v K* [2003] 1 FLR 2003 a case heard by Mr Rodger Hayward-Smith QC sitting as a Deputy High Court Judge, the court was keen to apply the law:

> "as it is now and not what it may or may not be after discussion on consultation elsewhere….".

He had before him the authorities of *Edgar v Edgar* [1981] 1 WLR 1410; *F v F* (Ancillary Relief :Substantial assets) [1995] 2 FLR 45; *S v S* (Divorce: Staying Proceedings) [1997] 2 FLR 100; M v M (Pre-Marital Agreement) [2002] 1 FLR 654 and *Wyatt-Jones v Goldsmith* [2000] WL 976036 in which judgment was given in CA on 28 June 2000. The facts were that 14 months prior to separation H was worth approximately £25m. W's father was wealthy. W had £1m assets, from which she enjoyed an income. The marriage followed an unintended pregnancy. The pregnancy was terminated under pressure from W's father and the marriage went ahead. W's father suggested a pre-marital agreement. Financial disclosure and independent legal advice followed. W sought to avoid the agreement, which provided £100k a lump sum to be increased by 10% per annum. There was no maintenance provision for wife (although this had been part of earlier negotiations). The agreement was signed the day before the wedding.
The Deputy Judge held the wife to the capital provision contained in the agreement (£120k as against her £1.6m sought). He held that:

(a) the wife understood the agreement;
(b) was properly advised;
(c) there was no pressure to sign;
(d) she signed with knowledge that there would soon be a child;
(e) there was no unforeseen change of circumstances which would make it unfair to hold her to the agreement;
(f) there would be an injustice to the husband if the court ignored the capital agreement; and
(g) the agreement was both "circumstances of case" and "conduct".

He also held that the agreement did not preclude a maintenance order, but if it did that would be unjust to wife and so ordered £15k per annum (taking into account the W's investment income). The Judge considered and rejected the idea of capitalisation under section 25A as contrary to pre-marital agreement to award wife any capital in addition to it. H was also to provide housing for child and wife via a trust with reversion to the husband and so he balanced s.25(1) and interests of child with the terms of pre-marital agreement and length of marriage.

1.19 In the case of *Parra v Parra* [2003] 1 FLR 492, CA, although not a pre-marital agreement case, the following passage from the judgment of Thorpe L J at para [27] might usefully be transposed in argument into a pre-marital agreement case: "the parties….. had in effect elected for a marital regime of community of property. In such circumstances what is the need for the Court's discretionary powers? The introduction of a "no order" principle into section 25 Matrimonial Causes Act 1973 might contribute to the elimination of unnecessary litigation ……"

1.20 In *A v T (Ancillary Relief: Cultural Factors)* [2004] 1 FLR 977, Baron J, it was held that, where the parties had entered into a marriage contract in Iran, the court could consider how the matter would be dealt with by the courts of that foreign country when dealing with ancillary relief proceedings because the foreign cultural background of the parties was a dominant factor. The decision of the Court of Appeal in *Otobo v Otobo* [2003] 1FLR 192, which was a forum conveniens case, was applied; Thorpe LJ had held that, when carrying out the exercise under the MCA 1973, s 25 in a case involving a family with only a secondary attachment to the English jurisdiction and culture, an English judge should give due weight to the primary cultural factors, and not ignore the differential between what the wife might anticipate from a determination in England as opposed to a determination in the alternative jurisdiction, including that as one of "the circumstances of the case". This approach was echoed in *C v C* [2004] EWHC 742 (Fam) by Wilson J in a case involving a post-nuptial discretionary settlement, where he held:

> "English law chooses no substantive law other than its own for the dispatch of applications for ancillary relief following divorce, even though belatedly it is beginning to recognise the need, in a case with foreign connections, for a sideways look at foreign law as part of the discretionary analysis required by substantive law (*Otobo v Otobo* [2003] 1FLR 192)."

1.21 In *J v V* (Disclosure: Off-shore Corporations) [2004] 1 FLR 1042, Coleridge J held that a pre-nuptial agreement in which the wife

relinquished all claims on the husband's interest in the family's business empire as well as other assets was of no significance it having been signed on the eve of the marriage without proper legal advice or disclosure and making no allowance of the arrival of children.

1.22 Following the decisions in White and Lambert, if an agreement provides for less than 50% of the assets in a long marriage, will a formula such as 50% of the assets created during the marriage in a pre-marital agreement be advanced and succeed and will this impact upon second marriage? It is thought that "the longer that a marriage has lasted, the less weight is likely to be attached to it", (Gareth Miller [2003] PCB Nov/Dec).

