INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS

AUDREY DUCROUX LECTURE 2011

WHAT'S THE DEAL?

MARITAL PROPERTY AGREEMENTS, PAST PRESENT AND FUTURE

Brenda Hale, Justice of the Supreme Court of the United Kingdom

It is such a pleasure to be back among the family lawyers and to be honouring an outstanding practitioner in international family law who obviously embodied all the good things we think about the French – brains, beauty and style. You have had a remarkable series of lecturers and lectures in her memory and not all of them about family law. I want to bring us back to family law and to a subject which is very topical in England and Wales at present. Many of you will think that we are agonising over a debate which was settled long ago. Some of you may think that we have the chance to avoid the mistakes which others have made. The issue is how far a husband and wife should be able to contract out of the ordinary rules of marriage and specifically the principle of equality?

Once upon a time I was accused of being a 'legal commissar subverting family values'. I didn't do much better when the judicial House of Lords stuck up for the traditional housewife in *Miller v Miller, McFarlane v McFarlane.*[1] Greater equality for the stay at home wife was greeted as 'the death of marriage'. I was a little more popular for saying that marriage still counted for something in the 'pre-nup' case of

[1] [2006] UKHL 24, [2006] 2 AC 618.

Radmacher v Granatino.[2] But I fear that many people who believe in marriage don't really believe in equality in marriage.

Marriage: contract or status?

Throughout history there has been a tension between those who see marriage as essentially a matter of contract negotiated between husband and wife or, more frequently, their families and those who see it as a matter of status imposed first by the Church and then by the State. We do not need to regard marriage as a religious sacrament to believe that it is more than a mere individual contract. All the text books say that it is a status. The parties freely contract into it but they are not free to write all the terms for themselves. Their relationship affects third parties, most notably their children, as well as themselves. The State, or rather the community as a whole, also has an interest. But what is the nature of that interest?

In modern times, the State's or the collective interest in marriage must stem from the family's function as its own little social security system, a private space within which the parties are obliged to look after one another and their children. The more the private family can look after its own, the less the State will have to do so. So of course the State will want to strengthen family ties and family responsibilities. But this view of family responsibility may depend upon the collective view of State responsibility. If the State makes hardly any provision for people who fall on hard times, then it will be more relaxed about letting them do so, whether as a result of decline in the job market or family breakdown. At the other extreme, if the State makes very generous

[2] [2010] UKSC 42, [2011] 1 AC 534.

provision for people who fall on hard times, people who welcome this 'cradle to grave' vision may be suspicious of strengthening family responsibility.

So it should come as no surprise that highly individualistic societies, such as many of the United States of America, and perhaps now Australia, are more relaxed about allowing people to contract out of family responsibility than we have traditionally been in this country. We might also expect to see a similar approach in a highly developed welfare state, such as some of those in western Europe. The trend of our own social policy in recent decades has certainly been away from cradle to grave welfare provision. Participation in the labour market has been seen as the route to financial security for everyone, men and women. The more people can look after themselves the less the State will have to do so.[3]

But any State needs people to have children, to look after those children and to look after the old and the sick. This country has very generous maternity leave policies to encourage child bearing, but much less generous high quality child care provision to encourage return to full time work. Not surprisingly, this goes along with a common pattern of part time working for women (or men) with family responsibilities. We are very unusual in Europe in the extent to which women work part time outside the home. In most other European countries they commonly work full time with good child care provision or they choose between working full time within the home and working full time outside the home, but only if they either have no children or have other family members who can look after them.

[3] Getting people into and back into paid work is, for example, the constant theme of Dame Carol Black's work as National Director for Health and Work:.*Dame Carol Black's Review of the health of Britain's working age population, Working for a healthier tomorrow* (2008, London: TSO).

These trends in social policy simply serve to emphasise the big question: to what extent can and should private financial responsibility towards partners who do not work full time outside the home fill the gap? Can this be a matter of private bargain alone or does there have to be some element of compulsion?

Marital agreements: valid or void?

The development and status of marital agreements has been very different as between continental community of property systems and the common law world which has its roots in England and Wales. After some uncertainties, English law recognised in the mid 19th century that separated or separating spouses could make binding separation and maintenance agreements.[4] These were beneficial to both parties. First, they relieved the couple of the enforceable duty to live together.[5] A consensual separation meant that neither spouse was guilty of desertion. Secondly, they normally contained maintenance arrangements. These had two advantages for a wife. Without an enforceable contract, she was only entitled to maintenance if her husband had been guilty of a matrimonial offence or if he had agreed to provide for her. With one, she did not have to prove this. And the contract might well make different or better provision for her than she could have obtained from a court. So separation agreements were by and large a good thing for the dependent spouse.

