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Regulating Prenuptial Agreements: Balancing Autonomy and Protection

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Terminology

This thesis is concerned with the regulation of prenuptial agreements. Couples use these in an attempt to avoid the default laws of financial orders. Previously, the making of such orders was referred to as ancillary relief, however, Rule 2.3 of the Family Procedure Rules 2010 served to update the terminology. Much of the academic commentary and judicial decision is couched in the old terminology, and so the terms ancillary relief and financial order will be used interchangeably throughout this thesis.

There is no statutory definition of a prenuptial agreement in England and Wales. Therefore, for the purpose of this thesis, a prenuptial agreement shall be defined as a contract that is entered into by a couple intending to marry, prior to the date of their marriage, which purports to regulate the financial aspect of any future reallocation of assets upon divorce.

It is prudent at this stage to highlight that there are two alternative forms of financial agreement affecting ‘matrimonial property’. The postnuptial agreement has the same characteristics as a prenuptial agreement, save for the fact that it is signed at some point following the marriage ceremony, while the separation agreement, which again regulates the financial aspect of divorce, is not entered into until after the couple’s relationship has irretrievably broken down. In that respect, a separation agreement is somewhat distinguishable from a prenuptial and a postnuptial agreement. At the time of entering into the separation agreement, the parties have greater awareness of all the circumstances and arguably the extent of the assets to be divided.

Prior to the Supreme Court decision in *Radmacher v Granatino*,¹ separation agreements were deemed enforceable by the Court of Appeal in *Edgar v Edgar*,² while Baroness Hale, sitting in the Privy Council, upheld a postnuptial agreement in *Macleod v Macleod*,³ contending that prenuptial agreements and postnuptial agreements were ‘very different’.⁴

¹ [2010] UKSC 42.

² [1980] EWCA Civ 2.

³ [2008] UKPC 64,

⁴ *ibid* [36].

The majority of the Supreme Court in *Radmacher* emphatically overturned this approach. The court expressed a preference for the umbrella term ‘nuptial agreements’,⁵ encapsulating financial agreements made both prior to and after the date of the marriage. The effect of this decision is that English courts will no longer look to draw a distinction between prenuptial and postnuptial agreements. However, for the sake of clarity it will sometimes be necessary to maintain the division within this thesis. Therefore, as far as it is possible to do so, I will endeavour to distinguish financial agreements as follows:

- i) ‘Prenuptial agreement’ will be used when referring specifically to a prenuptial agreement.
- ii) ‘Postnuptial agreement’ and ‘separation agreement’ will only be used any time that reference is made specifically to one of these types of agreement.
- iii) ‘Marital property agreements’, ‘nuptial agreements’ and ‘financial agreements’ will be used interchangeably as umbrella terms, incorporating all three types of agreement.

It should also be noted that the cases discussed within this thesis deal with the breakdown of a marriage between a man and a woman, however, all of the ideas promulgated apply equally to civil partners.

⁵ *Radmacher* (n1) [1].

Introduction

Prenuptial agreements are family law's 'hot topic'.¹ Some married couples utilise prenuptial agreements in an attempt to establish contract-like terms that will serve to dictate the distribution of their assets in the event of divorce.

Legal practitioners have described prenuptial agreements as unromantic, expensive² and even 'cold blooded'.³ In England and Wales, the courts have traditionally been highly suspicious⁴ of prenuptial agreements and what they represent. Public perception on the other hand is more complex and there is no single, unanimous view that can be gleaned.

Michael Winner, who in 2011 finally decided to marry his partner of over 50 years, 'absolutely declined'⁵ to sign a prenuptial agreement, although he acknowledged that there were several members of the legal profession willing to charge him extortionate amounts to aid him in drawing one up.⁶ Winner is known for his abrupt manner, but is his view reflective of the stereotypical British approach towards prenuptial agreements?

It has been suggested that prenuptial agreements may still be a 'bit too un-British'⁷ to gain widespread acceptance. A survey by Internet bank 'Smile' in 2004, found that 46% of the population supported the option of enforceable prenuptial agreements.⁸ In 2006, the Family Law group at solicitors firm ASB undertook a survey of nearly 2500 men and women. Over

¹ *NG v KR (Pre-Nuptial Contract)* [2008] EWHC 1532 (F) [36].

² Tony Yerburgh, 'Prenuptial Agreements: Are they Worth the Paper they are Written On?' (11 December 2003) <<http://www.collyerbristow.com/Default.aspx?sID=88&cID=224&ctID=43&lID=0>> accessed 17 April 2012.

³ Janice Montague, 'Family Law: Ancillary Relief – Pre- and –Post-Nuptial Agreements' (2008)13(2) *Cov LJ* 36, 38.

⁴ Law Commission, *Marital Property Agreements – A Consultation Paper* (Law Com No 198, 2011) [1.4].

⁵ Michael Winner, 'I was Always Massively in Love with Myself' *The Telegraph* (London, 1 November 2011) <<http://www.telegraph.co.uk/relationships/8860874/Michael-Winner-I-was-always-massively-in-love-with-myself.html>> accessed 24 November 2011.

⁶ *ibid.*

⁷ Afua Hirsch, 'William and Kate – the Prince, the Princess and the Prenups' *The Guardian* (London, 17 November 2011) <<http://www.guardian.co.uk/law/afua-hirsch-law-blog/2010/nov/16/prenups-prince-william-kate-royals>> accessed 24 November 2011.

⁸ Editorial, 'Half of Brits Want a Prenuptial Agreement Whilst No Cheating Tops Wish List of Marriage Clauses' (29 April 2004) <<http://www2.prnewswire.co.uk/cgi/news/release?id=121959>> accessed 17 April 2012.

half of the respondents disagreed with the statement that ‘you should not get married if you think you need a pre-nup’.⁹ On the basis of this evidence, opinion appears to be divided.

To date there is a lack of ‘published empirical, statistically significant evidence’¹⁰ as to the British public’s opinion on prenuptial agreements. It is currently estimated that forty-five per cent of all marriages will end in divorce proceedings.¹¹ Marriage is no longer a lifelong commitment and some have argued that gambling upon the sentiment of everlasting love is naïve, particularly where finances are concerned.¹² Furthermore, a higher median age at first marriage, coupled with an increased volume of re-marriages,¹³ has culminated in an ever-increasing proportion of newlyweds holding significant levels of pre-accumulated wealth.¹⁴

One scenario in which prenuptial agreements are reportedly valuable is where a couple are contemplating entering into a marriage that, for either party, is not their first.¹⁵ Divorce is an emotionally draining experience. In this situation, a well-drafted prenuptial agreement could be used to assist ‘mature couples...to regulate future enjoyment of their assets’.¹⁶

Another driver for pre-nuptial agreements is the large degree of unpredictability associated with ancillary relief in some circumstances. This does nothing to reduce the anxiety that surrounds the possibility of future divorce proceedings. In contrast, the existence of a prenuptial agreement could encourage cohabitants to enjoy the benefits of a formalised marriage relationship, with a safety net in place to ease their worries as to potential future ancillary relief claims.¹⁷

⁹ Newline Extra [2006] Fam Law 805, 811.

¹⁰ *Marital Property Agreements* (n 4) [1.51].

¹¹ Ben Wilson and Steve Smallwood, ‘The Proportion of Marriages Ending in Divorce’ (2008) 131 *Population Trends* 28, 35.

¹² Zahra Pabani, ‘All You Need is Love: Protecting Clients’ Wealth’ [2010] Fam Law 1005, 1006.

¹³ In 2009 16% of marriages were between couples where both parties were getting remarried, whilst 35% of marriages involved at least one spouse who had been previously married. Contrast this with 1940, where nearly three times the number of marriages that took place in 2009 occurred, but 91% of all marriages were the first for both parties. Office for National Statistics, ‘*Marriages in England and Wales, 2009*’ (2011) <<http://www.ons.gov.uk/ons/rel/vsob1/marriages-in-england-and-wales--provisional-/2009/index.html>> accessed 17 April 2012.

¹⁴ Ian Smith, ‘The Law and Economics of Marriage Contracts’ (2003) 17 *Journal of Economic Surveys* 201, 202.

¹⁵ *Marital Property Agreements* (n 4) [5.19].

¹⁶ *Radmacher (formerly Granatino) v Granatino* [2009] EWCA Civ 649.

¹⁷ Brigitte Clark, ‘Should Greater Prominence Be Given to Pre-Nuptial Contracts in the Law of Ancillary Relief?’ [2004] CFLQ 399, 400.

Until relatively recently any legal professional would have advised that prenuptial agreements could not be relied upon.¹⁸ Following the ruling in *Radmacher v Granatino*,¹⁹ which will be discussed in detail in the chapters to follow, this is arguably no longer the case. Resultantly, the prenuptial agreement has become an increasingly attractive, and indeed viable, option for couples seeking to determine for themselves the way in which their assets will be divided upon divorce.

It is a common misconception that prenuptial agreements are only accessible to the rich and famous. This notion is not entirely without foundation. The media frequently reports on agreements that may, or indeed may not, have been reached by ‘glitterati’²⁰ including Britney Spears,²¹ Demi Moore²² and Kim Kardashian.²³ These reports buttress the notion that only celebrities draw up prenuptial agreements, but this should not be seen to imply that prenuptial agreements are only used, or useful, in such circumstances.

There can be little doubt that prenuptial agreements may be useful tools for the extremely wealthy seeking to safeguard their assets; after all without the use of prenuptial agreement ‘avoiding marriage entirely is the only way of reliably avoiding the equal sharing principle’.²⁴ This is equally applicable whether both parties have considerable assets to protect, or one party is seeking to preserve their own personal fortune. Nevertheless, it is not the case that a prenuptial agreement can only be useful in ‘big money cases’.

¹⁸ Nicholas Francis & Susan Phillips, ‘New Light on Pre-Nuptial Agreements’ [2003] Fam Law 164, 164.

¹⁹ *Radmacher v Granatino* [2010] UKSC 42.

²⁰ Chris Barton, ‘Domestic Partnership Contracts: Sliced Bread or a Slice of the Bread?’ [2008] Fam Law 900, 902.

²¹ Caroline Graham, ‘Every Detail of Britney Spears’ Pre-Nup’ *Daily Mail* (London, 14 February 2007) <<http://www.dailymail.co.uk/tvshowbiz/article-415881/exclusive--every-britney-spears-pre-nup-65-million-fortune.html>> accessed 25 February 2011.

²² Editorial, ‘Demi Moore to ‘Punish’ Ashton Kutcher in Divorce’ *London Evening Standard* (London, 21 November 2011) <<http://www.thisislondon.co.uk/showbiz/demi-moore-to-punish-ashton-kutcher-in-divorce-6370239.html>> accessed 25 November 2011.

²³ Claire Rutter, ‘Will Kim Kardashian’s Prenup Be ‘Worthless’ Over Reggie Bush Rumours’ (3 November 2011) <<http://www.entertainmentwise.com/news/64696/Will-Kim-Kardashians-Prenup-Be-Worthless-Over-Reggie-Bush-Rumours>> accessed 25 November 2011.

²⁴ Joanna Miles, ‘Marriage and Divorce in the Supreme Court and the Law Commission: for Love or Money’ (2011)74(3) Mod L Rev 430, 442.

Prenuptial agreements appear to be an increasingly prevalent mechanism used within modern society. It has been suggested that there has been a ‘dramatic increase’²⁵ in both the number of agreements and the number of enquires as to their availability. Whilst it is impossible to put a precise figure on their incidence, practitioners have estimated that the number of couples seeking to create prenuptial agreements has doubled in the space of just a few years.²⁶ As such, they merit close scrutiny, not least to evaluate the possible avenues open to the Government for reform.

When the enforceability of prenuptial agreements was first considered in 1998,²⁷ ministers made it clear that their use should not be limited to ‘pop and film stars’.²⁸ Amongst the judiciary, Lord Justice Thorpe, much more recently, has emphasised that prenuptial agreements should not be reserved for the super-rich.²⁹ While the Supreme Court judgment in *Radmacher* will almost certainly serve to further protect the interests of the wealthy, whose agreements will now seemingly be adhered to unless they are manifestly unfair, this is not to say that the use of prenuptial agreements should be limited to affluent couples. It is now arguable that a prenuptial agreement could potentially provide couples a practical alternative to ancillary relief. However, it remains to be seen whether the *Radmacher* decision alone will be enough to open up prenuptial agreements to a wider demographic, or whether statutory assistance will be necessary in order to turn prenuptial agreements into a more accessible vehicle for the protection of assets in marriage.

Looking Towards the Future

The debate surrounding the enforceability of prenuptial agreements has reached a critical stage. Following the publication of the Law Commission’s initial consultation paper on marital property agreements in 2011,³⁰ it had appeared as though England and Wales was on the cusp of statutory reform. However, following the publication of a follow-up paper

²⁵ Emma Hitchings ‘From Pre-Nups to Post-Nups: Dealing with Marital Property Agreements’ [2009] Fam Law 1056, 1058.

²⁶ Yerburgh, (n 2).

²⁷ Home Office, *Supporting Families: A Consultation Document* (Cm 3922, 1998).

²⁸ Colin Brown, ‘Prenuptial Deals Backed in Family Green Paper’ *The Independent* (London, 29 October 1998) <<http://www.independent.co.uk/news/prenuptial-deals-backed-in-family-green-paper-1181308.html>> accessed 25 November 2011.

²⁹ *Radmacher (formerly Granatino)* (n 16) [27].

³⁰ Law Commission, *Marital Property Agreements – A Consultation Paper* (Law Com No 198, 2011).

concerning matrimonial property and needs earlier in 2012,³¹ it has become difficult to predict the stance that the Law Commission will take when it publishes its final report 2013, although there remains a strong case for statutory intervention. What can be stated with some certainty is that the current position continues to cause both ‘irritation’³² and anxiety for a whole range of reasons. The time is therefore ripe for a detailed exploration of the potential avenues for reform within this thesis.

When reflecting on the future of pre-nuptial agreements in England and Wales, the Commonwealth of Australia provides an optimal comparison. A former dominion of the British Empire, Australia only finally severed its constitutional links with the United Kingdom with the passing of the Australia Act 1986. Much of the historical common law that has developed in relation to contracts that regulate the breakdown of marriage is adopted from England and Wales.

Layered on top of this common law foundation, Australia has developed its own principles in regard to contract law and, more pertinently, ancillary relief. The Family Law Act 1975 (Australia) replaced the Matrimonial Causes Act 1959 and provides for no-fault divorce.³³ It deals with ancillary relief under Part VIII, which has remained virtually unchanged since its inception.³⁴ In addition, the Family Law Act (Cth) 1975 amendment, adopted in November 2000, introduced a new Part VIIIA, under which couples were empowered to enter into financial agreements that could be binding and enforceable providing certain criterion were met.

The more advanced stage of development that the law has reached in Australia is reflected in the way that prenuptial agreements are perceived in public and in the media. Australian lifestyle gurus have tackled the issue by accepting that prenuptial agreements ‘may be the least romantic thing in the world’³⁵ and provide a ‘land-mine’³⁶ to be negotiated by couples,

³¹ Law Commission, *Matrimonial Property, Needs and Agreements – A Supplementary Consultation Paper* (Law Com No 208, 2012).

³² Joanna Miles, ‘Agreements for Grown-Ups’ [2009] CLJ 285, 288.

³³ Family Law Act 1975 (Aus), s 48.

³⁴ The Hon Chief Justice Alastair Nicholson and Margaret Harrison, ‘Family Law and the Family Court of Australia: Experience of the First 25 Years’ (2000) 24 Melb U L Rev 756, 774.

³⁵ Sacha Crouch, ‘How to (Tactfully) Raise the Issue of a Prenup’ (18 April 2011) <<http://au.lifestyle.yahoo.com/health/blogs/show/2475863/how-to-tactfully-raise-the-issue-of-a-prenup/>> accessed 20 November 2011.

but ultimately assert that it ‘pays to be practical’.³⁷ In Australia, prenuptial agreements appear not to be viewed solely as a product of ‘selfishness and mistrust’.³⁸

The Australian public may well have accepted prenuptial agreements as the ‘celebutante face of a practical new trend’,³⁹ which, whilst a ‘tad pessimistic’,⁴⁰ ‘may be the most important document ever signed’.⁴¹ To draw the fairy-tale analogy, a signed prenuptial agreement allows the couple to get on with living ‘happily ever after’,⁴² free from lingering worries as to their financial affairs.

The semantics used to describe prenuptial agreements in Australia suggest that they have become an accepted norm and, in fact, one commentator went as far as critiquing the statutory regulation in place for being excessively ‘arduous’.⁴³ Whilst this acceptance is arguably itself a by-product of statutory regulation, it might become evident that the practical benefits of drawing up a prenuptial agreement hold more weight in Australia than any objections based upon traditional notions of romance and sanctity of marriage. This suggests that, in this context, Australian law may have been aligned to reflect a set of modern social norms.

Australia is a jurisdiction that has, over the course of the last decade, made significant advancements in the law in relation to prenuptial agreements. However, the judiciary is still grappling to come to terms with the legislation in place. A fairly extensive pool of common law has emanated from the alterations made to the statute. It is these decisions that provide useful material from which to instigate a comparative study. The decisions handed down by

³⁶ Emma Krieger, ‘The Prenup: Should You or Shouldn’t You?’ *Bride Tasmania* (Hobart, 15 April 2011) <<http://www.bridetas.com.au/blog/item/61-the-prenup-should-you-or-shouldnt-you>> accessed 20 November 2011.

³⁷ *ibid.*

³⁸ Crouch, (n 35).

³⁹ Janice Revell, ‘Prenup Agreements aren’t just for the Wealthy Anymore’ (24 August 2011) <http://money.cnn.com/2011/06/28/pf/marriage_prenup_agreement.fortune/index.htm> accessed 17 April 2012.

⁴⁰ Monique Friedlander, ‘The Prenup’ <<http://www.essentialgroom.com.au/grooms-guide/the-pre-nup>> accessed 20 November 2011.

⁴¹ Bina Brown, ‘Sign or Be Sorry’ *The Australian* (Sydney, 21 February 2007) <<http://www.theaustralian.com.au/business/wealth/sign-or-be-sorry/story-e6frgac6-1111113006951>> accessed 20 November 2011.

⁴² Caroline Counsel, ‘I love You Kate, Now Sign Here...’ *The Age* (Melbourne, 11 March 2011) <<http://www.theage.com.au/opinion/i-love-you-kate-now-sign-here-20110310-1bpns.html>> accessed 20 November 2011.

⁴³ Emily Bourke, ‘Pre-Nup Changes a Boon for Lawyers’ (2 January 2010) <<http://www.abc.net.au/news/2010-01-02/pre-nup-changes-a-boon-for-lawyers/1196084>> accessed 20 November 2011.

members of the Australian judiciary will hopefully serve to highlight some of the difficulties that will hinder future reform in England and Wales.

A strong case can be made for the statutory introduction of prenuptial agreements in England and Wales, but this thesis will evaluate the merits, and indeed de-merits, of the different potential avenues of reform that Parliament could choose to explore in relation to prenuptial agreements. This will be undertaken through a thorough examination of the position that the law in England and Wales has reached and the way that the law has developed in Australia.

This introduction has been devoted to highlighting the complexity of reform in this area. There is no universally held view as to the way in which reform should take place and the regulation of prenuptial agreements is an intricate process. Discussion as to future cannot take place without at least a basic understanding of the reasons why couples are attempting to contract out of the principles that have developed.

Chapter 1 will look at prenuptial agreements from a theoretical perspective. The issues that currently surround the regulation of agreements will be identified and the reasons for their existence explored. This discussion will be couched in the terms of ‘autonomy’ and ‘protection’. Autonomy in this context refers to the scope and freedom that couples should be afforded to implement a prenuptial agreement that will enable them to avoid the default rules on ancillary relief, whereas protection is used here to refer to the checks and balances that will ensure that the law continues to provide an appropriate level of security to individuals. The tension between these principles will continue to run throughout the remainder of this thesis and will finding a compromise position between the two of them is central to this work.

Traditionally, public policy objections have played an important role in the regulation of marital property agreements, but these historical objections have been rendered ‘obsolete’⁴⁴ in modern society. The chapter will proceed to explore whether prenuptial agreements should be regulated as unique hybrid entities, with their own new legal standing and deserving of their own set of regulations.

⁴⁴ *Radmacher* (n 19) [52].

As will become apparent in the course of the thesis, the regulation of prenuptial agreements cannot be dealt with in an absolutist manner and rigid rules would not appear to be a viable option. It is not simply a case of either having binding and enforceable prenuptial agreements or not. Whether or not couples should be afforded autonomy to enter into agreements will need to be scrutinised – are enforceable prenuptial agreements that cannot be set aside desirable, or will simply giving an increased weighting, while maintaining certain safeguards, be the more appropriate course of action? To aid in this process, it will be helpful to map the potential different legal perspectives that it is possible to take prenuptial agreements, ranging from a desire to afford couples full contractual autonomy to enter into agreements that they see fit, to continuing to ensure that the state provides individuals with the appropriate level of protection.

Chapter 2 will provide a summary of the relevant laws in England and Wales. Initially, some of the more important general principles of ancillary relief will be explained. Following on from this, a detailed exploration of the development of the common law in relation to prenuptial agreements within this jurisdiction will be undertaken. Chapter 3 will then analyse how the law has developed in Australia. The context for the implementation of the FLA 1975 will be briefly discussed. The inception of the new Part VIII A provisions regulating prenuptial agreements, and the subsequent amendments that have been introduced, will then be charted. Included in this discussion will be the particulars of a number of the key judgments that have been handed down by the courts in Australia. The tensions between autonomy and protection will be clearly visible throughout the discussion on the points of contention within both jurisdictions.

Chapter 4 breaks down the issues that have affected the judiciary in both jurisdictions. This will be split across the life-course of the agreement into sections dealing with potential time constraints, independent legal advice, full and frank disclosure and, finally, the concept of fairness. A number of these issues can be found within the wording of the six safeguards recommended by the Government in 1998,⁴⁵ and have provided focal points of contention within much of the ensuing case law. The approaches that judges have adopted will be

⁴⁵ Home Office, *Supporting Families* (n 27) [4.23].

considered, in order to assess whether some of the reasoning used by the Australian judiciary may provide guidance as to the future direction of the law in England and Wales.

The overarching question to be determined when examining each aspect is what the logical next step is for the law within this jurisdiction. In order to provide an answer that strikes the appropriate balance between autonomy and protection, conclusions will need to be drawn as to which components can be taken from Australia; whether there are any elements of the existing law that should remain intact; whether the procedural safeguards that might be put in place to avoid substantively unfair agreements are enough to protect individuals; and finally, whether Parliament is prepared to afford couples the autonomy to enter prima facie enforceable agreements or not.

Chapter 1: The Tension between Autonomy and Protection

At the core of the debate on prenuptial agreements is one central issue: striking the balance between affording couples the autonomy to enter into contracts and continuing to provide an appropriate level of state protection for individuals.¹ This closely mirrors the more general conflict that exists throughout family law between state intervention and private ordering. This tension underlies many of the problematic aspects that the judiciary and the Law Commission have had to deal with in the prenuptial agreement context. This tension will be explored throughout much of what is discussed in the upcoming chapters of the thesis.

Before going any further, it is prudent to explain what is meant by autonomy and protection in the prenuptial agreement context. Recently, family law has begun to place a much greater emphasis upon self-determination and self-sufficiency.² When considering autonomy, this thesis is focussing upon the extent to which individuals should be able to circumvent the jurisdiction of the court to make orders for ancillary relief as conferred under section 25 Matrimonial Causes Act 1973 (hereafter the ‘MCA 1973’) and instead implement their own terms governing the reallocation of their assets. However, Jonathan Herring has recognised the need to temper this vision of autonomy by considering the interdependency and vulnerability of individuals.³ Therefore, when talking about providing the appropriate protection for individuals, the financially weaker party, who may be relying upon the court to ensure that their financial needs are met through an ancillary relief order, must be taken into consideration.

The whole purpose of most prenuptial agreements is that they place one party at a financial advantage against another. Therefore, from a protection perspective, great significance is placed upon ensuring that one spouse cannot implement an agreement in a way that is unfair, or impose unfair contractual terms upon the other party. Conversely, from an autonomy angle

¹ Nina Dethloff, ‘Contracting in Family Law: A European Perspective’, in Katharina Boele-Woelki, Jo Miles and Jens M Scherpe (eds), *The Future of Family Property in Europe* (Antwerp, Intersentia, 2011), 68.

² Jonathan Herring, ‘Relational Autonomy and Family Law’, in Julie Wallbank, Shazia Choudhry and Jonathan Herring (eds), *Rights, Gender and Family Law* (Routledge 2010), 259.

³ *ibid* 275.

emphasis is placed upon individuals being able to enter into enforceable agreements without state intervention. It is recognised that ‘the contract model is colonising’ an increasing number of ‘areas of contemporary life’.⁴ Through the regulation of prenuptial agreements, the area of marriage ‘may not be immune’ from this phenomenon.⁵ An increased emphasis placed upon autonomy, has led to the emergence of a school of analysis that has identified a paradigm of ‘contract marriage’, which would enable couples to escape an ‘outmoded legal tradition’ by implementing agreements that are ‘tailored to fit their needs’.⁶

The current approach of the law is ambivalent. Both autonomy and protection are embraced to varying degrees throughout the judicial reasoning. For example, the Supreme Court in *Radmacher v Granatino*⁷ explicitly recognised that it would be ‘patronising’ not to give ‘respect’ to individual autonomy,⁸ but in the same judgment, reiterated that parties could not by agreement oust the jurisdiction of the court.⁹ This thesis will suggest that this decision has had a substantial impact on the complexities of the law as it stands, but to take a logical approach, a preliminary issue must be addressed and a decision reached as to what exactly a prenuptial agreement is. Firstly, it must be determined whether the prenuptial agreement should be conceptualised as a valid, binding contract. If this is the case, to what extent should any statutory approach to prenuptial agreements strictly apply the general principles of contract law? If a prenuptial agreement is not to be treated as prima facie a valid contract, what is the correct balance between autonomy and protection?

The courts themselves appear to be indecisive. The Supreme Court recently termed the distinction drawn between prenuptial and postnuptial agreements by Baroness Hale¹⁰ as a ‘red herring’,¹¹ suggesting that they are now prepared to afford both the same legal weighting. However, as neither is recognised within statute, a concrete position in between autonomy and protection has not yet been established. Before the implementation of a legal framework can even be considered for prenuptial agreements, their status and position within legal

⁴ David McLellan, ‘Contract Marriage – The Way Forward or Dead End?’ (1996)(23) *Journal of Law and Society* 234, 234

⁵ *ibid.*

⁶ *ibid* 236.

⁷ [2010] UKSC 42.

⁸ *ibid* [78].

⁹ *ibid* [2].

¹⁰ *Macleod v Macleod* [2008] UKPC 64 [36].

¹¹ *Radmacher* (n 6) [63].

theory must first be clarified. This will give any possible reform the greatest chance of widespread success and acceptance.

The first section of this chapter will outline some of the traditional public policy objections to marital property contracts. The decreasing relevance that the courts have been attaching to these objections will simultaneously be illustrated, in order to demonstrate the rapid developments that family law is currently undertaking as a result of changing social trends.

Whether full contractual autonomy is in fact what is desired or appropriate will then be examined. It is oft stated that prenuptial agreements cannot be equated to, and treated like, contracts in a commercial sense. This issue will be explored through the lens of relational contract theory, which provides a useful tool to aid the delineation of prenuptial agreements as a hybridised contract, which draws upon elements from both the contract law and family law approach. This will allow a more holistic approach to be taken to evaluating the extent to which couples should be afforded contractual autonomy to pre-determine the financial side of relationship breakdown. Ultimately, this will lead to conclusions as to whether a prenuptial agreement should function as a creature of contract law, of family law, or, if in fact a new hybrid legal model is required, which is influenced by, and draws upon, characteristics of both the contract and family law approaches.

Public Policy Objections to Marital Property Agreements

Prior to discussing the status of prenuptial agreements, the traditional public policy objections to the existence of contracts contemplating marital breakdown must be explored. Public policy is a difficult concept to define. It was long argued that no one has successfully managed to encapsulate the full meaning of public policy within one definition¹² and even today there is no widely accepted definition, so that: ‘most frequently public policy is regarded as having merely a negative function’;¹³ in other words, it is used to justify intervention with the law on the grounds of principle. Public policy arguments seek to protect the interests of the wider public as a whole, rather than just the person who brings the claim in question before a court.

¹² John Westlake, *Private International Law* (6th ed 1922), 51.

¹³ Ernest G Lorenzen, ‘Territoriality, Public Policy and the Conflict of Laws’ (1923) 33 *Yale LJ* 736, 746.

The rules that regard prenuptial agreements as contrary to public policy are ‘long standing’.¹⁴ In regard to contracts that regulate the financial aspects of divorce, the courts referred to a number of public policy based objections. Firstly, there was the traditional notion that marriage imposed a common law duty upon the couple to live together indefinitely.¹⁵ Lord Penzance’s oft-quoted definition of marriage specifically refers to marriage as a lifelong union¹⁶ and it was implicit that the couple would live together. Indeed, at one stage the law regarded the husband and wife as one entity for financial and legal reasons.¹⁷ Marriage has traditionally been afforded a high status within society. It is ‘deeply embedded in the religious and social culture of this country.’¹⁸ The State endorsed marriage because it ‘creates its own little social security system’.¹⁹ The theory was the more couples that were able to privately regulate themselves; the fewer onuses there would be upon the State to interfere.²⁰ This in turn would make the couple less burdensome on the State’s resources, which are only handed out in a minimalistic, stigmatised and begrudging manner.²¹ Consequently, it was felt that any agreement making ‘provision for the possibility of separation might act as an encouragement to separate’.²² This would go directly against the traditional notion of marriage.

A second public policy objection to marital property agreements, was a fear that allowing couples to oust the jurisdiction of the court to make orders for financial relief would be detrimental to the weaker spouse, and even more so the public as a whole. Lord Atkin advocated this approach in *Hyman v Hyman*,²³ holding that the court was granted its statutory power to make relief ‘to prevent the wife from being thrown upon the public for support’.²⁴ It was therefore not felt to be in the public interest to allow couples to agree contractual terms that could directly lead to the State having to subsidise a spouse who was left with insufficient financial support following a divorce.

¹⁴ *Macleod* (n 10) [31].

¹⁵ *ibid* [19].

¹⁶ *Hyde v Hyde* (1866) LR 1 P & D 130, 133.

¹⁷ *Williams & Glyn’s Bank v Boland* [1979] Ch 312 (CA).

¹⁸ *Bellinger v Bellinger* [2003] UKHL 21 [46].

¹⁹ Brenda Hale, ‘Equality and Autonomy in Family Law’ 33 JSW&FL 3, 4.

²⁰ *ibid*.

²¹ Martha Fineman, *The Autonomy Myth* (The New Press 2004) 228.

²² *Radmacher* (n 6) [31].

²³ [1929] All ER Rep 245 (HL).

²⁴ *ibid* 274.

These public policy objections continued to influence judicial decision making up to the turn of the 21st century. Mr Justice Wall, in 1999, ruled that it remained the case that a prenuptial agreement ‘undermines the concept of marriage as a life-long union’ and so was ‘perceived as contrary to public policy’.²⁵ This was reaffirmed in *X v X (Y intervening)*.²⁶ Although his thoughts had no application to the actual facts of the case, Mr Justice Munby confirmed that ‘a contract which purports to deprive the court of a jurisdiction which it would otherwise have is contrary to public policy’.²⁷ The traditional public objections to prenuptial agreements remained a very real consideration in the early part of the twenty-first century, but, since then, much has changed in terms of the judicial attitude towards prenuptial agreements. Consequently, the prominence of the traditional public policy objections has quickly diminished.

It is common knowledge that divorce rate have been steadily rising over the last half century. According to the Office for National Statistics there were 119,589 divorces in the UK in 2010.²⁸ This figure was up nearly 6,000 on what it had been in 2009.²⁹ Although the number of divorces actually peaked in 1985 when 160,300 couples went through the process,³⁰ the overall trend throughout the twentieth and into the twenty-first century demonstrates an overwhelming increase in divorce rates, particularly given that it was not until 1943 that annual divorce numbers reached the ten thousand mark.³¹ Current estimates are that 45% of new marriages will ultimately end in divorce.³²

In light of these figures, it has been suggested that to continue to uphold the traditional public policy objections would be ‘anachronistic’³³ and it is not overly surprising that the judiciary has questioned the significance of the public policy objections to prenuptial agreements.

²⁵ *N v N (Jurisdiction: Prenuptial Agreement)* [1999] EWHC Fam 838 [35].

²⁶ [2001] EWHC 11 (F).

²⁷ *ibid* [81].

²⁸ Office for National Statistics, *Divorces in England and Wales – 2010 data tables* (8 December 2011) <<http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcn%3A77-238035>> accessed 25 April 2012.

²⁹ *ibid*.

³⁰ *ibid*.

³¹ *ibid*.

³² Office for National Statistics, *The Proportion of Marriages Ending in Divorce in Population Trends* (2008) <http://www.statistics.gov.uk/articles/population_trends/PT131MarriagesEndingInDivorce.pdf> accessed 28 March 2012, 35.

³³ Baroness Ruth Deech, ‘What’s a Woman Worth?’ [2009] Fam Law 1140, 1144.

Mr Justice Connell was the first to suggest that the objections are ‘of less importance now that divorce is so commonplace’.³⁴ His sentiments have since been echoed in a number of leading judgments in the area. The impact of the judgment of the Privy Council, handed down by Baroness Hale, in *Macleod v Macleod* was limited by her decision to address only the enforceability of postnuptial agreements.³⁵ That said, it was specifically stated that, because ‘the old rule’ was ‘founded on the enforceable duty of husband and wife to live together’³⁶ which no longer applied, there was no public policy objection to stop a couple forming a postnuptial agreement.³⁷

Despite reaching this conclusion in relation to a postnuptial agreement, the Privy Council was unprepared to make the rational step and declare this as applying equally to prenuptial agreements. Instead, they took the view that it was ‘not open to them to reverse the long standing rule’³⁸ that regards prenuptial agreements as ‘contrary to public policy’.³⁹ This appears illogical because, as will be seen in Chapter 2, there had, prior to this decision, been significant judicial momentum towards taking prenuptial agreements into account, although in a strict legal sense it was the only decision that could be reached on the facts.

However, this stance has not proved to be overly problematic, and the decisions in the *Radmacher* dispute have now provided a degree of clarity as to the role of public policy in the consideration of prenuptial agreements. Firstly, the judges at Court of Appeal level touched on the subject, with Lord Justice Thorpe articulating the view that ‘the language of invalidity and public policy is no longer appropriate’⁴⁰ in the modern day. Lord Justice Wilson went on to hold that he knew of ‘no authority for the (continuing) existence’⁴¹ of public policy rules that would render a prenuptial agreement invalid. In that respect, he did not ‘fully understand’⁴² the decision that the Privy Council had handed down. The message

³⁴ *M v M (Prenuptial Agreement)* [2002] 1 FLR 654 (F) [21].

³⁵ *Macleod* (n 10) [36].

³⁶ *ibid* [38].

³⁷ *ibid* [36].

³⁸ *ibid* [31].

³⁹ *ibid*.

⁴⁰ *Radmacher (formerly Granatino) v Granatino* [2009] EWCA Civ 649 [66].

⁴¹ *ibid* [119].