1.23 Empirical evidence demonstrates that there has been greater use of pre-marital agreements and it is therefore a question of time before more cases come before the courts. The decision of the Court of Appeal in Parlour v Parlour; *McFarlane v McFarlane* [2004] 8 July on maintenance in high income cases may only serve to increase this usage. Such agreements cannot be ignored and the direction in which the courts are going needs to be interpreted carefully. The specialist family solicitors' view is that, whilst pre-marital agreements are not the mainstay of any family lawyer's practice, following increased media attention in celebrity cases, clients frequently raise the issue. The profession is thus faced with relatively low volume, but high risk work. Whilst professional guidance is to give clear written advice having first checked whether professional indemnity insurance covers the area and the sums involved, some choose to refuse the work or others charge a premium rate to cover the risks. It is perceived that the risk arises from a pre-marital agreement which can withstand a challenge and one which cannot. The current issue is not so much whether pre-marital agreements are legally binding today, but rather whether they may foreseeably become so in the future. There then arises the distinct issue of whether the family lawyer, who has acted for a divorced person who is about to remarry, should advise him/her to enter into a pre-marital agreement.

1.24 The Civil Partnership Bill which received its First Reading in the Commons on 5th July 2004 relates to same sex relationships but not to mixed sex relationships where parties choose not to marry. The proposals contained at paragraph 7 below should be applied by analogy to the proposed registered partnerships.

2. The Government's position

2.1 In March 1999 the Government produced Supporting Families - a consultation document. Its purpose was to raise a debate on measures which might strengthen the family.

The suggestions relating to agreements about property feature in Chapter 4 of the paper, which is entitled "Strengthening Marriage".

Paragraph 4.1

"Strong and stable families provide the best basis for raising children and for building strong and supportive communities."

Paragraph 4.3

"This Government believes that marriage provides a strong foundation for stable relationships."

Paragraph 4.4

"We are therefore proposing measures to strengthen the institution of marriage."

Paragraph 4.20

"Some couples also seek to reduce the scope for conflict on divorce by making agreements which deal with the way their property would be divided if they did divorce… There is, however, no requirement for the Courts to take any account of such agreement in deciding how to award property on divorce. This lack of certainty may well discourage couples from making such agreements."

Paragraph 4.21

"The Government is considering whether there would be advantage in allowing couples, either before or during their marriage, to make written agreements dealing with their financial affairs which would be legally binding on divorce. This could give people more choice and allow them to take more responsibility for ordering their own lives. It could help them build a solid foundation for their marriage by encouraging them to look at the financial issues they may face as husband and wife and reach agreement before the get married."

Paragraph 4.22

"Providing greater security on property matters in this way could make it more likely that some people would marry, rather than simply live together. It might also give couples in a shaky marriage a little greater assurance about their future than they might otherwise have had. Nuptial agreements could also have the effect of protecting the

children of first marriages, who can often be overlooked at the time of the second marriage, or a second divorce."

There appeared to be consideration as to whether or not there was any advantage to a couple in making a pre-marital agreement. This would give people more choice (para 4.21) and to take more responsibility for ordering their own lives. It might also allow couples to build a solid foundation for marriage by encouraging parties to address practical financial issues and reach agreement before marriage.

2.2 It was not suggested that such agreements would be mandatory. At paragraph 4.23, a safety net was proposed to ensure that the party to an agreement who was in an "economically weaker" position would be protected, as would children.

2.3 "The Six Safeguards" (paragraph 4.23)
The six suggested safeguards to protect the parties are set out so that, if one or more circumstances were found to apply, a written pre-marital agreement would not be legally binding:

(1) Where there was as a child of the family, whether or not the child was alive or a child of the family at the time the agreement was made.

(2) Where under the general rule of contract the agreement is unenforceable including if the contract attempted to lay an obligation on a third party who had not agreed in advance.

(3) Where one or both of the couple did not receive independent legal advice before entering into the agreement.

(4) Where the enforcement of the agreement, in a court's opinion, would cause significant injustice (to one or both of the couple or child of the marriage).

(5) Where one or both the couples failed to give full disclosure of assets and property before the agreement was made.

(6) Where the agreement was made fewer than 21 days prior to the marriage.

These safeguards are almost equivalent to the saving protection given in the State of Connecticut, USA. However, a pre-marital agreement which fell foul of any of the six safeguards would still be of fundamental importance.

