

PRE MARRIAGE AGREEMENTS

David Hodson

Introduction
Historical perspective
Matrimonial Causes Act 1973
Edgar 1981
Sabbagh 1985
Law Society Family Law Committee 1991
F v F 1995
N v N (Foreign Divorce: Financial Relief) 1997
S v S (Divorce: Staying Proceedings) [1997]
Supporting Families, Govt Green Paper 1999
Xydias 1999
N v N (Jurisdiction: Pre-Nuptial Agreement) 1999
G v G 2000
G v G (Financial Provision: Separation Agreement) 2004
Brussels conventions, 2001
White 2001
M v M (Pre-nuptial agreement) 2002
X v X (Y and Z intervening) 2002
K v K 2003
J v V (Disclosure: Offshore Corporations) 2004
SFLA's "A More Certain Future" 2004
V v C 2004
A v B (Financial relief: Agreements) 2005
Miller 2006
NA v MA 2006
Ella 2007
Civil partnerships and cohabitants
Australia: Binding Financial Agreements
Drafting

David Hodson
Panorama
Guildown Road
Guildford
Surrey GU2 4EY
07973 890648
www.davidhodson.com
© February 2007

ABOUT THE SPEAKER AND AUTHOR

David Hodson is a family law dispute resolution specialist. He is a English solicitor (1978 and accredited 1996), mediator (1997), family arbitrator (2002), Deputy District Judge at the Principal Registry of the Family Division, London (1995) and an Australian (NSW) solicitor (2003) and mediator.

He was joint founder in 1995 of probably the world's first metropolitan practice to combine family lawyers, mediators and counsellors and with an emphasis on a conciliatory and holistic approach. It was subsequently copied in many practices across the world. He is past chairman of the Solicitors Family Law Association's Financial Provision Reform Committee, Training Committee and Good Practice Committee and a member of its International Committee. He is a member of the Law Society's Family Law Protocol Committee. He is a member of the President's International Committee. He is past vice chair of the UK College of Family Mediators, the umbrella organisation for family mediation. He is a member of the Chartered Institute of Arbitrators. He is co-author of "Divorce Reform: a Guide for Lawyers and Mediators", "The Business of Family Law" "Guide to International Family Law" and consulting editor of "Family Law in Europe". He is a SFLA Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Fellow of the International Academy of Matrimonial Lawyers, a past trustee of Marriage Resource and member of the Family Law Section of the Law Council of Australia.

He has written and spoken extensively on family law including many conferences abroad. Some papers and articles can be found at his web site below.

He is practising in London and Surrey, England and Sydney, Australia.

More details can be found at www.davidhodson.com. He can be contacted on dh@davidhodson.com.

Introduction

The whole development of the approach of practitioners over the last two decades has been the conciliatory, the settlement focus, the private arrangements sometimes with no order and the non court based and/or imposed resolution. The bias towards this conciliatory approach has been demonstrated by the conception and growth of the SFLA Code, the Children Act, mediation and the FDR in particular. In addition the SFLA has produced and recently updated their pre marriage and separation precedents. As practitioners we have seen a rise in the number of enquiries from people wishing to enter into such agreements, assisted by the growth of European harmonisation, an increasing mobile population and Europe's stance on such agreements.

A very recent report of the AAML, the US family lawyers group, said 80% of members had seen an increase in pre marriage agreements over the past 5 years, mainly in the 40 – 60 year old category.

However, unlike most of our European and Australian counterparts who treat pre marriage financial agreements as binding on their courts, English law does not. Following *White* (and especially now *Miller*) there is now more focus on pre marriage acquired assets and the ability of a couple to reach their own settlement which is fair and just in their circumstances. In addition, *S v S* in 1997 saw *Wilson J* state that there could well be future cases in which the contents and surrounding circumstances of the pre marriage agreement could prove influential or even crucial in deciding the outcome of the case. Some other judges have followed with supportive comments but some seem adamantly opposed.

In 1999 the government announced that it was considering binding pre marriage agreements although no legislative reform followed. For the English courts a pre-marriage agreement is still not binding. Yet pressure has continued to grow for Pre-marriage agreements to be either binding or materially taken into account.

How do we advise our clients who want one? What do we say to clients who are being pressurised to sign? Can it be used to ring fence assets or protect a position as to outcome?

This seminar looks at the development of the law chronologically, including statute, case law, proposals for change and ancillary developments. It looks at the position in Australia then considers issues of drafting and advice to our clients.

Historical perspective

In *Cocksedge* (1844), there was a Pre-marriage contract which provided that the husband would pay the wife £400 per annum, not an insignificant sum then, on separation. The marriage broke down because of her adultery. She asked him to pay the maintenance. He didn't. She sued. She lost. The court said that it saw " the contract as an inducement to the wife to be guilty of worst conduct. ... If the bad conduct of the wife may be the contingency on which the husband would be bound to make the provision, the contract must fall altogether for it is an inducement to the wife to be guilty of the most atrocious conduct in order to entitle herself to the provision."

I question whether, in some essence, thinking has changed very dramatically from some of these sentiments. Not of course in law because we ignore the background to the ending of the relationship. But in some public thinking?

In *Hyman* (1929) AC 601, the House of Lords said in terms that as a matter of public policy parties cannot by agreement oust the jurisdiction of the court. Any covenant not to claim his void.

This strong judicial expression of policy has a strength and force probably greater than any piece of

legislation in the impact on agreements in the subsequent 80 years. It echoes around the higher courts today. Perhaps some younger members of the higher judiciary may not be so committed but their influence is not yet greatly felt, at least openly.

Yet the past 20 years, and possibly longer, have seen increasing demands for Pre-marriage agreements to be either binding or strongly influential. The rise over this period of many from abroad, from cultures and legal systems in which Pre-marriage agreements are the norm and binding, has significantly increased the demands.

In other areas of family law we have seen the importance of agreements. In children work, the Children Act specifically provides that the starting point should be no order, on the basis that parties should be encouraged to reach agreements direct and not come to court unless they could not reach agreement or it was exceptional circumstances. The result? A massive reduction in children orders being made. In finance work, there is a significant encouragement to mediation and other out-of-court settlements. England possibly has the highest, certainly one of the highest, out-of-court settlement rates in finance family law work in the world.

Yet still we are dogged by agreements not being binding or strongly taken into account. Whilst this is indefensible on separation agreements and other agreements pending a final order, there are special factors in Pre-marriage agreements.

Moreover agreements between a couple before they are married are enforceable in a variety of circumstances:

- pre-nuptial settlements
- deeds of gift
- declarations of trust
- General contracts which are not contrary to public policy

What has been the position of the courts, the legislature and the profession in the past decade?