⁴² *ibid*.

was unequivocal. The public policy grounds were regarded as ‘unrealistic, out-dated and out of line with international trends’.⁴³

Following on from this, the majority in the Supreme Court endorsed what the Privy Council had done in sweeping away the old public policy objections⁴⁴ in regards to postnuptial agreements. They then asserted that this ‘should not be restricted to post-nuptial agreements.’⁴⁵ The public policy objections were described as ‘archaic notions’.⁴⁶ Baroness Hale was the only judge to qualify this sentiment, expressing that she still felt that it should be public policy to continue supporting marriage in this country.⁴⁷

For the purposes of this thesis, the key point to emphasise is that now that legislative policy has been liberalised, it can no longer be contrary to public policy for couples to conclude agreements that avoid them having to submit to the uncertainty of the ancillary relief process.⁴⁸ It has therefore become much more difficult for the courts to dismiss prenuptial agreements on the traditional public policy grounds outlined above and, in a sense, protection has yielded to autonomy.

Contractual Autonomy v State Protection

It is commonplace to hear a prenuptial agreement referred to as a prenuptial contract. Other similar terms, for example ‘marital property agreement’ and ‘antenuptial contract’, are also widely used, both within the academic literature and the text of judicial reasoning. But the lexis of contract in this context is often used in a casual, informal manner, without much thought given to the connotations of the terminology used.

In a strict sense, a contract is an agreement reached with the intention to create legal relations, supported by consideration and that the law will enforce.⁴⁹ Firstly, an offer needs to be tendered by one party to another. To constitute an offer there must be a statement of

⁴³ *ibid* [29].

⁴⁴ *Macleod* (n 10) [38].

⁴⁵ *Radmacher* (n 6) [52].

⁴⁶ *ibid* [66].

⁴⁷ *ibid* [159].

⁴⁸ Anne Sanders, ‘Private Autonomy and Marital Property Agreements’ [2010] ICLQ 571, 583.

⁴⁹ Hugh G Beale (ed), *Chitty on Contracts, Volume 1: General Principle* (30th edn 2008) [2-001].

‘willingness to enter into a contract on stated terms.’⁵⁰ There then must be an acceptance of that offer in order for an agreement to be formed. This must come in the form of ‘an unqualified expression of assent to the terms proposed by the offerer.’⁵¹ An offer can be withdrawn at any point prior to acceptance without ramifications and is distinguishable from an invitation to treat, which is merely ‘an expression of willingness to enter into negotiations’.⁵²

It is not disputed that a prenuptial agreement prima facie fulfils the requirements of a legal contract. One spouse will have to make an offer of a prenuptial agreement. The other spouse must then return the signed agreement at some point prior to their marriage ceremony. The formal requirements of offer and acceptance are clearly satisfied through this set of actions. Additionally, there must be an intention to create legal relations between the parties. In the past it had been questioned whether such an intention does exist between a married couple,⁵³ however, the *Radmacher* ruling extinguished any doubt that had existed by determining that, from this point onwards, it will be ‘natural to infer’ that those who enter into a prenuptial agreement intend it be legally binding.⁵⁴

It is the wider implications and effect on the treatment of a prenuptial agreement as a result of it being afforded contractual status that is of greater concern to this thesis. The current process of review led by the Law Commission, asks whether ‘legislative reform should enable couples effectively to contract out of ancillary relief’.⁵⁵ Therefore, the focus of the Law Commission’s recommendations is likely to be upon how much autonomy Parliament should be willing to give to individuals to implement contractual terms in this context. It is important to note that technically, as things stand, couples can reach any agreement that they see fit, regardless of how unfair the terms may appear. But, in order for the agreement to be applied without further investigation, there must be no disagreement when divorce materialises.⁵⁶ This does not necessarily mean that they have created a legally valid contract;

⁵⁰ Ewan McKendrick, *Contract Law* (9th edn Palgrave Macmillan 2011) 27.

⁵¹ *ibid* 35.

⁵² *ibid* 27.

⁵³ See, eg, *Balfour v Balfour* [1919] 2 KB 571.

⁵⁴ *Radmacher* (n 6) [70].

⁵⁵ Law Commission, *Marital Property Agreements – A Consultation Paper* (Law Com No 198, 2011) [1.11].

⁵⁶ Peter G Harris, Robert H George & Jonathan Herring, ‘With this Ring I Thee Wed (Terms and Conditions Apply)’ [2011] Fam Law 367, 370.

the validity of the contract depends on the court's preparedness to uphold the agreement that they have put in place should there be a dispute.

It is often not the case that couples are able to come to their own arrangements at the point of separation. An application for ancillary relief would not be made if there was an amicable, autonomous agreement reached between the couple, although not all ancillary relief proceedings come about as a result of irreconcilable disagreements between the parties; it is also plausible that some couples simply mutually prefer to submit to the discretion of the courts. If legislation is enacted that confers prima facie enforceability on prenuptial agreements there must be a procedure in place that the court must adhere to when dealing with disagreements.

There is a spectrum of possible approaches that could be taken when a dispute arises. At one extreme is the notion of affording couples full autonomy; that is to view the agreement as legally binding, so that the court will only set it aside in circumstances where the traditional vitiating factors are triggered. These cover 'pathological'⁵⁷ situations where duress, undue influence, misrepresentation, mistake and fraud are involved.

At the opposite end of the spectrum, a prenuptial agreement could be given little or even no consideration by the court, regardless of the circumstances. Instead, the general principles of ancillary relief, namely the discretion afforded to the courts under Section 25 Matrimonial Causes Act 1973, the 'yardstick of equality'⁵⁸ and the themes of 'need', 'compensation' and 'sharing', all of which will be outlined in more detail in Chapter 2, would be applied in order for the courts to continue to protect vulnerable individuals. The benefit of this approach would be to allow the court to retain a strong paternalistic function and therefore continue to protect the interests of vulnerable individuals.

⁵⁷ Mindy Chen-Wishart, 'Undue Influence: Beyond Impaired Consent and Wrongdoing towards a Relational Analysis' in Andrew Burrows & Alan Rodger, *Mapping the Law: Essays in Memory of Peter Birks* (Oxford, OUP, 2006), 201.

⁵⁸ *White v White* [2000] UKHL 54 [25].

Jens Scherpe, drawing on the work of Kevin Gray,⁵⁹ has provided evidence of the contrasting approaches by highlighting the ‘pertinent’ distinction between ‘unconscionability of dealings’ and ‘unconscionability of outcomes’.⁶⁰ Scherpe outlines that an approach towards prenuptial agreements that is based around the ‘unconscionability of dealings’ very strongly favours the protection of autonomy, by scrutinising the factors surrounding the inception of the agreement, rather than looking at the substantive fairness of the agreement. However, if ‘unconscionability of outcomes’ is the main concern, then autonomy is clearly not the dominant objective as freely entered into bargains can still be set aside on fairness grounds.⁶¹ Scherpe’s analysis of the framework highlights the difficulty in attempting to regulate prenuptial agreements using either a pure protection or a pure autonomy approach and buttresses the fact that, for successful regulation of prenuptial agreements to be achieved, a position must be found that balances the two principles.

Historically, one of the most significant functions of ancillary relief was to provide protection to vulnerable individuals, who, in the majority of circumstances, were wives. Katherine O’Donovan explained that the ‘dependence’ of the financially weaker spouse upon the ‘wage-earner’ was inevitable under the traditional construct of the family.⁶² Whilst the modern family may see the boundaries between the male breadwinner and female homemaker as blurred, many couples continue to ‘adopt specialised roles within the family economy.’⁶³ Upon separation, the ‘vulnerabilities’ created by doing so are exposed.⁶⁴ The paternalistic function of ancillary relief would therefore be seen as vital by some to protect those whose earning capacity has been reduced as a result of marriage.

Any fresh legislative provisions regulating prenuptial agreements are unlikely to point the court towards affording prenuptial agreements no consideration at all. Such legislation would be without value, as judges would retain the wide discretion afforded to them by the Matrimonial Causes Act 1973, which will be outlined in Chapter 2. However, given that

⁵⁹ Kevin Gray, ‘Property in Common Law Systems’ in Gerrit E van Maanen and AJ van der Walt (eds), *Property Law on the Threshold of the 21st Century* (Antwerp, Maklue, 1996) 259.

⁶⁰ Jens M Scherpe, *Marital Agreements and Private Autonomy in Comparative Perspective* (Oxford, Hart, 1st Edition 2012) 514.

⁶¹ *ibid* 515.

⁶² Kathryn O’Donovan, ‘The Principles of Maintenance: An Alternative View’ [1978] *Fam Law* 180.

⁶³ Sonia Harris-Short & Joanna Miles, *Family Law: Text Cases and Materials* (OUP 2nd Edition 2011) 432.

⁶⁴ *ibid*.

reform of the law is clearly an option being considered, as evidenced by the Law Commission's consultation on Marital Property Agreements, the Government may have to work towards 'achieving the 'optimum tension''⁶⁵ between the two ends of the spectrum. For this to occur it must be accepted that a middle ground can be found between the two positions. It is necessary for law reform in relation to prenuptial agreements to be seen as creating a unique area of the law, rather than merely operating as an instrument of pure autonomy or pure protection.

There is evidence to indicate that the English common law is currently moving towards the contractual autonomy end of the spectrum. An examination of just how close to complete contractual autonomy it is desirable to reach, will aid in the determination of exactly where the optimum tension is to be found.

Prenuptial agreements are contractually binding throughout continental Europe, as well as in the USA, Canada, South Africa, Australia and New Zealand.⁶⁶ Yet even within these countries, 'the courts have retained full power to scrutinise'⁶⁷ the terms of any arrangement and 'have the final word'⁶⁸ on whether to hold the parties to what they have signed. Affording couples the autonomy to make financial provisions dealing with future in advance of relationship breakdown, and continuing to give the judiciary discretion to go behind the terms of a prenuptial agreement, are not, therefore, mutually exclusive.

In English law there is 'a considerable reluctance...to detect contracts and transactions in very personal affairs'.⁶⁹ Mr Justice Thorpe made it clear in *F v F*⁷⁰ that the statutory rights that individuals are afforded by section 25 MCA 1973 'cannot be much influenced by contractual terms'.⁷¹ He was averse to allowing married couples the option to avoid being

⁶⁵ Nicholas Wilson, 'Ancillary Relief Reform – Response of the Judges of the Family Division to Government Proposals' [1999] Fam Law 156, 162.

⁶⁶ Richard Todd, 'The Inevitable Triumph of the Ante-Nuptial Contract' [2006] Fam Law 539, 545.

⁶⁷ Jeremy D Morley, 'Enforceable Pre-nuptial Agreements: Their Time Has Come' [2006] Fam Law 768, 770.

⁶⁸ *ibid.*

⁶⁹ Sanders, (n 48) 581.

⁷⁰ (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45 (F).

⁷¹ *ibid.* 66.

governed by a statute that was implemented with the intention of having ‘universal application’⁷² within England and Wales.

Nevertheless, there has been a ‘shift in the court’s approach from one inclined to use its wide discretion paternalistically to one that is much more laissez-faire and desirous of granting autonomy’⁷³ to couples seeking to put in place agreements. By the time that Lord Justice Thorpe came to hand down his 2007 judgment in *Crossley v Crossley*,⁷⁴ he had begun to recognise that the ‘opportunity for the autonomy of the parties’⁷⁵ had taken on increased importance. Similarly, Baroness Hale in *Macleod* felt that, in relation to post-nuptial agreements, it must be ‘assume(d) that each party...is a grown up and able to look after him or herself’.⁷⁶ If this advice is heeded then it stands to reason that individuals should be afforded the autonomy to enter into prenuptial agreements as they see fit. In fact, some have actively been promulgating the removal of the court’s discretion completely in favour of full autonomy,⁷⁷ but this thesis respectfully suggests that this would be a step too far in light of concerns about the exposure of vulnerable parties to risk if the court’s discretion was completely removed.

These concerns emanate, in part, from doubts as to the level of autonomy that an individual can actually exercise when they are about to enter into marriage.⁷⁸ The fear is that vulnerable individuals will be willing to sign up to terms that award them significantly less than they would be left with if dealings were left in the hands of the judges, as a result of not being able to ‘judge the future of their own marriage rationally.’⁷⁹ This could stem either from a desire to appease their partners rather than upsetting them in the build-up to marriage, or the denial of the possibility that their relationship could ever break down.

⁷² *ibid.*

⁷³ Andrew Meehan, ‘Analyse this: *Radmacher v Granatino*’ [2009] Fam Law 816, 825.

⁷⁴ *Crossley v Crossley* [2007] EWCA Civ 1491.

⁷⁵ *ibid* [17].

⁷⁶ *Macleod* (n 10) [42].

⁷⁷ Deech, (n 33) 1143.

⁷⁸ Elizabeth Cooke, ‘The Law Commission’s Consultation on Marital Property Agreement’ [2011] Fam Law 145, 147.

⁷⁹ Jens Uwe Franck, ‘So Hedge Therefore, Who Join Forever: Understanding the Interrelation of No-Fault Divorce and Premarital Contracts’ (2009) Int J Law Policy Family 235, 253.

It is true that more women than men are worried by the possibility that their partners want a prenuptial agreement,⁸⁰ but this does not necessarily mean that they will not sign one anyway. Further, a study in the United States of America showed that, whilst the median response correctly identified the nationwide divorce rate of approximately 50%, in relation to their own marriages, the respondents felt that there was a 0% chance of the relationship breaking down.⁸¹ An idealistic and unrealistic approach by individuals towards their own marriages is not particularly surprising or blameworthy, but certainly something which must be borne in consideration when considering the extent to which couples should be afforded full autonomy to make binding prenuptial agreements.

It is easy to understand why a young couple, marrying for the first time, would want to sweep any lingering doubts that they may hold as to the longevity of the marriage that they are entering into under the carpet. These couples should be cautious though. Deliberately avoiding the issue of a prenuptial agreement does not mean that the relationship is less likely to break down; it merely serves to avoid addressing this possibility.⁸² Similarly, where a prenuptial agreement is drawn up, it may be that one party does not afford it the full consideration that it deserves, in the false belief that there is no chance of their marriage irretrievably breaking down, or to avoid causing unrest in their relationship. The court's discretion to potentially go behind the terms of an agreement is an important tool in such instances, as it is the only reliable way of protecting these potentially vulnerable spouses.

Further criticism of 'full autonomy' approaches has come from feminist theorists who have suggested that relying too heavily on autonomy is dangerous in the marriage context. This is because many individuals, women in particular, are not acting in a totally individualistic manner.⁸³ Rather than trying to maximise output for themselves, they are focussed on the consequences for the family as a whole. There is the distinct possibility that one spouse will

⁸⁰ William T Abraham, Robert E Cramer, Ana M Fernandez & Eileen Mahler, 'Infidelity, Race and Gender: An Evolutionary Perspective on Asymmetries in Subjective Distress to Violations-of-Trust' (2001-02) 20(4) *Current Psychology* 337, 344.

⁸¹ Lynn A Baker & Robert E Emery, 'When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage' (1993) 17(4) *Law and Human Behavior* 439, 442 & 443.

⁸² Franck, (n 79), 253.

⁸³ Brigitte Clark, 'Should Greater Prominence Be Given to Pre-Nuptial Contracts in the Law of Ancillary Relief?' [2004] *CFLQ* 399, 403.

attempt to take advantage of the good nature of the other by asking them to sign a contract containing provisions to their detriment.

It has been said that total ‘equilibrium is...a pipe dream in making deals of any kind of contracts’.⁸⁴ Whilst in an ideal world there would never be any pressure upon anyone to sign a contract, the reality is that this is a very rare instance.⁸⁵ It is arguable that even if the court’s discretion to go behind prenuptial agreements were to be removed, there would still be protection in the form of the standard contract vitiating factors. However, these are not intended for widespread use and the concerns over the effects of ‘full autonomy’ approach are valid.

A popularly held contemporary opinion is that the courts have insisted that modern day marriage is a partnership.⁸⁶ Indeed, there is an ‘increasingly akin view’ that marriage has been equated to ‘nothing more than a commercial partnership’.⁸⁷ Cases like *Lambert v Lambert*,⁸⁸ *Foster v Foster*⁸⁹ and *Miller; McFarlane*⁹⁰ all talked about marriage in such a way.

In the late 1990s the idea of a ‘more democratic form of family living’⁹¹ evolved from the judgments handed down by the Court, reflecting the belief that most people ‘had come to regard intimate relationships as partnerships of equals’.⁹² The traditional labour split, which regarded the husband as the breadwinner and the wife the homemaker, was ‘no longer the order of the day’.⁹³ Indeed, Lord Justice Thorpe expressly stated that it was ‘unacceptable’⁹⁴ for a court to value the contributions of the breadwinner above those of the homemaker, whilst Lady Justice Hale ruled that ‘there can be no justification...these days’⁹⁵ for a difference in treatment. The use of the phrase ‘these days’ points directly towards an ‘out with the old, in with the new’⁹⁶ attitude. There is strong empirical evidence that marriage is

⁸⁴ Chris Barton, ‘Marital Property Agreements: The Law Commission’s Cut’ [2011] Fam Law 992, 994.

⁸⁵ *ibid.*

⁸⁶ Morley, (n 67) 771.

⁸⁷ Todd, (n 66) 539.

⁸⁸ [2002] EWCA Civ 1685.

⁸⁹ [2003] EWCA Civ 565.

⁹⁰ [2006] UKHL 24.

⁹¹ Alison Diduck, ‘What is Family Law For?’ (2011) 64 Current Legal Problems 287, 292.

⁹² *ibid.*

⁹³ *White* (n 58) [24].

⁹⁴ *Lambert* (n 88) [27].

⁹⁵ *Foster* (n 89) [18].

⁹⁶ Diduck, (n 91) 402.

indeed viewed in the same way as a partnership, as well as providing assurances that the courts will continue to provide protection for those who may be in a financially vulnerable position because they have functioned in a homemaker capacity.

The logical and progressive next step would be to allow couples to draw up contractual terms to govern the conclusion of the partnership. Indeed, this would extinguish the ‘anomalous position’⁹⁷ that currently sees spouses unable to enter into valid contractual agreements, whilst their cohabiting counterparts can.⁹⁸ It is conceivable that affording parties such levels of autonomy will strengthen marriage as an institution. This will occur through encouraging those currently wary of entering into matrimony to take the step.⁹⁹

However, there are fears as to how this could escalate. Harris, George and Herring have raised concern as to how far the autonomy argument will run.¹⁰⁰ If it is powerful enough to enable individuals to escape from coming under the ancillary relief umbrella, will it run as far as allowing couples to contract on personal behaviour? The example given is a clause requiring one party to wear a yellow hat in order to avoid a divorce,¹⁰¹ but perhaps more worrying would be terms that required manual labour or sexual gratification by one of the parties.

The trio go on to mitigate their assertion by saying that such clauses would of course not be allowable under marriage law¹⁰² and the Law Commission itself appears to have dealt directly with this issue, explicitly stating that it is only exploring the possibility of enforceable provisions on financial matters.¹⁰³ The examples given above regarding manual labour and sexual gratification clearly do not regulate the financial side of divorce. Such clauses will be severable where it is possible to do so, or, where the term is explicitly part of the deal, it will render the whole prenuptial agreement void.¹⁰⁴

⁹⁷ Sarah Anticoni, ‘Resolution News Pre-marital Agreements’ [2005] Fam Law 313. 313.

⁹⁸ See, eg, Hart J in *Sutton v Mischo De Reya and Gawor & Co* [2003] EWHC 3166 (Ch) [22].

⁹⁹ Juliet Chapman, ‘The Magnetic Importance of a Prenup in the Paradigm Case *Crossley v Crossley* [2008] 1 FCR 323’ (2008) (30)(3) *Journal of Social Welfare and Family Law* 233, 239.

¹⁰⁰ Harris, George & Herring, (n 56) 369.

¹⁰¹ *ibid* 370.

¹⁰² *ibid*.

¹⁰³ Law Commission, *Marital Property Agreements* (n 55) [1.14].

¹⁰⁴ *ibid* [6.15].

The High Court, the Court of Appeal and the Supreme Court all considered the contractual status of prenuptial agreements in *Radmacher*. Mrs Justice Baron touched on the subject at first instance by stating that ‘standard contractual vitiating factors’¹⁰⁵ could affect the amount of weight given to an agreement. This did not introduce anything revolutionary. The idea that contractual factors like mistake, misrepresentation, duress, fraud and undue influence could be taken into account by courts was not a new one. Indeed, the Government Green Paper ‘Supporting Families’ specifically recommended that one of the safeguards that should be put in place was that a prenuptial agreement should be set aside if it would not be a valid agreement under the law of contract.¹⁰⁶ Mrs Justice Baron’s assertion, therefore, whilst not ground breaking, did re-affirm the role of contractual principles.

Upon appeal, Lord Justice Thorpe dealt specifically with the issues of contract and autonomy. It is worth repeating in full what he had to say at paragraph [27];

‘Due respect for adult autonomy suggests that, subject of course to proper safeguards, a carefully fashioned contract should be available as an alternative to the stress, anxieties and expense of a submission to the width of the judicial discretion.’¹⁰⁷

This was an explicit recognition that prenuptial agreements should be afforded contractual status and a degree of sympathy towards those wanting to enforce agreements was apparent. Affording individuals the autonomy to enter into agreements was clearly a favourable option. This would appear to have been a major factor in leading Lord Justice Thorpe to make the above statement. Additionally, he recognised the need to extinguish the ‘rules of law that divide us’¹⁰⁸ from both Europe and the wider common law world.¹⁰⁹

Naturally, Lord Justice Thorpe did not advocate the recognition of prenuptial agreements as contracts on an unqualified basis. Instead there were a number of vitiating factors that he outlined. He reasoned that:

¹⁰⁵ *NG v KR (Pre-Nuptial Contract)* [2008] EWHC 1532 (F) [136].

¹⁰⁶ Home Office, *Supporting Families: A Consultation Document* (Cm 3922, 1998) [6.23].

¹⁰⁷ *Radmacher (formerly Granatino)* (n 40) [27].

¹⁰⁸ *ibid* [29].

¹⁰⁹ *ibid*.

‘Any provision that seeks to oust the jurisdiction of the court will always be void but severable. Any contract will be voidable if breaching proper safeguards or vitiated under general principles of contract. Any contract would be subject to the review of a judge exercising his duty under s25 if asserted to be manifestly unfair to one of the contracting parties.’¹¹⁰

Whilst the general contractual principles were referenced, it is noteworthy that the notion of fairness and the idea that contracts could not seek to oust the jurisdiction of the court were also included. The inclusion of these qualifications suggests that the courts are not seeking to give prenuptial agreements contractual status in the strictest sense. It was also recognised that the law as it stands has ‘left it difficult or impossible to lay down...guidelines as to the circumstances in which the interests of private autonomy are to have weight.’¹¹¹

Lord Justice Rix asked the pivotal question when he expressly queried whether or not a prenuptial agreement should be looked at as if it were a standard binding contract?¹¹² He made reference to Baroness Hale, who, in *Macleod*, had held that ‘we must assume that each party to a properly negotiated agreement is a grown up and able to look after’¹¹³ themselves, placing emphasis on the terms ‘properly negotiated’.¹¹⁴ Lord Justice Rix continued to draw the distinction between a prenuptial and a postnuptial agreement,¹¹⁵ which is what Baroness Hale had been discussing. However, he allowed the question to remain unanswered.

The Supreme Court recognised that the majority of jurisdictions afford prenuptial agreements contractual status and will hold parties to them unless pre-specified safeguards or criteria are not met.¹¹⁶ At the same time, the Supreme Court questioned whether or not it was important that nuptial agreements, including prenuptial agreements, had ‘contractual status’,¹¹⁷ since the ‘value of a contract is that a court will enforce it’.¹¹⁸ They also acknowledged that, under the current law, the court couldn’t be bound by a prenuptial agreement, yet it is encouraged to

¹¹⁰ *ibid* [28].

¹¹¹ *ibid* [71].

¹¹² *ibid* [72].

¹¹³ *Macleod* (n 10) [42].

¹¹⁴ *Radmacher (formerly Granatino)* (n 40) [73].

¹¹⁵ *ibid*.

¹¹⁶ *Radmacher* (n 6) [3].

¹¹⁷ *ibid* [62].

¹¹⁸ *ibid*.

take it into consideration. This is the case whether or not agreements are afforded contractual status.¹¹⁹

The result of this analysis was that the enquiry into whether or not nuptial agreements should be afforded contractual status was dismissed as a ‘red herring’¹²⁰ by the majority of the Supreme Court. It was felt that the courts have ‘adopted a more nuanced approach’¹²¹ to nuptial agreements than they have to regular contracts. Consequently, it is ‘immaterial’¹²² in English ancillary relief whether or not a prenuptial agreement is regarded as a contract. The same criteria will be applied by the court in determining the weight to be afforded to the agreement regardless its contractual status.¹²³

The decision of the majority appeared to state that, as things stand, it does not matter whether a prenuptial agreement is considered to have contractual status or not. Baroness Hale seems to have interpreted the majority’s opinion as making prenuptial agreements contractually binding,¹²⁴ even if it was seemingly irrelevant whether they did so or not. In her dissent she expressly disagreed with the ‘mercifully obiter’¹²⁵ viewpoint that prenuptial agreements are contractually valid. Clearly the debate is not over. Whilst the majority have expressed that under the current laws of ancillary relief it does not matter whether the starting point is that prenuptial agreements are valid contracts or not, it is a topic that will have to be seriously considered when entertaining the possibility of law reform.

The Law Commission has recently proposed that in order for any ‘qualifying nuptial agreement’ to be capable of being upheld, the agreement must first be valid under the law of contract.¹²⁶ Contractual validity would therefore become a prerequisite for the creation of a binding prenuptial agreement, although it would not be the only safeguard. Parties would have autonomy in so far as they could enter into a prenuptial contract, however, it would not be the case that the mere finding of a valid contract would serve to oust the jurisdiction of the

¹¹⁹ *ibid.*

¹²⁰ *ibid* [63].

¹²¹ *ibid* [62].

¹²² *ibid* [74].

¹²³ *ibid.*

¹²⁴ Joanna Miles ‘Marriage and Divorce in the Supreme Court and the Law Commission: for Love or Money’ (2011)74(3) *Mod L Rev* 430, 439.

¹²⁵ *Radmacher* (n 6) [138].

¹²⁶ *Marital Property Agreements* (n 55) [6.46].

court. Such an approach is unheard of throughout the rest of Europe and other suitable comparators like Australia, the USA and New Zealand.¹²⁷ It has the potential to leave one spouse ‘destitute’¹²⁸ and, subsequently, much of the discussion in this thesis will be focussed upon the checks and balances upon autonomy that the state should provide.

The conflict of opinions on the matter is stark and a compromise must be found before law reform can be properly embarked upon. Only once the true status of prenuptial agreements is determined, will any statutory regime be able to be built successfully.

Using Relational Contract Theory to Bridge the Gap?

Despite the potential for prenuptial agreements to be viewed as binding contracts in the traditional sense, there is still a degree of discomfort with equating a marriage to a commercial transaction. The traditional notion is that marriage is a life-long commitment based around love, whereas a commercial transaction usually takes place in a business context and only governs a short period.¹²⁹ This view holds contracts as ‘discontinuous with our everyday thinking about marriage’.¹³⁰ However, an alternative theory promulgates that ‘contracts need no longer be read as creating exclusively commercial obligations’.¹³¹ As will be outlined, this methodology can prove useful in the prenuptial agreement context.

Much of the conflict that has arisen surrounding the regulation of prenuptial agreements stems from the autonomy versus protection debate, which leads to attempts to shoehorn prenuptial agreements into the remit of either contract or family law. This thesis highlights the possibility of conceiving prenuptial agreements as having their own unique legal form, drawing on relational contract theory in order to give content to the new ,hybrid model.

As a prerequisite to law reform taking place, there must be a degree of clarity as to the concept of the prenuptial agreement that is to be regulated. Further, the extent to which the

¹²⁷ Scherpe, *Marital Agreements* (n 60) 484.

¹²⁸ *ibid.*

¹²⁹ Sanders, (n 48) 589.

¹³⁰ Eric M Cave, ‘Marital Pluralism: Making Marriage Safer for Love’ [2003] *Journal of Social Philosophy* 331, 334.

¹³¹ Elizabeth Kingdom, ‘Cohabitation Contracts and the Democratisation of Personal Relations’ (2000)(8) *Feminist Legal Studies* 5, 5.

law should strive to afford individuals autonomy, as opposed to providing a paternalistic function, must be determined. By applying relational contract theory to prenuptial agreements, it can be shown that there is some value in regarding prenuptial agreements as contracts, albeit not in the classically understood commercial meaning of the word.

Essentially, relational contract theory can be looked upon as an ‘attempt to take into account all the surrounding circumstances of relationships’,¹³² rather than simply looking at a contract as a one-off arrangement. The ‘obvious definition’¹³³ of a relational contract is one that involves a relationship between the contracting parties rather than a mere exchange of a good or service.¹³⁴ The ‘substantive core’¹³⁵ of relational contract theory is based upon the notions that, firstly, contracts are ‘fundamentally about cooperative social behaviour’¹³⁶ and, secondly, that the ‘predominant form of contracts’ are those which contain ‘significant relational elements.’¹³⁷

Relational contract theory proposes that ‘agreements are not always transactional occasions’.¹³⁸ The traditional reluctance to afford prenuptial agreements the same status as commercial contracts came about in part because a clear distinction between contracts and family law agreements was often drawn. At one end of the scale lay the purely commercial transaction, which is ‘short-term and requires no personal interaction’,¹³⁹ while at the other was the tacit familial agreement that is not intended to be legally binding. However, if relational contract theory can be utilised to build an understanding that the future regulation of prenuptial agreements should draw upon values linked to both autonomy and protection, then viewing prenuptial agreements as a category of contracts in their own right will become more readily acceptable.

Although academics have been developing the perspective of relational contract theory since Ian Macneil’s groundbreaking work in the 1980s, there is ‘no developed body of relational

¹³² Stefanos Mouzas & Keith Blois, ‘Relational Contract Theory: Confirmations and Contradictions’ <<http://impgroup.org/uploads/papers/6764.pdf>> accessed 5 April 2012.

¹³³ Melvin A Eisenberg, ‘Why there is No Law of Relational Contracts’ (1999-2000) 04 Nw U L Rev 805, 816.

¹³⁴ *ibid.*

¹³⁵ Jay M Feinman, ‘Relational Contract Theory in Context’ (1999-2000) 94 Nw U L Rev 737, 743

¹³⁶ *ibid.*

¹³⁷ *ibid.*

¹³⁸ Robert C Bird, ‘Employment as a Relational Contract’ (2005) U PA Journal of Labour and Employment Law 149, 151.

¹³⁹ *ibid.* 152.

contract law'.¹⁴⁰ Classical contract law is 'implicitly based on a paradigm' of 'bargains made between strangers...in a perfect market'¹⁴¹ and is 'focused almost exclusively on a single instant in time'.¹⁴² This model of contract allows the parties the autonomy to enter into any agreement that they see fit, but does not lend itself to application to prenuptial agreements. A couple getting married are not strangers. Further, the bargain that they are making is not supposed to just cover the moment of inception, in fact, it rarely covers this moment at all. Instead, prenuptial agreements attempt to regulate an event that may or may not occur at some indefinable point in the future.

John Wightman, a notable proponent of relational contract theory, believes that the 'fundamental inadequacy' with traditional contract law is that it focuses upon the original agreement as the source of obligations.¹⁴³ Based upon this evaluation, the reluctance to treat the prenuptial agreement in a similar manner to a commercial agreement is more than understandable. The original terms of the prenuptial agreement will often be wholly unreflective of the circumstances that are actually in place when the agreement comes to be enforced. However, that is not to say that prenuptial agreements should have no contractual standing, nor should the ability to make autonomous decisions be taken out of the hands of couples. The contractual enforceability of prenuptial agreements is not an 'all or nothing' scenario. Relational contract theory can help justify the new hybrid position that this thesis believes prenuptial agreements should take in the future, which will draw on a desire to enable couples to reach autonomous decisions, tempered with checks and balances designed to ensure that vulnerable individuals continue to have their interests protected.

By challenging this status quo, Macneil 'persistently shoved a generation of legal thinkers out of the comfortable clarity of classical and neoclassical doctrinal analysis'¹⁴⁴ and feminists have described his work as a 'virtual rehabilitation of contract'.¹⁴⁵ Macneil explained that a contract between 'totally isolated, utility maximising individuals is, in fact, a 'war' rather

¹⁴⁰ Eisenberg, (n 133) 805.

¹⁴¹ *ibid* 808.

¹⁴² *ibid* 807.

¹⁴³ John Wightman, 'Intimate Relations, Relational Contract Theory and the Reach of Contract' (2000) *Feminist Legal Studies* 93, 103

¹⁴⁴ Elizabeth Mertz, 'Tapping the Promise of Relational Contract Theory – 'Real' Legal Language and a New Legal Realism' (1999-2000) 04 *Nw U L Rev* 909, 917

¹⁴⁵ Wightman, (n 143) 101.

than a contract.¹⁴⁶ He believed that ‘all real life exchange takes place in the context of relations more extensive than the exchange itself’.¹⁴⁷ In other words, Macneil holds that, to paraphrase George Orwell, all contracts are relational, although ‘some contracts...are far more relational than others’.¹⁴⁸ Discrete contracts, involving one-off transactions, ‘are almost as imaginary as unicorns’.¹⁴⁹ Instead, all contracts fall at some point along the spectrum between classical, discrete contracts and wholly relational ones.

Relational contract theory is deeply complex and is not based on one single model. One commentator described the whole area of academic literature as a swamp that requires escaping from.¹⁵⁰ Clearly then, from that analogy, it is not a concrete theory and is open to manipulation. This does not hinder the application of relational contract theory in the prenuptial agreement context. The purpose of proposing a relational contract analysis is to bridge the gap between informal agreements between spouses and commercial contracts, demonstrating the unique hybrid position that prenuptial agreements occupy between the pulls of contract and family law. By establishing that this position is one that law reform should look to achieve, it is hoped that some of the tension that has been evidenced to exist between autonomy and protection will be alleviated.

Firstly, relational contract theory entertains ‘the possibility that norms internal to the parties’ relationship...will become part of their obligations to each other’,¹⁵¹ even if they are not expressly part of the agreement. This point can be easily related to marriage and, in turn, the prenuptial agreement. The intended obligations of a marriage cannot be ‘set out completely at the beginning’, nor do the commitments made intend to ‘exhaust everything that the parties intend to occur during the relationship’.¹⁵² In the same manner, a prenuptial agreement is unlikely to be able to attempt to foresee every eventuality.

¹⁴⁶ Ian Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven (USA) Yale University Press 1980) 14.

¹⁴⁷ Ian Macneil ed David Campbell, *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell 2001) 99.

¹⁴⁸ Mouzas & Blois, (n 132).

¹⁴⁹ Eisenberg, (n 133) 816.

¹⁵⁰ *ibid* 931.

¹⁵¹ Richard E Speidel, ‘The Characteristics and Challenges of Relational Contracts’ (1999-2000) 04 Nw U L Rev 823,827.

¹⁵² Robert Leckey, ‘Relational Contract and Other Models of Marriage’ (2002) (40) Osgoode Hall Law Journal 1, 8.

Whilst it is more difficult in intimate relationships than it would be in the commercial context to imply terms based on general practice, it is not impossible.¹⁵³ In many cases, circumstances that were unforeseen at the start of a marriage have occurred by the time divorce takes place. The most common example would be the birth of children, but there could be many other factors, ranging from the more obvious like illness and disability, to more unlikely scenarios like fame, an unexpected career change or a lottery win, in which it could be equally as applicable. Where pre-nuptial agreement are concerned, unlike for commercial transactions, there are not ‘general business practices’ that can be used as a fall back position. However, the family courts have considerable expertise and experience of dealing with ancillary relief cases. The judges will be able to draw upon a wealth of policies and ideas that have previously been articulated by the family courts, within which the notion of protection for vulnerable individuals will feature heavily. This will enable them to flesh out the interpretation of statutory provisions, in order to determine which terms should be implied into the agreement based on the individual circumstances of the case.