2.4 In late 1999, there were 157 responses to the Consultation Document, 80 were in favour of allowing the agreements and 77 against. The Family Division Judges, including the President, approved Wilson J's response ([1999] Fam Law 159) in which they unanimously set out their reservations about "whether the law should strive to encourage pre-marital agreements". After strongly supporting the institution of marriage, they wondered "whether the pre-marital agreement conditions the couple to the failure of their marriage and so helped to precipitate this. This deserves research". To date, no such research has commenced.

2.5 Some judges felt the institution of marriage would be devalued if parties could elect to sever some of its most important legal effects. Others "hesitantly" felt that adults should be "allowed to cast their relationships in their own way". The only real consensus was that "it is profoundly difficult terrain".

2.6 There appeared to be common ground that there should be financial disclosure and separate legal advice and, if a contract was voidable under common law, it should not be relied upon. The judges were particularly concerned to protect the rights of the child whether alive or not yet born.

> "If, as we think, the presence of a child should deprive the nuptial agreement of much if not all of its effect, the role of the agreement in the law is much circumscribed."

2.7 They concluded that "the majority of us are of the view slightly, only slightly, greater prominence might be given to the pre-marital agreement in the law of ancillary relief". That suggested solution was an additional matter to be added into section 25(2)(i) namely that "terms of any agreement reached between the parties in contemplation of (or) subsequent to their marriage".

2.8 A minority of judges were prepared to go a little further despite their unanimous lack of enthusiasm "for the agreements…", but where there was an agreement … satisfying the elementary requirements, the shape of the law should be that it be enforced "unless". They added that the court was now "jealous of its own discretion" and so "the overall balance needs gentle redress but by means of the "unless" clause, making enforcement subject to the interests of the child and to a residual discretion to the depart in the plain case".

2.9 Since 1999, it is believed possible that the views of the Family Division Judges have evolved given the passage of time, if only to reflect the change in the constitution of the High Court Bench.

3. Law Society and other organisations: current position

3.1 Law Society

The Law Society's position as at May 2003, in its paper Financial Provision on Divorce - Clarity and Fairness: Proposals for Reform (page 20, paragraph 98(9)) was a tentative one. It felt that reform was needed. It stated:

> "Having dealt with the needs of children, the housing and other needs of the couple, and having taken into account any pre-marriage agreement, the court must then divide any surplus so as to achieve a fair result. Fairness may frequently require the value of the remaining assets to be divided equally, but this may be affected by one or more of the factors in section 25, such as the length of the marriage, the contributions of the parties, the future obligations to the family of the parties, and their respective overall financial positions. In any event, when the judge, in his final determination, proposes to depart from equality of division, he must specify which of the factors in section 25 have led him to that conclusion".

This was to be a guideline and not put forward as the only potential solution to ancillary relief reform. The Society felt it was a starting point for discussion and illustrated the type of guideline that could be implemented to give the public a better idea of how the decision making process works without changing the basis of current law and without overly hampering judges' discretion to find an appropriate bespoke solution to each case.

3.2 Other Organisations

The Joseph Rowntree Foundation has become one of the largest independent social policy research and development charities in the UK. Its work includes its research paper *How Parents Cope Financially on Marriage Breakdown* (April 2000) Ref. 480.

It felt that "the divorce process has assumed ever greater significance and debates concern family structuring, individual economic stability and conflict resolution. But debate is concerned with the end of this process rather than its beginning". The research, carried out at Cardiff University led by Gillian Douglas and Mervyn Murch, looked at how a group of divorcing parents coped financially before reaching a final divorce settlement,

> "nearly a quarter of parents [interviewed] felt that the settlement [ultimately achieved] had been unfair to them or to their children. They were fairly evenly divided as to whether a pre-nuptial

agreement would be a good idea. Some felt that this could protect their existing children in any future divorce, but others were worried that it would be impossible to foresee how circumstances might change. Fathers were more likely to favour such agreements than mothers".

The survey was carried out between 1998 and 1999 from random sample court records from six courts in South-West England. Following the research the implications for policy and practice were that "the law can set out more clearly the objectives and the approach which should be taken when settling family finances which would aid couples in negotiating a settlement. The Government's suggested guidelines and their consultation paper, Supporting Families, appeared to represent a useful way forward in this respect".

4. Resolution – the current position

4.1 The current policy is found in the SFLA policy digest 2001 and states that a pre-marital agreement "should be a section 25(2) factor".

> "They should not be binding even with the six safeguards proposed in the Supporting Families. Invariably there will have been some unexpected development from the time of the marriage to that of the divorce. There will be inequality of bargaining power. There will be considerable litigation over the meaning of "significant injustice" and proposed safeguards. This would involve looking back at the time of entering the agreement emphasis on the circumstances at the time of the marriage, the unforeseen developments and changes during the marriage and the element of injustice of the agreement itself all of which would be negative, contract law and family law based, lead directly away from future needs and detract from the separating adults being able to co-parent successfully."