Matrimonial Causes Act 1973

A court may ignore such an agreement altogether and will do so if it would produce an unfair and unjust outcome.

The starting point is s25(1) MCA 1973 which requires the court “to have regard to all the circumstances of the case, first consideration being given to the welfare of any minor child of the family who has not attained the age of 18”. Thereafter the court must consider the s. 25(2) factors. None of these refer to agreements. Therefore any attempt to give any weight to an agreement must be as the circumstances of the case.

The court’s entitlement to make a financial order cannot be fettered or restricted by any agreement or contract. Any attempt to do so is void, s.34 (1)(a) MCA.

A Pre-marriage agreement is not a “ maintenance agreement” by s34(2) MCA as by definition it is not entered into by parties who are husband and wife. Moreover they are arguably not an ante nuptial settlement which are settlements in contemplation of marriage not divorce. An ante nuptial settlement must confer a benefit on spouses in their capacity as husband and wife, not former spouses.

Edgar 1981

Edgar (1981) 2 FLR 19 is the agreement “foundation” case. It involved an agreement entered into by the parties, but against advice to the wife, for the husband to pay a lump sum of some £100K to wife. The wife was to claim no further capital provision but she did on divorce.

Ormrod LJ stated that the court must have regard to such matters as undue pressure by one side, exploitation of a dominant position to secure unreasonable advantage, inadequate knowledge, evidence of legal advice and a change in circumstances as important factors. Nevertheless he stated that there is a general proposition that a formal agreement properly and fairly arrived at with competent legal advice, disclosure and lack of misrepresentation or duress should not be displaced unless there are good and substantial grounds for doing so.

This statement has been relied on significantly in very many cases and across the profession. It has seemed at times to have less strength amongst some of the higher judiciary.

Sabbagh 1985

Earlier attempts to block pre marriage agreements on the basis of being bad for public policy have now disappeared. This is hinted at in Sabbagh [1985] FLR 29 which primarily concerned whether the wife, following marriage in Brazil, could obtain a divorce and make a claim for ancillary relief in this country. The parties to the marriage had, as usual in Brazil, entered into a pre-marriage contract. The court held that the wife was entitled to petition for divorce and make a claim for ancillary relief - and that the pre-marriage contract should be included in “all the circumstances of the case” which the court would consider in accordance with s25 MCA.

Law Society Family Law Committee 1991

In May 1991 the Law Society’s Family Law Committee in its report “Maintenance and Capital Provision on Divorce” specifically recommended (para 3.56) that pre-marriage contracts should be enforceable in England, provided certain provisions and safeguards applied, e.g. disclosure and legal representation with, crucially, review periods. If not reviewed every few years, then the agreement would lapse. The intention was that it would not be binding for ever but could be reviewed on certain developments such as birth of children.

Nothing happened.

F v F 1995

F v F (1995) 2 FLR 45 was one of the first big money cases from the mid 1990s onwards. The husband admitted to total assets of £150-£200m. The husband was 50 and the wife was 36. Both were of German origin. They had three children, aged 8, 6 and 5, the middle child having a handicap and some special needs. During the 7 year marriage, substantial properties were purchased in England and Germany, with the husband also having a tax residence in Switzerland.

When the relationship broke down, the husband engaged in a number of unilateral steps that unfortunately were to be the precursor of the intensive litigation that followed. Over a matter of days, he removed his belongings from their home, filed a petition for divorce, obtained an ex-parte order preventing his wife from removing the children from this country, took steps to cut off the very generous flow of financial support he had made available to her including cancelling her bank accounts and credit cards and he took possession of a substantial proportion of her jewellery. The case was marked by the amount of litigation, costs and tactics.

The parties had before the marriage entered into a pre-marriage contract in both Germany and in England, albeit the latter looking towards American law. The husband sought to bring forward substantial expert evidence regarding the effect of the pre-marriage contract in German law. However, Mr. Justice Thorpe would have none of it. He made it clear that in English jurisdiction, such pre-marriage contracts must be of very limited significance. They cannot bind the English Court. (In any event, in a case such as this, the Judge was not convinced that even the German Courts would feel themselves bound by them.) For the purposes of the final order, he did not attach any significant weight to the pre-marriage contract. He said

“The other special condition which has to be considered in this case, albeit briefly, is the existence of the ante nuptial contracts. It is not in dispute that contracts of this sort are commonplace in the society from which the parties come. They are much emphasised by the husband in his affidavits, since if strictly applied they would have the ridiculous result of confining the wife to the pension of a German judge, whatever that may be.

Equally, in the affidavits the wife is urgent in protesting the circumstances in which they came to be signed. I regard the protestations of both in relation to these contracts as having an urgency that the documents themselves do not demand. In this jurisdiction they must be of very limited significance. The rights and responsibilities of those whose financial affairs are regulated by statute cannot be much influenced by contractual terms which were devised for the control and limitation of standards that are intended to be of universal application throughout our society. It is said that these contracts would be strictly enforced against the wife in Germany. I have declined to enlarge the arena to allow evidence from German experts in that field. I cannot think that even in Germany the wife would not have the right to deploy a case either that there was some inequality of bargaining power, alternatively undue influence, or that they are inconsistent with social policy in Germany. For the purposes of my determination I do not attach any significant weight to those contracts.

This theme by probably the pre-eminent family finance judge of the past decade has dominated the development of agreements including Pre-marriage agreements, at least until the past couple of years.

N v N (Foreign Divorce: Financial Relief) 1997

N v N (Foreign Divorce: Financial Relief) (1997) 1 FLR 900 concerned a pre-marriage agreement entered into by two Swedish Nationals then living and working in New York but married at the Swedish Embassy in Paris. Later there was a divorce in Sweden but no application for financial provision. The wife moved to London. Later she applied for financial provision in England after an overseas divorce. It was held that the pre-marriage agreement would be a relevant circumstance in determining an application for leave for financial provision in England but it would not conclude the matter.

Cazalet J said:

“Furthermore the Swedish court, in my view, is the appropriate court in which to decide the effect of the prenuptial agreement. It would be binding in Sweden as against being no more than a material consideration in this court under s 25 of the Matrimonial Causes Act 1973. Indeed, by coming to this court the husband may obtain an advantage in that the court here in considering its award can step outside the constriction of the prenuptial agreement and may grant the husband more than his entitlement under Swedish law by taking into consideration the wife’s overall assets, including her inheritance from her father, a matter expressly excluded from the husband’s reach by the prenuptial agreement.

In other words, this was more an agreement in the context of forum than in the context of being enforced

in England. Another case on the same subject followed rapidly.