The presence of any of the factors listed above, and the list is far from exhaustive, will often trigger change in the course of dealings between the couple. In some instances the couple may have foreseen this occurrence, but in many instances, the prenuptial agreement in place will not have provided for such a change. By utilising the relational contract in this context, the courts’ continued discretion to intervene and protect the interests of vulnerable individuals, despite contractual terms already being in place, can be readily justified. In fact, the courts’ enduring discretion go behind the terms of the agreement is vital. The parties, to their detriment, will often rely upon the changes that may have occurred within relationships.¹⁵⁴ In such instances, it may not be fair to return to the original agreement.¹⁵⁵ In this respect, a prenuptial agreement does not align entirely with either the family law principle of protection, or the contract law principle of autonomy. Rather, as has already been suggested, it is more appropriately viewed as a hybrid relational agreement that draws upon features of both of these models.

¹⁵³ Wightman (n 143) 107.

¹⁵⁴ Stewart Macaulay, ‘Relational Contract Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein’ (1999-2000) 94 Nw U L Rev 775, 803

¹⁵⁵ *ibid.*

In the marital context, there is always going to be a highly relational connection between the spouses. Wightman has outlined a number of models that operate within the ambit of relational contract, one of which being the ‘altruistic model’.¹⁵⁶ In such a close relationship the idea of maximising individual utility becomes more ‘artificial’,¹⁵⁷ with the focus instead on long-term harmony for the couple and their family. Often, the problems with implying contractual terms into intimate relationships are that there is no consideration given for the bargain and it is generally presumed that there is no intention to create legal relations. Wightman suggests that even in the most highly relational of commercial contracts, ‘there is always a foundation of exchange which means that there is no problem in establishing the existence of a contract’.¹⁵⁸ The prenuptial agreement can therefore, as an irreducible minimum, be utilised to ensure that there are no issues in establishing a foundation of exchange in genuinely altruistic relationships. It is from this base that the level of autonomy to be afforded must then be determined.

Relational contract theory ‘demands’ that individuals ‘confront the reality of long-term continuing relations’.¹⁵⁹ This can in fact be healthy for a couple and will ‘facilitate communication between them.’¹⁶⁰ One of their primary concerns will be the ‘preservation of the relationship itself’¹⁶¹ and they often seek the best possible outcome for the family as a whole, as opposed to striving for individual wealth maximisation. By making it the more socially accepted norm for a long-term approach to be taken, there may be a greater degree of protection awarded to the vulnerable. The hybridised model of the prenuptial agreement will at least make couples consider sitting down and considering potential future changes in circumstances. There will be no guarantee that the court will not itself alter the terms of the agreement because of a material change of circumstances in order to provide protection for one party, but couples will at least give themselves a greater chance of having their autonomy upheld.

A supposed benefit of the relational contract is that it recognises that the parties are able to ‘utilise their detailed knowledge of their specific situation and...adapt to new information as

¹⁵⁶ Wightman (n 143) 121.

¹⁵⁷ Macneil, *The Relational Theory of Contract*, (n 147) 100.

¹⁵⁸ Wightman (n 143) 121.

¹⁵⁹ Macaulay, (n 154) 801.

¹⁶⁰ McLellan, (n 4) 237.

¹⁶¹ Leckey, (n 152) 10.

it becomes available.’¹⁶² In a prenuptial agreement negotiation, the couple know the intricacies of their financial situation better than anyone else and will, theoretically, be best placed to make any alterations to the terms of any agreement that need to come about as a result of changes in their personal circumstances. This is a clear benefit of allowing autonomy to some extent; however, this must be tempered to reflect the fact that both parties will not necessarily be working towards the same outcome.

To a certain extent relational contracts are ‘self-enforcing’¹⁶³ because both parties have an ‘incentive not to renege’¹⁶⁴ on the terms of the agreement. McLellan made it clear that ‘contracts to respect, honour, and love would be difficult to specify as performance and breach’,¹⁶⁵ but if marriage itself is viewed as the relationship, with the prenuptial agreement merely governing the terms of exit, then it will still most often be in the interest of the spouses and their family to keep the marriage going. At least at the time when the prenuptial agreement is entered into, it is only a contingency plan to deal with the financial side of any potential future relationship breakdown.

Naturally, where human beings are afforded autonomy, there is always a danger of opportunism. In a relational contract this can be defined as ‘self-interest seeking that contradicts the terms of an established relational contract’.¹⁶⁶ In the USA, where the Uniform Premarital Agreement Act has been adopted in over 27 states, Gail Brod argued in the 1990s that premarital agreements discriminated against women on gender grounds, highlighting them as a category of potentially vulnerable individuals in need of protection. She felt that the law should be refashioned so that autonomous agreements were only enforceable if the vulnerable spouse achieved economic justice and the bargaining process was fair.¹⁶⁷ Kingdom points out that this attitude preserved the ‘doctrine of contract as commerce’, even if it was ‘tempered’ by the notion of justice.¹⁶⁸ Therefore, with a successful move away from viewing prenuptial agreements as contracts in the traditional commercial sense that can be

¹⁶² Robert Gibbons, ‘Four Formal(izable) Theories of the Firm?’ (2005) *Journal of Economic Behaviour and Organisation* 200, 246.

¹⁶³ Mouzas & Blois, (n 132).

¹⁶⁴ *ibid.*

¹⁶⁵ McLellan, (n 4) 237

¹⁶⁶ Bird, (n 138) 198.

¹⁶⁷ Gail Brod, ‘Premarital Agreements and Gender Justice’ (1994) *Yale Journal of Law and Feminism* 229, 287.

¹⁶⁸ Kingdom, (n 131) 13.

autonomously entered into, there is the possibility of even stronger protections being in place for vulnerable individuals.

In any case, the danger of opportunism is present in any form of contract entered into. Leckey submits that relational contract theory recognises the ‘potential for serious inequality in intimate relationships’.¹⁶⁹ Autonomy for one party can be a restriction of autonomy for another and so the court retaining the discretion to go behind the terms of the prenuptial agreement will ensure sufficient protection remains in place for vulnerable individuals, who, in this context, have traditionally been women.

Wightman drew a ‘distinction between agreements for exchange and agreements for use’,¹⁷⁰ with the latter category encompassing contracts that do not fit the traditional commercial transaction model of contract. Rather than merely being contracts for exchange of a good or service, agreements for use practically govern a longer-term relationship between the parties. Within the second category, he explained that both ‘altruism’ and ‘cooperative norms’ would feature heavily.¹⁷¹ Therefore, it is possible that prenuptial agreements would include clauses that would ‘undermine’¹⁷² the traditional criticisms of contract law, which are seen as enabling the male to dominate financially. Instead, the agreements themselves would place both parties in favourable position. Guggenheimer was a champion of this theory, suggesting if parties are able to autonomously enter into prenuptial agreements, there will be those drafted that will favour equality over what she termed ‘feminomics’.¹⁷³ The prenuptial agreement itself in these instances will be the source of protection for vulnerable individuals.

Relational contract theory has previously been used in company law to gain an understanding of how long-term business contracts operate. It has also been suggested that it is used in employment law to evidence the ‘broad range of relational interests and contexts present in employment relationships’¹⁷⁴ that contract law alone could not show. There is no reason why it cannot be used in the family law sphere to highlight the complexities of a contract being

¹⁶⁹ Leckey, (n 152) 6.

¹⁷⁰ Kingdom, (n 131) 18.

¹⁷¹ John Wightman, *Contract: A Critical Commentary* (London: Pluto Press, 1996) Chapter 8.

¹⁷² Kingdom, (n 131) 19.

¹⁷³ Leah Guggenheimer, ‘A Modest Proposal: The Feminomics of Drafting Premarital Agreements’ (1996) *Women’s Rights Law Report* 147, 156.

¹⁷⁴ *ibid* 158.

implemented between spouses. In fact, Leckey argues that, owing to relational contract theory's 'sharp awareness of potential problems in private ordering',¹⁷⁵ by using the relational approach, the legislator is placed in a better decision to determine how objective or subjective it wants the safeguards that it puts in place to be.¹⁷⁶

Conclusion

Whilst the autonomy versus protection debate will always continue to cause controversy, it is clear that the current trend is a shift towards allowing couples the ability to make autonomous decisions. However, this move towards autonomy must be tempered as what one party sees as an autonomous decision, another may view as a restriction of their autonomy. Resultantly, the point has been reached whereby prenuptial agreements are arguably deserving of their own hybrid legal status which sits somewhere along the spectrum between autonomy and protection. Granting couples full autonomy to enter into agreements would lead to an inherent danger that one party would be able to take advantage of another, whether it be through the process of reaching an agreement, or in the actual terms of the prenuptial agreement itself.

This chapter has suggested that by viewing the prenuptial agreement through the relational contract theory lens, a much 'wider set of values to draw upon in understanding a relationship as a contract'¹⁷⁷ is opened up. Stychin argues that 'through thinking about contracts in more value-open terms...we may be liberated to think about contracts in richer, contractual terms'.¹⁷⁸ This more liberal attitude towards allowing couples to make autonomous decisions regarding the financial consequences of their divorce in advance, makes a hybrid position for prenuptial agreements, which sits in between 'autonomy' and 'protection', more readily justifiable. This position will not be cemented. It will continue to operate on a sliding scale, dependent upon whether certain criteria surrounding the implementation of a prenuptial agreement are met. These will be discussed in detail within Chapter 4 and must continue to ensure that elements of both 'autonomy' and 'protection' are present within the law.

¹⁷⁵ Leckey, (n 152) 22.

¹⁷⁶ *ibid.*

¹⁷⁷ Carl Stychin, 'De-Meaning of Contract' in Vanessa Munro and Carl Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Abingdon: Routledge-Cavendish 2007) 73, 83.

¹⁷⁸ *ibid* 85.

Prior to reaching that point though, an outline of the current common law position of England and Wales on prenuptial agreements will take place in Chapter 2, followed by a similar exercise in relation to the statutory provisions that have been enacted in Australia in Chapter 3. These chapters will serve to introduce the issues that will be discussed in more detail within Chapter 4.

Chapter 2: The Key Issues in England and Wales

Having introduced the tension that exists between autonomy and protection in Chapter 1, this chapter will outline the law on prenuptial agreements in England and Wales. To aid in achieving this, a brief overview of the wider issues that have arisen in relation to the economic aspect of divorce will be given. The general principles of ancillary relief will be outlined, prior to embarking upon an exploration of the way in which the court has historically dealt with contracts purporting to regulate the financial aspect of marital breakdown. Finally, the development of the law specifically in relation to prenuptial agreements since the 1990s will be charted. Throughout the course of the chapter, the tension between autonomy and protection will be clearly evident within judicial decision-making.

Dividing ‘Matrimonial Property’

One of the most problematic aspects of a divorce is how to divide assets between spouses. This is the issue upon which the whole area of ancillary relief and, latterly, prenuptial agreements, is constructed. The academic literature published in relation to these two topics has developed with a view to solving this issue.

In jurisdictions that recognise ‘matrimonial property’, its definition is in itself highly contentious. There are conflicting opinions as to whether it should include everything that the couple have acquired during a marriage, or, whether it should be possible to draw a distinction between assets that are familial and assets that are not.¹

Unlike many of its European counterparts, England and Wales does ‘not yet have’² in place any ‘community of property’ regime. Similar schemes can be traced back to the Soviet Union in 1926 and have been widely introduced throughout numerous European states.³ In

¹ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 [153].

² *ibid* [151].

³ Branka Resetar, ‘Matrimonial Property in Europe: A Link Between Sociology and Family Law’ (2008) 12(3) *Electronic Journal of Comparative Law* <<http://www.ejcl.org/123/art123-4.pdf>> accessed 16 December 2011, 1.

France, for example, the Napoleonic Code 1804 (*Code Napoléon*) allows couples complete freedom to elect to follow one of a number of regimes. These range from a regime which keeps the couple's assets totally separate upon divorce, including those obtained both prior to and during the marriage (*Séparation de Biens*⁴), to one which regards virtually all of the assets to be jointly held and thus divided evenly upon divorce (*Communauté Universelle*⁵).

This regime, and the parallel ones that can be found throughout the continent, ensures almost total clarity in regards to the status of assets upon divorce. Couples are presented with the chance to make autonomous choices on whether to protect what they consider to be their own personal assets, or to allow them to become matrimonial property.

Although the starting point in England and Wales is separate property,⁶ there have still been attempts by the judiciary to distinguish between assets that should be regarded as 'matrimonial' and those that individuals should be able to keep as personal. Lord Denning attempted to define family assets in *Wachtel v Wachtel*⁷ as:

....those things which are acquired by one or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole.⁸

Baroness Hale addressed the issue in detail in her part of the judgment in the conjoined *Miller; McFarlane* decision. She asserted that the family home, its contents, the parties' earning capacities, holiday homes, insurance policies and other family savings would all obviously form the 'fruits of the marital partnership.'⁹

The difficulty comes with assets acquired prior to and during the marriage, that one party wants to exclude from the so-called 'matrimonial property'. These could include anything from vast business corporations right the way down to small, inherited family heirlooms. Baroness Hale was clearly undecided as she engaged upon a difficult balancing act.

⁴ Napoleonic Code 1804, Articles 1536-1568.

⁵ *ibid* Article 1526.

⁶ Sonia Harris –Short and Joanna Miles, *Family Law Text, Cases and Materials* (OUP 2nd Edition 2011) 122.

⁷ [1973] EWCA Civ 10, [1973] 1 All ER 829.

⁸ *ibid* 836.

⁹ *Miller; McFarlane* (n 1) [154].

Ultimately, Baroness Hale pointed to section 25(2)(d) Matrimonial Causes Act 1973 (hereafter the ‘MCA 1973’). This provision expressly obliges the court to consider the duration of a marriage, thus ensuring that ‘the source of assets may be taken into account’.¹⁰ In this sense, the courts will continue to attempt to provide the appropriate level of protection to individuals who need it. That said, she warned that the importance of this factor will ‘diminish over time’,¹¹ perhaps as more weight is given to party autonomy. Most importantly, she expressly recognised that the starting point in England and Wales remains the ‘premise of separate property’,¹² within which there is ‘some scope for one...to acquire and retain separate property’.¹³

Despite this statement to the contrary, others argue that England and Wales has developed a common law community of property regime. Judicial decisions have supposedly created an environment whereby a ‘deferred community of assets’¹⁴ is effectively in place.¹⁵ Since Baroness Hale’s ruling was passed down, it has been expressly established in *Jones v Jones*¹⁶ that it is permissible for spouses to autonomously determine to ‘ring-fence’¹⁷ their personal assets, which are consequently excluded from any potential future ancillary relief proceedings.

Even the most ‘modest legislative steps’ in the direction of a community of property regime have so far been ‘strenuously resisted.’¹⁸ Following the *Jones* ruling, it is possible that individuals have, to a certain extent, the ability to make autonomous decisions to exclude assets from divorce proceedings, however, the court is still very conscious of its protective function. It therefore seems logical that couples will turn to a prenuptial agreement in order to circumvent the default property rules of this jurisdiction, perhaps in an attempt to formally construct their own personal ‘community of acquests’.¹⁹

¹⁰ *ibid* [152].

¹¹ *ibid*.

¹² *ibid* [153].

¹³ *ibid*.

¹⁴ Sandra Verburgt, Simon Bruce & Andreas Kuhne, ‘Marital Agreements: International Lawyers Neglect Jurisdictional Developments at their Peril’ [2011] IFL 215, 216.

¹⁵ Stephen Cretney, ‘Community of Property Introduced by Judicial Decision’ [2003] 119 LQR 349.

¹⁶ [2011] EWCA Civ 41.

¹⁷ Tom Phillips and Gary Yan, ‘Keeping Up With the Joneses’ [2011] NLJ 275.

¹⁸ *Miller; McFarlane* (n 1) [151].

¹⁹ Law Commission, *Marital Property Agreements – A Consultation Paper* (Law Com No 198, 2011) [5.57].

The majority of divorces are concerned with reaching ‘fair loss –sharing settlements’ rather than ‘divvying up a surplus’,²⁰ yet any surplus assets being protected need not run into the millions of pounds for a prenuptial agreement to be worthwhile. An enforceable prenuptial agreement could, for example, merely have the effect of unequivocally demonstrating the intention for a specific chattel, or land, to remain separate from the pool of marital assets. This thesis will highlight the potential issues problems that may arise in doing so.

The Uncertainty Surrounding Ancillary Relief

Divorcees undergo a life changing process. In many cases, they will be moving to ‘two households instead of one’.²¹ The fundamental role of ancillary relief is to ensure that, where assets allow it, both the husband and the wife have the financial means to support themselves and any children that they have. Its purpose is to ensure that a ‘gentle transition’²² can be made between joint and single life. Lord Mance has arguably articulated the most succinct mission statement for ancillary relief:

‘The ultimate objective is to give each party an equal start on the road to independent living.’²³

Ancillary relief operates as the default mechanism for resolving any disputes that arise between the parties over the reallocation of assets. It should be noted that in the ‘vast majority’²⁴ of cases the court is able make a consent order. Here it merely approves an ‘order in terms applied for to which the respondents agree’,²⁵ although it has been emphasised that the court does not simply ‘rubber stamp’²⁶ any terms placed in front of it.

This thesis is naturally more concerned with the regulation of disputes that arise between the separating parties. A prenuptial agreement is often driven by the desire to circumvent the

²⁰ Chris Barton, “‘In Stoke-on-Trent My Lord, They Speak of Little Else’”: *Radmacher v Granatino*’ [2011] Fam Law 67, 72.

²¹ *Wachtel* (n 7) 839.

²² *Miller: McFarlane* (n 1) [151].

²³ *ibid* [144].

²⁴ David Hodson, ‘Making, Drafting and Breaking Consent Orders’ (January 2007) <http://www.davidhodson.com/assets/documents/consent_orders.pdf> accessed 26 January 2012.

²⁵ MCA 1973 (UK), s33A (3).

²⁶ *Pounds v Pounds* [1994] EWCA Civ 10.

default ancillary relief position. Subsequently, it is ‘impossible’ to proceed with any analysis without first outlining the laws that couples are seeking to avoid.²⁷

As outlined above, ‘English law starts from the principle of separate property during marriage’.²⁸ This ‘remains the only matrimonial property regime’²⁹ applicable within this jurisdiction. If every marriage broke down amicably, spouses would always be able to independently conclude arrangements for the redistribution of assets. Court intervention would not be required and the laws regulating ancillary relief would be engaged less frequently. The reality is, however, that divorce is a highly emotive process that serves to blur objectivity and escalates human desire to further self-interest. Couples often find themselves embroiled in disputes as to the reallocation of assets following marital breakdown. In fact, some couples will make a joint-decision to ask the courts to settle their affairs, rather than even attempting to reach an agreement themselves. Upon the award of the decree absolute, signifying the legal completion of the divorce procedure, those not able to independently settle their affairs must make an application for ancillary relief.

Prior to the 1970s, the courts possessed limited power to intervene. The relevant legal provisions can now be found in the MCA 1973, which developed as a result of the Law Commission’s ‘Report on Financial Provision in Matrimonial Proceedings’,³⁰ chaired by Mr Justice Scarman in 1969.

The MCA 1973 bestows upon the court a considerable amount of power to choose from a detailed ‘menu of orders’³¹ in relation to both personal³² and real property.³³ This includes orders for both secured and unsecured periodic payments, lump sum payments and transfer of property. These powers have significant ramification for those to whom the court applies them. For the immediate future at least, any order made will dictate the standard of living that the recipient will be able to achieve. As such, the MCA 1973 requires the court to take into

²⁷ *Marital Property Agreements* (n 19) [1.15].

²⁸ *Miller; McFarlane* (n 1) 655.

²⁹ *Radmacher v Granatino* [2010] UKSC 42 [140].

³⁰ Law Commission, *Family Law – Report on Financial Provision in Matrimonial Proceedings* (Law Com No 25, 1969).

³¹ *Marital Property Agreements* (n 19) [2.5].

³² MCA 1973 (UK), s 25(1)(a)-(f).

³³ *ibid* s 25(1)(a)-(d).

account the ‘standard of living enjoyed by the family’³⁴ prior to the breakdown. Judges must ‘redistribute family property...as they consider just’,³⁵ taking into consideration an assortment of common law and statutory principles.

The statute itself provides the first port of call for the judges. The implicit, although not explicit, overriding principle is that the outcome should be the fairest possible for all concerned,³⁶ as both parties are ‘entitled to a fair share of the available property.’³⁷ Providing an appropriate level of protection to the parties as individuals is seemingly an important consideration. Regrettably, this in itself does not ensure certainty. Fairness is a subjective principle that, ‘like beauty, lies in the eyes of the beholder’.³⁸ Resultantly, the discretion that is left in the hands of judges to determine ancillary relief under section 25 MCA 1973 has, instead of providing certainty, generated a ‘judicial lottery’³⁹ that the spouses must enter.

A significant amount of litigation has concerned the wording of section 25(1) MCA 1973, which instructs a judge to take into account ‘all the circumstances’ of the case when considering making an award for ancillary relief. First consideration is afforded to the welfare of any minor children, and any order made will not affect, override or preclude in any way any child maintenance award made under the Children Act 1989. Furthermore, the courts must at least consider a clean break between the divorcees.⁴⁰ Section 25(2)(a)-(f) MCA 1973 contains a non-exhaustive list of factors that the court may take into account. These include income, age, familial contributions, pre-breakdown standard of living, conduct (now irrelevant unless ‘gross or obvious’⁴¹) and financial need.

The application of the provision has been significantly developed by the courts, with anything that could be termed as reform in the area having ‘fallen by default to the judiciary’.⁴² Prior to the decision in *White v White*⁴³ it had become ‘entrenched’ practice that the wife had her

³⁴ *ibid* s 25(1)(c).

³⁵ Jonathan Herring, *Family Law* (4th edn OUP 2009) 185.

³⁶ *White v White* [2000] UKHL 54 [23].

³⁷ *Miller; McFarlane* (n 1) [9].

³⁸ *White* (n 36) [1].

³⁹ Sarah Anticoni, ‘Resolution News Pre-marital Agreements’ [2005] *Fam Law* 313, 313.

⁴⁰ MCA 1973 (UK), s25A(1).

⁴¹ *Wachtel* (n 7) 835.

⁴² Rebecca Bailey Harris, ‘Dividing the Assets on Family Breakdown: The Content of Fairness’ (2001) 54(1) *Current Legal Problems* 533, 535.

⁴³ *White* (n 36).

‘reasonable requirements met’ and ‘the husband got the rest.’⁴⁴ Then the ‘great leap forward’⁴⁵ occurred in *White*, when Lord Nicholls introduced the ‘yardstick of equality’⁴⁶ principle. The outcome ‘marked a sea change’ in the way assets were divided upon divorce.⁴⁷ Lord Nicholls emphasised that, whilst this was not a presumption of equality under another guise,⁴⁸ only ‘good reason’ should see a departure from equal division of property.⁴⁹

Whilst this is prima facie a workable approach, there will often be insufficient assets to ensure equality, whilst simultaneously meeting the needs of the applicants and their children.⁵⁰ The court’s solution for this incidence is to only apply the yardstick approach when there are surplus assets after needs (as discussed below) have been satisfied.⁵¹ Thus, applications are seemingly handled differently where there are more substantial levels of assets involved. In *Miller; McFarlane*, for example, continual reference was made to the ‘big money’⁵² nature of the case. In doing so, the court was making it clear that there are different considerations to be taken into account in such circumstances.

Supplementary to the yardstick of equality the three rationales of ‘need’, ‘compensation’ and ‘sharing’ have evolved. These themes recur throughout the common law, although only ‘need’ expressly appears within the wording of section 25 MCA 1973.

There has been predictable confusion as to which of these three strands take precedence,⁵³ however, it appears that ‘need’ is the ‘most common rationale’⁵⁴ promulgated by the court and is addressed first.⁵⁵ This is based on the reason that ‘mutual dependence’ within the

⁴⁴ *Miller; McFarlane* (n 1) [135].

⁴⁵ *Miller; McFarlane* (n 1) [134].

⁴⁶ *White* (n 36) [25].

⁴⁷ *Marital Property Agreements* (n 19) [2.50].

⁴⁸ Although as close to home as in Scotland such a presumption does exist under the Family Law (Scotland) Act 1985, s 10.

⁴⁹ *White* (n 36) [25].

⁵⁰ Herring, (n 35) 237.

⁵¹ *Lambert v Lambert* [2002] EWCA Civ 1685.

⁵² *Miller; McFarlane* (n 1) [28], [55] & [146].

⁵³ Elizabeth Cooke, ‘*Miller/McFarlane*: Law in Search of Discrimination’ [2007] CFLQ 98.

⁵⁴ *Miller; McFarlane* (n 1) [138].

⁵⁵ Emma Hitchings, ‘Everyday Cases in the Post-White Era’ (2008) 38 Fam Law 873, 876.

marriage ‘begets mutual obligations of support’.⁵⁶ As a consequence, the parties have developed needs from within the relationship itself.⁵⁷

Often in cases involving vast sums of capital, ‘need’ is not a relevant consideration. The courts have been required to deal with assets exceeding £50 million⁵⁸ and, in reaction to this, have also developed a new principle of ‘reasonable requirement’.⁵⁹ This is a ‘more extensive concept’⁶⁰ than mere financial ‘need.’ It appears that ‘if you marry a captain of industry, you become one yourself for all time’.⁶¹ ‘Reasonable requirement’ has therefore not been strictly limited to essentials. For example, in *Gojkovic v Gojkovic (No 1)*⁶² an award of £1 million was made to fund a business launch. Reasonable requirements may also be augmented over time to coincide with an increase in earnings.⁶³ The court has thus managed to avoid unnecessarily couching an award in terms of ‘need’, when it is clear that ‘need’ is in fact irrelevant to the circumstances of the case.

Lord Nicholls discussed the notion of ‘compensation’ in *Miller; McFarlane*. He reasoned that if as a result of the marriage, one party had been ‘advantaged at the expense of the other’,⁶⁴ then it would be ‘extraordinary’⁶⁵ if an order for ‘compensation’ could not be made. The ‘compensation’ principle is only applicable to couples who have significant assets and thus is rendered ‘totemic’⁶⁶ in relation to the majority of society. This principle further buttresses the notion that the laws in relation to ancillary relief vary depending on the amount of money being contested.

The principle of ‘compensation’ is contentious. It has been argued that there has been ‘no parliamentary approval for its consideration’⁶⁷ as a factor, nor is there any direct reference to

⁵⁶ *Miller; McFarlane* (n 1) [11].

⁵⁷ *ibid* [169].

⁵⁸ *Charman v Charman (no 4)* [2007] EWCA Civ 503.

⁵⁹ See, eg, *O’D v O’D* [1975] 3 WLR 308; *Page v Page* (1981) 2 FLR 198 (CA).

⁶⁰ *White* (n 36) [31].

⁶¹ Baroness Ruth Deech, ‘What’s a Woman Worth?’ [2009] Fam Law 1140, 1140.

⁶² [1990] 1 FLR 140 (CA)

⁶³ *Hvorostovsky v Hvorostovsky* [2009] EWCA Civ 791

⁶⁴ *Miller; McFarlane* (n 1) [32].

⁶⁵ *ibid*.

⁶⁶ Jon Robins, ‘Landmark Divorce Ruling Strengthens Women’s Financial Case’ *The Guardian* (London, 28 May 2006) <<http://www.guardian.co.uk/money/2006/may/28/divorce.observercashsection>> accessed 18 April 2012.

⁶⁷ *Miller; McFarlane* (n 1) as per Jeremy Posnansky QC & Stephen Trowell for Mr McFarlane.

it within the wording of the MCA 1973. Yet, despite these criticisms of the principle, the judiciary seem to have widely accepted ‘compensation’ as a factor worthy of consideration. Lord Nicholls stated in *Miller; McFarlane* that ‘compensation’ was ‘aimed at redressing any significant prospective economic disparity’⁶⁸ between the divorcing couple that came about as a result of their marriage.⁶⁹ More recently, the Supreme Court’s consideration of compensation in *Radmacher* proved that the principle is an ‘indispensable’ factor.⁷⁰

It is important to bear in mind the possibility of two analogous streams of law being created in relation to prenuptial agreements – one for the so called ‘big money’⁷¹ cases and the other for the everyday prenuptial agreement. It is arguable that the law regarding prenuptial agreements may develop in a similar vein if the status quo is maintained and this possibility may be a factor to take into account when evaluating potential avenues for reform.

In 2010, Sir Mark Potter enunciated the popular belief that London had become the ‘divorce capital of the world’.⁷² This tag referred to the uncertainty surrounding the laws on ancillary relief within England and Wales, which has purportedly led to the English courts becoming an attractive venue for divorce, particularly for those economically weaker spouses who seek a more generous award than they would receive in another jurisdiction.⁷³ This suggests that the law has potentially gone too far in providing protection for individuals. The Supreme Court has arguably reinforced this status in *Agbaje v Akinnoye-Agbaje*,⁷⁴ when it made an order for ancillary relief in the knowledge that Nigerian law would have left the applicant penniless.⁷⁵ This appeared to highlight the opportunities for foreign litigants in a position to forum shop, with England and Wales providing a potentially fruitful alternative for many divorcees. Enforceable prenuptial agreements could redress the imbalance between autonomy and protection that appears to have manifested itself in this jurisdiction.

⁶⁸ *ibid* [13].

⁶⁹ *ibid*.

⁷⁰ Jens M Scherpe, ‘Fairness, Freedom and Foreign Elements – Marital Agreements in England and Wales after *Radmacher v Granatino*’ [2011] CFLQ 513, 521.

⁷¹ *Miller; McFarlane* (n 1) [28].

⁷² *Charman No4* (n 58) [116].

⁷³ Laura Brown and Nicola Fisher, ‘The Scramble to Secure Jurisdiction on Divorce – Could a Prenuptial Agreement Assist?’ [2009] PCB 221, 223.

⁷⁴ [2010] UKSC 12.

⁷⁵ Editorial, ‘Ruling Confirms London as Divorce Pay-out Capital’ *The Independent* (London, 10 March 2010) <<http://www.independent.co.uk/news/uk/home-news/ruling-confirms-london-as-divorce-payout-capital-1919119.html>> accessed 26 January 2012.

Speaking in relation to the provisions contained within MCA 1973 that deal with ancillary relief, Potter went on to communicate the necessity for ‘modernisation in the light’⁷⁶ of a society in which ‘matrimonial practice has changed out of all recognition’⁷⁷ over the course of the last fifty years.

Against the backdrop of these criticisms, it should be noted that as the MCA 1973 approaches its fortieth anniversary, it remains in many respects highly effective. It continues to leave a large amount of discretion in the hands of judges, which in turn enables ancillary relief to remain reactive in nature. For the vast majority of couples, ancillary relief works well and will continue to do so. Introducing a much more rigid statutory structure to ancillary relief in response to the criticisms outlined above, would not necessarily be helpful to couples and would potentially severely restrict the ability of the judiciary to exercise discretion when making financial orders.

Focus on Prenuptial Agreements as a Vehicle for Reform

The Law Commission initially resisted the calls for a comprehensive review of ancillary relief to redress the continued uncertainty facing couples, despite support for it to do so by the Family Justice Review.⁷⁸ Instead, prenuptial agreements were chosen as a vehicle for reform. The Law Commission’s consultation paper ‘Marital Property Agreements’⁷⁹ was initially due for publication prior to the Supreme Court ruling in *Radmacher*, however, the Commission chose to postpone this until after that decision had been passed down.⁸⁰ The paper’s main purpose was to gather opinion on the ‘status and enforceability’⁸¹ of marital property agreements.

A period of consultation followed the paper’s eventual publication in January 2011, with interested parties invited to make submissions. The final report will be released during

⁷⁶ *Charman No4* (n 58) [121].

⁷⁷ *Radmacher* (n 29) [146]

⁷⁸ Ministry of Justice, *Family Justice Review Final Report* (November 2011) 177.

⁷⁹ *Marital Property Agreements* (n 19).

⁸⁰ *ibid* [1.4].

⁸¹ *ibid* [1.13].

2013.⁸² It is widely anticipated that this document could contain a set of recommendations, opening up possible avenues that the Government could explore for statutory regulation of prenuptial agreements. The Law Commission had originally planned to publish its final report in 2012; the delay in publication of the final report is in order to enable reviews of the principle of ‘need’ and the idea of ‘non-matrimonial property’, both of which were discussed above, to be undertaken. A supplementary consultation paper, ‘Matrimonial Property, Needs & Agreements’,⁸³ was published in September 2012, with submissions invited up until December 2012. It has been stressed that the purpose of these reviews is not to bring about wholesale reform of the area, but instead to effectuate clarity to an area that is uncertain,⁸⁴ and thus provide more stable foundations on which the law of prenuptial agreements can be built.

Supporting Families and the Six Safeguards

The Government first recognised the potential value of prenuptial agreements regulating the financial aspect of marriage breakdown in its 1998 Green Paper ‘Supporting Families’.⁸⁵ This paper highlighted the protection and practical support intended to be given to help meet the needs of families and prenuptial agreements themselves were actively promulgated.⁸⁶ The Government had clearly given careful consideration to the advantages of enabling couples to make ‘written agreements’⁸⁷ that would regulate their financial affairs upon divorce. The thinking was that such a move would give couples ‘more choice’⁸⁸ and encourage them to ‘take more responsibility for ordering their own lives’,⁸⁹ specifically by forcing them ‘to face the reality of what can happen if things go wrong.’⁹⁰

⁸² See the Law Commission’s website for full details < <http://www.justice.gov.uk/lawcommission/areas/matrimonial-property-agreements.htm> > accessed 23 March 2012.

⁸³ Law Commission, *Matrimonial Property, Needs & Agreements* (Law Com No 208, 2012).

⁸⁴ See (n 82).

⁸⁵ Home Office, *Supporting Families: A Consultation Document* (Cm 3922, 1998) 1.

⁸⁶ *ibid* [4.21].

⁸⁷ *ibid*.

⁸⁸ *ibid*.

⁸⁹ *ibid*.

⁹⁰ Colin Brown, ‘Pre-Nuptial Agreements Backed in Family Green Paper’ *The Independent* (London, 29 October 1998) <<http://www.independent.co.uk/news/prenuptial-deals-backed-in-family-green-paper-1181308.html>> accessed 7 February 2012.

At no point did the Government propose allowing couples to enter into unqualified prenuptial agreements. Instead, a set of six statutory safeguards was promulgated. The Government stated that if any of the criteria set out within any of the safeguards were activated the prenuptial agreement would be rendered unenforceable. Many of the common law cases that have been decided since 1998 make reference to at least some of the six safeguards outlined. Agreements would not be enforceable if:

- 1) A child of the family existed, irrespective of whether the child was alive at the point when the agreement was made.
- 2) The agreement would be unenforceable under the general law of contract (including any attempt to place an obligation upon a third party without prior consent).
- 3) Either or both parties to the contract had not received independent legal advice.
- 4) The court considers that the agreement would cause significant injustice to either party or any child.
- 5) Either or both parties have failed to make full disclosure of assets/property to the other.
- 6) The agreement was made fewer than 21 days prior to the wedding.⁹¹

Despite this, the judiciary expressed ‘reservations about whether the law should strive to encourage’⁹² prenuptial agreements and were only prepared to give them ‘slightly...greater prominence’.⁹³

No subsequent action was taken as a result of this paper, either through amendments to the existing MCA 1973, or through introducing further fresh legislation. As a result there was criticism levelled at the ‘stubborn refusal to adapt the law to new conditions’.⁹⁴ Quentin Davis proposed a private members bill in 2007 that was rejected,⁹⁵ and so it remains the case that there is no explicit statutory recognition for prenuptial agreements in England and Wales.