4.2 The Cohabitation Committee of the SFLA noted in June 2003 that this policy is pre-White and needed revisiting/revising with a proper consideration of recent trends:

(a) If *K v K* indicates that courts are moving towards placing greater weight on pre-maritals, is the SFLA policy out of step with actual practice?

(b) With calls generally for greater predictability of outcomes for divorcing couples, will a change in emphasis or treatment of pre-maritals go some way to address this?

(c) Should an "opt out" approach be adopted (as in Fairness for Families with cohabitants), as opposed to an "opt in" which is favoured by the Government?

(d) Is it appropriate to revise policy away from "one of the section 25 factors to be considered with equal weight" towards "binding subject to Edgar safeguards"? In which case, what safeguards should there be: disclosure; independent legal advice; arms length negotiation; pre-marriage timing; duress?

4.3 The Cohabitation Committee posed the following questions. Should subsequent post-marriage changes part reduce or negate the enforceability of a pre-marital agreement? If so, how specifically should any change in circumstance be
defined: for example, any relevant change subject to court's discretion or a non-exhaustive list which might trigger a departure or part departure (birth of child to revision in health) or exhaustive list of circumstances which allow departure?

4.4 Can any safeguard adequately provide for inequality of bargaining power and protect the more vulnerable party?

4.5 Will any move towards enforceability of pre-marital agreements result in litigation based on historic events rather than outcome based on future needs? Will it add to litigation expense along Cowan/contribution arguments now disapproved of and discouraged by judiciary?

5. Other jurisdictions

By way of comparison, the Committee researched the current state of pre-marital agreements in comparable jurisdictions both in Europe, United States and the Commonwealth. Appearing at Annex 1 to this paper is a summary identifying:

(a) the existence and use of pre-marital agreements in other jurisdictions;

(b) whether or not they are compulsory;

(c) the format that they take;

(d) the circumstances in which they are enforceable;

(e) whether these stand up to judicial scrutiny and the extent to which they are used; and

(f) if so, by which groups of people.

In many community of property jurisdictions such as France, pre-marital agreements are executed for reasons other than for divorce, for example, to protect spouses' assets against creditors as well as for tax and inheritance reasons.

"The significant differences in law between England and Wales and civil law jurisdictions where community of property is common, has meant that pre-marital agreements are more common abroad than in England" (International Aspects of Family Law; SFLA, April 2004). Pre-marital contracts are enforceable in many of the accession states which have joined the European Community in May 2004.

No assumption should be made that the terms of a pre-marital agreement will reflect the totality of the financial provision available in any jurisdiction and local advice is still necessary. Indeed, given that premarital agreements in civil jurisdictions (including in many of the accession states) deal primarily with the marital property regime, the Committee considers that, if necessary, further consideration should be given to ascertaining the reasons that parties enter into agreements, the general contents of such agreements and whether they deal with maintenance, marital property and other financial provision.

Following the implementation of Brussels II, clearly jurisdiction clauses in cases involving another Brussels signatory country will be of less relevance. However, even if proceedings take place in a jurisdiction not anticipated by the parties at the time of the marriage, the contents of the pre-marital agreement are likely to be given some consideration by the judge when making a decision, which differs from the English judicial approach. The party for whom England is the less favourable jurisdiction will need to file expert evidence, if relevant, on the effects of a pre-marital agreement in his home jurisdiction.

As is concluded by the International Committee, with the developments in English law, it is believed a greater number of couples will wish to be able to reach an agreement with their future spouses as to the terms of the settlement should
that relationship break down. "Given that such agreements are enforceable in other jurisdictions… the request for pre-nuptial agreements will only increase and practitioners in England and Wales

can no longer ….. dismiss any agreements as unenforceable or unimportant".

6. Issues to address

The particular law reform issues that need to be addressed include:-

(a) lack of clarity and certainty of outcome;

(b) meeting the desire to self-order

(c) protecting inherited wealth;

(d) protecting children;

(e) consistency of approach with treatment of other social groups

(f) impact of cost of litigation on fairness of outcome; and

(g) harmonisation with other jurisdictions.

6.1 No legislation specific to the particular issue is imminently anticipated.

6.2 The Committee reviewed the current thinking in other relevant jurisdictions including Commonwealth and EU countries as well as worldwide with the assistance of the SFLA International Committee and its new International Aspects of Family Law (2nd Edition).