S v S (Divorce: Staying Proceedings) 1997

In S v S (Divorce: Staying Proceedings) (1997) 2 FLR 100, the husband was wealthy and they had connections with many countries through birth, business, tax and residency. For neither was it their first marriage. He insisted on a Pre-marriage agreement before he would marry her. They each took legal advice in New York and were separately represented. The agreement provided that it was governed by the laws of New York and it made provision for the wife in the event of a divorce. Ten years later there was a divorce, with a forum dispute with the husband wanting it in New York relying on the declaration in the Pre-marriage agreement. The judge, Wilson J, stayed in the English proceedings including on the basis that the Pre-marriage agreement with its substantial financial provisions and provisions as to forum was significant. He said:

‘There is no doubt that, where the English court proceeds to determine an application for ancillary relief, s 25 of the 1973 Act precludes any choice of foreign law, however vividly the circumstances of the case might protest its relevance. So the application is of English law and under s 25(1) regard must be had to all the circumstances of the case. In *F v F* itself, the result of a strict application of the effect of the prenuptial agreements would have been, as the judge said, ‘ridiculous’. In those circumstances they inevitably constituted circumstances of negligible significance. But there will come a case - were I to refuse a stay, might this be it? - where the circumstances surrounding the prenuptial agreement and the provision therein contained might, when viewed in the context of the other circumstances of the case, prove influential or even crucial. Where other jurisdictions, both in the USA and in the European Union, have been persuaded that there are cases where justice can only be served by confining parties to their rights under prenuptial agreements, we should be cautious about too categorically asserting the contrary. I can find nothing in s 25 to compel a conclusion, so much at odds with personal freedoms to make arrangements for ourselves, that escape from solemn bargains, carefully struck by informed adults, is readily available here. It all depends.

The matter must be left open and on the footing that, were she to be enabled to claim ancillary relief in England, the wife might secure an award of substantial further provision. In what follows my duty is to appraise the relevance of the prenuptial agreement to the determination not of the wife’s potential application for ancillary relief but of the entirely different issue as to forum”

He made clear that were he to have decided the wife’s financial provision claims in England, he might well have held her to her agreement. Some might consider him, particularly with his many years at the bar undertaking cases with an international dimension, as representing the younger and more pro agreement thinking. Many regard it as excellent news that he has recently been appointed to the Court of Appeal. Would his thinking in this case be followed?

Now see Ella (2007) below

Supporting Families, Govt Green Paper 1999

In April 1998, the LCD announced that it was itself engaging in urgent and wholesale review. The SFLA was itself doing so at the time and the process expedited their own review. It covered wholesale reform of the basis of financial provision law. But it included pre marriage agreements.

It said in July 1998 that “*we recommend that irrespective of any other changes, pre-marriage agreements and also separation agreements should be taken into account as one of the section 25 factors in a case. On balance, we do not yet favour their being binding in family law.*”

For perhaps the only time in the saga, something happened.

But from an unexpected direction.

The government Green Paper “Supporting Families” covered very many diverse issues, most directed to the families and family life in the widest sense but a couple directly related to family law in the narrow sense. Indeed, it was a surprise to many that it included significant proposals for reforms of financial provision law and then dealt with pre marriage agreements.

As to pre-marriage agreements, it said

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

Providing greater security on property matters in this way could make it more likely that some people would marry, rather than simply live together. It might also give couples in a shaky marriage a little greater assurance about their future than they might otherwise have had. Pre marriage agreements could also have the effect of protecting the children of first marriages, who can often be overlooked at the time of a second marriage - or a second divorce.

There would be no question of written agreements being made mandatory for couples intending to marry. Also, we would protect the interests of a party to the agreement who is economically weaker and the interests of children through six safeguards. If one or more of the following circumstances was found to apply, the written agreement would not be legally binding :

1. where there is a child of the family, whether or not that child was alive or a child of the family at the time the agreement was made,
2. where under the general law of contract the agreement is unenforceable, including if the contract attempted to lay an obligation on a third party who had not agreed in advance,
3. where one or both of the couple did not receive independent legal advice before entering into the agreement,
4. where the court considers that the enforcement of the agreement would cause significant injustice (to one or both of the couple or a child of the marriage),
5. where one or both of the couple have failed to give full disclosure of assets and property before the agreement was made,
6. where the agreement is made fewer than 21 days prior to the marriage (this would prevent a nuptial agreement being forced on people shortly before their wedding day, when they may not feel able to resist).”

Responses were invited.

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

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

The SFLA reconsidered in view of the strong encouragement to binding pre marriage agreements. In the responses the SFLA was divided on either being binding or simply to be strongly taken into account. It said:

The SFLA responded to the Government’s consultation of Spring 1998. ... In the relatively short intervening period, we have not changed our view on pre marriage agreements. We believe they should be a section 25(2) factor. We have redebated whether they should now be binding, especially given the 6 proposed safeguards but by a clear majority of our National Committee, we remain unconvinced. We are satisfied that the time is not yet right for them to have become binding in English law, especially from a position where they are still frequently ignored by courts. The cultural and legal changes would be very great, and we should proceed more slowly and cautiously, via the section 25 (2) element of being taken into account.

We are aware that the disadvantage of making a section 25 (2) factor is that the parties will not have confidence that the court will not give greater weight to other factors e.g. need (section 25 (2)(b)). This is a real risk. However it will only arise if both parties will not stand by the agreement. We believe that section 25 litigation is preferable to backward looking and negative “significant injustice” litigation. We anticipate that in due course a body of case law will develop of the (relatively exceptional) circumstances in which the court will and should give greater weight to other factors than the pre marriage agreement, just as policy issues have come through to good effect in decisions such as Edgar. However we believe this gradual development in the skilled and experienced hands of the High Court and Appeal Court Judges and in the context of other trends in family law is much preferable to a number of parties invoking the courts’ help in overturning binding agreements.

Accordingly for the reasons set out above and in our attached Paper, we do not support the Government in making pre marriage agreements binding even with the benefit of the safeguards. Instead we urge the government to make it a section 25 (2) factor. We commend again our original amendments to section 25 as set out in the attached Paper.

No reform followed but a marker had been put down by the government that binding the divorce court by an agreement before or early in the marriage was acceptable.

Then nothing happened.