⁹¹ *Supporting Families* (n 85) [4.23].

⁹² Nicholas Wilson, ‘Ancillary Relief Reform – Response of the Judges of the Family Division to Government Proposals’ [1999] *Fam Law* 156, 163.

⁹³ *ibid.*

⁹⁴ Jeremy D Morley, ‘Enforceable Pre-nuptial Agreements: Their Time Has Come’ [2006] *Fam Law* 768, 768.

⁹⁵ Elizabeth Walsh, ‘Newslite Extra: Pre-nuptial Agreements Bill’ [2007] *Fam Law* 853.

Nevertheless, the 1998 paper was pivotal in sparking the debate on prenuptial agreements into life. Some of these safeguards will act as useful points of reference in the detailed comparative analysis of the specific elements of the law that will take place within Chapter 4.

Historical Attitudes to Contracts Seeking to Oust the Court's Discretion

The current legal position of prenuptial agreements must be garnered from the common law. As a relatively modern idea, prenuptial agreements themselves are not directly referenced in much of the historic case law. In relation to contracts that purport to regulate the financial consequences of marital breakdown, the traditional position was engrained in *Hyman v Hyman*.⁹⁶ In determining the validity of a separation agreement, Lord Hailsham and Lord Aitken were adamant that the court's statutory discretion to make financial provisions that it felt were 'just'⁹⁷ in the circumstances could not be bartered away.⁹⁸ This conclusion drew on previous judgments passed down in *Morall v Morall*⁹⁹ and *Bishop v Bishop: Judkins v Judkins*,¹⁰⁰

Lord Hailsham concluded that the court's statutory discretion to make financial provisions upon divorce was necessary not only in the 'interests of the wife, but also the public',¹⁰¹ while Lord Aitken added that the purpose of the statute was to 'prevent' either party from 'being thrown upon public support'.¹⁰² Resultantly, financial agreements seeking to oust the jurisdiction of the court were considered void as a matter of public policy.

Half a century later the *Hyman* authority was still regarded as 'common ground'.¹⁰³ The law in relation to financial agreements could be viewed by taking one of two 'diametrically opposite'¹⁰⁴ stances, each of which occupies one extreme end of the spectrum. At one end sat the traditional notion that the courts hold an 'absolute right to go behind any agreement'.¹⁰⁵ At the other there was the idea that where there is a contract or agreement between two

⁹⁶ [1929] All ER Rep 245 (HL).

⁹⁷ SCJA 1925 (UK), s 4.

⁹⁸ *Hyman* (n 96) 259.

⁹⁹ (1881) 6 PD 98.

¹⁰⁰ [1897] P 138.

¹⁰¹ *Hyman* (n 96) 251.

¹⁰² *ibid* 258.

¹⁰³ *Edgar v Edgar* [1980] 1 WLR 1410, 1414.

¹⁰⁴ *Wright v Wright* [1970] 1 WLR 1219 (CA), 1223.

¹⁰⁵ *ibid* 1224.

parties, ‘effect must be given to it’.¹⁰⁶ This is precisely the tension between contractual autonomy and state protection that was introduced in Chapter 1 and is central to this thesis.

During the 1970s, the courts began to afford leverage to the enforceability of contracts that sought to oust their discretionary powers to make orders for ancillary relief. Following *Wright v Wright*¹⁰⁷ and *Brockwell v Brockwell*,¹⁰⁸ a separation agreement was upheld in *Edgar v Edgar* because the applicant had ‘failed to show sufficient grounds to justify...going behind the arrangement’.¹⁰⁹ In this instance, the sanctity of contract principle prevailed and the court asserted that a ‘freely negotiated bargain...cannot be lightly ignored’.¹¹⁰ Lord Justice Ormrod ruled that the wife had entered the agreement ‘with a full appreciation’¹¹¹ that she could have bargained for a more substantial settlement and so he had ‘no alternative’¹¹² but to uphold the agreement.

Separation agreements, or ‘Edgar Agreements’ as they are colloquially known, are distinguishable from prenuptial agreements as they are executed after a marriage has irretrievably broken down. Despite this fact, their enforceability highlights the court’s willingness to waive its discretionary power, except where there are ‘clear and compelling reasons’¹¹³ for it not to do so. The judiciary in *Edgar*, for the very first time, displayed a readiness to afford a significant level of autonomy those attempting to determine the financial consequences of their divorce by circumventing the MCA 1973.

Some academic commentary suggests that it is inevitable that prenuptial agreements will be treated in law in an identical fashion to separation agreements.¹¹⁴ This is yet to materialise, although the view is reflected in the way that prenuptial agreements have been commercialised. Harvey Nicholls offer prenuptial agreements as standard with their wedding packages;¹¹⁵ if this appears to suggest exclusivity, the website of iconic British retailer

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ (CA, 5th November 1975).

¹⁰⁹ *Edgar* (n 103) 1420.

¹¹⁰ *ibid* 1421.

¹¹¹ *ibid.*

¹¹² *ibid* 1420.

¹¹³ *ibid* 1424.

¹¹⁴ Richard Todd, ‘The Inevitable Triumph of the Ante-Nuptial Contract’ [2006] Fam Law 539, 547.

¹¹⁵ Editorial, ‘Harvey Nicholls Manchester Launches World’s First Pre-Nup Package’ (21 October 2010) <<http://www2.pnnewswire.co.uk/cgi/news/release?id=301395>> accessed 18 April 2012.

WHSmith now offers for sale a ‘Prenuptial Agreement eKit’. Prenuptial agreements are being sold to the public in a manner that suggests they are treated as prima facie enforceable by the law. Whilst this is not yet the position of in law, the availability of these agreements reflective of a rapidly changing societal attitude.

Prenuptial Agreements – the Early Years

In order to properly analyse the law as it stands, the steps that have preceded the current position need to be understood. Historically, the courts have been ‘exceedingly wary’¹¹⁶ of prenuptial agreements. This cautious approach has transposed itself onto British society. Paul McCartney’s was ordered to pay Heather Mills £24 million following their divorce.¹¹⁷ This surely rendered him immune from being labelled unromantic for suggesting a prenuptial agreement, but despite this, McCartney categorically refused to have one drawn up prior to wedding Nancy Shevell.¹¹⁸ Similarly, Prince William was ‘adamant’¹¹⁹ that no prenuptial agreement be executed prior to his marriage to Kate Middleton in 2011; despite fears as to the potential financial consequences should the marriage flounder. This was in stark contrast to the marriage of Swedish Crown Princess Victoria and Daniel Westling, where the existence of a prenuptial agreement provided evidence that they are becoming ‘increasingly fashionable in the royal houses of Europe’,¹²⁰ although it is noted that these are jurisdictions where a community of property system has been established.

Mr Justice Thorpe reflected this wariness in his judgment in *F v F*,¹²¹ categorically declaring that prenuptial agreements were of ‘very limited significance’¹²² within this jurisdiction. He opined that Parliament had created the MCA 1973 with the intention of it having ‘universal

¹¹⁶ Iain Harris and Rachel Spicer, *Prenuptial Agreements – A Practical Guide* (2008 Hammicks Legal Publishing), 8.

¹¹⁷ *McCartney v Mills-McCartney* [2008] EWHC 401 (F).

¹¹⁸ Alison Boshoff, ‘A Monster Ring, a Stella Bag...and No Pre-Nup. This DOES Look Like Love, Macca’ *Daily Mail* (London, 9 May 2011) <<http://www.dailymail.co.uk/tvshowbiz/article-1384979/Sir-Paul-McCartney-Nancy-Shevell-This-DOES-look-like-love.html>> accessed 18 April 2012.

¹¹⁹ Richard Eden, ‘Royal Wedding: Loving Prince William Rejects Prenuptial Agreement’ *The Telegraph* (London, 1 May 2011) <<http://www.telegraph.co.uk/news/uknews/royal-wedding/8485727/Royal-wedding-loving-Prince-William-rejects-prenuptial-agreement.html>> accessed 18 April 2012.

¹²⁰ Richard Palmer, ‘Prenup Ruled Out By Prince William and Kate Middleton’ *Daily Express* (2 May 2011) <<http://www.express.co.uk/posts/view/244247>> accessed 24 November 2011.

¹²¹ (*Ancillary Relief: Substantial Assets*) [1995] 2 FLR 45 (F).

¹²² *ibid* 66.

application’,¹²³ thus concluding that it would be unjust to allow individuals the autonomy to elect whether or not they are prepared to submit to its remit.

Unbeknown to the judge at the time, this was the first of what has proven to be a series of judicial decisions that have shaped the law on prenuptial agreements. In *N v N*,¹²⁴ Mr Justice Wall refused to depart from the historical line that prenuptial agreements were ‘contrary to public policy’,¹²⁵ although he conceded that an agreement might hold ‘evidential weight’,¹²⁶ where the terms are relevant. This followed a previous decision in *S v S*¹²⁷ and Mr Justice Munby in took a similar stance *X v X*.¹²⁸ These decisions hinted at a shift away from the traditional position.

In *M v M*,¹²⁹ the need to guarantee the sanctity of marriage as a matter of public policy was rendered significantly less important because divorce had become ‘commonplace’.¹³⁰ It was determined that, albeit in a first instance decision, as a minimum, the existence of a prenuptial agreement should be acknowledged, whether it be as part of ‘all the circumstances of the case’¹³¹ or as an aspect of the conduct of the parties. This would enable the court to decipher what weight the agreement should be given in order to achieve a just outcome.¹³²

Momentum had clearly gathered in favour of prenuptial agreements. In 2003 Mr Roger Hayward-Smith QC advanced this trend in *K v K*,¹³³ distilling sixteen questions that he felt summarised the issues that had plagued previous judges.¹³⁴ Although some of these questions were specific to the facts of the case being determined, they can roughly be grouped together under the headings of time limits, independent legal advice, full and frank disclosure and substantive fairness, which will form the basis for the analysis to take place within Chapter 4. Hayward-Smith’s ruling that the agreement should be taken into

¹²³ *ibid.*

¹²⁴ (*Jurisdiction: Prenuptial Agreement*) [1999] EWHC Fam 838.

¹²⁵ *ibid* 844.

¹²⁶ *ibid* 844.

¹²⁷ (*Divorce: Staying Proceedings*) [1997] 2 FLR 100 (F).

¹²⁸ (*Y and Z Intervening*) [2001] EWHC 11 (F).

¹²⁹ (*Prenuptial Agreement*) [2002] 1 FLR 654 (F).

¹³⁰ *ibid* [21].

¹³¹ MCA 1973 (UK), s25(1).

¹³² *M v M* (n 130) [21].

¹³³ (*Ancillary Relief: Prenuptial Agreement*) [2003] 1 FLR 120 (F).

¹³⁴ *ibid* 131.

consideration as part of all the circumstances of the case under section 25 MCA 1973 and, furthermore, the agreement constituted conduct that would be inequitable to disregard under section 25(2)(g) MCA 1973,¹³⁵ felt distinctly like a judicial attempt at opening the use of prenuptial agreements up to a wider demographic.

The Current Position of the Law

This momentum continued with a trio of recent judgments, opening with *Crossley v Crossley*,¹³⁶ encompassing Baroness Hale's Privy Council ruling in *Macleod v Macleod*¹³⁷ and culminating in the Supreme Court decision in *Radmacher v Granatino*.¹³⁸

Lord Justice Thorpe was again required to engage with prenuptial agreements when he gave the lead ruling in *Crossley*. The dispute arose between a wealthy, middle-aged couple. Both had been married previously and brought a number of children into the marriage. Their prenuptial agreement stated that, in the event of divorce, both parties would 'walk away from the marriage with whatever they had brought into it'.¹³⁹

Upon divorce, Mrs Crossley sought a higher award than the prenuptial agreement prescribed, relying on the court exercising its protective functions, despite possessing assets totalling around £18 million herself. Mr Crossley contended that taking into consideration all the circumstances of the case, the agreement should be upheld.

At first instance, Mr Justice Bennett concurred with Mr Crossley, requesting that Mrs Crossley explain why the prenuptial agreement should not be regarded as serving a 'knockout blow'.¹⁴⁰ Upon appeal, Lord Justice Thorpe concurred, stating that there was a 'very strong case'¹⁴¹ that Mrs Crossley should receive no further financial award. Evidential weight was given to the marriage's short duration, the parties' pre-marital wealth and the absence of children in forming part of all the circumstances to be taken into account under section 25

¹³⁵ *ibid* 132.

¹³⁶ [2007] EWCA Civ 1491.

¹³⁷ [2008] UKPC 64.

¹³⁸ *Radmacher* (n 29).

¹³⁹ *Crossley* (n 137) [1].

¹⁴⁰ *ibid* [5].

¹⁴¹ *ibid* [14.]

MCA 1973.¹⁴² Had these factors varied, it has been argued that a different conclusion may have been reached.¹⁴³

The appellate court also upheld the notion that the applicant should ‘show cause’¹⁴⁴ for departing from the agreement. This principle has not found favour in subsequent rulings. Had it done so, it would have placed a heavy burden upon those seeking to avoid the terms of a prenuptial agreement and would have placed strong emphasis on autonomy. Quite what ‘show(ing) cause’ to set an agreement aside would have entailed remains unknown, but it is almost certain that this burden of proof would have reduced protection afforded to economically weaker spouses.

Almost in mitigation of his decision, Lord Justice Thorpe pointed described the case as ‘quite exceptional’,¹⁴⁵ stressing that each decision in the future should remain ‘fact dependant’.¹⁴⁶ This disclaimer is unsurprising; it would have been misguided for a judge to make a declaration that prenuptial agreements were presumptively dispositive. Whilst he appeared to have favoured autonomy over protection in this instance, the judge clarified that this should not necessarily be the general approach.

The lexis used by Lord Justice Thorpe was the semantic opposite to that which he had used a decade earlier. He labelled the case as the ‘paradigm’¹⁴⁷ example of where a prenuptial agreement is a factor of ‘magnetic importance’.¹⁴⁸ Public policy objections to prenuptial agreements had existed for centuries, yet between 1995 and 2007 judicial attitudes were completely reversed, with unprecedented support for upholding prenuptial agreements.

The ruling, despite coming with the strong qualification that each case was ‘fact dependant’,¹⁴⁹ made it a virtual certainty that a prenuptial agreement will be taken into

¹⁴² *ibid.*

¹⁴³ Herring, (n 35) 256.

¹⁴⁴ *Crossley* (n 137) [18].

¹⁴⁵ *ibid* [15].

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.*

¹⁴⁹ *ibid* [115].

account as part of all of the circumstances of the case under section 25(1) MCA 1973.¹⁵⁰ Thus, even in the absence of reform, the common law has evolved to allow that prenuptial agreements will at least be afforded some weight. Lord Justice Thorpe attached greater weight to a prenuptial agreement than any member of the judiciary had done previously. Whilst the position of the law in England and Wales was not actively changed, as of course prenuptial agreements were not in themselves binding upon the courts, the decision served to develop the law in this area.¹⁵¹ But caution has been expressed from some quarters regarding the status of the decision as a ‘trailblazer’.¹⁵² It certainly could not be regarded as serving to wash away the section 25 MCA 1973 ‘line of sand’¹⁵³ as a starting point for the courts.

The judiciary had previously been prepared to use their discretion to take prenuptial agreements into account; however, this was the clearest indication to date that they would favour guidance in the form of statutory provisions.

The Privy Council ruling in *Macleod* almost exactly a year later, displayed a significantly more hesitant approach to prenuptial agreements. The judgment, which was widely anticipated,¹⁵⁴ but ultimately did nothing to directly enhance the standing of prenuptial agreements, concerned an American couple that relocated to the Isle of Wight. Both had been married previously, but neither had children prior to the five sons they had together. There was ‘considerable’¹⁵⁵ financial distance between them, with the husband having ‘substantial wealth’¹⁵⁶ of around ten million dollars, amassed from a range of business and property interests, while the wife had no significant assets.

A clear statement as to the position of prenuptial agreements was desirable, however, somewhat anticlimactically, Baroness Hale determined that the case was not concerned with the ‘validity and effect’¹⁵⁷ of a prenuptial agreement. Instead, it was the postnuptial

¹⁵⁰ Mark Harper & Lucy Alhadef, ‘*Crossley v Crossley*: Are Prenuptial Agreements Now Binding in England?’ [2008] Fam Law 334, 339.

¹⁵¹ *ibid* 235.

¹⁵² Darren McAuley, ‘Tightening the Knot or Loosening the Noose: Prenuptial Agreements and Measuring Matrimonial Happiness in Pounds and Pence’ (2008) 195 Journal of the LSNI, 6.

¹⁵³ *ibid*.

¹⁵⁴ John Bolch, ‘*Macleod v Macleod*: Post-Nups Valid’ (18 December 2008)

<<http://www.familylore.co.uk/2008/12/macleod-v-macleod-post-nups-valid.html>> accessed 2 February 2012.

¹⁵⁵ *Macleod* (n 138) [2].

¹⁵⁶ *ibid*.

¹⁵⁷ *ibid* [1].

agreement that had been signed following the marriage that she decided to uphold. She regarded this as ‘very different’¹⁵⁸ from the prenuptial agreement. The key point that led Baroness Hale to draw this distinction was that once a couple are married ‘a prenuptial agreement is no longer the price which one party may extract’¹⁵⁹ from the other for their willingness to marry. She felt then that postnuptial agreement is likely to be reached more autonomously, with a lesser degree of pressure.

Baroness Hale indicated that the traditional public policy rules, which frowned upon agreements that regulated any future separation of a married couple, were based on the ‘enforceable duty of the husband and wife to live together’.¹⁶⁰ She felt that the fact that society no longer viewed spouses as having this duty, coupled with the fact that the ‘reasoning which led to the rule has now disappeared’,¹⁶¹ meant that the time had come for the ‘rule itself’¹⁶² to be displaced. Resultantly, it was concluded that it would be illogical to deny spouses the freedom to make ‘agreements for the eventuality of a future separation’.¹⁶³

In relation to prenuptial agreements, Baroness Hale made her reasoning crystal clear. She showed an awareness of the recognition that prenuptial agreements are afforded within other jurisdictions, however, she then pointed out that in the majority of circumstances this had come about through ‘legislation...(that) gives careful thought to the necessary safeguards’¹⁶⁴ that needed to be put in place. Baroness Hale felt that it was ‘not open’ to the court to ‘reverse the long-standing rule’¹⁶⁵ that regarded prenuptial agreements as contrary to public policy. Finally, if there was any lingering doubt as to what she considered to be the appropriate next step in terms of the development of the law, it was extinguished when she expressly stated that ‘the validity and effect of...(prenuptial) agreements is more appropriate to legislative rather than judicial development.’¹⁶⁶

¹⁵⁸ *ibid* [36].

¹⁵⁹ *ibid*.

¹⁶⁰ *ibid* [38].

¹⁶¹ *ibid* [39].

¹⁶² *ibid*.

¹⁶³ Joanna Miles, ‘*Radmacher v Granatino*: Upping the Ante-Nuptial Agreement’ [2009] CFLQ 513, 516.

¹⁶⁴ *Macleod* (n 138) [31].

¹⁶⁵ *ibid*.

¹⁶⁶ *ibid* [35].

Baroness Hale's reluctance to deal with prenuptial agreements is synonymous with the courts' enduring fear of overstepping their role as statutory interpreters. Despite this, her position was still somewhat puzzling given the momentum shift in favour of the enforcement of prenuptial agreements in certain circumstances, which had already been gathering pace at common law. It was unlikely to have been considered to be excessively controversial for Baroness Hale to have discussed the merits of the prenuptial agreement that was originally signed.

It is arguable that Baroness Hale made a conscious decision to steer clear of such a contentious subject matter. In reality, by upholding a postnuptial agreement, the court in *Macleod* may have unwittingly opened the back door for prenuptial agreements. It follows that legal practitioners will advise couples to follow up a prenuptial agreement with a postnuptial one in order to make the agreement *Macleod*-compatible.¹⁶⁷ If this is done, then their autonomous decision to enter into both agreements is likely to provide strong weight for the enforceability of the prenuptial agreement.

Despite endeavouring to make the language more succinct, the decision to deal with prenuptial and postnuptial agreements as separate entities only served to increase confusion. Baroness Hale goes on to accept a degree of 'blame'¹⁶⁸ for creating the 'mess'¹⁶⁹ surrounding prenuptial agreements. In doing so, she recognised that the 'wider legal community' was left 'disappointed'¹⁷⁰ by the judgment that she handed down. It should not be forgotten however, that even if she had treated the parties as completely autonomous 'grown ups'¹⁷¹ by making their prenuptial agreement prima facie binding, uncertainty would not have been eradicated totally. The court would still have retained its discretion to set aside any agreement as it saw fit. What it did serve to achieve was to make prenuptial agreements more expensive to implement, with couples now potentially incurring two sets of legal costs in order to fulfil the requirements of both obtaining independent legal advice on two separate occasions.

¹⁶⁷ Miles, 'Upping the Ante-Nuptial' (n 164) 519.

¹⁶⁸ *Radmacher* (n 29) [139].

¹⁶⁹ *ibid.*

¹⁷⁰ Janice Montague, 'Family Law: Ancillary Relief – Pre- and –Post-Nuptial Agreements' (2008)13(2) *Cov LJ* 36, 37.

¹⁷¹ Joanna Miles, 'Agreements for Grown-Ups' [2009] *CLJ* 285, 288.

The case law in relation to prenuptial agreements came to a crescendo in 2010, when the most authoritative ruling to date in the UK was passed down by the Supreme Court. The dispute, which took place between Nicholas Granatino, a French National, and Katrin Radmacher, a German national, is widely regarded as the ‘landmark’ case that shifted England and Wales ‘much closer to the law and practice of many other countries’.¹⁷² Prior to a detailed analysis of the ruling, it is important to understand how the decision came about.

The couple married in 1998 in England and the marriage lasted for 8 years.¹⁷³ They had two daughters. A prenuptial agreement, clause 3 of which precluded either party from making any claim for ancillary relief upon divorce, had been drawn up upon the insistence of Radmacher, aided by significant pressure from her father. The agreement was signed prior to the marriage in Germany.¹⁷⁴ Radmacher’s legal adviser witnessed the signing, although it later emerged that he had been unhappy about the fact that Granatino had not received a translated copy of the agreement.¹⁷⁵ The agreement contained a choice of laws clause, stating that all of the effects of their marriage would be governed under German law.¹⁷⁶

Upon divorce, Granatino turned to the laws of England and Wales, petitioning for ancillary relief in London. He sought orders for both periodical payments and a lump sum.¹⁷⁷ Radmacher was a woman of ‘great riches’.¹⁷⁸ Her wealth, which exceeded £50 million, largely came about as a result of familial inheritance. In her response to Granatino’s petition, she pointed to the existence of the prenuptial agreement and stated that he had signed the document willingly; that there would have been no marriage had the agreement not been signed; that her father would not have signed over to her many of her current assets without the prenuptial being in place; that there was no matrimonial property to speak of; and, finally, that she held the role as the primary carer for the children.¹⁷⁹

¹⁷² Stephen Cretney, “Foreword” in Stephen Gilmore, Jonathan Herring and Rebecca Probert (ed), *Landmark Cases in Family Law* (Hart Publishing, 2011) 6.

¹⁷³ *Radmacher* (n 29) [9].

¹⁷⁴ *ibid* [12].

¹⁷⁵ *ibid* [90].

¹⁷⁶ *ibid* [12].

¹⁷⁷ *ibid* [15].

¹⁷⁸ *NG v KR (Pre-Nuptial Contract)* [2008] EWHC 1532 (F) [2].

¹⁷⁹ *ibid* [7].

At the time when the prenuptial agreement had been signed Granatino was working for JP Morgan & Co, earning around £120,000 per year. This figure had doubled by 2001.¹⁸⁰ When the parties divorced, he was undertaking a research doctorate at Oxford University and his earnings had significantly decreased.

Granatino's petition was based upon 'need'. He made it clear that he was not seeking a percentage share of Radmacher's assets, which he recognised as familial rather than matrimonial.¹⁸¹ He contended that the prenuptial agreement should be set aside upon the grounds that he had not received independent legal advice; Radmacher had not made full disclosure of her assets; no provision was made foreseeing the birth of the daughters; and that, in allowing for no claim by either party upon the divorce, the agreement itself was manifestly unfair.¹⁸² A number of the safeguards recommended by the Government in the 1998 'Supporting Families' report¹⁸³ featured heavily in the submissions of both spouses.

At first instance, Mrs Justice Baron acknowledged that she was ruling upon a 'hot topic'.¹⁸⁴ In expressing grave reservations regarding the prenuptial agreement in this case, she also made significant references to the 'Supporting Families' safeguards, asserting that the agreement in question fell foul of almost all of these.¹⁸⁵ In concurring with each of Granatino's submissions, Mrs Justice Baron showed concern that the agreement left no prospect of financial assistance for either party in instances of real 'need'.¹⁸⁶ Clearly, the judge had the court's protective function in mind.

In relation to the foreign aspect of the agreement, the judge felt that, whilst there were 'no doubts',¹⁸⁷ as to the validity of the agreement under German and, indirectly, French law,¹⁸⁸ in England and Wales the court 'applies its own law irrespective of the domicile of the parties'.¹⁸⁹ The judge conceded that to completely ignore the nationalities of the parties

¹⁸⁰ *Radmacher* (n 29) [14].

¹⁸¹ *NG v KR* (n 179) [8].

¹⁸² *ibid.*

¹⁸³ *Supporting Families* (n 85) [4.23].

¹⁸⁴ *NG v KR* (n 179) [36].

¹⁸⁵ *ibid* [36]-[38].

¹⁸⁶ *ibid* [38].

¹⁸⁷ *ibid* [77].

¹⁸⁸ *ibid* [78].

¹⁸⁹ Lord Collins and others (ed) *Dicey, Morris and Collins on the Conflict of Laws* (14th Edition Sweet and Maxwell, 2008) [18-207].

would have been ‘unfair and unjust’,¹⁹⁰ however, she remained firm in maintaining that any enforceability of the prenuptial would arise from a ‘court order and not from the agreement itself.’¹⁹¹

Mrs Justice Baron’s conclusion was that ‘from an English perspective the agreement was flawed’¹⁹² and ‘tainted’.¹⁹³ It therefore could not be given full effect. It was acknowledged that Granatino had ‘understood the underlying premise’¹⁹⁴ of the agreement when he entered into it. Subsequently, the award would be reflective of that ‘to a degree’¹⁹⁵ and totalled £5.56 million.

Radmacher appealed against the award, claiming that it was not clear exactly how the agreement had been taken into consideration at all. Granatino launched a counter appeal, in which he sought an increased sum that would enable him to purchase property in Monaco where the children would be relocating with Radmacher. This counter appeal does nothing to dismiss the notion that prenuptial agreements are the preserve of the ‘super rich’.¹⁹⁶ Clearly a high of affluence is involved when one party is contesting a multi-million pound award on the basis that it does not allow them to purchase property in one of the world’s most exclusive principalities.

In the Court of Appeal, Lord Justice Thorpe acknowledged that any reform of the area should be left in the hands of Parliament.¹⁹⁷ However, he recognised that a ‘carefully fashioned’¹⁹⁸ agreement was a viable ‘alternative to the stress, anxieties and expense of a submission to the width of judicial discretion’.¹⁹⁹ To a certain extent there was a degree of sympathy from the

¹⁹⁰ *NG v KR* (n 179) [92].

¹⁹¹ *ibid* [119].

¹⁹² *ibid* [139].

¹⁹³ *ibid* .

¹⁹⁴ *ibid*.

¹⁹⁵ *ibid*.

¹⁹⁶ Simon Johnson, ‘In Practice – Prenuptial Agreements after *Radmacher v Granatino*’ [2009] Fam Law 718, 718.

¹⁹⁷ *Radmacher (formerly Granatino) v Granatino* [2009] EWCA Civ 649 [63].

¹⁹⁸ *ibid* [27].

¹⁹⁹ *ibid*.

judiciary towards those who endure divorce, coupled with a ‘forensic discomfort’²⁰⁰ caused by the ‘lack of clarity...under our present law.’²⁰¹

Throughout the preceding common law, it had appeared that the ‘journey towards prenuptial agreements should be mapped against’²⁰² the safeguards found in ‘Supporting Families’, however, the Court of Appeal did not follow this pattern in finding that the prenuptial agreement should have been given decisive weight.²⁰³ The £2.35 million maintenance award was recalculated so that Granatino was only considered in his role as father to the two girls.²⁰⁴ Furthermore, the award made for housing established a trust that would revert back to Radmacher when the children reached the age of majority.²⁰⁵

Lord Justice Rix pointed out that Granatino had been given ‘ample opportunity’²⁰⁶ to seek independent legal advice. Granatino’s background served as evidence that he was sufficiently aware that he could have requested full financial detail, but showed ‘no interest’²⁰⁷ in doing so. Additionally, there was nothing to suggest that even if Granatino had received independent legal advice he would not have signed the agreement.²⁰⁸

The birth of the two daughters was ruled not to have any effect on the weight afforded to the prenuptial agreement, as the agreement did ‘not purport to’²⁰⁹ affect, and could not in any case have effected under English law, any obligation for either spouse to support the children or claim financial provision under Schedule 1 of the Children Act 1989.

The Court of Appeal dismissed the fact that the prenuptial agreement precluded claims in times of real ‘need’ as irrelevant. Without the agreement in place, there would have been no marriage. Resultantly, no right to claim was lost.²¹⁰ This was relatively uncontroversial on the facts of this case. It was difficult to imagine Granatino falling upon times of real ‘need’.

²⁰⁰ *ibid* [127].

²⁰¹ *ibid*.

²⁰² Ashley Murray, ‘Drafting Prenuptial Agreements: *NG v KR*’ [2009] Fam Law 142, 145.

²⁰³ *Radmacher (formerly Granatino)* (n 198) [149].

²⁰⁴ *ibid* [154].

²⁰⁵ *ibid* [150].

²⁰⁶ *ibid* [140].

²⁰⁷ *ibid* [141].

²⁰⁸ *ibid* [137].

²⁰⁹ *ibid* [143].

²¹⁰ *ibid* [144].

Whilst his daughters remained minors, he would lead a similarly extravagant lifestyle to them. After this time, his personal earning capacity would enable him to live in relative comfort.

As discussed in Chapter 1, the distinction drawn between the different types of agreement in *Macleod* was dismissed as a ‘red herring’.²¹¹ Lord Justice Wilson, expressed doubts as to whether such a sharp distinction was required.²¹² The Supreme Court dismissed Granatino’s final appeal and the majority expressly concurred on this point, immediately quashing the notion that prenuptial and postnuptial agreements should be viewed as fundamentally different. The opening paragraph of the judgment incorporated the umbrella term ‘nuptial agreements’.²¹³ Courts in the future must follow this line of reasoning, unless legislation is introduced to the contrary, or the Supreme Court decides to reverse its decision.

The majority of the Supreme Court found that the fact that an agreement was binding in a foreign jurisdiction simply made it ‘crystal clear’²¹⁴ that the agreement was intended to create legal relations. The English Court’s insistence on applying English law irrespective of any foreign connections of the parties ‘continues to cause irritation’²¹⁵ for those who would see their agreements upheld elsewhere.

As mentioned in Chapter 1, it was also determined that in the future, it would be ‘natural to infer’²¹⁶ that those who enter into prenuptial agreements intend them to be legally binding. This means that couples can no longer rely on the fact they had been advised that agreements were not binding in England and Wales in order to avoid a prenuptial agreement.²¹⁷ Subsequently, much doubt as to prenuptial agreements being treated like any other contract has been alleviated in this context.

The overriding principles of fairness, and the three strands of ‘need’, ‘compensation’ and ‘sharing’ emanating from ancillary relief, were regarded as providing the framework for

²¹¹ *ibid* [64].

²¹² Miles, ‘Upping the Ante-Nuptial’ (n 164) 518.

²¹³ *Radmacher* (n 29) [1].

²¹⁴ *ibid* [182].

²¹⁵ Miles, ‘Agreements for Grown-Ups?’ (n 172) 288.

²¹⁶ *Radmacher* (n 29) [70].

²¹⁷ Law Society Gazette, ‘In Practice: Pre-Nups – Now Worth the Paper They’re Written On?’ (2010) LS Gaz, (11 Nov) 18, 18.

determining the weight to be attached to prenuptial agreements.²¹⁸ Once ‘nuptial agreement’ became an inclusive term, it logically followed that prenuptial agreements should only be set aside if holding the parties to the agreement would be unfair, as alluded to in *Macleod*. Whilst they were reluctant to circumscribe a set of factors that would ‘fetter the flexibility’²¹⁹ of the court in the future, the majority reiterated that an agreement should not prejudice the reasonable requirements of any child of the family.²²⁰ In addition, the preclusion of unfettered exercises judicial discretion in the future²²¹ provided strength to the position of ‘autonomy’.

Commenting on the possibility of a prenuptial agreement that leaves one party in a situation of real ‘need’, the majority of the Supreme Court asserted that such an agreement would be likely to be regarded as unfair.²²² This perhaps served to reinforce the notion that a prenuptial agreement is not a worthwhile exercise for couples with limited assets, but also evidences that the judiciary have not completely relinquished their protective role in favour of allowing couples to come to ‘autonomous’ decisions. They also reaffirmed that the devotion of one party to the marriage, which left the other party free to accumulate wealth, should not go uncompensated.²²³

The majority in the Supreme Court were ‘much more ready to attribute appropriate and, in the right cases, decisive weight to an agreement as part of all the circumstances of the case.’²²⁴ It seems that, while the six statutory safeguards that the court at first instance had been keen to adhere to were regarded by the Supreme Court as important, they were not ‘the be-all and end-all’.²²⁵

Lady Hale, in her dissent, expressed concern that the test for fairness laid out by the majority came dangerously close to making prenuptial agreements presumptively dispositive. She felt that this could be classed as going beyond ‘the permissible bounds of interpretation’.²²⁶ To

²¹⁸ *Radmacher* (n 29) [75].

²¹⁹ *ibid* [76].

²²⁰ *ibid* [77].

²²¹ *ibid* [78].

²²² *ibid* [81].

²²³ *ibid*.

²²⁴ *ibid* [111].

²²⁵ Andrew Meehan, ‘Radmacher in the Supreme Court: What Does It All Mean?’ [2010] *Fam Law* 1284, 1288.

²²⁶ *White* (n 36) [27].

avoid this ‘impermissible judicial gloss’,²²⁷ Lady Hale forwarded her own test. She opined that, provided that the agreement was entered into with a full understanding of its implications, the court should look at whether it would be fair to hold the parties to their agreement in the current circumstances.²²⁸

This stance could have arisen from the reservations that Lady Hale harboured over the make-up of the court. She felt that the decision was ill suited to a court made up of eight men and one woman.²²⁹ Interestingly, Lord Mance, who preferred the majority position, felt that the starting point for the test of fairness was irrelevant. He asserted that once all the facts are put before the court, the outcome would be the same regardless of the starting point,²³⁰ and that the difference between the tests was purely semantic. Ordinarily this might be true, but it is arguable that Lady Hale’s test would provide more protection for economically weaker spouses with more affluent partners, who theoretically could be relatively unprotected when the court is determining whether the terms of an agreement should be enforced. It would arguably be significantly easier for the court to depart from the terms of an agreement that it felt were unfair using the test formulated by Lady Hale.