6.3 How far can judges in the Family Division currently interpret the law? For example, in October 2002, Thorpe LJ indicated that change of view, describing the Supporting Families proposals as "well pitched" and adding "more emphasis should be placed on self ordering by elevating the effect of pre-marital contracts in any straightforward situation". He suggested "a clearer definition of the judicial task" and an "objective of fairness" to be achie-ved by the application of a series of prioritised principles. He did not believe this was "changing the world" but rather "to make apparent the existing judicial approach".

6.4 In Dr Cretney's view, "the least disadvantaged way of reconciling the claims of certainty, predictability and personal autonomy would be to allow husband and wife the liberty, which we concede to those who live together outside marriage, to decide for themselves the terms of their own partnership. The only coherent argument advanced for

denying this right to husband and wife is that such contracts might be a means for heaping family support obligations on to the state; but that is a problem which could be (and, so far as practicable) is dealt with in the Child Support and Welfare Benefit Rules. For the rest, the paternalism implicit in our refusal to recognise what is widely accepted in continental Europe and the US seems to reflect a view of the relationship between the courts and the family almost as outdated as the rules seeking by legal means to uphold the stability of the family."

7. Proposed policies for reform

There are a range of options that the Committee has considered which include:

7.1 Maintaining the status quo

Whilst the benefits of this are the flexibility offered by section 25 of the Matrimonial Causes Act 1973, the unsatisfactory and unpredictable outcomes as well as lack of certainty remain. The Committee rejected as wholly unsatisfactory the idea that the status quo should be maintained.

7.2 Practice Direction or Rule Change

The Committee would accept and endorse, by way of Rule Change (i.e. amendment to the Family Proceedings Rules) or Practice Direction, the idea that there would be some procedural reform which would have the effect of allowing a pre-marital agreement to be a preliminary issue in a case. Thus, following the issue of a Form E, the pre-marital agreement would be scrutinised at a separate hearing and, dependant upon the outcome of that, the matter would proceed towards First Appointment. Its effect would be equivalent to a Dean application to show cause. Whilst this might be an interim step more easily introduced by the President of the Family Division, the Committee expressed concern that such hearings might give greater weight to the arguments in favour of agreements without clarifying its position in relation to the impact of Section 25 of the Matrimonial Causes Act 1973. In any event, it would be of limited effect.

7.3 Pre-marital agreements be made compulsory subject to an option to opt out

The Committee rejected the suggestion, knowing of no other jurisdiction which adopted this approach. The concern was that this step would inevitably undermine the institution of marriage.

7.4 Pre-marital agreements become legally binding subject to safeguards

The safeguards contemplated include those contained within the Government's consultation paper Supporting Families, November 1998.

The type of factors which might vitiate an agreement under the Government's safeguard relating to the prevention of "significant injustice" would include, but not be limited to, in the Committee's view:

Duress
Fraud
Misrepresentation
Redundancy
Serious illness
Disability
Inheritance

The Committee recommends that consideration be given to additional safeguards, e.g. effluxion of time post-agreement and requirements as to the execution of the pre-marital agreement.

This option would require a new section to be inserted into the Matrimonial Causes Act 1973.

The Committee would also propose that there be a good practice guide in relation to the drafting of pre-marital agreements to support the SFLA's Precedents for Separation

Agreements and Pre-marital Agreements, a new edition of which is due to be published shortly. The good practice guide would also set out the details of the format in which financial disclosure should take place.

The Committee questions whether the presence of a child of the family (whether or not the child was alive or a child of the family at the time the agreement was made) should automatically operate as a factor which would render a pre-marital agreement no longer legally binding. Certainly, if there were such a child (or one of the parties was pregnant) at the time the agreement was made, it is difficult to see why it should amount to an avoiding factor automatically. Further, the parties may wish to have the certainty of planning ahead for a child or children secure in the knowledge that their agreement would not be overturned. Nonetheless, the existence of the child would always potentially be capable of avoiding a pre-marital agreement on the basis of significant injustice.

7.5 Pre-marital agreements should be added as a separate section 25 of the Matrimonial Causes Act 1973 factor

This would be effected by adding a new section 25(2) (i) namely:

"the terms of any agreement reached between the parties in contemplation of, or subsequent to, their marriage" (as per the wording suggested by Wilson J as author of the response of the Family Division Judges to Supporting Families).

It would also be proposed that the following be added: "and, where any such agreement had been entered into by the parties under the laws of a foreign jurisdiction, the legal effect which that agreement would have in that jurisdiction".