There were, however, two important rules of public policy. One, recognised by the House of Lords in *Hyman v Hyman*,[6] was that a separation agreement could not oust the statutory powers of the courts to make financial orders between the spouses. The

4 *Wilson v Wilson* (1848) 1 HLC 528, 9 ER 870; *Hunt v Hunt* (1861) 4 DF & J 221.

5 Disobedience to a decree of restitution of conjugal rights was punishable by imprisonment from the Ecclesiastical Courts Act 1813 until the Matrimonial Causes Act 1884 (the 'Weldon Relief Act'): see SM Cretney, *Family Law in the Twentieth Century* (Oxford: OUP. 2003), pp 143-147.

6 [1929] AC 601, 614.

couple married in September 1914. They had no children and by September 1919 when they made their separation agreement the husband was living with another woman. By deed the husband agreed to pay his wife lump sums of £200 and £2000 and £20 per week for her life. The £2000 and £20 were guaranteed by his brother. We know nothing of the husband's means, but the sums themselves do not look ungenerous, and the life time duration coupled with the brother's guarantee will have been definite advantages for the wife. In return she agreed not to take her husband to court for restitution of conjugal rights or for any variation in the sums agreed. The husband kept his side of the bargain.

But in 1919 an English wife could not divorce her husband for simple adultery. It had to be adultery plus – incest, cruelty or desertion – and the agreement meant that she could not complain of desertion. Then came the Matrimonial Causes Act 1923, which at last put wives on an equal footing to husbands and allowed them to petition for simple adultery. The wife obtained a divorce in 1928 and applied for an award of maintenance under the statutory powers of the divorce court. The House of Lords held that these were not ousted by their separation agreement. As Lord Atkin put it, 'the wife's right to future maintenance is a matter of public concern which she cannot barter away'.[7] This was so, even though the agreed sums would keep the wife a long way from the bread line.

This principle led to two difficulties. First, the court might hold that the husband's promise was not valid if the only consideration, or quid pro quo, given by the wife

[7] At p 629.

was her promise not to take him to court.[8] I myself think that this would rarely be the only quid pro quo. The case of *Balfour v Balfour*[9] concerned a husband's promise to pay housekeeping money to his wife during the marriage. It is well known to English law students as an example of an agreement where the parties had no intent to create legal relations. But Lord Atkin would have readily have found consideration in the wife's promise to use the money for its intended purpose. But the second problem was that, while the wife could always go back to court to ask for more, the husband could not go back to court to ask for less, no matter how their original circumstances had changed.

So in 1957 the Maintenance Agreements Act put this right. It put the rule in *Hyman v Hyman* on a statutory basis, but at the same time provided that this did not invalidate the other promises in a maintenance agreement. It allowed also either party to apply to the court for a variation of the financial arrangements if the circumstances changed. With minor variations, those provisions are now to be found in the Matrimonial Causes Act 1973. The rule in *Hyman v Hyman* remains intact. And *Radmacher v Granatino*[10] does not affect it.

The other, longer standing, rule of public policy was that it was not possible to agree *in advance* what the financial consequences of a *future* separation or divorce would be.[11] The fear was that this would encourage separations. The wife might be encouraged to leave her husband if she knew what he would have to pay her if she

---

8 *Bennett v Bennett* [1952] 1 KB 249.

9 [1919] 2 KB 571.

10 [2010] UKSC 42, [2011] 1 AC 534.

11 See *Westmeath v Westmeath* (1831) 1 Dow & Cl 519, 5 ER 349; *Cocksedge v Cocksedge* (1844) 14 Sim 244; *Cartright v Cartwright* (1853) 3 de GM & G 982; *H v W* (1857) 3 K & J 382, 69 ER 1157.

did. Perhaps worse, the husband might be encouraged to leave his wife or agree to her leaving him if he knew in advance what he would have to pay. The same applied to settlements made by third parties. So a perfectly sensible marriage settlement which gave the wife more if she were to live apart from her husband might be invalid. This was true whether the settlement or agreement was made before or after the marriage.[12]

Most, perhaps all, marital agreements provide, not only for what is to happen if and when a couple separate or divorce, but also for what is to happen during the marriage. The odd result of the rule was that, provided that the couple intended their agreement to be binding and complied with any necessary formalities to ensure that it was, those parts dealing with what was to happen during the marriage would be valid and enforceable, while those dealing with what was to happen if they separated or divorced would not be.