Xydhias 1999

In Xydhias (1999) 1 FLR 683, a case concerning an agreement reached just as a case was to be concluded at court, Thorpe LJ stated that “the award to an applicant for ancillary relief is always fixed by the court”. Thus although he viewed the negotiations involved in reaching a settlement between the parties as helpful, the court still had ultimate power to award a settlement having been assisted by the negotiations already accomplished by the parties. This strong declaration of judicial independence from the parties’ own agreements surprised many practitioners

N v N (Jurisdiction: Pre-Nuptial Agreement) 1999

In N v N (Jurisdiction: Pre-Nuptial Agreement) (1999) 2 FLR 745, the parties, both orthodox Jews, entered into a pre-marriage agreement which dealt with property matters but also required them to comply with rulings of the Beth Din in the event of a Matrimonial dispute. The case is set against the difficulties in the Jewish community whereby only the husband has the power to grant a get, a Jewish divorce. The case is therefore of some limited application. Nevertheless the court said that on the basis of public policy, pre-marriage agreements as a class are not specifically enforceable in English law. The existence of an agreement is evidential weight of factors to be taken into account. There is no power in any statutory provision to compel the parties to implement any part of the agreement.

G v G 2000

In G v G (2000) 2 FLR 18 Connell J explored just how important was the coming into existence of a separation agreement. He considered how the agreement was made, did the parties attach importance to it and had they acted upon it? He held that the agreement was “the most important aspect of the circumstances of the case arising as it does from the conduct of both parties”.

“In my view it does not matter whether the court looks at the agreement as an aspect of conduct, or as part of the overall circumstances. Whichever approach be adopted, the most relevant questions are (a) how did the agreement come to be made? (b) did the parties themselves attach importance to it? (c) have the parties themselves acted upon it? In the light of the answers to these questions, the court then has to decide ... whether that agreement should be persuasive as to the appropriate orders to be made in favour of the wife”.

It should be noted that despite finding that the agreement was the most important element of the case, Connell J rejected the submission that there was a presumption that the courts should enforce the terms of the agreement. Instead, he concluded that “the agreement should be strongly persuasive, but not conclusive of the resolution of this case”. It is important to note that this was a case of substantial assets where under the terms of the agreement the wife was receiving periodical payments for maintenance. In the desire to achieve finality as required by the court, her maintenance claims were capitalised, hence the (only) deviation on the separation agreement.

G v G (Financial Provision: Separation Agreement) 2004

Although a 2004 FLR case report, it was decided in June 2000, by the then President and Thorpe LJ but only recently reported.

In G v G (Financial Provision: Separation Agreement) (2004) 1 FLR 1011, before the marriage, which was a second marriage for both parties, the husband and wife signed a deed prepared and drafted by the husband’s solicitors, said to be binding, which stated, wrongly, that both parties had received independent legal advice and had made full financial disclosure. The husband was already a wealthy man, with assets exceeding £4 million, while the wife had an interest in a modest property and an income of about £10,000 a year. The agreement provided that in the event of separation the husband would pay the wife (a) the cost of the secondary stage of her children’s education, (b) her reasonable household expenditure, and (c) sufficient capital to enable her to purchase alternative accommodation to the standard of her former home.

On the second anniversary of their marriage, the wife had another agreement prepared, as a present to the husband, in which she renounced any claims against the husband, other than to a home similar to her old home and a reasonable monthly salary to maintain herself and such a property.

Four years after the marriage, following a dramatic series of events, including the murder of one of the husband's previous partners, the resulting arrival of two of the husband's children from that previous relationship to live with the family, and the wife's discovery of the husband's continuing long-standing affair with another woman, a separation agreement was drawn up without legal advice.

A property had already been purchased for the wife for £250,000, financed in part by sale of a property previously purchased by the husband in the wife's name and by the wife's share of the proceeds of her old home. In addition, the agreement provided that the wife was to be paid £10,000 to furnish the home and maintenance of £3,000 a month until the last of the children (including the husband's two children who had remained with the wife) reached 18. Thereafter the wife was to receive £20,000 annually for her lifetime, cost of living indexed.

The husband was subsequently acquitted of conspiracy to murder his former partner. At different times in the course of the litigation both the husband and the wife sought to set aside the agreement. The judge considered that the separation agreement was the most important aspect of the case, although the generosity of the housing provision made for the wife was also a factor, and awarded the wife a lump sum payment of £240,000, to replace the periodical payments under the agreement. The husband appealed unsuccessfully, arguing that the judge had given too much weight to the separation agreement, had failed to give adequate weight to the wife's housing provision, and had given insufficient weight to the length of the marriage.

The Court held that in this highly unusual case, the normal concerns about an agreement reached at a time when emotional pressures were high and judgement likely to be clouded were balanced by the consideration that both husband and wife had previous experience of marital breakdown and had from the outset elected to regulate their future affairs contractually, and by consideration of the husband's financial generosity up to the point at which the wife began co-operating with the police murder enquiries. The judge (Connell J) had been entitled to give the agreement the weight which he had.

The judge was entitled to consider that the wife's very significant contribution and the husband's misconduct contributing to the breakdown of the marriage were factors counter-balancing the fact that this was a short marriage. In trying to achieve fairness between the parties, a judge had to be free to include within that discretionary review the factors which compelled the wife to terminate the marriage as she did.

In a highly unusual case such as this, the ambit of the judge's discretion was correspondingly enlarged. This was a case in which it would have been open to the judge to make an award within a particularly wide range without exposing himself to criticism on appellate review.

In this case there were both pre marriage and separation agreements in similar terms for the court to consider. The court was concerned that on the first the wife had not received independent legal advice whereas the husband had, although neither of them had received advice on the term of the separation agreement. Further relevant factors were that this was a second marriage for both parties and also a short marriage of 4 years duration. By the time that the matter came to court, the husband had already purchased a property for the wife for £250, 000, significantly beyond his obligations under the agreements. Both the court at first instance and the Court of Appeal approved the lump sum and maintenance in the terms of the separation agreement although the latter was capitalised. The Court of Appeal held that the separation agreement should be strongly persuasive but not conclusive of the case. The agreement was a starting point for the order.

Brussels conventions, 2001

Brussels II came into force on 1 March 2001. It was radical, dramatic and with minimal introduction. It changed the discretionary basis of forum disputes to one of the first to issue. The existence of a pre-marriage agreement setting out that the parties had chosen one particular country as the forum for their divorce was utterly irrelevant.

However it did the focus attention on another Brussels Convention which some of us had rather overlooked! Brussels I (The Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters which governs family law maintenance enforcement in EU countries) Article 17 provides that if the parties, one or more of whom are domiciled in a Contracting State, have agreed that the courts of a State are to have jurisdiction to settle any disputes which ... arise in connection with a particular legal relationship, those courts shall have exclusive jurisdiction. The agreement must be in writing or evidenced in writing. Where such an agreement is concluded, the other courts of Contracting States shall have no jurisdiction. In other words, the parties can bind themselves and the court as to jurisdiction. Clearly the English family courts have acceded to binding jurisdiction on forum issues regarding maintenance.