The Committee felt that the law was not really being advanced beyond where it is now.

7.6 As a variation of 7.5 above, as proposed by the Law Society, pre-marital agreements should be a specific factor to be taken into account only when assets exceeded the needs of the children and parties to be rehoused and needs met.

There was no enthusiasm for the proposal and it was considered to be too restrictive, focusing as it did on only one particular section of the community. There was concern that argument would surround the interpretation of "exceeded the needs".

7.7 Pre-marital agreements become legally binding and enforceable subject to a single overriding safeguard of significant injustice

As a variation of 7.4 and 7.5 above, pre-marital agreements become legally binding subject to an overriding safeguard of significant injustice and be added as a separate section 25 Matrimonial Causes Act 1973 factor. The Committee considered the risk of satellite litigation that might flow to define "significant injustice", but concluded that this was a small price to pay for the certainty of pre-marital agreements.

The amendment to s 25(1), it is proposed, should read:

(a) the first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18;

(b) any agreement entered into between the parties to the marriage, in contemplation of, or after the marriage, for the purpose of regulating their affairs on the breakdown of their

marriage, which shall be considered binding upon them unless to do so will cause significant injustice to either party or to any such minor child of the family.

A parallel amendment would be needed to MCA 1973, s 34 so as to render it subject to the amended provisions of s 25.

No specific reference is required to foreign pre-marital agreements on the *Otobo* principle because all pre-marital agreements would be legally binding unless a significant injustice arose.

The Committee would also propose that there be a Good Practice Guide in relation to the drafting and financial disclosure for such agreements.

This proposal differs from that originally proposed by the Government and summarised at 7.4 in that it bolsters the need to consider any pre-marital agreement as a primary factor and in particular would allow the courts to use s.25 discretionary factors to mitigate the need for satellite litigation on "significant injustice". The proposal contained at 7.4 would seek to make pre-marital agreements legally binding outside the scope of s 25 by reference to more closely defined safeguards. The solution at 7.7 preserves the court's discretionary functions within s 25 as a whole.

7.8 Resolution recommends

The Committee therefore recommends 7.7 as the preferred proposal for reform.

The proposal and wording contained within paragraph 7.7 takes the lead for change from the Government's initiative as contained in its Supporting Families paper of 1999. Whilst retaining judicial discretion, it allows parties from all financial backgrounds greater predictability of outcomes in a community where second and subsequent marriage is prevalent, bringing English domestic law in line with the jurisdictions of the rest of the world and, in particular, with Europe. The intention would be to cut down on the high cost of post-marital litigation with the legislation acting as preventive medicine.

The proposed amendment to the legislation benefits those who are entitled to public funding upon the breakdown of their marriage as well as those who fund their costs privately. The more assets and income that are left intact

within the family and not spent on post-marital litigation, the more likely families will not need to turn to other social security benefits and housing.

The public would, if these proposals were to be implemented, have greater clarity and certainty of outcome as well as choice at the outset of married relationships. If they wish to enter into such agreements to avoid the fear of uncertain outcomes, it might encourage more to choose marriage as an option for family life, especially when cohabitants have even greater uncertainty of outcomes.

These proposals are consistent with the statements made by Lord Filkin, the Family Justice Minister, upon publication of the findings in the report prepared by the Newcastle Centre for Family Studies, Picking up the Pieces: Marriage and Divorce Two Years after Information Provision (Department for Constitutional Affairs 2004) in which he confirmed that "the Government was committed to supporting marriage and families when relationships failed, especially when there were children involved". He added that "the research addressed a number of key themes that bore on the initiatives currently being taken forward in support of the principles underlying the Family Law Act 1996; saving marriages; promoting conciliatory divorce; and encouraging positive relationships between children and parents who separate".

The Committee believe that the proposals put forward clearly are consistent with the Government's stance and promote conciliatory divorces and encourage positive relationships between children and parents who separate. The Government, in its support of the Civil Partnership Bill has, in principle, given a green light to self-ordering. The proposals contained in this paper extend the concept of self-ordering to the wider community who have chosen marriage, but whose marriages have failed.