This brings me to the Privy Council case of *MacLeod v MacLeod.*[13] The couple had married in Florida, where the Supreme Court had long ago abandoned the rule of public policy in *Posner v Posner.*[14] But they moved to the Isle of Man, where the law is almost identical to English law, and replaced their Floridian pre-nup with a Manx post-nup. At that time the couple were still together but shakily so. While they were together, the agreement gave the wife a lump sum of £250,000 for her to invest, a personal allowance of £25,000 a year (payable monthly and adjusted annually for inflation), an allowance for her grandmother who lived in the USA, all her expenses

---

12 This could lead to some odd results. Eg *Re Johnson's Will Trusts* [1967] Ch 387, where a father left his daughter an income of £50 per year while she remained living with her husband, but if he died or they separated, she would have the whole residuary income from his estate (presumably more). Instead of invalidating the larger gift, the court invalidated the smaller one.

13 [2008] UKPC 64, [2010] 1 AC 298.

14 257 So 2d 530 (Fla 1972).

up to a maximum of £100,000 in obtaining another degree, and the husband's share in a house which it was said had been bought as a home for the wife (and their five children) in the event of divorce or the husband's death. The agreement also said that the wife would not be called upon to pay any household expenses while they were married. The husband did all this.

They stayed together for another 13 months. But the writing was on the wall and they eventually divorced. The wife claimed full financial provision, which she put at 30% of the husband's wealth at marriage and 50% of its increase during the marriage, which came to roughly 5.5 million pounds. The husband said that she should be limited to what was in the agreement in the event of a divorce: one million pounds, adjusted for inflation, plus provision for the children. He agreed that the original house was not good enough for them, so he proposed that a further £750,000 (later increasing to £1,250,000) should be spent on a house for them. The Manx courts largely respected the agreement. By the time the case got to the Judicial Committee of the Privy Council, the sole argument was about whether that house should belong to the wife outright or be put on trust until the youngest child reached 23.

The main argument was about whether a post-nuptial agreement providing for a future separation was legally binding. In retrospect, this was, as the majority put it in *Radmacher*, a red herring.[15] The case was always about how much weight should have been given to it by the divorce court judge when deciding what order to make. However, it is not surprising that people should think that it might matter. After all, separation agreements are legally binding, and the courts have always attached

[15] Para 63.

considerable weight to them when deciding what should happen on divorce. As Ormrod LJ put it in the leading case of *Edgar v Edgar*,[16]

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

So in *MacLeod*, the Privy Council decided that the old rule of public policy no longer applied to post-nuptial agreements. The rule had been based upon the enforceable duty of husband and wife to live together and that duty had finally disappeared in 1971 with the abolition of all means of enforcing it.[17] They should be given essentially the same weight as separation agreements in the divorce proceedings.

But, *obiter,* the Privy Council refused to take the same line for pre-nups. It took the view that there were differences in principle between an agreement providing for a current state of affairs and one providing for a future and uncertain event. Although most of the other legal systems which were based on the English common law had now abolished the rule, almost all of them had done so by statute and not through case law. The courts were not the best place in which to devise whatever safeguards might be necessary to prevent abuse and preserve whatever interest the State had. That was a job for Parliament.

---

16 [1980] 1 WLR 1410, at 1417.

17 See Matrimonial Proceedings and Property Act 1970, s 20; Law Reform (Miscellaneous Provisions) Act 1970, s 5.

Before coming on to what difference, if any, the decision in *Radmacher* has made, we need to take a look at what would happen without an agreement. The Privy Council in *MacLeod* did say that 'It is said that calls for the legislative recognition of ante-nuptial agreements appear to have increased with the development of more egalitarian principles of financial and property adjustment on divorce'.[18] Although the Court of Appeal doubted this in *Radmacher*, it is true that many people at family law conferences were saying this, and the Law Commission too have said that 'the decision in *White v White* is likely to have increased the demand for reliable pre-and post-nuptial contracts'.[19]

Finance and property on divorce

Our newspapers, as the President of the Family Division remarked in 2007, regularly describe London as 'the divorce capital of the world'.[20] Quite why this is a matter of complaint, when we are so proud that so many commercial contracts are governed by English law and litigated or arbitrated in London, is a mystery to me. Nor do I have any idea whether or not it is true. But there is a perception that our divorce laws are now so favourable to the claimant spouse that they wish to be divorced here rather than elsewhere. How did this perception come about?