The majority acquiesced that at first instance Mrs Justice Baron had erred in finding the agreement ‘tainted’,²³¹ and that it was ‘not apparent’²³² how the award made reflected the existence of the prenuptial agreement. The conclusion reached was that to depart from the prenuptial agreement would be ‘unfair’.²³³ Once more Lady Hale articulated a slightly differing stance. Whilst she agreed that not enough weight had been given to the agreement at first instance, she felt that the Court of Appeal had gone too far in completely dismissing the needs of Granatino and treating him like an ‘unmarried parent’.²³⁴ She emphasised that ‘marriage still counts for something’ in England and Wales and it must ‘continue to do so.’²³⁵ Therefore she would at least have given consideration to Granatino’s needs once the children

²²⁷ *Radmacher* (n 29) [166].

²²⁸ *ibid* [169].

²²⁹ *ibid* [137].

²³⁰ *ibid* [121].

²³¹ *ibid* [117].

²³² *ibid*.

²³³ *ibid* [123].

²³⁴ *ibid* [195].

²³⁵ *ibid*.

had reached adulthood.²³⁶ This stance was reflective of a deep-rooted willingness to uphold marriage as a traditional institution within family law. Had this been the majority opinion, it would have weakened the position of prenuptial agreements for those protecting substantial assets, who may resultantly have been left paying financial awards that were significantly greater than those that their prenuptial agreements prescribed.

Future Regulation of Prenuptial Agreements

Throughout the second half of this chapter, a clear shift in judicial attitude, from ‘entrenched caution, bordering on hostility, to a growing acceptance’,²³⁷ has been highlighted. The Supreme Court has received plaudits for handing down a ‘clear, fair and certain’²³⁸ decision, but a note of caution must go with this. It has been ‘widely and wrongly’²³⁹ inferred that *Radmacher* was authority for the ‘general enforceability’²⁴⁰ of prenuptial agreements. It is important to emphasise that prenuptial agreements are still not legally binding.²⁴¹ Upon this point the Supreme Court could not have been clearer. The principle that the court determines the appropriate award of ancillary relief when a marriage comes to an end is embodied within the legislation.²⁴²

What can be concluded is that prenuptial agreements will be afforded decisive weight provided that the court does not feel that they are unfair. The fairness test of the majority, which gives effect to an agreement that is freely entered into provided that each party is fully aware of its implications, unless in the circumstances it would be unfair to hold the parties to it,²⁴³ purports to be equally applicable regardless of the value of assets involved. However, in light of the express statement that the court will ‘not go so far’²⁴⁴ as to allow a prenuptial agreement to be decisive in a situation that left one of the parties in real ‘need’, it could be inferred that a prenuptial agreement is less likely to be upheld in the case involving ordinary levels of assets.

²³⁶ *ibid* [191].

²³⁷ *Marital Property Agreements* (n 19) [3.27].

²³⁸ David Hodson, ‘English Marital Agreements for International Families after *Radmacher*’ [2011] IFL 31, 33.

²³⁹ Geraldine Morris, ‘Seeking Certainty’ (2011) 161 NLJ 99, 99.

²⁴⁰ *ibid*.

²⁴¹ Meehan, ‘What Does It All Mean’ (n 226) 1284.

²⁴² *Radmacher* (n 29) [7].

²⁴³ *ibid* [75].

²⁴⁴ *ibid* [118].

Once again, the ‘direct relevance’ of the decision is therefore potentially ‘limited to a handful of...people’.²⁴⁵ It seems probable that any prenuptial agreement will be set aside where the capital involved is limited. As the focus in the majority of divorces is on reaching a ‘fair loss-sharing settlement’ as opposed to ‘divvying-up a surplus’,²⁴⁶ then the potential is there for agreements to be set aside frequently. Unless a surplus of assets is anticipated, it seems that the inception of a prenuptial agreement will not be vindicated.

Regardless, the law has reached a position in England and Wales whereby it is virtually certain that a prenuptial agreement will be taken into consideration by the court and afforded some weight. How much weight an agreement is given, will very much depend on the circumstances of the case, but it is clear that courts are ‘increasingly open to concluding that the...agreement...outweighs other factors.’²⁴⁷ Radmacher translated literally from German to English means wheel maker. There are those believe that the decision could prompt Parliament, aided by the Law Commission, into inventing statute that could be as important as the wheel.²⁴⁸ Whilst this is no doubt hyperbolised, in the family law context it is not far from the truth.

This remains the position of the law in England and Wales today. To date there have been only two cases on prenuptial agreements brought before the courts post-*Radmacher*. In November 2011, Mr Justice Moor applied the majority judgment in *Radmacher* in *Z v Z*,²⁴⁹ rejecting arguments that ‘it would not be fair to uphold the Agreement in so far as it excludes sharing’.²⁵⁰ The following month, Mr Justice Charles ruled in *V v V*,²⁵¹ that the Supreme Court decision in *Radmacher* had necessitated ‘a significant change to the approach to be adopted...to the impact of (prenuptial) agreements’.²⁵² Consequently, the court significantly reduced the award made to the wife because the agreement was a ‘powerful’ and ‘important’

²⁴⁵ Chris Barton, “‘In Stoke-on-Trent My Lord, They Speak of Little Else’: *Radmacher v Granatino*” [2011] Fam Law 67, 67.

²⁴⁶ *ibid* 72.

²⁴⁷ Johnson, (n 197) 721.

²⁴⁸ Anne Sanders, ‘Private Autonomy and Marital Property Agreements’ [2010] ICLQ 571, 603.

²⁴⁹ [2011] EWHC 2878 (F).

²⁵⁰ *ibid* [64].

²⁵¹ (*Prenuptial Agreement*) [2011] EWHC 3230 (F).

²⁵² *ibid* [36].

factor to be taken into account when assessing both departure from the ‘sharing’ principle and the overall effect of the agreement on the award.²⁵³

The position outlined in *Radmacher* will be followed until such a time comes where there is statutory intervention, or the Supreme Court decides to overturn its own ruling. However, these decisions do serve to highlight how unusual the facts of *Radmacher* were. Whilst there is not much dissent as to the validity of the legal test that *Radmacher* established, there are those who feel that the financial result in the case was wrong and that Granatino could be considered ‘unlucky’;²⁵⁴ although this does not alter the legal position that was reached.

As was outlined much earlier in the chapter, the Law Commission is nearing the completion of its review on marital property agreements. Ultimately, the key question asked by the paper is:

Should pre-nuptial and post-nuptial agreements continue to be enforced by the courts at their discretion...within ancillary relief proceedings?²⁵⁵

It is believed that, following *Radmacher*, the law has been taken as close as it is possible to do so towards enforceable prenuptial agreements within the current legal framework.²⁵⁶ If the Commission determines that the answer to this question is in the negative, then focus will turn to how legislative reform will be implemented. This thesis will seek to provide some guidance on this issue within Chapter 4.

²⁵³ *ibid* [73].

²⁵⁴ Charlotte Bradley & William Healing, ‘Applicable Law Light’ [2012] *Fam Law* 294, 296.

²⁵⁵ *Marital Property Agreements* (n 19) [1.11].

²⁵⁶ *ibid*.

Chapter 3: The Key Issues in Australia

Family Law in Australia

This chapter will focus upon the law in Australia. Owing to the Commonwealth's former status as a dominion of the British Empire, which it gained in 1907, much of the historical common law is identical to that of England and Wales. It was only with the passing of the Australia Act 1986 that Australia became fully independent, and the option for Australian cases to be heard at the Privy Council in London was finally removed.

The Australian equivalent to the Matrimonial Causes Act 1973 (hereafter the 'MCA 1973') is the Family Law Act 1975 (hereafter the 'FLA 1975'). This was enacted in order to replace the Matrimonial Causes Act 1959. Prior to this period, the traditional public policy objections to prenuptial agreements, as delineated by judges in England and Wales, were equally applicable in Australia and the balancing act to be undertaken between autonomy and protection was also a prevalent point of contention.

The FLA 1975 made a number of significant changes to family law in Australia. Firstly, no-fault divorce was introduced. Section 48 enables a marriage to be dissolved if one party is able to show that the parties have been separated for 12 months¹ and the marriage has irretrievably broken down.²

Secondly, with the FLA 1975's inception came the simultaneous establishment of the Family Court of Australia. This move was seen as a 'bold experiment',³ justified by the theory that where family law issues are decided by more generalist courts, family law tends to be the first area affected by budget cuts and, perhaps more importantly, the quality of the judgments handed down suffers.⁴ The Family Court of Australia has jurisdiction across all Australian states, with the exception of Western Australia, which established its own court, the Family

¹ FLA 1975 (AUS), s48 (2).

² *ibid* s48(1).

³ Alastair Nicholson & Margaret Harrison, 'Family Law and the Family Court of Australia: Experience of the First 25 Years' (2000) 24 *Melb U L Rev* 756, 760.

⁴ *ibid* 761.

Court of Western Australia, with the passing of the Family Court Act (WA) 1975. Cases that are appealed from the Family Court of Australia are passed onto the Full Court of the Family Court of Australia and then, finally, onto to the High Court of Australia if necessary. It should be noted that, following the establishment of the Federal Magistrates Court of Australia in 1999, many of the cases brought under the FLA 1975 are heard before this court at first instance.⁵

The Financial Regulation of Divorce

The provisions regulating the financial aspect of divorce can be found within Part VIII of the FLA 1975. As far as the reallocation of property is concerned, section 79 FLA 1975 gives the court a broad discretion to alter the property rights of the parties as it sees ‘appropriate’,⁶ in order to achieve a ‘just and equitable’⁷ outcome. The wide discretion afforded to the courts in England and Wales under the MCA 1973 serves as a suitable comparator. Sections 79(4)(a)-(g) FLA 1975 enable the courts to take a broad range of circumstances into account when reaching a decision. These factors include, but are not limited to:

- i) Direct and indirect financial contributions to the acquisition, conservation or improvement of property⁸
- ii) Any other direct or indirect contribution to the acquisition, conservation or improvement of property,⁹ and
- iii) Any contribution made to the welfare of the marriage.¹⁰

Spousal maintenance is dealt with under section 74 FLA 1975, with a broad list of factors that the court can consider outlined under section 75(2) FLA 1975. These include, but are not limited to, age, health, capacity to work, income, responsibilities towards others, duration of

⁵ Federal Magistrates Court of Australia < <http://www.fmc.gov.au/services/html/family.html>> accessed 15 February 2012.

⁶ FLA 1975 (AUS), s79(1).

⁷ *ibid* s79(2).

⁸ *ibid* s79(4)(a).

⁹ *ibid* s79(4)(b).

¹⁰ *ibid* s79(4)(c).

marriage and who is the primary carer for any children of the marriage.¹¹ Once more, clear similarities can be seen between the discretion afforded to Australian judges under these provisions, and that that is afforded to judges in England and Wales by section 25 MCA 1973.

Part VIII FLA 1975 has remained ‘virtually unchanged since its inception’.¹² Inevitably, criticism has been levelled towards certain aspects of the provisions, particularly regarding the lack of weight allegedly afforded by judges towards non-financial contributions and various section 75(2) FLA 1975 factors.¹³ While this thesis will not discuss these critiques in detail, it is worth noting that the Australian Government has not yet amended these provisions.

A rebuttable presumption of equal sharing was given careful consideration during the 1990s. The Second Parliamentary Joint Select Committee recommended it in 1992¹⁴ and the Attorney General concurred in 1999, outlining two proposals of possible reform options,¹⁵ both of which received a ‘generally negative’¹⁶ response. Chief Justice Nicholson, a senior judge in the Australian Family Court, commented that, while he recognised that deficiencies existed within the current law, he felt that these should be addressed using well thought-out amendments rather than a ‘grandiose and dangerous program of reform’.¹⁷ Subsequently, these suggestions were dropped¹⁸ and wholesale reform of the ancillary relief principles has not yet taken place.

This did not stop the Australian Government turning their attention to enforceable prenuptial agreements. Prior to the introduction of the amendments to the FLA 1975, which will be outlined below, the only type of financial agreement that was binding upon the courts was a maintenance agreement, entered into under section 87 FLA 1975. This agreement had to be

¹¹ *ibid* s75(2)(a)-(q).

¹² Nicholson & Harrison, (n 3) 774.

¹³ *ibid* 775.

¹⁴ Joint Select Committee, *The Family Law Act 1975: Aspects of Its Operation and Interpretation* (Canberra, AGPS, 1992) [1224].

¹⁵ Stephen Bourke, ‘Property and Family Law – Options for Change’ (Attorney-General’s Department, Commonwealth, Discussion Paper 1999) [5].

¹⁶ Nicholson & Harrison, (n 3) 776.

¹⁷ Alastair Nicholson, ‘Proposed Changes to Property Matters Under the Family Law Act’, 20 May 1999 (Bar of Association of NSW, Sydney) 1 – 18, 10.

¹⁸ Daryl Williams, ‘Shaping Law for the Future’ (1999) <<http://law.gov.au/ministers/attorney-general/articles/PressClub.html>>.

created after the couple had separated, and the court retained the power to either approve, or refuse to approve, the agreement.¹⁹ Although section 86 FLA 1975 appeared to allow couples to register maintenance agreements with the court before they had separated,²⁰ the case law suggests that the courts did not feel bound by this provision.²¹

While prenuptial agreements were not statutorily recognised, it was generally accepted that they ‘at the very least had evidentiary value’²² in any divorce proceedings that followed their inception. Emphasis was placed on the fact that they were merely a relevant factor (as opposed to being a decisive one) in determining how the court would exercise its discretion.²³ In the unreported case of *Re Dzieczko*²⁴ the court ruled that the weight attached to a prenuptial agreement would be dependent on:

‘the particular circumstances of the case including the nature and content of the agreement, the circumstances in which it was entered by the parties and the extent to which its terms have been carried out by either of them.’²⁵

Belinda Fehlberg and Bruce Smyth gave an excellent summary of the state of the law in Australia prior to the amendments to the FLA 1975 coming into place. They stated that:

‘If a couple has made an agreement at any stage in their relationship prior to separation, the court may consider that agreement when making orders dividing property and/or spousal maintenance. However, the court is not obliged to follow the agreement...’²⁶

¹⁹ FLA 1975 (Aus), s87(3).

²⁰ *ibid* s86(1).

²¹ See, eg, *Re Sykes* (1978) 4 Fam LR 55; *Re Candlish and Pratt* (1980) 6 Fam LR 75.

²² Geoff Wilson, ‘Intolerable Cruelty Downunder’ (2006)1 IAML

<http://www.iaml.org/iaml_law_journal/back_issues/volume_1/intolerable_cruelty_downunder/index.html> accessed 17 February 2012.

²³ Belinda Fehlberg & Bruce Smyth, ‘Binding Pre-Nuptial Agreements in Australia: The First Year’ (2002) Int JLPF 127, 127.

²⁴ [1992] (Fam Ct of A, 30 April 1992, Appeal No 125 of 1991, No PA 1405 of 1990, Strauss, Lindenmayer and McCall JJ, unreported).

²⁵ *ibid* [39].

²⁶ Belinda Fehlberg & Bruce Smyth, ‘Pre-Nuptial Agreements for Australia: Why Not? (2000) 14 Australian Journal of Family Law 80, 81.

Prima facie, the position that the law had reached in Australia by the end of the twentieth century appears to be synonymous with the position that the law in England and Wales has recently arrived at following *Radmacher v Granatino*.²⁷ There was certainly already evidence of judicial will to afford couples the autonomy to reach their own arrangements and it is the way in which the Australian law has developed in the subsequent decade that is of greatest interest to this thesis. This will be scrutinised closely both within the remainder of this chapter and also in Chapter 4, where some of the individual issues raised in this chapter will be explored in greater depth.

The Introduction of Statutory Prenuptial Agreements

The Family Law Amendment Act 2000 introduced a new Part VIIIA into the provisions of the FLA 1975. The changes came about following ‘a lengthy period of public debate’²⁸ as to whether prenuptial agreements should be enforceable. The result was that financial agreements, whether in the form of a prenuptial agreement entered into prior to the start of the marriage,²⁹ a postnuptial agreement entered into during the marriage,³⁰ or a separation agreement entered into following a divorce order,³¹ became statutorily recognised in Australia. This was the third attempt to regulate prenuptial agreements, following the failed efforts of both the Australian Law Reform Commission in 1987³² and the Joint Select Committee in 1992.³³ The move was taken in order to ‘bring the Act into line with prevailing community attitudes and needs’³⁴ and afforded couples significant autonomy to enter into agreements.

This amended version of the FLA 1975 was succeeded by the Family Law Amendment Act 2003, which in turn was followed by the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008. The 2008 Act introduced provisions for financial agreements made between non-married couples, which were in turn amended by the Federal

²⁷ [2010] UKSC 42.

²⁸ Patrick Parkinson, ‘Setting Aside Financial Agreements’ (2001) 15 Australian Journal of Family Law 26, 26.

²⁹ FLA 1975 (Aus), s 90B.

³⁰ *ibid* s 90C.

³¹ *ibid* s 90D.

³² Australian Law Reform Commission, *Matrimonial Property* (Report No 39 1987).

³³ Joint Select Committee (n 14).

³⁴ Second Reading Speech, Mr Williams, House of Representatives, Hansard 22 September 1999, 10151, 10152.

Justice System Amendment (Efficiency Measures) Act (No1) 2009 (hereafter ‘the FJSAA 2009’).

With the inception of the new Part VIIA, any lingering public policy arguments relating to the objection that agreements foresaw and encouraged the breakdown of marriage were finally dismissed in Australia. Instead, an approach allowing ‘couples to be able to plan in an orderly fashion for an almost 50% chance’³⁵ of divorce was favoured. This change came about despite the fact that there was ‘very little’³⁶ empirical evidence as to the attitudes of Australians towards prenuptial agreements, with it even being suggested that there was no ‘widespread community support for the(ir) enforceability’³⁷. The fact remains that, for over a decade now, couples have been afforded the autonomy to enter into prenuptial agreements that are recognised as ousting the jurisdiction of the Australian courts to make orders for financial relief, provided that certain conditions, designed to enable the court to continue providing protection to those who need it, are met.

Section 90B, 90C and 90D FLA 1975 - Forming a Financial Agreement

The starting point for an enforceable prenuptial agreement is that the couple must have reached an agreement governing their finances. Only then will the court examine whether that agreement is binding and precludes the court from applying Part VIII FLA 1975.³⁸ Section 90B FLA 1975 indicates what is necessary in order for a prenuptial agreement to be formed, with section 90C and 90D doing the same for a postnuptial and separation agreements respectively.

Section 90B(2) FLA 1975 states that the agreement will be a prenuptial agreement if it deals with:

- a) How, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties at the time when the agreement is made, or at a later time and before divorce is to be dealt with;

³⁵ John Wade, ‘Marriage and Cohabitation Contracts’ (2011) 17(2) *The National Legal Eagle*.

³⁶ Fehlberg & Smyth, ‘Why Not?’ (n 26) 93.

³⁷ Reg Graycar, ‘Law Reform by Frozen Chook: Family Law Reform for the New Millennium’ (2000) 24 *Melb U L Rev* 736, 749.

³⁸ See, eg: *Fevia & Carmel - Fevia* [2009] FamCA 816 [128]; *Senior & Anderson* [2011] FamCAFC 129 [26]

- b) The maintenance of either of the spouse parties:
- During the marriage; or
 - After divorce; or
 - Both during the marriage and after divorce.

This indicates that a prenuptial agreement is essentially the same concept within both the UK and Australia.

The Family Court of Australia in *Fevia & Carmel-Fevia*³⁹ considered the issue of whether there was a financial agreement in place. The wealthy husband and his wife, a woman of modest means, had negotiated a prenuptial agreement prior to their wedding and signed it, with her solicitor present, in the period immediately preceding the marriage. The husband claimed that he gave his wife an 18-page annexure listing his property and business interests. His wife counterclaimed that the annexure had not formed part of the original agreement. Mr Justice Murphy accepted the wife's evidence on this matter.⁴⁰ The judge stated that the first issue to be determined by the courts in such claims was whether there was in fact an agreement in place. Under the terms of the FLA 1975, there was no such thing as a prima facie binding financial agreement. Initially, it must be established that there was a financial agreement and then, once that hurdle is surmounted, the court will look at whether the agreement is to be considered binding.⁴¹

The husband submitted that because the agreement itself contained a reference to the annexure, he had implied authority to insert it into the agreement.⁴² Further, he alleged that the annexure did not alter the legal effect of the document; the terms of the document that was signed reflected the agreement that the parties had reached during negotiations.⁴³

Mr Justice Murphy accepted that a 'clear and central purpose'⁴⁴ of the agreement was to exclude Part VIII. Therefore, 'axiomatically, an express purpose of the agreement'⁴⁵ must

³⁹ [2009] FamCA 816.

⁴⁰ *ibid* [46].

⁴¹ *ibid* [126].

⁴² *ibid* [132]-[135].

⁴³ *ibid* [143].

⁴⁴ *ibid* [150].

⁴⁵ *ibid* [150].

have been to specify the property to which it applied. However, he determined that this should not necessarily be the end of the inquiry into their mutual intentions.⁴⁶ Ultimately, the judge held that, even looking at the annexure ‘as liberally and reasonably as possible’,⁴⁷ it was to be regarded as a material alteration to the document that the wife had signed. As a result, there was no ‘valid, enforceable and effective agreement’⁴⁸ between the parties, meaning there could be no financial agreement under section 90B FLA 1975.⁴⁹

In *Senior & Anderson*⁵⁰ the Full Court of the Family Court of Australia was also asked to determine a dispute that had arisen on this issue. The couple had signed a document that was headed ‘section 90C Financial Agreement’, which implied that it was a postnuptial agreement. What the agreement should have been headed was ‘section 90D Financial Agreement’, as it was actually a separation agreement entered into after their marriage had irretrievably broken down. There were also errors that had been made in regards to the attached certificate of independent legal advice. This issue will be revisited later.

At first instance the judge had ordered that all the errors should simply be rectified⁵¹ as they were not fatal to the binding nature of the agreement. While the wife’s appeal against this decision was ultimately successful, in relation to the erroneous references to section 90C FLA 1975 the judges agreed with the trial judge.

Mr Justice Strickland reinforced the idea that there was no such thing as a prima facie binding financial agreement. The first step was for a financial agreement to be established. Only then would the court go on to look at whether they could be bound by it.⁵² It was held that ‘the agreement was clearly an agreement, and once the section 90C/D error was rectified it was a financial agreement’.⁵³ It was made clear that this power of rectification came not from the body of the statute, but from the laws of equity,⁵⁴ which section 90KA FLA 1975 enables the

⁴⁶ *ibid* [153].

⁴⁷ *ibid* [158].

⁴⁸ *ibid* [163].

⁴⁹ *ibid* [164].

⁵⁰ [2011] FamCAFC 129

⁵¹ *ibid* [9].

⁵² *ibid* [88].

⁵³ *ibid* [130].

⁵⁴ *ibid* [132].

court to use. On this rectification the judges were unanimous, with both Mr Justice May and Mr Justice Murphy approving.⁵⁵

The Family Court of Australia was again faced with a similar issue in *Sullivan & Sullivan*.⁵⁶ The husband had presented the wife with a prenuptial agreement shortly before the wedding. She had then signed the agreement prior to the marriage. The husband then signed the agreement after the wedding had taken place. The agreement referred to section 90B FLA 1975 which outlines the requirements for a prenuptial agreement. The wife submitted that it should have contained references to section 90C FLA 1975 as a postnuptial agreement.

Counsel for the husband accepted that in this sense the agreement was indeed ‘erroneous’,⁵⁷ but went on to argue that it was ‘completely immaterial to the substantive provisions of the agreement’.⁵⁸ Further, it was submitted that this error did not affect the ‘common intention’⁵⁹ of the parties to enter into the agreement. Counsel for the wife on the other hand suggested that, unlike in *Senior & Anderson*, the mistake was not a mutual one and so there was ‘no common intention to enter into a section 90C FLA 1975 agreement’.⁶⁰

In this instance, it was ruled that there was not even an agreement in place between the parties.⁶¹ The husband had given the wife an invitation to treat when he had given her the agreement.⁶² By signing the agreement and handing it back to him the wife had made an offer,⁶³ which was to be properly read as an offer of a prenuptial agreement that had to be accepted prior to their marriage.⁶⁴ The husband did not sign the agreement until after the marriage had taken place. Therefore the wife’s offer had not been accepted and so there was no agreement in place between the parties.

Subsequently, it was not necessary for the court to determine whether sections 90B and 90C FLA 1975 were applicable in this case. The court did note that an agreement couldn’t come

⁵⁵ *ibid* [36].

⁵⁶ [2011] FamCA 752.

⁵⁷ *ibid* [30].

⁵⁸ *ibid* [30].

⁵⁹ *ibid* [28].

⁶⁰ *ibid* [36].

⁶¹ *ibid* [114].

⁶² *ibid* [88].

⁶³ *ibid* [94].

⁶⁴ *ibid* [104].

under both headings. As such it is necessary that financial agreements be expressed under a single section. Additionally, the financial agreement must fulfil the requirements of the section under which it is made.⁶⁵ In the circumstances of this case there could have been no rectification as the two agreements would have been ‘materially different’.⁶⁶ The husband submitted that the rules of equity could, as enabled under section 90KA FLA 1975, be used as a remedy, however, the judge was not persuaded by this reasoning, pointing out that the equitable remedy of rectification did not bring about an agreement when in fact the parties had not concluded one.⁶⁷ Therefore, on the facts there was no financial agreement found between the parties under either section 90B or section 90C of the FLA 1975.⁶⁸

The judges in these instances were continuing to exercise the court’s discretion in order to provide appropriate protection for the spouse. While theoretically the FLA 1975 afforded couples significant autonomy, the judiciary were clearly mindful of the need to continue to exercise a protective function. It would appear that because of the level of autonomy that couples in Australia are provided with to conclude agreements, the courts have strictly upheld the need to fulfil the statutory requirements in order for an agreement to be formed, with the exception of where there has been a mutual mistake. This is clear evidence of the judiciary continuing to perform its protective function. Should the next step in England and Wales be statutory recognition of prenuptial agreements, Parliament would need to carefully specify exactly what constitutes an agreement. Under the current common law regime this issue has not given rise to a noticeable amount of controversy; it is generally accepted that an agreement made prior to a marriage, purporting to govern the financial aspect of any future divorce proceedings, is a prenuptial agreement. The litigation has largely concerned the level of weight that the court should attach to the agreement.

However, any statute that is enacted, because of the increased level of autonomy that it seems most likely to provide couples with, will have to provide a set of clearly defined requirements for a prenuptial agreement, and indeed any other type of financial agreement that it may attempt to regulate. Thought must be given to whether the formation of a prenuptial agreement becomes a preliminary hurdle to be overcome, as is the case in Australia, or

⁶⁵ *ibid* [119].

⁶⁶ *ibid* [121].

⁶⁷ *ibid* [142].

⁶⁸ *ibid* [143].

whether the definition merely provides guidance for couples as to the types of things that they can include, with the court's focus in any dispute whether the agreement in question is binding. The Supreme Court has clearly expressed that in the future it will be 'natural to infer'⁶⁹ that when a couple enter into a prenuptial agreement it will be assumed that it is intended to be legally binding. This would appear to set the bar relatively low for parties establishing that a prenuptial agreement is in place. The Law Commission has indicated its preference for a mixed approach, drawing a distinction between qualifying nuptial agreements, which satisfy a specific set of prerequisites, and agreements that do not satisfy such requirements and therefore continue to be merely looked at as part of all the circumstances of the case.⁷⁰ Parliament, in its role as the maker of law, must determine the extent to which it will be necessary for prenuptial agreements to satisfy specific prerequisites.

Section 90G - When a Prenuptial Agreement Will Bind the Courts

Once it has been established that there is a prenuptial agreement in place between the parties, Australian courts turn to determining whether the terms are binding upon them. The relevant provisions here can be found under section 90G FLA 1975. This section has been subject to a number of amendments over the years. These have been 'met with varying degrees of applause, alarm, surprise, uncertainty, bewilderment, and a general consensus that this will not be the last lot of amendments'.⁷¹ Section 90G FLA 1975, in its current format, outlines that:

- 1) Subject to subsection (1A), a financial agreement is binding on the parties to the agreement if, and only if:
 - a) The agreement is signed by all the parties; and
 - b) Before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and

⁶⁹ *Radmacher* (n 27) [70].

⁷⁰ Law Commission, *Marital Property Agreements – A Consultation Paper* (Law Com No 198, 2011) [6.2].

⁷¹ Paul Doolan, 'Financial Agreements – Everything You Always Wanted to Know, but Were Too Afraid to Ask' <www.familylawyers.com.au/financial-agreements.doc> accessed 19 April 2012, 11.

disadvantages, at the time that the advice was provided, to that party of making the agreement; and

- c) Either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and
 - (ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party or to a legal practitioner for the other spouse party; and
- d) The agreement has not been terminated and has not been set aside by a court.

The current wording of this provision is much changed from that of section 90G as the Family Law Amendment Act 2000 first introduced it. Indeed, each of the subsequent amendments to the FLA 1975 has seen changes made to section 90G, although the most dramatic came under the FJSAA 2009.

The Strict Interpretation of Section 90G FLA 1975

The interpretation of section 90G FLA 1975 is the perhaps most hotly contested area of the law of prenuptial agreements in Australia. The general requirements for the parties to have received independent legal advice prior to the inception of the agreement,⁷² for the agreement to be in writing and for it to be signed by all parties,⁷³ mirror a number of the safeguards that have been discussed throughout the debate on enforceable prenuptial agreements in England and Wales. These will be looked at in more detail within Chapter 4. For now, the question to be determined is just how strictly the requirements of section 90G must be adhered to in order for the prenuptial agreement to be considered binding. In establishing an answer to this question a large amount of litigation has been generated.

⁷² FLA 1975 (AUS), s90G(1)(b).

⁷³ *ibid* s90G(1)(a).

The Full Court of the Family Court of Australia, in the case of *Black & Black*,⁷⁴ gave a landmark ruling on this matter in 2008. The prenuptial agreement that the couple had signed stated that their assets should be split equally. They agreed that the husband would sell his house, put the proceeds into a pool of assets and then this would then be used to purchase a joint property. At the time of marriage the wife was awaiting an insurance pay out which she would then add to the pool. When this eventually came it was much smaller than had originally been anticipated. Subsequently, the husband sought an 80/20 split in his favour.

The husband wanted the requirements of section 90G to be strictly adhered to. He pointed to a number of flaws in the agreement, whilst the wife wanted the court to construe the relevant legislation purposively.⁷⁵ There were conflicting preceding authorities for the court to take into account when reaching their decision. In *J v J*⁷⁶ Mrs Justice Collier had preferred a strict interpretation of the wording of the statute. He placed great weight on the use of the words ‘if and only if’,⁷⁷ ultimately holding that ‘something approaching full compliance...is not enough’.⁷⁸ By way of contrast, Mr Justice O’Ryan had held in *ASIC and Rich & Anor*⁷⁹ that the ‘requirements of s90G are not stringent.’⁸⁰

The trial judge in *Black & Black* had preferred this less strict interpretation, stating that the terms of the Act did not ‘create a regime of strict compliance’⁸¹ and emphasising the court’s duty to ‘give purpose to the legislation’.⁸² This approach was followed in the rulings handed down in *Ruzic & Ruzic*⁸³ and *Stoddard & Stoddard*.⁸⁴

However, the judges of the Full Court reversed this decision,⁸⁵ and expressed caution that ‘care must be taken’⁸⁶ when interpreting a statute that has the effect of ousting the court’s jurisdiction. It was also recognised that the legislature were wary of the fact that long-

⁷⁴ [2008] FamCAFC 7.

⁷⁵ *ibid* [32].

⁷⁶ [2006] FamCA 442.

⁷⁷ *ibid* [20].

⁷⁸ *ibid*.

⁷⁹ Australian Securities & Investments Commission and Rich & Anor (2003) FLC 93-171.

⁸⁰ *ibid* [64].

⁸¹ *Black* (n 74) [110].

⁸² *ibid*.

⁸³ [2007] FamCA 473.

⁸⁴ [2007] FMCAfam 735.

⁸⁵ *Black* (n 74) [39].

⁸⁶ *ibid* [40].

standing public policy objections had existed restricting the use of marital contracts. They felt that the ‘compromise reached’⁸⁷ by the statute was to allow parties to oust the court’s jurisdiction, but ‘only if certain stringent requirements were met’.⁸⁸

The three judges categorically stated that ‘strict compliance with the statutory requirements is necessary to oust the court’s jurisdiction to make adjustive orders under section 79 (FLA 1975)’.⁸⁹ Section 90G(1) FLA 1975 states that an agreement can be binding ‘only if’ the provisions are adhered to. The courts appear to have given heavy weight to this terminology. The level of autonomy afforded to couples was therefore tempered by a strict set of prerequisites.

Because the decision in *Black & Black* was a decision of the Full Court, it was heavily influential on subsequent cases that came before the Family Court. In *Fevia & Fevia* there were questions raised as to how the principles of equity, as prescribed under section 90KA FLA 1975, would intersect with the application of section 90G FLA 1975.⁹⁰ Mr Justice Murphy affirmed that the only way that parties can exclude the provisions of Part VIII FLA 1975 is through compliance with section 90G FLA 1975⁹¹ and thus concluded that the equitable doctrine of ‘estoppel has no operation to section 90G’.⁹² Reinforcing the strict stance was in reality the only conclusion that Mr Justice Murphy was able to reach following on from the decision in *Black & Black*.

In *Gardiner & Baker*⁹³ Federal Magistrate Coakes reinforced the strict compliance test once again. The husband had submitted that, although he had not used the exact lexis prescribed by section 90G of the statute, the words that he had included in the financial agreement amounted to the same thing and so the strict compliance test need not be used.⁹⁴ The judge ignored the husband’s plea, holding that it was not open to him to depart from the strict compliance test and, further, even if it had been open to him to do so he would not have

⁸⁷ *ibid* [42].

⁸⁸ *ibid* [42].

⁸⁹ *ibid* [45].

⁹⁰ *Fevia* (n 39) [243].

⁹¹ *ibid* [291].

⁹² *ibid* [293].

⁹³ [2009] FMCAfam1029.

⁹⁴ *ibid* [25].

done.⁹⁵ The lack of a ‘statement...in the agreement, in the form prescribed by section 90G(1)(b)’⁹⁶ FLA 1975 was enough for the judge to hold that the agreement should be set aside.

The significance of the *Black & Black* ruling should not be underestimated. The number of agreements that could potentially have been affected will never be known, but it is unlikely that the figure would have been insignificant. Many couples could have found themselves in a situation whereby they had invested significant time and money into drawing up what they believed to be an autonomous and binding prenuptial agreement, only for it to be set-aside because it does not fulfil the exact requirements of Section 90G FLA 1975. The decision was therefore critiqued as a ‘very dark’⁹⁷ day for legal practitioners, in the absence of any future ‘substantive and retrospective legislative intervention’.⁹⁸

However, legislative change did follow in the form of the latest amendments to the FLA 1975. The FJSAA 2009 drastically changed the wording of section 90G 1975. Most notably it removed the requirement that the terms of the independent legal advice be included within the body of the financial agreement itself, although it is still recommended that this be annexed to the agreement in order to minimise potential future disputes.⁹⁹ The next question to address therefore is what effect, if any, did these amendments have in terms of lowering the strict compliance hurdle that the court had set out in *Black & Black*?