Subsequent attempts by us to change Brussels II by introducing agreements as a prior criteria on jurisdiction have had no impact whatsoever. We keep trying!

So far nothing has happened!

White 2001

The House of Lords decision of White (2001) 2 FLR 981 dramatically changed the whole direction of financial provision law in England but also in many other discretionary based jurisdictions around the world. It again focused attention on pre marriage acquired assets and the ability of the couple to reach their own binding decisions on what they consider to be fair and just. See article by Simon Bruce, "Pre marriage agreements following White", (2001) Fam Law 304.

M v M (Pre-nuptial agreement) 2002

A post White pre marriage agreement case is M v M (Pre-nuptial agreement) [2002] 1 FLR 654. This was the parties second marriage which lasted 5 years. Shortly before their marriage the parties entered into a pre nuptial agreement in Canada. The husband had had an acrimonious divorce in his first marriage and did not want to marry again without such an agreement being in place. The wife signed the agreement despite having received legal advice to the contrary because she was pregnant at the time, she wanted the marriage and the wedding had already been arranged. During the marriage the parties enjoyed a luxurious lifestyle, travelling extensively in promotion of the husband's business.

The parties moved to England and then both travelled independently with the wife returning to England with the child and filing for divorce. During the course of the divorce proceedings the wife claimed £1.3 million. The husband was worth about £7.5 million. However, under the terms of the pre nuptial agreement the husband had agreed to pay to the wife £275,000.

The Court found that the husband should pay to the wife a lump sum of £875,000 on a clean break basis. This was divided as to a housing fund of £575,000 and Duxbury of £300,000 representing £60,000 over a course of 5 years.

The court had to consider what weight to attach to the pre marriage agreement. They found it was not

binding on the parties. But it will be considered by the Court within the section 25 (1) factor, "all the circumstances of the case". However, the weight attached to such an agreement depends largely on the facts of the case. For example whether each party received independent legal advice, the closeness of the agreement reached to the wedding (i.e. ease of cancellation), whether circumstances occurred that would now render the agreement reached redundant, e.g. birth of a child. Connell J said:

In this case the court is concerned with fairness - indeed this is the overriding factor in all cases of ancillary relief. However, this is a fairly short marriage with the aggravating factor of the child, for which the court has to exercise its powers with respect to the mother as primary carer. It does seem however, that whilst judicial lip service is paid to the pre-nuptial agreement, it does beg the question as to whether the outcome would have been very different without such an agreement. Perhaps the amount of consideration that appears to have been given to the pre-nuptial agreement is yet another attempt of the court to ensure that each party has a fair trial, thus continuing to comply with Human Rights legislation.

X v X (Y and Z intervening) 2002

X v X (Y and Z intervening) (2002) 1 FLR 508 concerns a separation agreement rather than a pre-marriage agreement but is indicative of some judicial thinking. The parties, both Jewish, separated after 5 years of marriage. Following negotiations between the parties and their respective solicitors a consent order was drawn up by the parties:

- a) It would be a clean break.
- b) The wife would petition for divorce on the grounds of unreasonable behaviour.
- c) The husband would receive a lump sum payment of £500,000, to be paid by her brother.
- d) The husband would give a Get.

The consent order was duly sent to the Court but the District Judge refused to approve it as there were doubts about disclosure and an adequate explanation as to the rationale of the settlement. The wife claimed she had no assets of her own and the husband admitted to £620,000 capital, plus a £60,000 pension fund and £70,000 salary. So why was she paying him? Surely not just for the Get. It was odd. The wife then tried to resile from the agreement and husband applied to the Court for the consent order to be made into an order. Therefore the court had to consider if the agreement reached was "binding" in the light of the disclosure and rationale (or lack of) behind the settlement.

Munby J at page 536 summarised the following propositions as relevant:

- In exercising its duty under s 25 the task of the court is to reach a just result, what Lord Nicholls in White respectively called the 'fair' outcome...
- The fact that the parties have made their own agreement is a 'very important' factor in considering what is the just and fair outcome. The amount of importance will vary from case to case
- The court will not lightly permit parties who have made an agreement between themselves to depart from it. The court should be slow to invade the contractual territory, for as a matter of general policy what the parties have themselves agreed should, unless on the face of it or in fact contrary to public policy or subject to some vitiating feature of the type referred to by Ormrod LJ, be upheld by the courts
- A formal agreement, properly and fairly arrived at with competent legal advice, should be upheld by the court unless there are 'good and substantial grounds' for concluding that an 'injustice' will be done by holding the parties to it. (I adopt Ormrod LJ's formulation in preference to that of Thorpe J: his references to 'the most exceptional circumstances' and 'overwhelmingly strong considerations' seem to me, with respect, to put the matter perhaps a little too high)
- The mere fact that one party might have done better by going to court is not of itself generally a ground for permitting that party to resile from what was agreed

- The court must none the less have regard to all the circumstances. The circumstances are to be judged in their totality and with a broad perspective rather than individually one by one.
- In particular the court must have regard to the circumstances surrounding the making of the agreement, the extent to which the parties themselves attached importance to it and the extent to which the parties themselves have acted upon it.
- The relevant circumstances are not limited to the purely financial aspects of the agreement: social, personal and, I would add, religious and cultural considerations, all have to be taken into account
- The court should bear in mind the undesirability of stirring up problems with parties who have come to an agreement
- On the contrary the court should if possible, and consistent with its duty under s 25, seek to bring about family peace and finality

This agreement did not offend any public policy.

The fact that the parties had made their own agreement was very important.

The Court would not lightly allow parties who reached an agreement to depart from it. Most importantly there was a formal agreement reached here which had been arrived at with competent legal advice and there were no good or substantial grounds for concluding that an injustice would be done by holding the parties to it.

The wife had received expert legal advice and she had not been able to establish an inequality of bargaining position. The wife had also failed to show that if she was held to the agreement she would suffer an injustice. The husband had acted faithfully on the agreement, having obtained the Get.

Unlike the case of M v M, this case demonstrates that there are circumstances where an agreement will be considered by the court and upheld. But the court looked at the circumstances surrounding the making of the agreement (e.g. legal advice).

Quoted favourably in NA v MA (2006) below

K v K 2003

In K v K (2003) 1 FLR 120, there was a marriage of 14 months but one child. The wife had a trust fund of £1M. The husband was worth in excess of £25M. The husband was under pressure to marry due to a child. He insisted on the pre marriage agreement. It provided for final capital provision of £100K (plus interest) if the marriage ended in 5 years. Both parties had legal advice including knowing he wife was pregnant. The wife on divorce wanted £1.6M plus pp of £57K.