In the olden days of the common law, as we all know, a wife had no property. Everything she owned or earned either belonged to her husband or was controlled by him. The rich got round this by marriage settlements which put property on trust for the wife's separate use. So when Parliament got round to reforming the law in the 19th century it adopted the model of the wife's separate property rather than any of the

18 Para 33.
19 *Marital Property Agreements: A Consultation Paper*, CCCP No 198, 2010, para 3.58.
20 *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246.

models of community of property then (and now) in use in continental Europe. From 1882, we had a system of separate property coupled with the husband's duty to maintain his (innocent) wife.

The reforms to divorce law which came into force on 1 January 1971 should have made a radical change. The law became sex-neutral, in that the same remedies and principles were applied both to husband and to wives. It also became much kinder to homemakers and care-givers. It gave the divorce courts a vast discretion about how to re-arrange the couple's property and finances. All the actual and foreseeable resources of either party, property and income, could be shared out in whatever way the court thought just, depending on the facts and circumstances of the individual case. Until 1984, the courts were supposed to exercise their discretion on the assumption that the divorce had not taken place. This meant that the parties would have continued to enjoy much the same standard of living. It therefore meant an equality of outcome of sorts, though I used to call this an equality of misery because there was usually not enough to support two households at the level which one had enjoyed. It also led to an equality of treatment of their respective marital behaviour. If all their property was in principle up for sharing out on the principle of equal misery, then 50:50 shares in entitlement meant that only gross departures from 50:50 shares in blame need alter the result.[21]

However, the legal profession soon returned to their focus on the wife's needs, although rather more generously defined. The talk of earning a share in the family's

21 *Wachtel v Wachtel* [1973] Fam 72, CA.

assets in some of the early cases in the 1970s[22] soon gave way to the reasonable requirements approach.[23]. Vast sums in lawyers' fees were devoted to pouring over the wife's budget and deciding how many times she needed to go to the hairdresser and how much she needed to spend upon food. The idea that a wife might have a little extra to save for a rainy day or to leave to her family if she died was seen as going beyond what she reasonably required. Wives of rich men could expect far less than they would have received under a continental community of property regime. Wives of less than rich men, on the other hand, did better than they had done before 1971, because preserving a roof over the mother's and children's heads was seen as the priority.[24]

Then along came *White v White*[25] in the House of Lords. This ought to have been an easy case - a farming couple who had both worked hard during their long marriage and ended up with two farms: why not give them one each, the more valuable to the husband to recognise that his family had provided some capital in their early days? But at trial the wife was given only a comparatively small lump sum to cater for her 'reasonable requirements' – the assumption being that this was the most that any wife, even a working partner wife was entitled to. So it is not surprising that the House of Lords knocked on the head the idea that reasonable requirements could operate as a ceiling on claims. Instead they adopted the 'yardstick of equality', against which the result of applying the statutory list of factors should be checked. Furthermore, it was

---

22 Not only *Wachtel v Wachtel* [1973] Fam 72; see, eg, *Trippas v Trippas* [1973] Fam 134, CA, 146, where Scarman LJ stated that 'there is nothing either in the so-called one third rule or in the language of the Act of 1970 which precludes this court from doing rough justice on the basis of approximate equality'.

23 *O'D v O'D* [1976] Fam 83, CA; the high-water mark may be *Page v Page* (1981) 2 FLR 198, CA, but *Dart v Dart* [1996] 2 FLR 286, CA, is a serious competitor; at 294, per Thorpe LJ, 'the reality is that it [*Wachtel v* Wachtel] has been consistently rejected as a case of general application'..

24 *Scott v Scott* [1978] 3 All ER 65.

25 [2001] 1 AC 596.

impossible to measure financial and domestic contributions against one another and therefore it should be assumed that each was making an equal contribution in their separate sphere.