It was suggested by the judges in *Kostres & Kostres*¹⁰⁰ that the amendment was purposely ‘designed to overcome the effect’¹⁰¹ of the strict compliance test that placed strong emphasis on the protective functions of the courts. This was issue also dealt with in more depth in *Senior & Anderson*, with the court here also asked to rule on errors made by the solicitors as to the names that they used on their clients’ certificates of independent legal advice.

⁹⁵ *ibid* [26].

⁹⁶ *ibid* [27].

⁹⁷ Paul Staindl and Lisa Bradley, ‘Cover Story – Black and Black’ (2008) 82(12) LIJ 36, 36.

⁹⁸ *ibid* 40.

⁹⁹ Doolan, (n 71) 12.

¹⁰⁰ [2009] FamCAFC 222.

¹⁰¹ *ibid* [165].

Mr Justice May gave a dissenting opinion. He felt that the court couldn't turn to the equitable principles under section 90KA FLA 1975 in this instance.¹⁰² However, the amendments introduced under a new section 90G(1A) FLA 1975 did appear to allow the court to enforce agreements that fell short of meeting the requirements of Section 90G(1) if it felt it would be equitable to do so. A financial agreement will now be binding upon the parties even if any of the requirements a section 90G(1)(b), (c) or (ca) are not met provided that;

Section 90G(1A)

...

(c) A court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made); and

(d) The court makes an order under subsection (1B) declaring that the agreement is binding on the parties to the agreement; and

(e) The agreement has not been terminated and has not been set aside by a court.

Prima facie the introduction of this section into the statute directly addresses the strict compliance test. Mr Justice May felt that the facts in this case were a 'good example of Parliament's intention not to allow technical faults'¹⁰³ to be used by parties to set aside agreements, after all; the mistake in this instance was down to an error by the solicitors rather than the couple themselves.

In contrast, Mr Justice Strickland did not 'consider that rectification is available to a court so as to 'correct' non-compliance'¹⁰⁴ with any of the requirements under section 90G FLA 1975. In holding that the requirements under this section are in a 'quite distinct category'¹⁰⁵ from

¹⁰² *Senior* (n 50) [36].

¹⁰³ *ibid* [39].

¹⁰⁴ *ibid* [138].

¹⁰⁵ *ibid* [139].

any issues in determining whether there is a financial agreement in place, the ‘if, and only if’ test was held to be mandatory.¹⁰⁶ This seemingly suggested that he was continuing to apply the *Black & Black* test, despite the Government amendments.

However, in regards to section 90G(1A) Mr Justice Strickland held that, whilst these provisions did not allow for mistakes to be rectified, they instead made an agreement binding despite its deficiencies.¹⁰⁷ He held that the purpose of the introduction of these provisions was to determine whether it would be unjust and inequitable, in the circumstances, for an agreement to be set aside because of a failure to meet a technical requirement.¹⁰⁸ The court therefore accepted the relaxation of the strict test; although in this particular instance Mr Justice Strickland was unconvinced that sufficient argument had been heard to determine this issue and so he remitted the case back to the trial judge.¹⁰⁹

Mr Justice Murphy agreed with Mr Justice Strickland’s decision to revert the case back to the court of first instance. Additionally, he commented on the amending Act’s retrospective effect. Firstly, he accepted that the amendments were not ‘clear and unambiguous’.¹¹⁰ It was his view that the plain meaning of the amendments was not obvious from the wording of the Act alone.¹¹¹ Therefore, he felt it necessary to qualify the broad retrospective application of the provisions in order to avoid a sudden influx of litigants.¹¹² This is exactly what he did by pointing out that agreements that have already been set aside by the court, and have been replaced by a financial award, are not affected by the retrospective legislation.¹¹³

The Family Court in *Sullivan & Sullivan* reached a similar conclusion. Mr Justice Young, who had been the judge at first instance in *Senior & Anderson*, followed what the Full Court had ruled on the matter. He held that even if an agreement has been rectified to reflect the

¹⁰⁶ *ibid* [141].

¹⁰⁷ *ibid* [143].

¹⁰⁸ *ibid* [154].

¹⁰⁹ *ibid* [156].

¹¹⁰ *ibid* [173].

¹¹¹ *ibid* [173].

¹¹² *ibid* [178].

¹¹³ *ibid* [191].

common intention of the parties to make a financial agreement, the advice provided to each spouse and the certificates proving this advice could not be rectified themselves.¹¹⁴

Resultantly, whilst the courts have remained reluctant to move away from the idea that the requirements in section 90G FLA 1975 must be strictly adhered to, following the introduction of section 90G (1A) under the FJSAA 2009, it is now clearly intended that it should not be so easy for autonomy to be disregarded and agreements set aside on mere technicalities. It is a delicate balancing act that the Government have been trying to undertake. On the one hand there is a desire to protect couples against pressure to rush into agreements without following the appropriate processes. Subsequently, they continue to strictly regulate how agreements are formed. On the other, they are wary of the emotional and the financial difficulty that couples drawing up a prenuptial agreement can encounter, and do not want carefully negotiated, autonomous agreements to be able to be set aside easily.

This is of course the same balancing exercise that the courts in England and Wales have been grappling with through the common law. Should the UK Government choose to introduce statutory regulation of prenuptial agreements, they would be well advised to take into account the problems that have been encountered in Australia. Initially, the courts interpreted the Australian Government as desiring strict compliance with section 90G FLA 1975 in order to enable a prenuptial agreement to oust the court's jurisdiction to make an order for financial relief under section 79 FLA 1975. This interpretation strongly emphasised the protective functions of the statute, however, the Government have since reacted to the strict application of the statute emanating from *Black* by amending the provisions to make it easier for courts to avoid setting agreements aside, suggesting that it is the actual intention of the parties to autonomously enter into prenuptial agreements that is afforded greater weight.

This illustrates a useful lesson that can be learned when discussions are taking place about the regulation of prenuptial agreements within this jurisdiction. The judiciary, who will be tasked with ensuring that any legislative changes are applied in practical situations, would welcome specific guidance on how strictly the courts should interpret any provisions outlining the formal requirements that a prenuptial agreement needs to meet.

¹¹⁴ *Sullivan*, (n 56) [146].

Section 90K - Setting aside a Prenuptial Agreement

In addition to being able to set aside an agreement on the grounds that it does not satisfy the requirements of section 90G FLA 1975, or does not constitute a financial agreement under the section 90B, C or D FLA 1975 heading, section 90K FLA 1975 gives the court a fairly wide discretion to set aside a prenuptial agreement if it satisfied that any of the following circumstances has occurred:

Section 90K(1)

- a) The agreement was obtained by fraud; or
 - (aa) a party to the agreement entered into the agreement:
 - i) For the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or
 - ii) With reckless disregard of the interest of a creditor or creditors of the party; or
 - (ab) a party to the agreement entered into the agreement:
 - i) For the purpose, or for purposes that included the purpose of defrauding another person who is a party to a de facto relationship with a spouse party; or
 - ii) ...
 - iii) With reckless disregard of those interests of that other person; or
- b) The agreement is void, voidable or unenforceable; or
- c) In the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or
- d) Since making the agreement, a material change in circumstances has occurred...(a child)...and, as a result of the change, the child or, if the applicant has caring responsibility for the child, a party to the agreement will suffer hardship if the court does not set the agreement aside; or
- e) In respect the making of a financial agreement – a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable.

Clearly, the provisions within this section cover a broad range of circumstances, juxtaposing general principles of contract law, such as fraud and unconscionability, with more family-related issues, for example a material change of circumstances. A number of the protective safeguards discussed in the previous chapter in relation to England and Wales are also visible within this section of the statute.

The full effect of this section of the provisions is not yet known. Two leading Australian academics have suggested that autonomy is now strongly favoured and, subsequently, that couples are now most likely to be held to the terms of their agreement, ‘even if the outcome is patently unfair’.¹¹⁵ However, this is difficult to say with any certainty as in certain respects the regulations are still in their infancy. For example, there has not yet been a case brought before the courts involving a material change in circumstances under section 90K(d).¹¹⁶

That said there are examples of agreements that have been set aside by the Australian courts on a number of the other grounds found in section 90K. *Blackmore & Webber*,¹¹⁷ a case determined by Federal Magistrate Bender in the Federal Magistrates Court of Australia, highlighted a number of the key issues. The husband was Australian, whilst the wife, who was at the time of proceedings living with her new partner, had been born in Thailand, but had moved to Australia in 2001. She contended that the prenuptial agreement that they had entered into be set aside. Her claim was based on a number of assertions. These included that the agreement was obtained by fraud (section 90K(1)(a)), the agreement was void, voidable or unenforceable due to duress (section 90K(1)(b)) and that the husband had engaged in unconscionable conduct (section 90K(1)(e)).¹¹⁸

The first of these issues to be dealt with was the claim to have the agreement set aside on the grounds of fraud under section 90K(1)(a) FLA 1975. The magistrate was ‘satisfied’ that any non-disclosure of assets ‘was not a deliberate omission perpetrated by the husband’,¹¹⁹ however, he then went on to point to the judgment of Federal Magistrate Alotobelli in

¹¹⁵ Belinda Fehlberg & Juliet Behrens, *Australian Family Law – The Contemporary Context* (Melbourne, Oxford University Press, 2008), 562.

¹¹⁶ Owen Jessep, ‘Marital Agreements and Private Autonomy in Australia’ in Jens M Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (Oxford, Hart Publishing 2012), 43.

¹¹⁷ [2009] FMCAfam 154.

¹¹⁸ *ibid* [16].

¹¹⁹ *ibid* [35].

Stoddard & Stoddard, who had stated that ‘fraud has a broader meaning’ and ‘may be constituted by omission – ie. non-disclosure of a material matter’ in the context of prenuptial agreements.¹²⁰ His Honour noted that it was the husband’s solicitors who had drawn up the agreement, without any input from a legal advisor to the wife.¹²¹ It was also accepted that the husband had given his solicitor a full list of his assets and it had been the solicitor’s decision to omit some of these from the final agreement.¹²² Ultimately, despite these factors, the wife’s interests were protected through the determination that the agreement should be set-aside on the basis it was ‘obtained by fraud, arising from the non-disclosure of material information.’¹²³

Of course, once the financial agreement had been set aside on the grounds of fraud there was no onus upon the magistrate to explore the remaining grounds in detail. Nevertheless, he acknowledged the considerable time devoted to them during the hearing and so considered them briefly,¹²⁴ although it should be noted that his comments were merely obiter statements.

Turning first to duress, Federal Magistrate Bender acknowledged the words of Federal Magistrate Ryan in *SH & DH*,¹²⁵ when he stated that the court must ‘examine the circumstances of each case, the circumstances surrounding the alleged duress and the resolution of the proceedings.’¹²⁶ It was the husband who had informed the wife that he wanted an agreement to confirm that she would make no claim upon his property. The wife’s counsel submitted that she had argued that this was unnecessary, but that he was adamant that one should be drawn up. Subsequently, the husband claimed that she had reluctantly agreed to sign an agreement.¹²⁷

The agreement was not then discussed again until 5 days prior to the wedding, at which point the husband asserted that if the agreement was not signed then the wedding would be cancelled.¹²⁸ It was accepted that the period prior to this had been an ‘unhappy’ one for the

¹²⁰ *Stoddard* (n84) [44].

¹²¹ *Blackmore* (n 117) [44].

¹²² *ibid* [35].

¹²³ *ibid* [57].

¹²⁴ *ibid* [60].

¹²⁵ (*No 1*) [2003] FMCAfam 330.

¹²⁶ *ibid* [69].

¹²⁷ *Blackmore* (n 117) [67 – 71].

¹²⁸ *ibid* [75].

couple, with the wife suffering depression and the husband showing symptoms of what was later diagnosed as cancer.¹²⁹ The wife confirmed that two days later she had agreed to sign the agreement. When she was taken to the solicitor initially she had refused to sign the agreement, however, an hour later, after the husband had reconfirmed that the marriage would not take place without the agreement in place, she agreed to sign it.¹³⁰

The wife consistently insisted that she had no choice but to sign the agreement. In particular, she was ‘humiliated by the thought’ that she would return to her family ‘pregnant, unmarried and without the father of her child’.¹³¹ The combination of the proximity between the agreement being presented to the wife and the marriage, the fact that she was pregnant and that her family expected her to return to Thailand a married woman, and, finally, that the husband was aware at all times that the wife did not want to sign the agreement and so the pressure placed upon the wife was ‘illegitimate’,¹³² meant the agreement was signed under duress and would have been set aside under section 90K(1)(b) had it not already been set aside under section 90K(1)(a).¹³³ Once more the court reinforced its determination to providing a protective function.

Finally, Federal Magistrate Bender considered whether unconscionability, a doctrine not recognised in this context in England and Wales, was present. For this to occur there must be two factors, as laid out by Mr Justice Dean in *Commonwealth Bank of Australia Limited v Amadio & Anor.*¹³⁴ Firstly, one party to a transaction must be ‘under a special disability in dealing with the other party.’¹³⁵ Then it must be established that the disability was ‘sufficiently evident to the stronger party to make it prima facie unfair or ‘uncontentious’ to carry out the bargain.’¹³⁶

In the current circumstances, it was held that there was ‘no doubt’ that the wife had a ‘special disability’ in relation to the husband.¹³⁷ Her command of the English language would not

¹²⁹ *ibid* [73] & [74].

¹³⁰ *ibid* [77].

¹³¹ *ibid* [80].

¹³² *ibid* [106].

¹³³ *ibid* [107].

¹³⁴ (1983) 151 CLR 447.

¹³⁵ *ibid* 474.

¹³⁶ *ibid*.

¹³⁷ *Blackmore* (n 117) [117].

have been as well developed as it was at the time of the trial, she was pregnant, faced with deportation should she not be married and her family were situated in Thailand meaning they were unable to provide her with close support.¹³⁸ In addition to this, she was totally reliant upon him in terms of accommodation, food and financial support.¹³⁹ The culmination of these factors lead to the determination of her ‘special disability’ and it was determined that the husband was aware of this and took unconscionable advantage of it.¹⁴⁰ Consequently, it was held once more than the agreement would also have been set-aside on unconscionability grounds under section 90K(1)(e).¹⁴¹ Clearly, this case demonstrates that although the provisions prima facie afforded couples significant autonomy to enter into agreements, a fairly wide range of grounds on which an agreement could be set aside continues to exist.

A number of the issues discussed in *Blackmore & Webber* also arose in *Tsarouhi & Tsarouhi*.¹⁴² Following a 20-year marriage, it was ‘common ground’ that the wife had forged the husband’s signature on a number of occasions in order to withdraw money from their joint account.¹⁴³ Federal Magistrate Riley declared that the financial agreement in place between the couple was entered into under duress. This was because the husband knew that the wife had only agreed to enter the agreement because she thought this would prevent criminal prosecution against her for withdrawing the money.¹⁴⁴ However, the charges had already been laid upon the wife prior to the signing of the agreement and there was ‘nothing to suggest that the wife understood, or the husband believed the wife understood that the police would not halt the prosecution.’¹⁴⁵ Consequently, it was determined that the agreement had been entered into under duress and should be set-aside under section 90K(1)(b).¹⁴⁶

Unconscionability was also addressed by the court. The wife’s fear of prosecution and her limited education combined to leave her at a special disadvantage relative to the husband.¹⁴⁷ Federal Magistrate Riley felt that her limited education led her to neglect to seek legal advice

¹³⁸ *ibid.*

¹³⁹ *ibid* [122].

¹⁴⁰ *ibid* [123].

¹⁴¹ *ibid* [124].

¹⁴² [2009] FMCAfam 126.

¹⁴³ *ibid* [2].

¹⁴⁴ *ibid* [43].

¹⁴⁵ *ibid* [42].

¹⁴⁶ *ibid* [43].

¹⁴⁷ *ibid* [51].

on the effect of the document and that she ‘simply assumed that if she signed the agreement, the prosecution would not proceed.’¹⁴⁸ The final question to be asked therefore was whether or not the husband knew, or ought to have known, of the existence of the special disadvantage. On the available evidence it was determined that the husband knew of the wife’s fear of prosecution, he knew that she believed signing the agreement would halt the prosecution and, finally, that he knew that this would not actually be the case.¹⁴⁹ Finally, the judge noted that the clean hands defence would not have been applicable in this instance as the wife’s deception did not ‘have an immediate and necessary relation to the agreement’.¹⁵⁰ Resultantly, unconscionability was also determined to be another ground under which the prenuptial agreement could be set aside using section 90(1)(e).¹⁵¹

These decisions clearly demonstrate that the Australian court will be prepared to set aside financial agreements on any of the protective grounds found under section 90K(1) FLA 1975. While it is therefore true that there is potentially still much litigation to come on the grounds outlined in this provision, it is already clear that the courts will readily set aside financial agreements where there is evidence of the presences of one of the section 90K(1) factors. Strong checks upon individual autonomy subsequently continue to exist in order to appropriately protect individuals, particularly those that the courts feel are at a ‘special disability’ in relation to their spouses.

There is no mention in the statute of a time frame for such applications to be brought. Despite this the Federal Magistrates Court of Australia has considered the issue and determined that action must be brought within a ‘reasonable time’¹⁵². A 12 month period was ruled not to fall within a ‘reasonable time’, however, these comments were obiter and should not be relied upon, as the case was dealing with difficult issues as to when exactly the applicant did and didn’t have mental capacity to enter into an agreement.

¹⁴⁸ *ibid* [53].

¹⁴⁹ *ibid* [55].

¹⁵⁰ *ibid* [57].

¹⁵¹ *ibid*.

¹⁵² *Cole & Cole* [2008] FMCAfam 664 [30].

Finally, section 90F(1) and (1A) FLA 1975 ensure that the court will not enforce a prenuptial agreement when the terms of it will cause one of the parties to become reliant upon the state for financial aid.

Conclusion

Through the introduction of Part VIIIA FLA 1975, Australia has developed its law in relation to prenuptial agreements beyond the position in England and Wales. A fairly comprehensive statutory framework has evolved and it is arguable that a parallel set of provisions is what the MCA 1973 lacks.

From the overview of the Australian law that has been given it is plain to see that a prenuptial agreement cannot be entered into lightly. This is, of course, a deliberate ploy to stop parties scribbling down terms on a napkin and later trying to rely upon them in court. Interestingly, practitioners have suggested that there is a noticeable increase in tension when the lawyers have to go into the details of potential agreements in order to attempt to meet the statutory requirements of the FLA 1975.¹⁵³

Once the lawyers have explained the entire list of exceptions and circumstances in which a prenuptial agreement can be set aside, many clients may simply ask ‘what’s the point’¹⁵⁴ in having an agreement? It has been demonstrated that it is possible for prenuptial agreements to be avoided in Australia, with the courts demonstrating a strong willingness to continue to provide appropriate protection for individuals; however, this should not necessarily lead to the conclusion that they are easy to avoid. The legislation was introduced with the specific intention of allowing couples to be able to achieve autonomously drawn up prenuptial agreements that will be adhered to by the courts. Therefore while avoidance is clearly possible, it is likely to be both a ‘costly and risky’ process.¹⁵⁵ Although the cases mentioned above demonstrate occasions on which agreements will be set aside in order to provide protection for one spouse, this is not an exercise that the court will undertake lightly.

¹⁵³ Fehlberg & Smyth, ‘The First Year’ (n 23) 135.

¹⁵⁴ Wade, (n 35).

¹⁵⁵ Jacqueline Campbell, ‘Pre-Nuptial Agreements – Possible Escape Routes’ (2005)79(5) LIJ 44, 50.

Of course the common law in relation to prenuptial agreements in Australia has developed from the statute itself. The opposite is true in England and Wales, with any Government deciding to legislate in the area in the future having the benefit of a decade of litigation to take into consideration. Between the courts in England and Wales and the Australian family courts, many of the more contentious issues have been litigated. Chapter 4 of this thesis will be dedicated to examining these points of contention in the context of England and Wales.

Chapters 2 and 3 have served to introduce the current laws regulating prenuptial agreements within both jurisdictions, while also highlighting the areas where conflict can be found between autonomy and protection. The overarching aim of this thesis is to provide guidance as to potential future avenues for reform, bearing in mind the need to strike a balance between autonomy and protection. Chapter 4 will therefore scrutinise the substantive elements that make up the current law within this jurisdiction and Australia with this aim in mind. By undertaking such an analysis, it highlights the potential for the Government in this jurisdiction to look at how the law in Australia has evolved and learn from the various amendments introduced.

Chapter 4: Drawing Comparisons Between the Jurisdictions

Having outlined the current laws in both jurisdictions, attention now turns to legal issues that have arisen in relation to the practical regulation of prenuptial agreements. The issues explored within this chapter are reflective of some of the key points of contention within both Australia and England and Wales. This analysis will take place in chronological order, starting with the issues surrounding the actual signing of the agreement, before moving on to explore the potential procedural requirements for an agreement to be properly formed; namely independent legal advice and full and frank disclosure, and then finally looking the extent to which the court should continue to be able to monitor substantive fairness of the agreement, with particular focus being placed on the financial ‘need’ of the parties. All of this discussion will bear in mind the overarching theme of this thesis, namely striking a balance between affording individuals the autonomy to enter into financial agreements and continuing to provide appropriate protection to those who need it.

Within the discussion of each issue, the relevant points of law will be discussed in relation to both jurisdictions separately. This will enable conclusions to be drawn as to preferable strategies for reform, including discussion as to the desirability and extent of Government intervention required on each issue.

The Australian legal framework has developed over more than a decade. A number of statutory amendments have been passed and numerous cases have been contested in the Australian family courts. Subsequently, many of the current points of contention in England and Wales have already been litigated and, subsequently, resolved in Australia. There is much that this jurisdiction can learn from the experiences of their Australian counterparts.

This comparative analysis is necessary in order to understand which elements of the law work well, as well as the areas in which there is room for improvement in this jurisdiction. Informed conclusions can then be drawn as to the potential direction that the reform of the law in England and Wales could take. It is hoped that by doing so, some guidance can be

gleaned as to how the law should strive to strike an appropriate balance between autonomy and protection.

i) The Signing of the Agreement

One issue to be explored is whether there should be any time parameters that serve to invalidate an agreement executed within a certain number of days of the wedding. To date, this issue has not been particularly contentious in either of the jurisdictions explored within this thesis; however, it is included here because it has featured in previous narrative on prenuptial agreements and therefore it would be prudent to discuss its effects.

Introducing time parameters potentially serves a protective function, in so far as it may prevent agreements being presented to a vulnerable spouse within close proximity of the wedding with the expectation that they will sign immediately. Its inclusion in future statute would therefore be an attempt to alleviate the pressure placed upon parties to sign an agreement prior to the wedding.¹ It is also useful to consider the fact that standard contracts can be vitiated in cases where the court feels that the agreement was entered into under duress or undue influence. Therefore, as an alternative to expressly including a specific provision on the matter, the courts when looking for these vitiating factors could consider the timing of the agreement.

In England and Wales, statutory time periods are on the law reform agenda, with a number of different figures proposed. The Law Commission in 1998 proposed that an agreement should be invalid if it is not completed 21 days prior to the wedding.² The Centre for Social Justice recommended a 28-day time period,³ while Resolution have given their support to a 42-day time limit.⁴ Evidently, the idea of using a time limit as a protective measure is a popular one. Indeed, ‘best practice’ in this jurisdiction is to ensure that any agreement is concluded at least

¹ Law Commission, *Marital Property Agreements – A Consultation Paper* (Law Com No 198, 2011) [6.108].

² Home Office, *Supporting Families: A Consultation Document* (Cm 3922, 1998) [4.23].

³ Centre for Social Justice, *Every Family Matters: An In-Depth Review of Family Law in Britain* (2009) <http://www.centreforsocialjustice.org.uk/client/downloads/WEB%20CSJ%20Every%20Family%20Matters_s mallres.pdf> accessed April 16 2012.

⁴ Resolution, ‘Family Agreements – Seeking Certainty to Reduce Disputes: the Recognition and Enforcement of Pre-nuptial and Post-nuptial Agreements in England and Wales’ (2009) <www.resolution.org.uk/site_content_files/files/family_agreements.pdf> accessed 16 April 2012, 3.

21 days prior to a marriage taking place.⁵ Although there is little in the way of explicit reference to any time limit in the courts, ‘their Lordships did indicate that such gaps were helpful’⁶ in the Supreme Court when passing down judgment in *Radmacher v Granatino*.⁷

Some have argued that the imposition of a statutory time period is ‘arbitrary’.⁸ It would simply be a figure determined, by the legislator, with no real factual grounding or formulaic calculation for its deduction. Therefore the major criticism of the imposition of a time limit is that it would simply serve to shift the pressure rather than neutralising it.⁹ Whereas ordinarily pressure would be created in the days immediately preceding the wedding itself, a statutory time limit would mean that the pressure is ‘simply transferred to the deadline’¹⁰ that has been artificially created. On this basis it would seem that such a clause would not necessarily be an effective safeguard of the interests of the vulnerable.

In Australia, the Family Law Act 1975 (hereafter the ‘FLA 1975’) is silent in regards to a statutory time limit, with no guidance offered as to the time period prior to a marriage in which a prenuptial agreement must be engaged. Given the number of amendments that have been made to Part VIIIA, it is clear that implementing a statutory time limit is not on the agenda.

Obviously, it is not desirable for prenuptial agreements to be forced upon a party shortly before a wedding takes place.¹¹ But by the same token, a prenuptial agreement is a complex instrument and protracted negotiations are often required before terms are agreed upon. It must be considered that it may not be possible to conclude an agreement more than a short period before marriage.¹²

⁵ Mark Harper & Lucy Alhadef, ‘*Crossley v Crossley*: Are Prenuptial Agreements Now Binding in England?’ [2008] Fam Law 334, 338.

⁶ Chris Barton, “‘In Stoke-on-Trent My Lord, They Speak of Little Else’”: *Radmacher v Granatino*’ [2011] Fam Law 67, 73.

⁷ [2010] UKSC 42.

⁸ Jens M Scherpe, ‘Fairness, Freedom and Foreign Elements – Marital Agreements in England and Wales after *Radmacher v Granatino*’ [2011] CFLQ 513, 517.

⁹ *ibid.*

¹⁰ Elizabeth Cooke, ‘The Law Commission’s Consultation on Marital Property Agreement’ [2011] Fam Law 145, 150.

¹¹ Brigitte Clark, ‘Should Greater Prominence Be Given to Pre-Nuptial Contracts in the Law of Ancillary Relief?’ [2004] CFLQ 399, 405.

¹² Scherpe, (n 8) 517.

A time limit is not included within the legislation of the majority of other common law jurisdictions.¹³ The Law Commission has recently explicitly stated that it does not feel that the introduction of a time limit would ‘provide any useful protection’,¹⁴ instead preferring to recognise that contract law doctrines such as duress and undue influence will provide the necessary shield in these cases.¹⁵ The introduction of such a clause could even become a litigation generator itself, with the scope for couples to argue that the imposition of the statutory time frame should not be applied to their particular set of circumstances. A more unlikely, but nevertheless plausible, scenario would be a disagreement as to the exact date that a prenuptial agreement was finalised.

This area is one in which a large amount of discretion should be left in the hands of the courts. In relation to marital property agreements, judges have considered the issues of duress, undue influence and even the time period prior to the marriage at which an agreement was signed. This often takes place as part of their assessment of all the circumstances of the case, which they are required to take under section 25(2) of the Matrimonial Causes Act 1973 (hereafter the ‘MCA 1973’).

For example, in *NA v MA*,¹⁶ undue influence was the reason why a post-nuptial agreement was set aside. Lord Nicholls, in *RBS v Etridge*,¹⁷ stated that;

If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or ‘undue’ influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will.¹⁸

¹³ Gareth Miller, ‘Prenuptial Agreements in English Law’ (2003) PCB 415, 422.

¹⁴ *Marital Property Agreements* (n 1) [6.111].

¹⁵ *ibid.*

¹⁶ [2006] EWHC 2900 (F),

¹⁷ (*No 2*) [2001] UKHL 44.

¹⁸ *ibid* [7].

This is a prime example of the definition used for undue influence in civil cases. The objective of ensuring ‘that the influence of one person over another is not abused’¹⁹ is synonymous with what the courts are trying to achieve when they consider these matters in relation to marital property agreements.

In *NA*, the wife had been caught having an affair, but wanted to save her marriage. The husband insisted that she signed a post-nuptial agreement in order to do so.²⁰ Mrs Justice Baron ultimately determined that the husband had put the wife ‘under continuing, unacceptable and undue pressure.’²¹ Subsequently, the post-nuptial agreement was set aside.

Clearly, the judiciary have been exercising common sense in this context in order to continue to provide a protective function. Issues surrounding the timing of a prenuptial agreement’s signing will always be taken into consideration by judges. If proposed legislation is to say anything at all on the subject, it should simply formalise the idea that undue influence, duress and time periods will be relevant considerations, rather than directly imposing an arbitrary time figure. Of course, by including no clause with a time limit, a greater amount of autonomy is being afforded to the parties, however, this will not jeopardise the courts’ protective function. If anything it will do the opposite, as one spouse will not be able to argue that the agreement should be upheld simply because it was signed within the statutorily prescribed time frame.

ii) Independent Legal Advice

Independent legal advice is the first substantive aspect of the prenuptial agreement to be examined. The inclusion of any requirement for independent legal advice would once more aim to ensure that spouses are provided with appropriate protection, in addition to facilitating autonomous decisions indirectly. If specific guidance is to be given as to the exact requirements of a binding prenuptial agreement, then parties can do everything possible to ensure that their autonomous agreements fulfil such criteria.

¹⁹ *ibid* [6].

²⁰ *NA v MA* (n 16) [69].

²¹ *ibid* [96].

There are two questions that need to be addressed. Firstly, whether it should be the case that any statute implemented in England and Wales will contain a provision making independent legal advice a pre-requisite for a prenuptial agreement to be upheld and, secondly whether the courts should, even if independent legal advice is not expressly required by statute, continue to look for its presence as a determining factor on whether an agreement should be upheld.

The Government in England and Wales has previously recommended that a prenuptial agreement should not be binding ‘where one or both of the couple did not receive independent legal advice before entering in to the agreement.’²² The motivation for this approach is that if both parties have received separate legal advice on the terms of the agreement, then there is less scope for one party to manipulate the agreement in their favour. In this respect, independent legal advice is regarded by some as ‘fundamental to the basic concepts of English culture of fairness and justice’ within the family law sphere.²³ Protection is very much at the forefront of thinking in this context.

The judiciary have shown clear support for the requirement of independent legal advice. It has been held to be an ‘important factor’²⁴ for the court to take into account when considering the weight that it will attach to a prenuptial agreement. In 1999, the judges of the Family Division outlined that, in their opinion, it was ‘clear’ that ‘separate legal advice on each side’²⁵ should be prerequisite if a prenuptial agreement was to have any effect in law. Such a strong statement in favour of independent legal advice no doubt came from the judiciary because of their awareness of their protective function.

Furthermore, they assumed that state funding would be made available to ensure that this requirement was complied with. To date there has been nothing to indicate that this is on the agenda.²⁶ This issue will become important to the demographic of people that a prenuptial agreement will become available to. If state funding did become available, a prenuptial agreement would suddenly be a much more viable proposition for many more couples than is

²² *Supporting Families* (n 2) [4.23].

²³ *Every Family Matters* (n 3) 196.

²⁴ Miller, (n 13) 422.

²⁵ Nicholas Wilson, ‘Ancillary Relief Reform – Response of the Judges of the Family Division to Government Proposals’ [1999] Fam Law 156, 164.

²⁶ Ministry of Justice, *Family Justice Review Final Report* (November 2011) 179.

currently the case. However, in the current economic climate it is fair to suggest that providing such funding is not a priority.

Decisions in England and Wales have frequently made reference to the necessity of independent legal advice. In *Edgar v Edgar*,²⁷ the leading authority on separation agreements, the importance of the parties receiving ‘competent legal advice’²⁸ was cited. Similarly, the judiciary in *J v V*²⁹ ruled that the agreement in question fell ‘at every fence’³⁰ for reasons that included a lack of independent legal advice.

Reportedly, practitioners have also clearly recognised the importance of this factor. Legal counsel in *K v K*³¹ for example, advised their client that independent legal advice would ‘maximise the influence such an agreement might have on a judge’.³² It has been recommended that practitioners representing the wealthier of the two spouses should advise their clients to fund the other party’s legal advice to prevent costs being a restrictive factor and to ensure that all parties receive the same standard of advice.³³ Subsequently, the likelihood of any issues surrounding access to independent legal advice rising in a later dispute is minimised.

The issue was discussed in depth at all three judicial levels of the *Radmacher* dispute. At first instance, one of the major factors in Mrs Justice Baron’s finding that the agreement was ‘flawed’³⁴ was that Granatino had ‘not had independent legal advice about the ramifications of the deal’.³⁵ In fact, it was felt that he had not even had a ‘realistic opportunity to take proper independent legal advice’.³⁶ A German notary had advised Granatino, but the judge observed that the same notary had also taken instructions from, and advised, Radmacher and her family. Whilst Mrs Justice Baron made it clear that she was not suggesting that the notary

²⁷ [1980] EWCA Civ 2.

²⁸ *ibid* [25].

²⁹ [2003] EWHC 3110 (F).

³⁰ *ibid* [41].

³¹ *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120 (F).

³² *ibid* [125].

³³ Zahra Pabani, ‘All You Need is Love: Protecting Clients’ Wealth’ [2010] Fam Law 1005, 1008.

³⁴ *NG v KR (Pre-Nuptial Contract)* [2008] EWHC 1532 (Fam) [4].

³⁵ *ibid*.

³⁶ *ibid* [38].

had performed his role dishonestly, she asserted that, a result of this factor, the prenuptial agreement was ‘one-sided’ and ‘demonstrably not neutral.’³⁷

The requirement for independent legal advice was upheld stringently at first instance. The judgment appeared to ‘underline that an English court will not accept anything less’.³⁸ This was the case despite the fact that the agreement was reached in Germany, where it is not necessary for couples entering into a prenuptial agreement to receive independent legal advice. Mrs Justice Baron’s decision was ‘interesting’³⁹ in that her ruling essentially meant that, from an English viewpoint, German couples would rarely obtain proper legal advice.⁴⁰ This would potentially have affected any number of cases where an agreement was formed outside of England and Wales.

Whereas previously the judiciary had considered independent legal advice to be a ‘crucial aspect of a fair prenuptial agreement’,⁴¹ at both Court of Appeal and Supreme Court level Mrs Justice Baron’s strict adherence to the requirement of independent legal advice was departed from, in favour of giving more weight to the autonomous decision of the parties to enter into the agreement. In the Court of Appeal, it was still accepted that in the majority of cases it would be ‘necessary and...desirable’⁴² for all the parties to have received independent legal advice prior to entering into a prenuptial agreement. The reasoning for this was simple. The existence of such advice is ‘often the only, and always the simplest’⁴³ method of showing that a party entered into the agreement knowingly.

However, the lack of independent legal advice was not regarded as fatal to the prenuptial agreement in question. It was held that if Granatino had wanted to seek independent legal advice he had had ample opportunity to do so. In fact, he had turned down the chance of receiving a translated copy of the agreement.⁴⁴ The court held that the ‘fluidity’⁴⁵ of the law

³⁷ *ibid* [76].

³⁸ Ashley Murray, ‘Drafting Prenuptial Agreements: *NG v KR*’ [2009] Fam Law 142, 146.

³⁹ Anne Sanders, ‘Private Autonomy and Marital Property Agreements’ [2010] ICLQ 571, 577.

⁴⁰ *ibid*.

⁴¹ Sharon Thompson, ‘Levelling the Prenuptial Playing Field: Is Independent Legal Advice the Answer?’ [2011] IFL 327, 327.