The Court held that the wife had willingly and with understanding signed the agreement, which was a s25 MCA factor. It was a short marriage and no contribution by the wife. The husband had married under pressure. So it was fair that the wife was held by agreement as to capital.

But the court went on to say it was unfair to hold the wife to no maintenance – the agreement silent on this issue.. Her upbringing of child was a s25(2)(f) contribution and she should have both the £15K child pp already agreed and an extra £15K in her capacity as mother and to bring her up to some degree of standard of father. However there was a direction of court that it should not be capitalised.

The child needed a home. The court said it should be on trust with sufficient to furnish properly but revert on child majority. It should bear some relationship to father's current resources and standard of living. The court provided £1.2M. this is very similar to TOLATA outcome.

The court upheld the pre-marriage agreement as regards capital but refused to follow it with regard to maintenance. As far as capital was concerned, the court upheld Edgar in that the parties had received independent legal advice, and that the husband had agreed to the marriage on the basis that the agreement would govern capital provision should the marriage end in early divorce. The court was concerned that the husband would suffer an injustice if the agreement were not upheld. However, with regard to maintenance, the fact that the wife was limited as far as earning power was concerned due to her being the primary carer of the child was a major factor in deciding that in respect of that part of the pre-marriage agreement, it should not be upheld as to do so would be to create injustice. The pre-marriage agreement was treated as both “circumstances of the case” and “conduct” in the exercise of the court’s discretion.

The case and judgement is important to read for the circumstances in which pre marriage agreements will be probably followed. Must be no duress, both must be legally represented and advised and all salient facts must be known to them both. Even then will not be upheld if terms manifestly unfair.

J v V (Disclosure: Offshore Corporations) 2004

In J v V (Disclosure: Offshore Corporations) (2004) 1 FLR 1042, the husband and wife had been married for 10 years and had three children, aged 13, 11 and 10. The wife had signed a prenuptial agreement purporting to prevent her from claiming against the husband’s assets. The husband had vigorously defended the wife’s divorce petition, while simultaneously attacking the wife’s character. The wife sought financial provision of £6 million from the husband, whom she claimed held an equal one-third share in a family company worth \$100 million, plus other significant capital assets. The husband’s position was that his financial resources were much more limited than that claimed by the wife. Following a 15-day hearing into the extent and value of the husband’s resources, the judge found that the husband’s credibility had been severely damaged by his conduct of the case and in particular his non-disclosure of audited accounts of the company in question. The wife’s costs were of the order of £700,000. She was awarded a clean break lump sum of £3,315,000.

Considering all the financial resources available to the husband, and making use of the informal paperwork drawn up for private consumption, which was a better guide to the underlying reality than the formal paperwork, the husband’s financial resources were valued at over £15 million. The court held this was not a case for an equal division and the award was based on the wife’s needs.

Incidentally, the court said that in cases involving a lavish standard of living funded through offshore corporations, which were designed and intended to be impenetrable, respondents who wished to prevent the instigation of an exhaustively searching enquiry had to be, from the outset, perhaps even fuller and franker in the exposure and explanation of their assets than in conventional onshore cases. If they did not, the applicant was likely to believe that assets were being hidden amongst complex corporate undergrowth. Because the husband in this case had distanced himself from the assets, the wife and her advisers had not been prepared to take the husband’s assertions at face value and had been justified in their refusal to do so.

The prenuptial settlement signed by the parties was held to be of no significance in this case. Quite apart from the obvious unfairness of its terms, it had been signed on the very eve of the marriage, without full legal advice, without proper disclosure and had made no allowance for the arrival of children.

Coleridge J explained his dismissal of the prenuptial agreement in this case

[41] I should also, as a preliminary point, deal with the prenuptial agreement. I mention it only to put it to one side in this case. Nowadays, occasionally, their existence can be of some significance but

not in this case. This contract was signed on the very eve of the marriage, without full legal advice, without proper disclosure and it made no allowance for the arrival of children. It must, in my judgment, therefore, in this jurisdiction fall at every fence, quite apart from the fact that the terms were obviously unfair, preventing the wife from claiming against the husband's assets.

Clearly and in line with previous authorities, the judge is concerned with fairness and factors such as those set out in Edgar, the presence or absence of which renders a contract fair or unfair.

SFLA's "A More Certain Future" 2004

SFLA Paper on status of agreements.

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

Whilst the judiciary retain the ability to exercise discretion on a case by case basis, even the Court of Appeal (Thorpe LJ October 2002), describing the Supporting Families proposals as "well pitched", added "more emphasis should be placed on self ordering by elevating the effect of pre-marital contracts in any straightforward situation". He himself suggested "clearer definition of the judicial task".

The[SFLA] considered maintaining the status quo or the introduction of a Practice Direction or a rule change. None of these did more than the existing law permits.

The [SFLA] also considered making pre-marital agreements compulsory, subject to an option to opt out but this was considered too bold a step. The [SFLA] also considered pre-marital agreements becoming legally binding subject to safeguards (those safeguards being those contained within the Government's consultation paper Supporting Families).

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

On balance, the [SFLA] felt that pre-marital agreements should become legally binding subject to an overriding safeguard of significant injustice and also be added as a separate section 25 Matrimonial Causes Act 1973 factor. The[SFLA] considered the satellite litigation that might flow to define what "significant injustice" was, but concluded that it was a small price to pay for the certainty of legally binding pre-marital agreements.

Thus it was proposed that s 25 be amended so that the court is directed to have regard to: "any agreement entered into between the parties to the marriage, in contemplation of or after the marriage for the purpose of regulating their affairs on the breakdown of their marriage, which shall be considered binding upon them unless to do so will cause significant injustice to either party or to any [such] minor child of the family".

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

other discretionary factors to mitigate the need for satellite litigation on significant injustice.

The proposed amendment benefits both those who are entitled to public funding upon the breakdown of their marriage, as well as those who fund costs privately. The more assets and income that are left intact within the family and not spent on post-marital litigation, the more likely families will not need to turn to other social security benefits such as housing and health care.

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

These proposals are consistent with statements made by Lord Filkin, the former Family Justice Minister, who confirmed that the Government was committed to supporting marriage and families when relationships failed especially when there were children involved. The [SFLA] believes that the proposals are consistent with this stance and promote conciliatory divorces and encourage positive relationships between children and parents who separate.

The Government, in support of its Civil Partnership Bill, has in principle given a green light to self ordering and these proposals extend this concept to the wider community who have chosen marriage, but whose marriages have failed.”