But what did they mean by equality? Equality of *esteem* for the home-making role, certainly. But equality of *division* would lead to severe inequality of result in the many cases where the breadwinner has a substantial earning capacity and the homemaker does not. Equality of *result* is nearer the mark. But if each spouse has a reasonable earning capacity, it makes sense to divide up their marital assets equally and let them go their separate ways, even if in future one will fare better than the other.[26] So perhaps equality of *opportunity* as each embarks upon a separate life is the key?[27] But for the mega-rich, equality of result, even equality of opportunity, might well be achieved without equality of division, leaving the money maker to keep the lion's share of his profits. So once the 'yardstick of equality' took over, the profession had to look for reasons to depart from it.

In *Miller v Miller; McFarlane v MacFarlane,*[28] the House of Lords suggested that, in a regime which begins with separate property, there are three possible rationales for redistribution, although one should be careful to avoid double counting: compensation for relationship-related need; compensation for relationship-related sacrifices; and sharing the fruits of the marital partnership. In *McFarlane* the couple had shared out their capital, which consisted mainly of their homes. But the wife had given up lucrative work to look after their three children, for which she should be compensated

[26] Eg *Foster v Foster* [2003] EWCA Civ 565, [2003] 2 FLR 299 and *Burgess v Burgess* [1996] 2 FLR 34.

[27] As I later suggested in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, para 144.

[28] [2006] UKHL 24, [2006] 2 AC 618.

out of the husband's very large income. But she was not entitled to an equal share of both capital and income for life: you cannot have your cake (by dissolving the partnership and sharing out the assets) and continue eat from the other person's share.

In *Miller,* everyone agreed that the wife was not entitled to a half share in the enormous but unquantifiable wealth which the husband had chanced to accumulate during their short childless marriage. Usually, dividing up what has been accumulated during the marriage works pretty well: in most short marriages little has been accumulated so that the duration factor answers itself.[29] The majority distinguished between assets acquired for the use and benefit of the family – which should be shared between them – and pure business assets to which a discount should be applied to reflect the short time during which the wife had made any contribution at all.[30]

The upshot is that, while the compensation principles continue to apply, the sharing principle is more vulnerable to the couple's individual circumstances. As Lord Mance prophetically put it,[31]

> 'Once needs and compensation had been addressed, the misfortune of divorce would not, of itself, as it seems to me, be justification for the court to disturb principles by which the parties had chosen to live their lives while married.'

But this could mean that, if the couple have generally kept their finances separate, the lower earning one in a dual income family might end up less well off than the stay at

---

29 *Foster v Foster* [2003] EWCA Civ 565; [2003] 2 FLR 299.

30 Rebecca Bailey Harris, 'Comment on *GW v RW (Financial Provision: Departure from Equality)* [2003] Fam Law 386, 388.

31 *Miller,* para 170.

home wife in another. Would that be fair? [32] A wife who has gone out to work all her married life, borne and brought up the children, and done her share of the household chores, may well feel that she deserves more out of the family cake than a wife who has not tried to do it all. So that brings us back to role which their individual contractual or other arrangements should play.

The Radmacher decision

In *Radmacher*,[33] a German heiress married a French investment banker. They made an ante-nuptial agreement in Germany in which they opted out of German community of property, pension sharing and succession laws. They also agreed that neither would make any claim on the other in the event of divorce. The agreement would have been recognised as binding in Germany and in France. In community of property systems it has always been possible to opt out or choose a different property regime, but Germany is apparently unique in also allowing couples to contract out their mutual maintenance obligations.[34] Property regimes and maintenance obligations are quite separate matters in continental systems. But the couple married, made their home, had two children and divorced in England, where it was not. The trial judge made various criticisms of the way in which the agreement had been entered into but said that she was taking it into account. She still gave the husband a substantial sum to provide him with an income, on top of generous sums for looking after the children while they were with him and another substantial sum to buy a house which he would own outright, all of which the wife could easily afford. The Court of Appeal held that the husband had freely entered into the agreement knowing what it meant. His award should be limited to what an unmarried parent might expect as provision for the

32 Para 153.
33 [2010] UKSC 42.
34 LCCP No 198, paras 4.6-4.15.

children: a home on trust to live in with them and money to look after them while they were growing up. The Supreme Court dismissed his appeal.