⁴² *Radmacher (formerly Granatino)* [2009] EWCA Civ 649 [137].

⁴³ *ibid*.

⁴⁴ *ibid* [138].

⁴⁵ *ibid* [140].

as it stands in England and Wales, enabled them to apply what they termed to be a ‘common sense’⁴⁶ approach to the prenuptial agreement. Clearly, the appellate court was less concerned with providing Granatino with protection and more interested in the autonomy of the couple.

The Supreme Court concurred on this point, holding that the husband had a number of opportunities to seek independent legal advice but chose not to do so.⁴⁷ It was reiterated that ‘sound legal advice is...desirable’,⁴⁸ but it was also felt that it was more important that ‘each party should have all the information...material’⁴⁹ to their decision. Again a common sense approach towards independent legal advice appears to have been taken. The current position in England and Wales appears to be that the absence of independent legal advice will not in itself automatically lead to a prenuptial agreement being discarded by the court.

This approach has not come without its criticism. Some feel that it is ‘surprising that violations of such basic safeguards...can be ignored because the court considers that, on the facts, it was probably not material’⁵⁰ to the circumstances of the case. There are ‘many who would say...that it is essential to fairness that independent legal advice should be required’⁵¹ regardless of the context. This would be in order to both protect the economically weaker party and justify the acts of the economically stronger party.⁵² Nevertheless, this is not the route that the judiciary have chosen to take. Parliament must now determine whether or not it will depart from this approach.

As in England and Wales, the necessity of independent legal advice is also a prominent theme in the regulation of prenuptial agreements in Australia. It is regarded to be the ‘main safeguard offered to deal with the lack of ‘control’ and ‘choice’⁵³ that the parties to a prenuptial agreement may have. The requirements under the initial amendments to the FLA 1975 in 2000 were stringent. Section 90G FLA 1975, as it was prior to the amendments made

⁴⁶ *ibid.*

⁴⁷ *Radmacher* (n 7) [139].

⁴⁸ *ibid* [69].

⁴⁹ *ibid.*

⁵⁰ Peter G Harris, Robert H George & Jonathan Herring, ‘With this Ring I Thee Wed (Terms and Conditions Apply)’ [2011] *Fam Law* 367, 368.

⁵¹ Andrew Meehan, ‘*Radmacher*: What Practitioners Needs From the Supreme Court’ [2010] *Fam Law* 253, 256.

⁵² Harris, George & Herring, (n 49) 368.

⁵³ Belinda Fehlberg & Bruce Smyth, ‘Pre-Nuptial Agreements for Australia: Why Not? (2000) 14 *Australian Journal of Family Law* 80, 92.

in 2009, required a financial agreement to contain a statement that each party had received advice from a legal practitioner, on matters including the effect of the financial agreement on their rights⁵⁴ and the financial advantages and disadvantages of making the agreement.⁵⁵ Furthermore, there was a requirement that a signed certificate stating that this advice had been given be annexed to the agreement.⁵⁶ It was clear that, although the law was enabling couples to exercise autonomy by entering prenuptial agreements, protection was still very much a priority, as demonstrated by the implementation of very stringent independent legal advice requirements.

The strict requirements applied in Australia led to a fear that solicitors may be reluctant to give advice on prenuptial agreements and sign statements to that effect, in case their clients brought a negligence action against them at a later date.⁵⁷ These fears featured ‘prominently during the first year’⁵⁸ after the inception of the provisions. There was also debate as to whether, in giving independent legal advice, practitioners would be overstepping their role by giving financial rather than legal advice.⁵⁹ Whilst the fear of client action against solicitors did not materialise in reality, the strict compliance test that emanated from the ruling in *Black & Black* did nothing to alleviate the doubts of practitioners. It was clear that the operation of the clauses requiring independent legal advice were strictly adhered to in Australia.

The wording of the original section 90G FLA 1975 in relation to independent legal advice came under close scrutiny from, and was strictly adhered to by, the judiciary. The inception of the Federal Justice System Amendment (Efficiency Measures) Act (No1) 2009 amended section 90G(1) FLA 1975 in relation to independent legal advice so that it now reads:

(b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages,

⁵⁴ FLA 1975 (Aus), s90G(1)(b)(i).

⁵⁵ *ibid* s90G(1)(b)(ii).

⁵⁶ *ibid* s90G(1)(b).

⁵⁷ Patrick Parkinson, ‘Setting Aside Financial Agreements’ (2001) 15 Australian Journal of Family Law 26, 28.

⁵⁸ Clark, ‘Should Greater Prominence’ (n 11) 402.

⁵⁹ Belinda Fehlberg & Bruce Smyth, ‘Binding Pre-Nuptial Agreements in Australia: the First Year’ (2002) Int JLPF 127, 136.

at the time that the advice was provided, to that party of making the agreement;
and

(c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and

(ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party;

These amendments were specifically targeted at dealing with the problems brought about by the strict compliance test. The biggest change that this amendment brought about was the removal of the requirement for the statement of independent legal advice to be annexed as part of the agreement. That said, it is still recommended practice to include such a statement within the body of the prenuptial agreement to avoid the possibility of future litigation.⁶⁰ It is evident that the new requirements are not as stringent and do not provide such a heavy burden upon legal practitioners as previously. In fact, the court now has the option of holding an agreement to be binding even if the required legal advice is not given; provided that it feels that it would be ‘unjust and inequitable’⁶¹ to not uphold the agreement.⁶² This is ‘strikingly similar’⁶³ to the approach that the UK courts took in *Radmacher*. It certainly suggests a greater emphasis being placed upon the autonomy of parties to enter into agreements, although a large amount of protection is still afforded to those who are in need of it.

Unlike with the previously discussed issue of the mandatory pre-marriage time limit for signing an agreement, independent legal advice cannot be dismissed as being adequately dealt with by the discretion of the judges. It seems clear that legislative guidance should be

⁶⁰ Paul Doolan, ‘Financial Agreements – Everything You Always Wanted to Know, but Were Too Afraid to Ask’ <www.familylawyers.com.au/financial-agreements.doc> accessed 19 April 2012, 29.

⁶¹ FLA 1975 (Aus), s90G(1A)(c).

⁶² Scherpe, (n 8) 517.

⁶³ *ibid.*

given on independent legal advice in order to ‘strike a balance between (state) control...and allowing for private ordering and negotiation’.⁶⁴

Indeed, both the Court of Appeal and the Supreme Court alluded to as much in their respective *Radmacher* rulings. The Court of Appeal foresaw an absolute requirement of independent legal advice ‘in every case, irrespective of...surrounding circumstances’⁶⁵ if a prenuptial agreement is ever to be presumptively dispositive, whilst the Supreme Court asserted that ‘black and white rules’⁶⁶ are necessary if statute is to be forthcoming.

The lexical choices, by the Supreme Court particularly, suggest that once statutory provisions are introduced the matter should be clear cut; an agreement either fulfils the requirement of independent legal advice, or it falls short of doing so, in which case it can be set aside. Should this approach be enacted, judges would presumably lose the discretion that they currently have under section 25 MCA 1973.

Any statutory provision regulating prenuptial agreements would need to contain a set of requirements that must be fulfilled. The Government will have to determine whether it wishes to take a strict formulaic checklist approach, or whether it will insert a clause that leaves the discretion in the hands of the court to continue to take a more flexible approach, similar to the one that the Court of Appeal and Supreme Court chose to take in *Radmacher*.

The Australian Government has had the opportunity to introduce a set of amendments, allow them to develop and be contested in the family courts, and then refine the provisions in order to deal with the issues and conflicts that have arisen. As has been outlined, the Australians started off by taking the strict approach to the requirement of independent legal advice, but have since relaxed their stance.

This can provide a real lesson to the legislator in this country. Independent legal advice is a vital tool in protecting the interests of those entering into prenuptial agreements, particularly

⁶⁴ Brigitte Clark, ‘Prenuptial Contracts in English Law: Capricious Outcomes or Legislative Clarification?’ (2010) 32:3 *Journal of Social Welfare and Family Law* 237, 245.

⁶⁵ *Radmacher (formerly Granatino)* (n 41) [140].

⁶⁶ *Radmacher* (n 7) [69].

the more vulnerable spouses. It is ‘perhaps unsurprising’⁶⁷ that the Law Commission has recommended that ‘one of the pre-requisites for entering into a qualifying nuptial agreement should be that the parties have taken legal advice’.⁶⁸

Through the hybrid lens discussed in Chapter 1, it becomes much easier to accept that there is a middle ground, that on the one hand provides for mandatory independent legal advice, whilst on the other continues to allow judges to exercise their discretion. This would not be so readily acceptable if continuing desire to categorise the prenuptial agreement as wholly a ‘family law’ or a ‘contract law’ instrument existed. The tension between autonomy and protection can be relaxed here by acknowledging that prenuptial agreements require a bespoke approach of their own. Black and white rules governing independent legal advice are not necessary. Instead, individuals can be afforded autonomy to conclude agreements, but with a strong and clearly visible protective measure in place that makes it necessary to receive independent legal advice, save for in circumstances where a judge feels compelled to uphold an agreement even without the presence of such advice.

It is also important that careful consideration is given to exactly what will be mandatory for couples. The level of independent legal advice that should be required is currently undetermined.⁶⁹ The Law Commission has pointed out that it is not the norm for the law to insist on individuals taking legal advice.⁷⁰ It is also the case that there may be resistance to any clause ‘because there is a natural reluctance to pay money to lawyers’,⁷¹ particularly in the current financial climate. For this reason, any requirement for independent legal advice must clearly state exactly what is required of the parties in order to satisfy the criteria.

Initially, in Australia, there was technically only a requirement that there was a certificate stating that the legal advice had been received, not that it had actually been given.⁷² Now though section 90G(1)(b) FLA 1975 offers guidance on the advice to be given, with a

⁶⁷ Edward Heaton & Caitlin Jenkins, ‘Marital Property Agreements – An Overview of the Law Commission Consultation Paper’ (2011) PCB 143, 144.

⁶⁸ *Marital Property Agreements* (n 1) [6.88].

⁶⁹ Emma Hitchings ‘From Pre-Nups to Post-Nups: Dealing with Marital Property Agreements’ [2009] *Fam Law* 1056, 1063.

⁷⁰ *Marital Property Agreements* (n 1) [6.86].

⁷¹ *ibid* [6.82].

⁷² Parkinson, (n 57) 28.

requirement that both the ‘advantages and disadvantages’ of entering into the agreement be communicated. The Law Commission promulgated a similar approach by suggesting that the advice ‘cannot be formalistic’ and ‘must involve an element of evaluation’.⁷³ More needs to be required of practitioners than to simply making their clients aware of the law. They must offer clients advice on the effects of entering into a prenuptial agreement in their circumstances. The Government should give serious consideration to adopting the wording of section 90G(1)(b) FLA 1975 or developing a similar provision, in order to facilitate the appropriate balance between autonomy and protection.

In terms of the liability of practitioners, Patrick Parkinson, one of the leading experts in Australia, has suggested that ‘it is enough that advice was given’⁷⁴ to the clients. The Law Commission concurred by expressing a reluctance to ‘open the door to disputes as to whether...advice has in fact been taken.’⁷⁵ Statute can only ensure that the parties have received independent legal advice. ‘Clients will not always listen’⁷⁶ to the advice of their solicitors and if the law required them to do so, this would be a severe restriction upon individual autonomy. Therefore, if a prenuptial agreement stated that both parties had received independent legal advice, the courts would have to take this at face value, rather than undertaking a substantive investigation into the advice given.

However, as will be argued later within this chapter, in order to continue to provide appropriate protection to individuals, independent legal advice must continue to function alongside the courts’ methods of substantively assessing fairness.⁷⁷ The limits of legal advice in ensuring functional autonomy are such that a prenuptial agreement should never be enforced purely because both parties have received independent legal advice. Such a move would potentially jeopardise the protective function of the law.

Taking all of the above into account, this thesis leans towards the position reached at common law level in England and Wales and suggests that within the body of any future statutory regulation of prenuptial agreements a clause relating to independent legal advice

⁷³ *Marital Property Agreements* (n 1) [6.92].

⁷⁴ Parkinson, (n 57) 28.

⁷⁵ *Marital Property Agreements* (n 1) [6.88].

⁷⁶ Thompson, (n 41) 330.

⁷⁷ *ibid.*

would be a worthwhile inclusion. The Law Commission itself has made clear that it strongly advocates the inclusion of mandatory independent legal advice in order for parties to be able to enter into qualifying nuptial agreements.⁷⁸

Legal advice that is both independent and competent may be an effective means of removing inequalities in bargaining power,⁷⁹ provided that there is still a substantive safety net in place that looks at the actual content of the agreement. The requirement for independent legal advice is in this sense only a threshold that couples must meet. It is extremely uncommon for the law to require individuals to take legal advice. In many cases, it is encouraged and it is often the prudent thing to do, but to make it mandatory is a fairly extreme step.⁸⁰ However, in this context, it is an element that the judiciary already looks for when determining the extent to which they will exercise their discretion under section 25 MCA 1973. Making independent legal advice mandatory will serve to continue to ensure that, as far as is possible to do so, prenuptial agreements are entered into autonomously, with a full-understanding of the legal implications and without one spouse being able to pressurise the other spouse into signing disadvantageous terms.

That said in order to continue to provide appropriate levels of protection to individuals, the presence of independent legal advice will not make a prenuptial agreement *de facto* binding. It would instead be the case that its absence would mean that an agreement is certain to be set aside.

Those charged with the task of reform will have to determine whether there can be any extenuating circumstances that will mean that the requirement for independent legal advice can be waived. The Law Commission has suggested that an exception be made in situations where it is just one party trying to protect an asset from the other. In such instances, only the party seeking protection will be required to have taken independent legal advice.⁸¹ This is logical, but no mention is made of instances where financial constraints have prevented couples from seeking independent legal advice. This thesis suggests that in order to continue

⁷⁸ *Marital Property Agreements* (n 1) [6.88].

⁷⁹ Thompson (n 41) 329.

⁸⁰ *Marital Property Agreements* (n 1) [6.81].

⁸¹ *ibid* [6.96].

to preserve the fine balance between autonomy and protection, the requirement for mandatory independent legal advice should not be easily departed from.

iii) Full and Frank Disclosure

The next issue to be considered is the extent to which the parties to a prenuptial agreement are required to disclose their assets to each other. The debate on this requirement is centred on two main issues, namely, ensuring that all parties fully understand the implications of agreement that they are entering into, thus making their decisions as truly autonomous as possible, and, furthermore, providing appropriate protection to individuals by safeguarding equal bargaining power between the parties.

This issue presents a ‘difficulty unique to nuptial agreements.’⁸² There is a significant degree of ‘uncertainty as to how full...disclosure needs to be’⁸³ in order for the appropriate balance between autonomy and protection to be struck. If it is accepted that there must be some disclosure of assets, it must be determined whether statute should demand that full and frank disclosure of all assets take place, or, alternatively, whether simply an awareness of the estimated value of the other spouse is enough to enable an autonomous decision to enter into an agreement to be upheld.

The Law Commission recommended in 1998 that an agreement be disregarded if one, or both parties failed to make full disclosure of assets and property prior to the agreement being made.⁸⁴ The requirement has since been addressed by the judiciary in a series of cases that have come before them. In *F v F*⁸⁵, Mr Justice Thorpe referred to ‘the duty of full and frank disclosure’⁸⁶ in the context of financial orders, noting that the court had the ‘power to ensure compliance’⁸⁷ with this duty. This suggested a stringent adherence to the requirement of full and frank disclosure. Contrastingly, in *K v K*, it was held that the lack of financial disclosure

⁸² Richard Todd, ‘The Inevitable Triumph of the Ante-Nuptial Contract’ [2006] Fam Law 539, 547.

⁸³ Meehan, ‘What Practitioners Need’ (n 51) 256.

⁸⁴ *Supporting Families* (n 2) [4.23].

⁸⁵ (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45 (F).

⁸⁶ *ibid* 70.

⁸⁷ *ibid*.

was not fatal to the agreement. This was because the husband had not ‘exploit[ed] his dominant financial position.’⁸⁸ There was some disclosure of assets by the husband in this instance, but the ‘decision not to press for values’⁸⁹ was the wife’s. The general awareness of the husband’s wealth was deemed to be sufficient protection in this instance.

In *Crossley v Crossley*⁹⁰ an ‘important plank’⁹¹ of the argument submitted by the wife for setting aside the prenuptial agreement was the fact that full disclosure had not been made. However, once more the agreement was upheld despite this factor. Therefore, prior to the *Radmacher* dispute, there was uncertainty as to the level of financial disclosure that the courts required parties to make, although the courts were hinting that they would not use a lack of full and frank disclosure to strike down an autonomously reached agreement lightly.

Katrin Radmacher made no financial disclosure to Nicholas Granatino. Mrs Justice Baron felt that this was a ‘deliberate’ ploy ‘to keep her asset base secret’.⁹² It was accepted that the absence of disclosure would not have effected agreement under German law, however, under English law it was relevant; ‘without full knowledge of the assets it is impossible...to make a fully informed decision’.⁹³ The lack of full disclosure was one of the reasons why the prenuptial agreement was not upheld at first instance.⁹⁴ The decision appeared to indicate a return to the position that full and frank disclosure was absolutely necessary in order to protect individuals. Accordingly, practitioners were advised to give ‘very careful thought’⁹⁵ to the possibility of a successful challenge to an agreement because of a lack of disclosure.

As with independent legal advice, the Court of Appeal and Supreme Court went on to reveal further complexities. Lord Justice Thorpe asserted that, rather than just a mere lack of disclosure, a ‘causative element’ was required;⁹⁶ it was necessary for the court to find that

⁸⁸ *K v K* (n 31) [1].

⁸⁹ *ibid* [131].

⁹⁰ [2007] EWCA Civ 1491.

⁹¹ *ibid* [7].

⁹² *NG v KR* (n 34) [38].

⁹³ *ibid*.

⁹⁴ *ibid* [137].

⁹⁵ Simon Johnson, ‘In Practice – Prenuptial Agreements after *Radmacher v Granatino*’ [2009] Fam Law 718, 718, 722.

⁹⁶ *Radmacher (formerly Granatino)* (n 42) [141].

had ‘accurate mutual disclosure been made’⁹⁷ there was a chance the agreement would not have been entered into. As a result, Granatino’s awareness of his ex-wife’s wealth, combined with his lack of enquiry as to the actual figures, meant that the lack of disclosure was not fatal to the agreement.⁹⁸

The majority in the Supreme Court concurred on this point. The most important factor was held to be that the parties had ‘all the information...material’⁹⁹ to their decision. If a party was ‘indifferent to (the) detailed particulars of the other party’s assets’,¹⁰⁰ as Granatino had been, then the agreement should not be afforded reduced weight because of a lack of disclosure. This was followed in *Z v Z*,¹⁰¹ where it was held that there was ‘no need for disclosure as both parties’¹⁰² were aware of each other’s financial arrangements. Clearly, the courts favoured upholding autonomy where circumstances dictated that they were able to. This is how the appellate courts appeared to have treated Granatino, with the insinuation that he was neither vulnerable, nor in need of their protection.

The law in England and Wales has reached a position whereby full and frank disclosure is ‘not necessarily mandatory’, but should be ‘recommended very strongly’.¹⁰³ The lack of disclosure will ‘not be fatal’¹⁰⁴ in circumstances where the challenging party is deemed to have had an understanding of the implications of entering into a prenuptial agreement.¹⁰⁵ This suggests that a ‘millionaire’s defence can be deployed’¹⁰⁶ by any wealthy party seeking to have their autonomy upheld, by simply pointing to the fact that the less well-off spouse knew of their approximate wealth and therefore it did not matter that the exact details were not exposed.

Recent decisions display judicial willingness to take a common sense approach when dealing with full and frank disclosure. When it comes to law reform the choice is similar to the one

⁹⁷ *ibid.*

⁹⁸ *ibid.*

⁹⁹ *Radmacher* (n 7) [69].

¹⁰⁰ *ibid.*

¹⁰¹ [2011] EWHC 2878 (Fam).

¹⁰² *ibid* [46].

¹⁰³ Scherpe, (n 8) 518.

¹⁰⁴ David Hodson, ‘English Marital Agreements for International Families after *Radmacher*’ [2011] IFL 31, 32.

¹⁰⁵ *ibid.*

¹⁰⁶ Andrew Meehan, ‘Analyse this: *Radmacher v Granatino*’ [2009] Fam Law 816, 825.

discussed with regard to independent legal advice. The question is whether the Government should continue to allow the court the discretion that it is currently afforded, or whether to make full and frank disclosure mandatory?

In Australia, Section 90K(1)(a) FLA 1975 enables a court to set aside a financial agreement on the grounds of fraud. Non-disclosure of a material matter is included under this provision. Whilst there is no express reference made to financial disclosure in the requirements for a financial agreement, 'it is implicit...that the parties make full and frank disclosure'¹⁰⁷ of their property and assets to each other. This is a similar position to that to which the common law has led in England and Wales.

The idea of full and frank disclosure in financial cases is not a new one in Australia. The case of *Weir & Weir*¹⁰⁸ is often referred to when this topic is deliberated. Here it was held that if 'deliberate non-disclosure'¹⁰⁹ could be established, then the 'Court should not be unduly cautious'¹¹⁰ about finding in favour of the challenger. It was then reaffirmed in *Kannis & Kannis*¹¹¹ that 'the duty to disclose is absolute'.¹¹² Other cases where the courts of Australia have determined that full and frank disclosure is a requirement in this context include *Suiker & Suiker*,¹¹³ *Morrison & Morrison*¹¹⁴ and *Malpass v Mayson*.¹¹⁵ In fact, in *Suiker* the Full Court went as far as saying that the requirement of full and frank disclosure is necessary to fulfil the 'fundamental aims'¹¹⁶ of the financial provisions of section 79 FLA 1975. It is unquestionable that full and frank disclosure is therefore utilised in Australia in order to provide the appropriate level of protection to spouses.

This notion was reiterated by the implementation of the Family Law Rules 2004 (Aus) that notably require a party to a financial case to make full and frank disclosure to the other

¹⁰⁷ Geoff Wilson, 'Intolerable Cruelty Downunder' (2006)1 IAML
<http://www.iaml.org/iaml_law_journal/back_issues/volume_1/intolerable_cruelty_downunder/index.html>
accessed 17 February 2012, 4.

¹⁰⁸ [1993] FLC 92-338.

¹⁰⁹ *ibid* 79-593.

¹¹⁰ *ibid*.

¹¹¹ [2002] FamCA 1150.

¹¹² *ibid* 1151.

¹¹³ (1993) FLC 92-463.

¹¹⁴ (1995) FLC 92-573.

¹¹⁵ (2000) FLX 93-061.

¹¹⁶ *Suiker* (n 113) [84 – 471].

party.¹¹⁷ This includes the party's earnings,¹¹⁸ interest in property,¹¹⁹ income earned by a legal entity fully or partially controlled by a party¹²⁰ and the party's other financial resources.¹²¹ Additionally, both of the parties and any practitioners involved had a responsibility to promote compliance with the duty of disclosure.¹²²

There have been occasions where non-disclosure of assets has been sufficient for a financial agreement to be set aside. The case of *Blackmore & Webber*¹²³ is one such example. Here the agreement was set aside pursuant to the fraud provisions of section 90K(1)(a) FLA 1975. This was despite the fact that the judge acknowledged that the 'exclusion of certain assets and liabilities'¹²⁴ from the agreement had been the decision of the solicitor and not the husband. This followed on from Federal Magistrate Altobelli holding in *Stoddard & Stoddard*¹²⁵ that, for the purposes of Part VIIIA FLA 1975, 'fraud may be constituted by omission'.¹²⁶ There is therefore clear precedent for courts setting aside agreements because of a lack of full and frank disclosure indirectly under the fraud heading, in order to provide appropriate protection for individuals.

The law here appears to have reached a crossroads. It could be concluded that 'it is not satisfactory to pay lip-service to the duty to make disclosure'¹²⁷ in Australia when dealing with financial arrangements. However, it has been reiterated that the FLA 1975 does not make it mandatory for an annex detailing the financial circumstances of each party to be attached to a prenuptial agreement.¹²⁸ In this respect, it is suggestible that the law in Australia, like in England and Wales, has not quite managed to achieve clarity when it comes to requirements for full and frank disclosure.

¹¹⁷ Regulation 13.04(1) FLR 2004.

¹¹⁸ Regulation 13.04(1)(a) FLR 2004.

¹¹⁹ Regulation 13.04(1)(b) FLR 2004.

¹²⁰ Regulation 13.04(1)(d) FLR 2004.

¹²¹ Regulation 13.04(1)(e) FLR 2004.

¹²² Regulation 1.08(1) & (2) FLR 2004.

¹²³ [2009] FMCAfam 154.

¹²⁴ *ibid* [35].

¹²⁵ [2007] FMCAfam 735.

¹²⁶ *ibid* [44].

¹²⁷ Peter Cook, 'Full and Frank Disclosure – Whose Obligation' Edmund Barton Chambers' (10 March 2010) <http://www.ebc44.com/articles/Cook_10_March_2010.pdf> accessed 8 March 2012.

¹²⁸ Doolan, (n 60) 34.

That said, it is explicit, because of the presence of section 90K(1)(a) FLA 1975, that the court holds the discretion to set aside agreements where there is a lack of material full financial disclosure. A logical conclusion from this would be that the court holds an implicit discretion to ‘find that a particular non-disclosure was immaterial’.¹²⁹

The thesis suggests that the issue of full and frank financial disclosure cannot be dealt with in an absolutist manner. Through full disclosure the parties can avoid having their agreement set aside on a mere technicality, however, it would arguably be too great an intrusion of privacy to make full and frank disclosure an absolute requirement. Conversely, it would also be dangerous to completely disregard it because of its function in providing protection to individuals. A position must be established that ensures that any future statutory legislation has optimum effect and carefully balances the two issues. Both parties will not have the same objectives and a lack of disclosure does not always mean that one party has taken advantage of the other. Therefore a hybrid position on full and frank disclosure is permissible, and indeed necessary, in order to facilitate the balance between autonomy and protection.

Making financial disclosure can be ‘time-consuming, costly and give rise to major disputes’¹³⁰ between the parties. In the current financial climate, it seems illogical to insist that couples go through an expensive legal process to disclose assets when they are both content with what they are signing. Indeed, the courts in both jurisdictions have already demonstrated that they use common sense, working on the basis that disclosure is a factor in deciding the weight to be afforded to an agreement, but it isn’t in all cases decisive.¹³¹

There are still those who argue that full and frank financial disclosure is necessary ‘in order to ensure transparency’,¹³² however, it is respectfully suggested that those who remain generally more suspicious of prenuptial agreements hold this view. In particular, they are likely to be worried about the welfare of the economically weaker spouses who are traditionally women. It is of course vital that these interests are strongly protected, but there are other mediums through which this can be achieved. These include the requirement for

¹²⁹ *Marital Property Agreements* (n 1) [6.61].

¹³⁰ David Hodson, ‘Making, Drafting and Breaking Consent Orders’ (January 2007) <http://www.davidhodson.com/assets/documents/consent_orders.pdf> accessed 26 January 2012, 5.

¹³¹ Clark, ‘Capricious Outcomes’ (n 64) 242.

¹³² Pabani, (n 32) 1007.

independent legal advice that has already been discussed, as well as the fairness and needs based safeguards that will be discussed below.

That is not to dismiss the requirement for financial disclosure all together. A study of practitioners undertaken by Emma Hitchings has found that there is a range of approaches that practitioners take towards disclosure.¹³³ This range, however, did not come about as a result of a lack of understanding as to the meaning of full and frank disclosure, but because the practitioners took into account what was appropriate having regard to all the circumstances.¹³⁴ This common sense approach is precisely what is required here and in this respect the autonomous decisions of the parties should be respected where it is possible to do so, without exploiting vulnerable parties.

The appellate courts in *Radmacher* echoed the sentiment that it would be ridiculous for a prenuptial agreement between a multi-millionaire and their spouse, entered into with full understanding of its implications, to be set aside because a detailed breakdown of all the accounts, properties and investments was not given by one spouse to the other. Similarly, the increased legal costs of detailing their exact financial arrangements may well discourage those who are less affluent from entering into an agreement, against a backdrop of mandatory independent legal advice.

Disclosure will be necessary to some extent, but statute could prevent asset hiding by introducing a clause that renders an agreement void on the grounds of fraud where there is a material lack of disclosure. This would avoid requiring a detailed breakdown of all assets within the body of autonomously reached agreements, but would continue to provide protection in a similar manner to that which is found in Australia in section 90K(1)(a) FLA 1975.

The Law Commission has concurred by suggesting that a prenuptial agreement should not be enforceable unless there is material full and frank disclosure.¹³⁵ The operative word here is

¹³³ See, eg, Emma Hitchings, 'From Pre-Nups to Post Nups' (n 69).

¹³⁴ *ibid* 1064.

¹³⁵ *Marital Property Agreements* (n 1) [6.74].

material. ‘In the majority of cases...general disclosures’¹³⁶ will be important, but it will not be vital in every case. This is the position that the common law in this country has reached over the past decade and it is suggested by this thesis that any fresh statutory legislation entrenches this stance.

It is useful at this point to note that there is already a statute already in place that provides some protection for spouses whose partner may have attempted to exclude assets from a financial relief order. Section 37 was inserted into the MCA 1973 as a measure to stop one party from moving or hiding their assets specifically to prevent them forming part of an order for financial relief. The effect of the provision is two-fold. Firstly, it is preventative. It allows a Court to appropriately protect spouses by stopping the stronger spouse disposing assets to their detriment, provided that this is only being done ‘with the intention of defeating a claim for financial relief’.¹³⁷ Secondly, it can act as a restorative measure by undoing any disposition of assets that has already taken place.¹³⁸ If it makes such an order, the Court is entitled to ‘give such consequential directions as it thinks fit.’¹³⁹

Despite prima facie being a strong protective measure, it would appear that an order under section 37 MCA 1973 is not one in which a court will readily engage. For example, in *Field v Field*¹⁴⁰ the wife’s application for an injunction under section 37(2) MCA 1973 was rejected because it could not be established that the husband was about to dispose of the pension fund from which she was trying to claim the payment of a lump sum order. Mr Justice Wilson stated that the ‘carte blanche’ power to make an order ‘conferred upon the court by the section is illusory’.¹⁴¹ A heavy burden therefore appears to be placed upon the party seeking the injunction to show that it was the intention of the other party to dispose of the asset in question. The protective qualities of this provision are therefore questionable.

However, there is clearly already some statutory protection in place that spouses can attempt to use if they fear that they are not going to get an award that reflects the reality of their

¹³⁶ Hodson, ‘English Marital Agreements’ (n 104) 32.

¹³⁷ MCA 1973 (UK), s37(2)(a).

¹³⁸ *ibid* s37(2)(a) & (b).

¹³⁹ *ibid* s37(3).

¹⁴⁰ [2002] EWHC 2762 (Fam).

¹⁴¹ *ibid* [16].

financial situation. Perhaps in some instances, an order under this section could be useful in a prenuptial agreement context. For example, if the agreement provides one spouse with either specific assets that their partner has attempted, or is attempting, to relinquish ownership of before the terms of the agreement are enforced, then an order preventing such a disposition will be helpful. Additionally, if a prenuptial agreement ascribes a pre-determined percentage of the total assets to one of the spouses, then such an order could be used to prevent or undo any attempt to reduce this pool.

The issue of self-help remedies to non-disclosure in a more general financial relief context arose in the 2010 Court of Appeal decision in *Imerman v Imerman*.¹⁴² In this dispute Mrs Imerman's main point of contention was that her husband should not be able to 'escape his true liability by concealing his assets'.¹⁴³ Further, she suggested that 'feared dishonesty justifies self-help, even where that self-help is unlawful'.¹⁴⁴ In this instance, the unlawful self-help amounted to her brothers, who shared an office with Mr Imerman, obtaining files belonging to Mr Imerman from a joint work server, which they then passed on to Mrs Imerman and her lawyers.

It should be noted that both parties to financial relief proceedings are already required to 'make full and frank disclosure of all material facts to the other party and the court'.¹⁴⁵ This disclosure is however, not required until Form E, which is part of the ancillary relief claim, has actually been lodged.¹⁴⁶ This does not aid those who sign a prenuptial agreement because of course this will be drawn up long before Form E becomes a consideration.

A number of decisions handed down on cases concerning self-help have referred to what are commonly known as the *Hildebrand*¹⁴⁷ rules. This is so despite the fact that the actual case appears to give 'no authority for the so-called...rules'¹⁴⁸ that have subsequently evolved from

¹⁴² *Tchenguiz v Imerman; Imerman v Imerman* [2010] EWCA Civ 908.

¹⁴³ *ibid* [6].

¹⁴⁴ *ibid*.

¹⁴⁵ *Livesey (formerly Jenkins) v Jenkins* [1984] UKHL 3, [1985] AC 424, 438.

¹⁴⁶ *Imerman*, (n 142) [33].

¹⁴⁷ See, eg, *Hildebrand v Hildebrand* [1992] 1 FLR 244.

¹⁴⁸ *Imerman*, (n 142) [41].

it. The *Hildebrand* rules were summarised by Lord Justice Ward in *White v Withers LLP and Dearle*¹⁴⁹ and this passage is worthy of inclusion in full here:

The family courts will not penalise the taking, copying and immediate return of documents but do not sanction the use of any force to obtain the documents, or the interception of documents or the retention of documents nor I would add, though it is not a feature of this case, the removal of any hard disk recording documents electronically. The evidence contained in the documents, even those wrongfully taken will be admitted in evidence because there is an overarching duty on the parties to give full and frank disclosure.¹⁵⁰

A number of decisions can be seen to portray this definition as accurate. Mr Justice Wilson in *T v T*¹⁵¹ held it ‘reasonable’ that the wife searched the dustbin and copy documents that were in the house, but ‘unacceptable’ and ‘reprehensible’ for her to use force, keep original documents and intercept mail.¹⁵² However, in *Imerman* itself the *Hildebrand* rules ‘as we knew them’ were ‘washed away’.¹⁵³ Lord Neuberger placed emphasis upon the fact that the rules are ‘authority only as to the time when copies obtained unlawfully or clandestinely should be disclosed to a spouse.’¹⁵⁴ In other words, it could not be used to justify the procurement of documents prior to the inception of financial relief proceedings. It seems unlikely, therefore, that spouses who are trying to ascertain the full extent of their partners’ financial assets prior to entering into a prenuptial agreement could rely upon these rules to justify any investigations they may decide to undertake.

As a further deterrent, claims for unlawful actions against those procuring such information have also been considered. In addition to potentially tortious and criminal liability, the law of confidence is also a possible source of action that must be taken into account. This legal doctrine is closely tied to the laws on privacy that have developed following the passing of

¹⁴⁹ [2009] EWCA Civ 1122.

¹⁵⁰ *ibid* [37].

¹⁵¹ (*Interception of Documents*) [1994] 2 FLR 1083 (F).

¹⁵² *ibid* 1085.

¹⁵³ Davina Hay, ‘Keep It to Yourself: The Unfortunate Moral of the *Imerman* Tale’ [2010] Fam Law 1207, 1209.

¹⁵⁴ *Imerman* (n 142) [42].

the Human Rights Act 1998 (hereafter the 'HRA'), which incorporated elements the European Convention on Human Rights 1952 (hereafter 'the Convention') into domestic law.