Naturally, concerns that its introduction would simply shift litigation to a concern about whether there would be significant injustice to either party or child. To which see V v C below.

So far, nothing has happened.

V v C 2004

In V v C (2004) (seemingly unreported) parties signed a pre marriage agreement in Spain with separation of assets and contribution to maintenance based on length of marriage. There was a child born before the marriage with special needs and unlikely to become fully independent. The marriage lasted about five years. Baron J decided that the pre marriage agreement was not binding under English law and that the court's powers arose under statute and not determined by the parties agreement although the agreement was a factor to be taken into account. The needs of the child were given priority when applying section 25.

A v B (Financial relief: Agreements) 2005

In A v B (Financial relief: Agreements) (2005) 2 FLR 730, there was a separation agreement three years after separation but the husband five years later then applied for financial provision. By the agreement, the wife received 45% of the assets but shortly after the agreement received proceeds of sale from an inheritance but did not tell the husband. At the final hearing, because the wife's assets had increased because of the London property market, the husband now had 25%. He said he had been under pressure to sign the agreement as he had an urgent housing need.

The judge was satisfied that the separation agreement was fair taking into account the section 25 factors. The husband was able to meet his needs from the resources without recourse to the inheritance.

Black J said that Smith (2000) 3 FCR 374 had not altered the time-honoured principles of Edgar and it remained the case that an agreement reached between the parties shall be taken into account under

the heading of conduct as one of the considerations to which the court must give weight in applying the statutory criteria.

Miller 2006

Whilst Mr Miller might well have been advised to have entered into a pre marriage agreement to save paying £5 million for the benefit of a three-year marriage, and reportedly has now remarried without again a pre marriage agreement, and therefore it is not a case regarding Pre-marriage agreements, the judgments have dramatically increased calls for Pre-marriage agreements to be binding or substantially taken into account. Whilst the principles set out in Miller may seem fair, the practical application in some cases seems unfair and in any event the House of Lords decision has given rise to uncertainty where the judgments conflict.

Moreover, comments by one of the judges seems inadvertently to have fuelled the calls for binding pre marriage agreements.

It was in the context of Lord Mance commenting on remarks by Baroness Hale concerning the separate arrangements couples make regarding their finances during marriage and whether they should then be implemented as the arrangements on divorce. Lord Mance had strong views on maintaining on divorce the financially separate arrangements some couples chose for their marriage. He said dividing equally might be inconsistent with a proper respect for the other's personal autonomy and development, and even more so if the other were to claim a share of any profit made from them (170).

It seems dramatically inconsistent for these two law lords to suggest that arrangements couples reach regarding their finances during the marriage should then determine the financial arrangements on divorce, one of them going so far as to refer to a proper respect for the other's personal autonomy, if the financial agreements reached before marriage after disclosure with the benefit of legal advice should have no or sometimes relatively minimal determinative effect and at times seem to give no respect for personal and joint autonomy. Could unwittingly the House of Lords in Miller by its own obiter comments have given a strong push towards binding pre marriage agreements?

NA v MA 2006

(2006) EWHC 2900 (Fam) Baron J.

A very recent case which has to be read in full as to the lives of the wealthy (annual living costs of £1.22 Mill), the costs of some litigation (£1.2 Mill and only to first instance hearing), the preparation of cases (described as "shambolic" by the judge), the vicious attack on a leading solicitor, his assistant and trainee ("brutal litigation"), a very good summary of post Miller law in non matrimonial property and non acquiescence cases and, oh yes, circumstances in which the courts should look at agreements drawn up between parties during a marriage to govern any divorce when accompanied by disclosure and with expert legal representation!

In summary, the husband and wife married in 1998 with 6 years prior cohabitation, and had 2 children, 4 and 6. Both still in early and mid 30s. Husband's father company was worth at peak in 2000 approx \$500M. After his death and much litigation, the husband's share was \$124M. The evidence is clear that it was never an equal marriage. The husband expected his word to be obeyed. After many turmoils and stresses, the wife had an affair with the husband's best friend. How this was discovered requires a reading of the judgement!! He was devastated. But over a short period of a few weeks he insisted that the wife signed an agreement about certain matters including giving up the affair and also financial provision if there were then to be a divorce. He consulted a top solicitor – none are identified in the

judgement – and an agreement with terms was drawn up. The husband's lawyer never seems to have given advice on the terms (i.e. stunningly unfair) but seems simply to have accepted what to put forward by the husband and his commercial lawyer. The wife was given the name of another top lawyer (just one, not a selection) whom she consulted. Disclosure was eventually given at £60 Mill. She was to get £3 Mill plus £240K pa pp if there was to be a divorce.

She was advised not to sign. A couple of months passed with increasing pressure to sign by the husband. There was much deception on her by those she trusted in the household. She was isolated. She recommitted adultery and the husband found out the next day, 9 March 2005, and told her (from New York) to sign or she could not come back to the house that night (with the children and presumably the £1.22 Mill pa lifestyle). She went to her lawyers office at about 7.30 pm. The partner was telephoned by her when he was at a dinner party in Sloane Square, and he called his assistant solicitor, shopping in Regents Street, who went back to the office and along with a trainee who unwisely was still at the office, saw the wife for 90 minutes, advised against signing, but she signed. On 12th May, a divorce petition was filed.

The only issue for these notes is the weight given to the pre marriage agreement. Despite the disclosure and the independent advice, the judge was clear. (paras 128 – 130)

128) ...I find that this ... agreement was offered on a take it or leave it basis at the time of and in the throes of emotional melt down and was stipulated to be the only way in which to save this marriage. It was also in play at a time when the parties were living in the same household, were habitually arguing and where the Wife (on everyone's evidence) was being subject to constant questioning and arguments about her affair. There was no time for careful reflection. The Wife informed the Court that the Husband pressurised and bullied her to sign from the outset. I accept her evidence on that point. Once he had decided to countenance the possibility of a reconciliation, I have no doubt that he told her that she must abide by all his conditions without demur and she must sign the deal as it arrived. He made it clear that, if she did not, there would be no reconciliation. As the Husband knew that she wanted above all else to save the marriage, felt overwhelmingly guilty and did not want her affair to destroy her or children's lives, his ultimatum about the agreement being a pre-requisite to the marriage continuing put her under severe, undue and unacceptable pressure. I find that she was given no effective choice and her free will was overborne. I am absolutely satisfied that the Husband made his position abundantly clear to her whenever the matter was raised. He used his dominant position both emotional and financial (in the sense that he knew she had no financial independence) to ensure that she felt that she had no alternative but to sign the agreement. On the 8th and 9th March he told her that she could not come home unless she signed it. She signed the agreement at about 8 pm on the 9th March only because she knew that he meant it and she had no realistic alternative if she wanted to return to her home (to be with her children) and to give the marriage a further chance.