Bibliography

- *Pre-nuptial Agreements in English law* – Gareth Miller 2003 PCB November/December Sweet & Maxwell

- *Matrimonial Survey 2003* – Grant Thornton – Tom J M Pincott

- Simon Bruce :

  (1) *Pre-marital Agreements following the House of Lords Decision in White*, 20.11.00

  (2) *Pre-nuptial agreements following K v K (Ancillary Relief: Pre-nuptial Agreement)* [2003] 1 FLR 120

- Supporting Families November 1998

- Peter Duckworth, 29 Bedford Row *Asset Protection Before Marriage* Family Law Conference September 2003

- Jeremy Posnansky "Pre-nuptial Agreements," 20 November 2002

- SFLA Policy Digest 2002

- David Salter - Jordans Regional Updates 2004

- Joseph Rowntree Foundation - *How Parents Cope Financially on Marriage Breakdown* April 2000 Ref: 480

- Stephen Cretney The *Family and the Law - Status or Contract?* May 2003 - *Child & Family Law Quarterly* Volume 15 No.4 2003

- *Binding Financial Agreements*: New Ways to Get Rid - David Hodson, February 2004

- SFLA International Committee - *International Aspects of Family Law* (Chapter 11), 2nd Edition

- *Ancillary Relief Reform and Response of the Judges of the Family Division to Government proposals made by way of submission to the Lord Chancellor's Ancillary Relief Advisory Group*, Sir Nicholas Wilson 13.6.98 (1999) 29 Fam Law 159-163

- *Ancillary Relief, International Family Law Issues and Family Justice Council*, 1 Hare Court, Nicholas Mostyn QC, 8th June 2004

- *Family Property and Finance Conference 2004*, 9th June 2004 James Turner QC

- *Fairness for Families, SFLA Cohabitation Committee*, October 2000 (updated 2003)

Annex 1 - other jurisdictions

The following questions were posed to experienced family practitioners in the following countries between September 2003 and February 2004

(a) Do pre-marital agreements exist in this jurisdiction?

(b) Are they compulsory?

(c) What format do they take?

(d) In which circumstances are they enforceable?

(e) Do they stand judicial scrutiny?

(f) Are they regularly used and if so to what extent?

Australia

(a) Yes as binding financial agreements (BFAs) December 2000 pursuant to s.90 Family Law Act 2000 to cover separation agreements and agreements instead of final divorce orders as well as pre-marriage agreements.

(b) No

(c) Yes as binding financial agreements (BFAs) December 2000 pursuant to s.90 Family Law Act 2000. There are a number of different formats. Disclosure in a certain form and certificate of legal advice, guidance as to well worded letter of legal advice to be given as to whether beneficial or not to enter into it, advantages and disadvantages, etc.

(d) If the statutory requirements are complied with then the agreement will be enforceable and take effect as a final divorce court order. This will be very hard to review. Attempts to do so are mainly linked with non-disclosure of the financial position. If the certificate of legal advice is given and attached to the document, then arguments as to lack of advice or pressure to enter into the agreement will not succeed in avoiding enforceability of the agreement itself.

(e) Yes

(f) Increasingly used as previously such agreements had been possible but were not ultimately binding on the family Court. Culture change already under way. They are now used instead of final Court orders in cases of separation.

Austria

(a) Yes

(b) No

(c) Attested by a Public Notary

(d) "If they are not null and void e.g. never ever maintenance?"

(e) Sometimes

(f) Not regularly used.

Source Dr Alfred Kriegler

Belgium

(a) Yes

(b) No

(e) Yes

Canada

(a) Yes

(b) No

(c) Contract dealing with property, income and provision on death. Also provisions for children alive at time of the agreement.

(d/(e) General movement in recent years to enforce agreements rather than set aside.

(f) Yes, especially where one party holds all the assets before marriage and also when parties marry for a second time.

Czech Republic

(a) Yes

(b) No

Deals with marital property

Denmark

(a) Yes

(b) Not compulsory.

(c) Formal requirements to pre-marital agreements are that it be in writing and signed by both parties; registered and demands a specification namely to secure and divide the assets and liabilities that are separate property from other assets and liabilities.

(d) They are enforceable when the division of assets and liabilities arises on separation, divorce and death. This applies to the parties and to third parties including creditors.

(e) Registration of an agreement is not a guarantee that the agreement is valid. It is for the courts to decide validity. All agreements are submitted for judicial scrutiny. There is no rule to govern fairness of these agreements but will be invalid if it has not been registered; one or both parties were under age or incapable of managing their own affairs; undue influence; fraud; one or other of the parties taking advantage of the other party's economic personal distress or lack of knowledge of the consequences of the agreement.

(f) Pre-marital agreements are not common in Denmark, but their popularity is rising. They are typically made when one or both parties have previously been married; if one party's assets are substantially higher than the other's; if one party has high debt or if there is a large inheritance in prospect. Please note they can also be made after the parties have married and can be amended during marriage.