The issue was not whether the agreement was legally binding. The issue was how much weight it should be given as part of 'all the circumstances' to be taken into account in the exercise of the court's discretion. The majority put the test to be applied like this:[35]

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

This test is in many ways more flexible and generous to the applicant than the separation agreement test which was approved in *MacLeod*. The court has to look at the circumstances in which the agreement was made and at what has happened since. The question is what is fair *now* and not what might have seemed fair *then*. My only disagreement with this test was where it put the burden of persuasion - whether the applicant would have to show that it was unfair to give effect to it or whether the respondent would have to show that it was fair to uphold it. As Lord Mance thought, there may not be much difference in practice, once the case gets to court.

But we did disagree about whether these agreements were legally binding before the case gets to the divorce court. Although the majority said that it was a red herring,

---

[35] Para 75.

obiter they thought that they were. They could not see a good reason to distinguish between ante- and post-nuptial agreements once the rationale for the old rule of public policy had gone. They were unimpressed by the dangers of making something legally binding when there was no power of variation – or perhaps they could stretch the statutory wording of the Matrimonial Causes Act to cover pre-nups as well as post-nups. My view was that we did not need to decide this. We had not been asked to do so, as both parties had agreed that it would require legislation. We should leave it to the Law Commission. As the Commission point out, the enforceability of the contract is by no means a red herring for third parties in cases where ancillary relief is not a possibility.[36]

The way forward or backward?

I do not envy the Law Commission their task. The law is undoubtedly in a mess. It is odd and untidy if parts of a contract are legally binding and parts are not. It might well be better if they were all *prima facie* binding but all subject to a power of variation if anyone tries to enforce them. The Law Commission have provisionally proposed that an agreement between spouses, whether made before or after the marriage, should not be regarded as void, or contrary to public policy, because it provides for the financial consequences of a future separation or divorce.[37]

But the main question is not how far the agreement should bind the parties before they get to court, but how far it should bind the court once they get there. What should happen to the rule in *Hyman v Hyman*? The Law Commission have not reached even a provisional conclusion on this. They merely ask whether 'a new form of qualifying

[36] LCCP No 198, para 3.70.

[37] *Ibid*, para 3.84. No mention is made of variation or of settlements and gifts made by third parties.

nuptial agreement' should be introduced excluding the jurisdiction of the courts to award ancillary relief.[38] But they clearly see a strong argument for making this possibility available to protect pre-acquired, gifted and inherited property, thus introducing something like an optional community of acquests only.[39]

There are, of course, a wide variety of policy considerations which might influence our views. *First*, there is a view, which has been expressed by Lord Hoffmann ,[40] that it is wrong to make the weight to be attached to an agreement depend upon the quality of legal advice given to the party who wants to get out of it, a matter over which the party who wants to uphold it may have no control. It would be better if such agreements were always binding or that they were never so. The *Radmacher* test, in concentrating on the effect of an agreement in the light of the circumstances now prevailing, rather than on the circumstances in which it was made, may be a little less objectionable from this point of view. But if qualifying nuptial agreements are introduced, provided that certain procedural safeguards are complied with, the focus of argument is bound to shift towards whether or not there is full disclosure and whether or not the claiming party was properly advised. One can also readily imagine, even if US lawyers had not confirmed it, that a great deal of time and money will be spent on pre-agreement disclosure and advice in order to avoid such arguments.

Secondly, there is a view that giving legal force to these agreements will reduce the uncertainties, and thus the cost, delay and emotional trauma of ancillary relief proceedings today. Resolution (formerly the Solicitors' Family Law Association, so

38 *Ibid*, para 5.69.
39 *Ibid*, paras 5.49 – 5.61, 5.70.
40 *Pounds v Pounds* [1994] 1 WLR 1535, at 1550-1551.

perhaps they should know) is certainly of this view.[41] But others are more dubious. There must always be some get-outs: certainly if there was misrepresentation or undue influence or other vitiating factors when it was made; certainly if the agreement fails to make proper provision for the children; almost certainly if the claimant spouse would otherwise have to be supported by the State; and possibly if the agreement were manifestly unjust in some other way (as in New Zealand). So there will always be something to argue about if the resources are enough to make it worthwhile.[42] Would there be any more certainty than there is under the present law and if there was would there be more injustice? Would the people who lost most be those who had suffered manifest injustice but where there was not enough to make it worthwhile to argue about?

Thirdly, there is a view that not enough people are getting married and that allowing them to make their own bargains will encourage more to do so. This is linked to the view that the perceived injustice of the post-*White* rules may be deterring the rich and powerful from tying the knot. There has apparently been a dramatic decline in marriage rates in this country, and this roughly coincides with the developments in family law since 1971. However, research suggests that there are other reasons why people in this country are simply not bothering to get married. The law is not usually a factor.[43] The rich are well enough catered for by the post-*Radmacher* regime.