Lord Neuberger certainly showed that he believed the two to be synonymous by stating that 'to follow that intentionally obtaining such information, secretly and knowing that the claimant reasonably expects it to be private, is itself a breach of confidence',¹⁵⁵ although he did go on to also point out that the misuse of private information was not absolutely required in order for there to be a breach of confidence found.¹⁵⁶ The submission by the wife that the husband could not hold a right of confidence against her over information that, if they were not married, he would have enjoyed, was dismissed as being 'simply unsustainable'.¹⁵⁷ It was held to be 'implicit' from the wording of article 8 of the Convention that spouse's private life, separate from their family life, was to be protected.¹⁵⁸

Ultimately, 'once it is determined that the document is properly to be regarded as confidential to one spouse but not to the other, the relationship has no further relevance in relation to the remedy for breach of that confidentiality.'¹⁵⁹ Given this is the situation when financial relief proceedings are already underway, it would be impossible for couples seeking full and frank disclosure to circumvent the effects of section 8 of the Convention to ensure that such disclosure was achieved.

In fact, the possibility that, should any new statute introduce a provision requiring full and frank disclosure, there may be claims brought against the state for interfering with an individual's private life must also be considered. It is certainly plausible that an individual could seek a declaration of incompatibility under section 3(1) HRA 1998 in relation to any clause forcing them to make full and frank disclosure.

The general consensus is that, as a result of the *Imerman* decision, the approach to ancillary relief cases has switched from one where the parties were required to disclose their assets, to

¹⁵⁵ *ibid* [68].

¹⁵⁶ *ibid* [71].

¹⁵⁷ *ibid* [82].

¹⁵⁸ *ibid* [84].

¹⁵⁹ *ibid* [89].

one where one spouse is able to withhold some information from the other.¹⁶⁰ The *Hildebrand* rules have been reduced to little more than an ‘urban myth’.¹⁶¹ This has ‘caused shock waves, panic and confusion’¹⁶² amongst practitioners, who are now uncertain as to exactly how they should be advising their clients when it comes to obtaining documents in situations where full and frank disclosure has not been made. Whilst some have argued that the Court of Appeal essentially used a ‘sledgehammer to crack a nut’,¹⁶³ it is unlikely that, in the prenuptial agreement context, the more vulnerable spouse will be able to utilise these rules to ensure full and frank disclosure is made.

It is possible to suggest that the statutory provisions dealing with full and frank disclosure in Australia have only served to move the law to an analogous position to that which has evolved out of the common law in England and Wales. The argument set out above suggests that the requirement of full and frank disclosure, whilst being important, is perhaps not as vital as ensuring that each party to an agreement has received independent legal advice.

Historically, the courts have taken a tough line on those who deliberately try to conceal their assets from a financial relief case. Lord Justice Ward in *Aragchinchhi v Aragchinchhi*¹⁶⁴ held that where one spouse had been untruthful about the full extent of his means, ‘it is open to the court to find that beneath the false presentations are undisclosed assets and to make an order on that basis’.¹⁶⁵ Lord Justice Wilson then made the point in *Mahon v Mahon*¹⁶⁶ that, because of how adept the family courts have become at recognising all kinds of innovative methods of deception, ‘the strategy, designed dishonestly to reduce...financial exposure to the other party, usually instead leads to an enlargement of it.’¹⁶⁷ Protection is therefore clearly at the forefront of the minds of the judiciary when determining this issue.

There is no reason to believe the courts will not continue to take such a tough line on failure to disclose when it is asked to determine the validity of a prenuptial agreement. In fact, the

¹⁶⁰ Andrew Meehan, ‘*Imerman*: Cards off the Table?’ [2010] Fam Law 944, 953.

¹⁶¹ Leonora Onaran, ‘*Hildebrand* Documents: The Warp and Weft of Ancillary Relief Litigation’ [2010] Fam Law 1303, 1303.

¹⁶² Meehan, ‘Cards Off the Table’ (n 160) 945.

¹⁶³ Onaran, (n 161) 1304.

¹⁶⁴ [1997] EWCA Civ 1091.

¹⁶⁵ *ibid* 1095.

¹⁶⁶ [2008] EWCA Civ 901.

¹⁶⁷ *ibid* [6].

most likely scenario is that should such a dispute arise with the law as it stands, then the court would not look favourably on such a deliberate deceit. Subsequently, this thesis suggests that any future statutory proposal governing prenuptial agreements should not contain an absolute requirement of full and frank disclosure. Instead, it is preferable to continue leave to the discretion with the judiciary to determine, on a case-by-case basis, the level of disclosure it deems necessary.

If full and frank disclosure is to be found anywhere within the new statute, then, as is the case in Australia, it should be that a material lack of disclosure will potentially be a way of setting an agreement aside at the point of exit, rather than being one of the preliminary entry requirements that places a check upon the parties' ability to enter autonomous agreements. This approach would leave parties continuing to face a degree of uncertainty, however, this thesis suggests that this is in fact a positive, as it will place responsibility upon the parties to put significant effort into carefully wording their agreements.

iv) Fairness

Attention must turn to how the courts are to continue to provide appropriate levels of protection for individuals by monitoring the substantive fairness of prenuptial agreements in the future. This issue is one that judges have constantly had to grapple with when determining ancillary relief claims. Given the relational nature of marriage, it is unsurprising that the courts have always sought to try and produce fair outcomes between the parties, taking into account the subjectivities of their relationship. The issue to be determined is the extent to which couples should be able to autonomously insert binding contractual terms that make awards that would not be considered a fair split of assets.

Within the fairness heading, the area with the greatest resonance to the debate is financial need. As outlined in Chapter 2, the current method of ensuring fairness in an ancillary relief context is drawn from the existence of section 25 MCA 1973, the landmark House of Lords ruling in *White v White*,¹⁶⁸ which introduced the 'yardstick of equality',¹⁶⁹ and the three

¹⁶⁸ [2000] UKHL 54.

strands of ‘need’, ‘compensation’ and ‘sharing’. If statutory prenuptial agreements are introduced then couples will explicitly be able to contract out of the sharing principle. The issue to be addressed within this section will be the extent to which the courts should be able to continue to use its protective function to ensure that financial needs are met. If statutory prenuptial agreements are introduced, this will be the vehicle by which courts can ultimately ensure that the appropriate balance is struck between the autonomy and protective interests of the parties.

In England and Wales, section 25 MCA 1973 explicitly instructs judges to take financial need into consideration.¹⁷⁰ Additionally, *Supporting Families* recommended that judges enforce fairness by ensuring that the needs of each party are met.¹⁷¹ This is one certain way in which the interests of the vulnerable can be protected. It has been suggested that the majority of divorces are ‘factually...rather than legally complex’.¹⁷² More often than not, there is simply not enough capital to allow both parties to buy new houses. In such instances, the focus must be on financial need.¹⁷³ However, as was outlined in Chapter 2, that is not to say that need has been restricted to merely ensuring that parties are able to keep themselves above the breadline. In *F v F*, the court held that in determining the reasonable needs of the wife, it must not ‘avoid’ applying ‘scales that would seem generous to ordinary people’.¹⁷⁴ The standard of living that the family had previously enjoyed was to be used as ‘the yardstick against which the wife’s needs must be measured’.¹⁷⁵ In enacting fresh statutory legislation, Parliament will have to determine whether it will be possible to autonomously agree to a lower standard of ‘need’ being met, or whether the court will still be able to make more generous awards despite the existence of a prenuptial agreement.

As with independent legal advice and full and frank disclosure, financial ‘need’ was discussed in detail at all three levels of the *Radmacher* dispute. Granatino’s legal counsel highlighted that the prenuptial agreement made no financial provision for either of them in

¹⁶⁹ *ibid* [25].

¹⁷⁰ MCA 1973, s25(2)(b)

¹⁷¹ *Supporting Families* (n 2) 38.

¹⁷² Emma Hitchings, ‘Everyday Cases in the Post-White Era’ (2008) 38 *Family Law* 873, 874.

¹⁷³ *ibid*.

¹⁷⁴ *F v F* (n 85) 50.

¹⁷⁵ *ibid* 63.

the event of divorce.¹⁷⁶ He contended that the agreement should be set aside because it did not make contingencies for the parties if they were left in a situation of ‘need’ and therefore left him potentially unprotected.

Mrs Justice Baron concurred with this line of argument. Resultantly, she undertook an evaluation of the various factors that could affect the needs-based order in this instance. Although Granatino had made the choice to leave his career in the city in order to pursue a doctorate, his needs were not significantly reduced by his ‘investment skills’.¹⁷⁷ It was understood that Granatino had made a novel discovery that would potentially be of interest to pharmaceutical companies, however, this was ‘incapable of quantification’¹⁷⁸ and so again could not be taken into consideration. Additionally, the judge felt compelled to ensure that her order would cover the debt that Granatino had incurred in bringing initial proceedings contesting residence of the couple’s children.¹⁷⁹

Attention then turned towards the lifestyle that the parties had led. Radmacher contested that Granatino had made a conscious choice not to exploit his earning capacity. She argued that he had chosen the life of an academic and, resultantly, he should be held to the autonomously entered prenuptial agreement and accustom himself to the lifestyle of an academic.¹⁸⁰ Mrs Justice Baron determined that Granatino’s current financial position was not a litigation tactic and felt that the wife would have continued funding their lifestyle had the couple remained married.¹⁸¹ This was deemed to be influential in the assessment of Granatino’s needs.¹⁸² Mrs Justice Baron also felt that Radmacher’s ‘supposed parsimony’¹⁸³ was a deliberate ploy with Granatino’s needs based claim in mind and therefore concluded that Granatino’s claim should be based upon ‘his needs as judged against the lifestyle that the parties lived’.¹⁸⁴ This followed the approach the court would have taken in a regular ancillary relief claim. Mrs Justice Baron clearly felt that the need to provide protection to Granatino’s needs was greater than the necessity to hold the parties to their autonomously entered agreement.

¹⁷⁶ *NG v KR* (n 34) [8].

¹⁷⁷ *ibid* [57].

¹⁷⁸ *ibid* [58].

¹⁷⁹ *ibid* [68].

¹⁸⁰ *ibid* [73].

¹⁸¹ *ibid*.

¹⁸² *ibid*.

¹⁸³ *ibid* [74].

¹⁸⁴ *ibid* [95].

The total award prescribed to Granatino ‘balanced the need to produce a result which takes into account the prenuptial agreement, the wife’s extensive fortune and the husband’s entitlement under English law’. The wife’s resources in this case were vast; however, the judge limited the husband’s claim to merely his needs.¹⁸⁵ Importantly, it should be recognised that ‘need’ in this instance was not limited to ensuring that Granatino did not become a financial burden on the state. Rather, the court was more concerned with ensuring that Granatino was able to continue to enable his daughters to live in the lifestyle that they had become accustomed to. This is primarily what led Mrs Justice Baron to a needs based award that most would regard as extremely generous given the existence of the prenuptial agreement.

The Court of Appeal had serious reservations about the level of award made and gave a much greater weighting to the autonomous decision of the parties to enter the prenuptial agreement. It articulated that it was ‘difficult’¹⁸⁶ to see how the judge had ‘applied any real discount’¹⁸⁷ to the husband’s claim because of the existence of the prenuptial agreement. Lord Justice Rix categorically stated that in the circumstances there was ‘no case for making’¹⁸⁸ a financial support order ‘for the whole of his lifetime’.¹⁸⁹ Instead, it was felt that the financial award that Radmacher was to receive should ‘merely reflect his continuing parent obligations...not his own long term needs.’¹⁹⁰ In any case, the award he would receive as a father would ‘cover his real need for the foreseeable future’.¹⁹¹ Subsequently, the £2.335m Duxbury award was sent back for recalculation. Additionally, the property that Granatino was to be allowed to purchase as a home for him and the girls would revert to Radmacher once the parenting years were over.

Furthermore, the Court of Appeal also touched on what the outcome of the case would have been if the agreement had genuinely prevented Granatino from bringing a claim in a situation where he was in real need. Lord Justice Wilson asserted that in any analysis of whether

¹⁸⁵ Murray, (n 38) 145.

¹⁸⁶ *Radmacher (formerly Granatino)* (n 42) [79].

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid* [81].

¹⁸⁹ *ibid.*

¹⁹⁰ Barton, (n 6) 70.

¹⁹¹ *Radmacher (formerly Granatino)* (n 42) [148].

preclusion of claims in circumstances of real need was ever fair, it should look at the factors that precipitated the prenuptial agreement,¹⁹² including whether the claimant was aware of the said preclusion.¹⁹³ This suggested that the Court of Appeal would potentially go as far as upholding an autonomously entered agreement even when the agreement prevented a claim where one party was in a situation of real ‘need’, provided that there was an awareness of the potential financial situation that they would be left in.

Lord Justice Wilson was somewhat wary of this stance. He qualified it by stating that in such an instance the ‘proportionate response’¹⁹⁴ would of course have been to allow a claim ‘to the extent necessary for the service of his real need’.¹⁹⁵ However, there was nothing in the facts of the current case that could have enabled Mrs Justice Baron to conclude that at any point in his life Granatino would find himself in a situation of real need.¹⁹⁶ Granatino was seemingly afforded a lesser degree of protection on this basis.

It is noticeable that the prefix ‘real’ has attached itself in front of the rationale of need. The Court of Appeal decision still left sufficient ambiguity surrounding the effect of an agreement that precluded a claim in circumstances of ‘real need’. The Supreme Court then discussed the issue and reiterated that ‘real need’ was the ‘irreducible minimum’,¹⁹⁷ which would be set at a lower threshold than ‘need’ would be set at in an ancillary relief claim.

The Supreme Court majority entered into a detailed dialogue on the three rationales of need, compensation and sharing. It was the first two strands, need and compensation, that would most often cause the court to determine it unfair to uphold a prenuptial agreement.¹⁹⁸ They felt that Lord Justice Wilson had ‘inferentially’¹⁹⁹ implied that the agreement would still have been upheld even if Granatino had been left in a situation of real need. The majority were not prepared to go that far.²⁰⁰ However, they concurred that in the circumstances the Court of

¹⁹² *ibid* [144].

¹⁹³ Meehan, ‘Analyse This’ (n 105) 816.

¹⁹⁴ *Radmacher (formerly Granatino)* (n 42) [148].

¹⁹⁵ *ibid*.

¹⁹⁶ *ibid*.

¹⁹⁷ Joanna Miles, ‘Marriage and Divorce in the Supreme Court and the Law Commission: for Love or Money’ (2011)74(3) *Mod L Rev* 430, 443.

¹⁹⁸ *Radmacher* (n 7) [81].

¹⁹⁹ *ibid* [118].

²⁰⁰ *ibid*.

Appeal had been correct in concluding that Granatino's needs were not a reason to render the prenuptial agreement invalid.²⁰¹ Again Granatino's high level of professional qualification, alongside the substantial relief that was awarded to him in his role as a homemaker, was cited as influencing factors within the judgment.²⁰² This strongly indicated that the courts were prepared to allow parties to autonomously contract for a lower settlement than they would be afforded through an ancillary relief claim, provided that their real needs were satisfied.

Baroness Hale's sole dissent was not in complete agreement with the majority judgment. She asserted that need had become 'shorthand for...mutual commitment'²⁰³ between spouses. This commitment is no longer lifelong, however, the couple's support for each other may 'generate a continued need for support'²⁰⁴ post-separation. In her eyes, the issue was whether this support should continue after the youngest daughter had grown up,²⁰⁵ or whether Granatino had no right to claim for his needs beyond those of looking after his daughters.

Baroness Hale distinguished the court's lack of power to make an order for an unmarried person from its express power to make awards to married parents.²⁰⁶ She felt that the law enables the court to 'look independently at the needs of the parent' where the couple are married. In not awarding Granatino any needs-based award beyond what he was given in his role as a homemaker, she felt that the Court of Appeal had treated the litigants 'as if they had never been married,'²⁰⁷ and that this was an error. She intimated that it was not fair to allow a prenuptial agreement to preclude the court from considering making any provision for the parents' future needs,²⁰⁸ displaying an obvious concern for the lack of protection that the majority's test seemed to provide.

As a result of the assortment of differing opinions offered by the judiciary at various levels, 'it is not entirely clear when the financial needs' of one party 'could mean that it would be

²⁰¹ *ibid* [120].

²⁰² *ibid* [119].

²⁰³ *ibid* [187].

²⁰⁴ *ibid* [188].

²⁰⁵ *ibid* [191].

²⁰⁶ *ibid*.

²⁰⁷ *ibid* [192].

²⁰⁸ *ibid* [193].

unfair'²⁰⁹ to uphold a prenuptial agreement. What is certain is that it is 'inappropriate...to give effect to an agreement...(that) casts' one party onto state benefits.²¹⁰ This is a common sense approach and it would be contrary to public policy to uphold an agreement that would place a burden upon the state. Additionally, this would leave vulnerable individuals with very little protection against spouses in a much stronger financial position, who in turn would be able to insist upon agreements that might be widely considered to be unfair.

Judges have been plagued by the lack of specific guidance that the courts have given as to how 'need', and indeed 'compensation' and 'sharing', are to be interpreted and applied.²¹¹ Jens Scherpe has suggested that the term real need sets a lower hurdle to be reached in this context, than the interpretation of need in a standard ancillary relief claim.²¹² This stance certainly justifies the conclusion reached by both the Court of Appeal and the majority in the Supreme Court. It is clear that a binding prenuptial agreement would enable a couple to opt out of the sharing principle. Further to this, it appears that although need cannot be totally disregarded, a couple can autonomously subscribe to conform to a lower standard of need than would be applied to a couple without a prenuptial agreement in place.

A two-tier approach to needs has been developed.²¹³ Where there is no prenuptial agreement in place, the mandatory ancillary relief approach will continue to lead to needs based awards that reflect the lifestyle that the parties have been living. However, where a prenuptial agreement is signed it is likely that a 'reduced quantification of needs'²¹⁴ will occur as a result. This situation has been described as a 'double whammy'²¹⁵ for those who opt to sign prenuptial agreements. They lose out twice; firstly by not having the opportunity to bring a claim for ancillary relief and then secondly because the standard of need that they are judged against is lower than it would have been had there not been a prenuptial agreement in place.

²⁰⁹ Brigitte Clark, 'Ante-nuptial Contracts after Radmacher: an Impermissible Gloss?' (2011) *Journal of Social Welfare and Family Law* 15, 21.

²¹⁰ Hodson, 'English Marital Agreements' (n 104) 32.

²¹¹ Jeremy D Morley, 'Enforceable Pre-nuptial Agreements: Their Time Has Come' [2006] *Fam Law* 768, 771.

²¹² Scherpe, (n 8) 522.

²¹³ Caitlin Jenkins, 'Are Pre- and Post-marital Agreements Finally Worth the Paper they are Written On?' (2001) *PCB* 30, 36.

²¹⁴ *ibid.*

²¹⁵ *ibid.*

Using the *Radmacher* dispute as an example, not only did Nicholas Granatino contract out of the sharing principle by signing a prenuptial agreement, he also decreased the size of the needs-based award that he received. Those considering signing a prenuptial agreement should seriously consider this potential outcome. It seems that, as things stand, they can no longer rely upon the protection of a generous needs-based award to counteract the existence of their prenuptial agreement. It is clearly much easier for a couple to contract out of the sharing principle,²¹⁶ with the needs principle continuing to ‘form the protective core of ancillary relief.’²¹⁷ That said, terms that purport to reduce needs-based awards will no longer be automatically dismissed and, instead, will most likely be adhered to except where they leave one party in a situation of real ‘need’.

In Australia, comparable litigation has not occurred in the prenuptial agreement context. This is due to the degree of certainty that Part VIIIA FLA 1975 has provided. Section 90F FLA 1975 states that:

- 1) No provision of a financial agreement excludes or limits the power of a court to make an order in relation to the maintenance of a party if subsection (1A) applies.

1A) This subsection applies if the court is satisfied that, when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income test pension, allowance of benefit.

This comes extremely close to being a statutory version of the rule that the appellate courts developed in *Radmacher*. A relatively low hurdle is set for need, with the exclusion of maintenance provisions only not permissible where one party would have been left relying upon the state financially. This is the Australian equivalent of introducing the real need hurdle that English courts will now use when determining whether terms in prenuptial agreements that preclude maintenance claims are valid. The statutory provisions appear to have settled the debate as to the level of needs based award that the court can make despite

²¹⁶ Miles, ‘Love or Money’ (n 197) 439.

²¹⁷ Scherpe, (n 8) 522.

the existence of a prenuptial agreement. Couples are afforded a great deal of autonomy to contract out of maintenance orders, provided that they are above a relatively low minimum threshold. Clearly then any statute introduced within this jurisdiction should attempt to have a similar effect.

Undoubtedly, fairness and, more specifically, the principle of need are extremely important considerations when it comes to policing prenuptial agreements. Unlike the potential requirements for both parties to take independent legal advice and for full and frank disclosure to be made, a determination of fairness involves an examination of the actual substantive terms of the agreement, rather than simply looking at the procedural requirements.

Once more there is a delicate balancing act that must be undertaken, made more difficult by the fact, as alluded to previously, what one party views as an exercise of autonomy, the other party may view as a restriction of the same principle. There is little point in introducing statutorily enforceable prenuptial agreements if a court will be likely to go behind the terms that are set out in the majority of cases. By the same token, there must still be a certain level of restriction to prevent autonomy being exercised in a way that has a negative effect upon one party. The law reform on this aspect is particularly important, as it is effectively the court the last line of defence for the protection of vulnerable individuals.

The Law Commission considered the issues surrounding the principle of need in its consultation paper *Marital Property Agreements*. It was asserted that making provisions for the needs of the parties is the ‘bed-rock of ancillary relief’²¹⁸ in England and Wales. The Law Commission also recognised the ‘considerable lengths’²¹⁹ that the courts have gone to at common law level in order to ensure that needs continue to be provided for sufficiently. It therefore has initially recommended the inclusion of a safeguard in any forthcoming statutory regulation that protected both needs and compensation.²²⁰ This would result in the court retaining considerable discretion to make an award that supplements any terms of a prenuptial agreement that fall short of providing for the parties’ needs.

²¹⁸ *Marital Property Agreements* (n 1) [7.51].

²¹⁹ *ibid* [7.50].

²²⁰ *ibid* [7.52].

Need is undoubtedly an irreducible minimum that a prenuptial agreement should not be able to circumvent, although it will not always be particularly pertinent in cases where large sums are being contested. The notion of compensation on the other hand is only relevant on the occasions that the court is dealing with a ‘super-rich’ couple.²²¹ The publication of the final Law Commission report following up Marital Property Agreements has recently been delayed, in order for a more detailed review of the extent to which the parties’ needs should be met by an agreement.²²² It is clearly vital that need continues to be protected in any new statute introduced in this country.

It is important to remember that all the ‘furore and complications’²²³ seen in relation to the so called big money cases has ‘very little practical effect’²²⁴ on the majority of disputes. Prenuptial agreements entered by those without significant assets will be overturned very simply if they leave one party in a situation of real need. Where there are significant assets in place, a decision must be made by the legislature as to what the minimum standard of need is that will be enforced. Agreements that do not deal with excluding maintenance claims and instead simply attempt to contract out of the sharing principle will not be problematic. In these instances it will often be the case that ‘fairness...may not require a departure from the...agreement’.²²⁵ In big money cases where the prenuptial agreement attempts to preclude any sort of maintenance claim, as was the case in the *Radmacher* dispute, the statute will need to be clear as to where the threshold is set in terms of minimum level of need.

The low threshold set by the section 90F FLA 1975 in Australia, whereby the exclusion of maintenance claims is only prevented when it would leave one party requiring state benefits, is perhaps a step too far in favour of ‘autonomy’ in this jurisdiction. The legislator will have to determine exactly what should be regarded as ‘real need’. This thesis suggests that the court should continue to retain some discretion to set aside agreements on this basis.

²²¹ Sanders, (n 39) 594.

²²² Law Commission, ‘Clarifying the Law on Financial Provision for Couples When Relationships End’ <http://lawcommission.justice.gov.uk/news/Press_notice_financial_provision.htm> accessed 13 April 2012.

²²³ Juliet Chapman, ‘The Magnetic Importance of a Prenup in the Paradigm Case *Crossley v Crossley* [2008] 1 FCR 323’ (2008) (30) (3) *Journal of Social Welfare and Family Law* 233, 239.

²²⁴ *ibid.*

²²⁵ *Law Society Gazette*, ‘In Practice: Pre-Nups – Now Worth the Paper They’re Written On?’ (2010) *LS Gaz.* (11 Nov) 18, 20.

Previously, autonomy has been favoured in the independent legal and advice and full and frank disclosure contexts, and so this move will ensure that adequate protection is provided for vulnerable spouses. However, this must be tempered to ensure that all of the emphasis placed upon individual autonomy at the earlier stages is not negated.

Conclusion

This chapter has served to highlight the key substantive and procedural points of contention that have arisen in much of the deliberation on prenuptial agreements. By addressing these issues, significant suggestions have been made as to how the legislator could go about finding an appropriate balance between affording couples the autonomy to enter into prenuptial agreements and continuing to provide protection for vulnerable spouses.

The balancing act being undertaken is extremely delicate. It is also impossible for any new statutory provisions to perfectly cover every plausible set of circumstances. There will always be litigation surrounding statute, but what the legislator must be sensitive of is the need to attempt to draw the line between autonomy and protection at the most appropriate point, and it is hoped that the discussion within this last chapter will provide some guidance on the matter.

Conclusion

Cretney has stated that, in an ancillary relief context, the best way of ‘reconciling the claims of certainty, predictability and personal autonomy’ is to allow couples ‘the liberty...to decide for themselves the terms of their own partnership’.¹ This thesis has highlighted the main issue surrounding the regulation of prenuptial agreements: the tension that exists between Cretney’s position and the continuing need for the court to provide an appropriate level of protection for individuals. The purpose of this work has been to evaluate the current state of the law in this jurisdiction, drawing comparisons with the position of the law in Australia, with a view to ultimately helping alleviate this tension.

This thesis has proceeded on the basis that future law reform in relation to prenuptial agreements is a distinct possibility. This stance was adopted from the outset; however, ample evidence in support of this understanding has been presented throughout this work. It is approaching 15 years since the Government published its Green Paper ‘Supporting Families’² in which support was first shown for prenuptial agreements.³ This has now manifested into a full Law Commission consultation on the matter and a final report is due within the next twelve months.⁴ Subsequently, every conclusion reached within this thesis has been made based on the premise that law reform is likely to occur at some point in the relatively immediate future.

It is also prudent at this stage to reinforce the point that contracts and agreements are distinguishable from each other. This thesis has not suggested that prenuptial agreements should be regarded as binding contracts. Instead, it is submitted that there must be scope for individuals to have an autonomous role in the reallocation of assets process should they so desire. The law must provide this, while simultaneously continuing to provide safety nets that provide appropriate levels of protection to the individuals that require it.

¹ Stephen Cretney, ‘The Family and the Law – Status or Contract?’ [2003] CFLQ 403, 412.

² Home Office, *Supporting Families: A Consultation Document* (Cm 3922, 1998).

³ *ibid* [4.21].

⁴ Law Commission, *Marital Property Agreements – A Consultation Paper* (Law Com No 198, 2011).

Before it publicises any recommendations, the Law Commission should be clear as to what it is that they are trying to achieve. This thesis has respectfully suggested that the idea of a prenuptial agreement being accommodated either under the family law or the contract law umbrella is not plausible. Instead, the prenuptial agreement must be treated as a standalone concept, deserving of the development of its own strand of law. Once this is accepted, it may be that it is easier for law reform to take place. Some of the ideas that underpin relational contract theory were therefore drawn into Chapter 1 in order to demonstrate how this may be possible. Relational contract theory was useful not because its principles should be adopted as part of legislative reform, but because it aids in justifying this hybrid conceptualisation of the prenuptial agreement. This was then the platform upon which an evaluation of the current laws in both this jurisdiction and Australia was built.

It would be valid to point to the steadily progressive evolution that is evident within the judicial reasoning, and argue that the common law itself has already evolved to a position that appropriately balances protection and autonomy. After all, in a relatively short period of time, prenuptial agreements have gone from having little or no weight in this jurisdiction,⁵ to only being set aside where it would be unfair to hold the parties to the agreement.⁶ However, it must not be forgotten that law reform is not aimed solely at the judiciary. Legislators, practitioners and, perhaps most importantly, the wider public will all be beneficiaries of the increased certainty that carefully constructed statutory provisions could bring about.

The Law Commission's in-depth exploration of marital property agreements is well under way. The fact that publication of the final review paper has been delayed in order to enable a further consultation paper that explores the concepts of non-matrimonial property and financial need,⁷ clearly evidences the widespread view that divorcing couples face a lack of certainty when it comes to ancillary relief.

As things currently stand, a couple submitting a claim for ancillary relief are placing their finances in the hands of judges, who will use their discretion to take into account all of the circumstances of their case as prescribed by section 25(1) MCA 1973. Discretion is nothing

⁵ *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45 (F).

⁶ *Radmacher v Granatino* [2010] UKSC 42.

⁷ See Law Commission website for details <<http://www.lawcommission.justice.gov.uk/areas/marital-property-agreements.htm>> accessed 28 August 2012.

new in this context and it arguable that, by implementing new statutory provisions, all that is being done is shifting discretion from one forum to another.

However, the nature of the discretion that any fresh statutory provisions regulating prenuptial agreements will afford to judges is completely different to that which they hold under ancillary relief. It is in a sense more realistic and sensitive to the issues that actually affect real people. The current laws on ancillary relief are simply not reflective of the fact that individuals are eager to plan for the reallocation of their financial assets in the eventuality of divorce. This thesis has attempted to find the level of discretion that must continue to be left in the hands of the judiciary, in order to balance the sensitive issues of autonomy and protection.

As a result of any future reform the law will become much more reflective of contemporary society. Any changes proposed will most likely be reactive rather than proactive, but that should not detract from their purpose of ensuring that the law meets the needs of the modern day couple. It is therefore respectfully submitted that to suggest that there is little worth in implementing statutory provisions regulating prenuptial agreements, on the basis that the discretion afforded to judges is simply shifted to a new forum, is failing to view any new legislation with a holistic approach.

This thesis has drawn upon the legal framework of two jurisdictions. Australia was chosen as a suitable comparator jurisdiction because of its former social and legal links to England and Wales. This meant that it would provide an appropriate benchmark for comparison, which was important because if a jurisdiction with significantly different socio-legal conditions in place were chosen, then any comparison would have no real validity.

Further justification for the comparison then became evident as family law in Australia was explored. The amendments to the Family Law Act 1975, which introduced a new Part VIIIA specifically dealing with marital property agreements through the Family Law Amendment Act 2000, meant that there were already statutory provisions in place regulating prenuptial agreements. These were ripe for analysis. In fact, there was a decade worth of common law decisions to be explored. It became apparent that many of the issues in relation to prenuptial agreements that the courts have had to grapple with in this jurisdiction, including independent legal advice, full and frank disclosure and the substantive fairness of prenuptial agreements,

were also sources of contention over in Australia. The balance between protection and autonomy was one that the Australian Government had also been trying to achieve, and a number of amendments to Part VIIIA evidenced this fact.

Chapters 2 and 3 of this thesis were vital in establishing the base knowledge of both the legal intricacies and the context of the topic. Additionally, and equally as importantly, they served to highlight the autonomy and protection issues that were then analysed within Chapter 4. The development of the common law in England and Wales, stretching right back to the beginning of the twentieth century with the decisions in *Hyman v Hyman*,⁸ was mapped. A similar exercise was also undertaken based on the law in Australia. This then ensured that the actual substantive analysis of the various provisions and precedents was focussed upon the most important issues.

Autonomy versus state protection is a theme that continually recurs throughout all the literature. The level of autonomy that couples are afforded in terms of regulating the financial side of their divorce has continually increased over the last couple of decades. Through this comprehensive analysis of this issue, this thesis concludes that the introduction of statutory regulation will potentially serve to cement the position of autonomy as the most important justification for prenuptial agreements. However, if this is to occur, it is still necessary to maintain a number of checks upon individual autonomy so that appropriate levels of protection can continue to be provided to all individuals involved.

Independent legal advice is perhaps the most significant of these checks. Following an analysis of the laws in both jurisdictions, this thesis concludes that such advice is vital both to ensure that agreements are genuinely autonomous and that appropriate protection is provided to vulnerable individuals. However, in order to provide a greater level of protection, it was submitted that the mere presence of independent legal advice would not be enough to make an agreement *de facto* binding. Instead, the lack of such advice would preclude an agreement being upheld, save perhaps for in a number of exceptional circumstances, which must be clearly defined by any new statutory provisions. It is through such a provision that a large

⁸ [1929] All ER Rep 245 (HL).

proportion of the protection that fresh statute should provide to those who require it, will be provided.

Of only slightly less significance is the full and frank disclosure of assets. The discussion on this point included an exploration of potential self-help methods that vulnerable individuals could employ to protect themselves. Ultimately, it was determined that it would not be worthwhile to include an absolute requirement of full and frank disclosure in any fresh statute. There will be many occasions when a detailed breakdown of financial assets will not have any more influence than simply a general awareness as to the level of assets accrued. What must be prevented by fresh statute is a material lack of disclosure that would have significantly altered one party's decision to enter into a prenuptial agreement. This is a much weaker protective clause than a blanket requirement of full and frank disclosure, but is necessary to prevent invasive intrusions upon individual autonomy. Rather than being a negative, the uncertainty that such a provision may leave couples which could have positive connotations. It may serve to encourage couples to exercise caution when entering into agreements in order to satisfy themselves that they have done everything possible to ensure that their agreement is valid.

Equally as importantly, substantive fairness was evaluated, with particular emphasis placed upon the courts taking into account the financial needs of the parties. This element of any fresh statute introduced would provide the strongest protective element, as it would potentially give the courts the opportunity to set aside agreements based upon substantive clauses, rather than procedural shortcomings. Financial need was chosen to form the basis of the evaluation here, as this forms the irreducible minimum that must be protected. If couples choose to autonomously opt out of compensation and sharing with a statutorily provided for prenuptial agreement then the court should have much less mandate to interfere, but where an agreement potentially leaves one party in a situation of financial need then protection must continue to be provided, regardless of the autonomy of the individuals.

As outlined within Chapter 2, in an ordinary ancillary relief claim, the court will make needs-based awards that take into account the lifestyle that the parties have previously enjoyed. Chapter 4 suggests that where couples have autonomously chosen to enter into a prenuptial agreement, a lower standard of need could be used as a threshold; namely, real need. Such a standard will continue to provide vulnerable individuals with protection against being left

below the breadline, however, will not necessarily prevent them from autonomously agreeing to a lower standard of living than they may have enjoyed during the marriage.

In relation to imposing a statutory time period for an agreement to be introduced, it is suggested in Chapter 4 that such a provision would be both arbitrary and unnecessary. Its potential protective capacity is outweighed by the litigation that it could generate. Naturally, the timing of the agreement will remain an important consideration when it comes to assessing the substantive fairness of an agreement, however, for the reasons outlined in the previous chapter, it is not worthy of specific regulation.

It is clear from the findings that the balance between protection and autonomy cannot be struck by dealing with each of the issues in isolation. If this approach was taken, then it is likely that the relevant provisions would either fall down too favourably for one of autonomy and protection, or, more likely, contradict each other to the extent that they become untenable. Instead, an approach must be taken that considers the overarching aim of any statutory regulation, when dealing with time constraints, independent legal advice, full and frank disclosure and substantive fairness.

For example, the approach that this thesis suggests in the context of full and frank disclosure, which is geared towards affording couples the ability to enter into autonomous decisions, is viable because at a later stage autonomy it is tempered by substantive fairness provisions that provides a much stronger protective element.

England and Wales is potentially on the verge of rapid developments in the way that prenuptial agreements are regulated. Ultimately, it is hoped that this paper helps to cast a new perspective through which the reform process can be viewed.

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