Annelise Lemche

Estonia

(a) Yes

(b) No

(c) Deals with marital property

France

(a) Yes

(b) No

(c) By civil notary. Not compulsory or common for separate representation

(e) Yes

Germany

(a) Yes

(b) No

(c) They must be signed in the presence of a notary.

Greece

(a) Yes

(b) No

(e) Yes

Holland

(a) Yes including mid-marital agreements with Court approval

(b) No

(c) By civil notary advising both parties. Not compulsory or common for separate representation.

(d) Yes even if circumstances change.

(e) Yes even if circumstances change.
(f) In 1996 approximately 28% were marriages made pursuant to PMAs. The number is likely to have increased by now.

Carla L. M. Smeets, Nauta Dutilh

Hong Kong

(a) Pre-marital agreements exist in Hong Kong.

(b) They are not compulsory.

(c) They take a general format taking into account the matters the parties wish to set out in agreement.

(d) They are not binding on the Court but they may be "persuasive" if each party has had prior independent legal advice, there has been an exchange of relevant financial and other information and the agreement is voluntary.

(e) See above.

(f) Practitioners are seeing an increase in the number of pre-marital agreements amongst the professional and more wealthy clients.

Hungary

(a) Yes
(b) No
(c) Deals with marital property

Ireland

(a) Yes they exist, but have no defined status. Despite the constitution favouring families based on marriage, it can be argued that they are against public policy. A contra argument is that the system recognises the ability and constitutional rights of citizens to regulate their own lives and property. Primary legislation or the Supreme Court to determine a suitable case is awaited. Such agreements may be altered by the courts in the context of a marriage and subsequent separation/divorce.

(b) No, not compulsory but it is possible to contract out of succession at spousal rights (Succession Act 1965). This gives spouses a right to a specific portion of the other spouse's estate on death - the precise

percentage depending on whether there are children of the marriage or not.

(c) Various precedents are used. There is a contract to marriage settlement or arrangements for children marrying by their parents in a farming/land context but a pre-nuptial agreement by two adults is unusual, becoming more common especially where they are buying property to be held jointly but by unequal financial contributions. Circumstances where they are enforceable unconscionable/unfair lack of legal advice.

(d) Do they stand judicial scrutiny. Awaiting test case. Usefully used by professionals where subsequently trying to establish "intention" where property purchased in different proportions put in joint names. Are they regularly used - more and more common as fewer people marry with married fertility falling and unmarried fertility increasing.

Rosemary Horgan

Italy

(a) Yes

(b) No

(e) Yes

Lithuania

(a) Yes

(b) No

(c) Deals with marital property (and it appears maintenance: to be checked). Attested by a notary.

Norway

(a) Yes

(b) No

(e) Yes

Portugal

(a) Yes

(b) No

(e) Yes

Scotland

(a) Yes

(b) No

(c) No standard format, all assets and income streams at the time of marriage and acquired after that can be included.

(d) Not yet tested in the courts under the Family Law (Scotland) Act 1985.

(e) If entered into after independent advice, financial disclosure and no duress, it is generally thought that they will be upheld by the court.

(Messrs Turcan Connell, Edinburgh)

Spain

(a) Yes

(b) No

(e) Yes

Sweden

(a) Yes

(b) No

(e) Yes

Switzerland

(a) Yes

(b) No

(e) Yes

USA

See Schedule attached.

Appendix

Approach to PMA's in the United States of America

States	Property	Maintenance	By Statute?
Alabama			
Alaska		Yes	Yes
Arizona			
Arkansas			
California		No	Property only
Colorado			Property only
Connecticut			Yes
Delaware	Yes		
DC		Yes	Property only
Florida			
Georgia			Yes
Hawaii			
Idaho		?	
Illinois			
Indiana		Yes	Property only
Iowa			Yes
Kansas			
Kentucky	No	No	No
Louisiana			Yes
Maine	Yes	Yes	
Maryland			Property only
Massachusetts			Yes
Michigan		No	No
Minnesota	No	Yes	Property only
Mississippi		No	No
Missouri			
Montana			
Nebraska			

States	Property	Maintenance	By Statute?
Nevada			
New Hampshire		Yes	
New Jersey			Yes
New Mexico	Yes		
New York			
N Carolina			
N Dakota			
Ohio		No	
Oklahoma		Yes	No
Oregon			Yes
Pennsylvania	No	No	No
Rhode Island	Yes	Yes	Yes
S Carolina	No	No	No
S Dakota		Yes	Yes
Tennessee		No	Property only
Texas			Yes
Utah		Yes	No
Vermont	Yes		
Virginia			
Washington		No	
W Virginia			Yes
Wisconsin		Yes	
Wyoming			