---

41 Resolution, *Family Agreements*, *seeking certainty to reduce disputes,* 2010 (available to download from www.resolution.org.uk).

42 Eg RH George, PG Harris and J Herring, 'Pre-Nuptial Agreements: For Better or Worse?' [2009] *Fam Law* 934.

43 See eg A Barlow, S Duncan, G James and A Park*, Cohabitation, Marriage and the Law* (Oxford: Hart, 2005).

Fourthly, there is a view that respecting these agreements is to respect the autonomy of grown-up individuals who can be presumed to know what is best for them. Others are more dubious. It cannot too often be stressed that, unlike separation agreements, the object of these sort of ante- and post-nups is always to give someone less than they would otherwise be entitled to, less than we think would otherwise be fair. Freedom of contract is a very 19th century idea. In the 20th century we became used to interfering in freedom of contract in order to redress inequality of bargaining power in other long running relationships, notably between landlord and tenant, employer and employee. Why not in these?

Inequality in bargaining power is very common in this context. It is obvious in both the cases where there is thought to be a particular demand for ante-nuptial agreements: where there is a great disparity in wealth between the prospective spouses and in second or subsequent marriages. The latter are a particular concern of mine. Supposed two widowed people propose to marry. The woman agrees not to make any claims upon her second husband's estate because he wants to preserve it for the children of his first marriage and she does not want to be seen as a 'gold digger'. She loses her own home and widow's pension as a result of the marriage. She looks after him devotedly in his declining years. When he dies, the grown up children get the whole of his estate and she has bargained away her claim to provision under the Inheritance (Provision for Family and Dependants) Act 1975. Is this fair?

There is also a concern that inequality within marriage is the norm in certain cultures. I shall never forget the litigant in person who thought that his former wife should have to pay him and his family back for the board and lodging that she had received from

them during their marriage. Will brides in certain cultural groups be expected to sign away the basic provision for their needs which they would otherwise be entitled to? These are often not at all wealthy families.

Fifthly, therefore, there is a view that we should be more sympathetic to contracting out of some principles of redistribution but not others. This is closely linked to the Law Commission's view that there are strong grounds for distinguishing between assets acquired by the spouses during their marriage and assets acquired before the marriage or by gift and inheritance during it. If the main principles governing ancillary relief in this country are compensation for relationship-generated needs and sacrifices, why should anyone be allowed to contract out of those? But if the couple choose not to adopt a sharing principle within their marriage, should anyone else mind?

Radmacher was a very unusual case: the couple had no shared property at all. They had always lived in rented homes. The wife's capital had all come from her family and would not have come to her had her father had thought there was a risk of her husband getting his hands on it: shades of the old married woman's separate property here. It was strongly arguable that the only applicable principles were compensatory. And did a brainy young man who had given up investment banking for academic research deserve any compensation? (On the other hand, marriage is supposed to be about compromising one's own interests for the sake of the whole family: they had come back from New York because she did not like it there. He may not have had much choice about opting for an academic career.).

The collective interest is in both the compensation principles: that relationship generated needs should be catered for within the family rather than by the State and that people should not be deterred from compromising their own financial position for the sake of their families. I think that this is more important than the source of the assets. If there is relationship-generated need, why should it matter that the resources available to meet those needs were inherited by one of the spouses before they married? Surely the landed gentry with their income-generating family estates expect to support their families from those estates?

I think that I would rather allow couples who wanted to do so to contract out of the sharing principle than engage in a wholesale review of the principles of ancillary relief which might well result in the abandonment of that sharing principle even for those who are happy with it. But as must be perfectly obvious I am sceptical of the need for any further reform of our law. In the end it comes back to what we think marriage is and is for. Is it simply a private arrangement from which each can walk away when they want and without regard to the consequences for the other? Or is it a status in which we all have an interest? By this I mean an interest which goes beyond an interest in keeping people off welfare benefits. Do we want to encourage responsible families, in which people are able to compromise their place in the world outside the home for the sake of their partners, their children and their elderly or disabled relatives, in the expectation that they can be appropriately compensated for this if things go wrong? I hope that we do. But I have a sneaking suspicion that Audrey Ducroux would have wondered what all the fuss was about.