129) The Law as set out above, characterises this type of behaviour as undue pressure and undue influence. For these reasons I will not implement the terms of this agreement.

130) In addition, as I have found, the agreement was not premised on fairness, it was calculated by the Husband and his commercial lawyer on the basis of what the Husband was willing to provide. It was devised with the purpose of being either a golden handcuff, or a cheap pay off. As a result of the Husband's behaviour towards the Wife, there was no proper opportunity to negotiate its terms. For these additional reasons it would be wholly unfair to implement its terms. It would also be unfair to use them as a starting point with which to judge the fairness of any award. Consequently, in this case, I will apply the Law in accordance with Section 25 Matrimonial Causes Act 1973 as interpreted through Authority.

There are many other issues in the case. But one of them was the investigation of the background to the agreement, which makes painful yet vital reading for those of us involved in urgent attendance notes

and emotional situations – and those of us with any concern for the reputation of our specialisation. Almost all solicitors will have sympathy with the trainee, assistant and partner for the wife in this case.

Baron J added that she thought that where an agreement was under attack in a case, lawyers should change. This will often be good practice. She said at para 182: The wife's legal team remained the same throughout. I do not believe that they ever considered that their bona fides was going to be an issue. No point was ever made about their continuing to act and, it is fair to note, this also occurred in the case of Edgar. However, with hindsight, I consider that it would have been prudent for there to have been a change of legal advisors in this case. When the validity of an agreement is challenged it would be wise for all the solicitors involved in the preparation and signing of the agreement to stand aside in favour of new advisors.

Ella 2007

[2007] EWCA Civ 99, Court of Appeal. Couple, both Jews, married in Israel in 1996 and moved in England. Wife born in England. Pre marriage agreement that any divorce should be in Israel and she had no right to any of his capital assets, effectively each kept their own. W had no independent legal advice or disclosure, being advised by husband's long term lawyer. Admitted that it was signed at a time of emotional turmoil, wife pregnant at the time and marriage arrangements rushed so child born in wedlock. Husband worth £2.5 M at time of marriage and now worth much more. Home, children (4, 8 and 9) and married life in England. On any basis, an English case. Wife issued first in England. Husband applied to transfer to Israel and the rabbinical courts.

Court of Appeal gave much weight to the agreement, saying the couple had strong links with Israel, and the agreement, binding in Israel, said any divorce should be in Israel. So transferred case to Israel.

Case highlights how crucial it is for the correct tactical and procedural steps to be taken in all relevant jurisdictions. Actions in the proceedings in Israel by wife's Israeli lawyer may have been very prejudicial to her English case.

Comparisons with S v S (1997) above but there the couple had connections with several countries and also clear that each had had independent legal advice. What pressure, including religious and family/community, was placed on the wife in Ella marrying in a country with pre marriage agreements as a norm and perhaps without the expectations of material provision for wives on divorce? Court of Appeal gave little weight to the detailed considerations of Wilson J in S v S to background of the pre marriage agreement in that case and said the judge in his comments was flagging up a potential shift in judicial thinking and was at most "interesting"!!

Moreover the Ct of Appeal specifically contemplated that the wife would apply under Part III MFPA 1984 if she did not receive anymore than specified in the pre marriage agreement. This therefore seems to create an international state of affaires where the English courts will give weight to the involvement of foreign courts based on a pre marriage agreement giving jurisdiction to the other courts but then accept back jurisdiction to make a fairer order in English legal eyes than had been made at "home"! This seems surprising logic! Perhaps too political for lawyers to comprehend.

Also seems surprising given that many of us support pre marriage agreements only if independent legal advice and this has been a big cause of difference with Europe in past 2 years.

Civil partnerships and cohabitants

It is an anomalous and discriminatory position that husbands and wives and same sex registered

couples are unable to bind themselves with a contractual pre-marital agreement, whereas cohabitants can. By a declaration of trust, cohabitation agreement or other written agreements, cohabiting couples are able to reach an agreement which will be upheld by the court under contractual law. The same does not apply for civil partnerships with s66 and s67 Civil Partnership Act 2004, with some variations, and they too have to rely on a similar law as divorcing couples. This preference to cohabitants is in stark contrast to the prejudicial treatment of marriage in which on divorce, couples face financial outcomes which represent a judicial lottery based on the exercise of statutory discretion. This cannot continue.

Australia: Binding Financial Agreements

Australia has binding financial agreements.

Introduced in 2001, the law is that if a couple reach agreement in writing after satisfactory disclosure and with both having specialist legal advice, then that agreement is binding on the parties and takes effect as if it were a court order. There are many such agreements. It includes pre marriage agreements, of marrieds, heterosexual and same sex. In a number of cases, the parties reach agreement instead of commencing court proceedings. In such circumstances, they enter into the agreement and then never bother to commence proceedings at all. (Australia has freestanding financial proceedings, totally separate to the divorce itself.) However even when there are court proceedings but then a settlement is reached before the final judgment, even if at the door of the court or at the end of the first day of the hearing, the parties often enter into a binding financial agreement rather than asking the court to make an order. Even in the past two years in Sydney, practice was moving away from consent orders into binding financial agreements. In part this was due to a perverse situation in which the Family Court had no power, even by consent, absolutely to dismiss maintenance claims and bring about a clean break whereas such an outcome was possible in a binding financial agreement. However another key factor was that such agreements were private whereas consent orders were potentially public. Several profile cases in Sydney which were concluded by these agreements which would then be confidential but final and binding.

Australia has shown that it is possible to have binding agreements alongside a discretionary system. So why cannot England have binding pre marriage agreements?

Drafting

At present, not binding.

So why do them?

Possible reasons:

- May be binding in law when event e.g. divorce, occurs
- Good evidence of what parties agreed and court will consider under s25 (1) MCA
- May be binding if parties divorce abroad
- Helps put parties minds to financial issues of their marriage

But unlike separation agreements, they have a major problem. (Which means clients have a major problem. Which actually means we lawyers have a major problem.)

No one knows what will happen over a lifetime of a pre marriage agreement. Major illness, unemployment, accident affecting health or ability to work, child (unplanned), handicapped child, mental illness, dramatic changes in financial fortunes, unexpected inheritances, very short or very long marriages.

Moreover many couples do not know where they will get any divorce. In which country? This is of crucial importance. There are significant differences in law between England and Wales and other civil law communities where community of property is common and where enforceable pre-marriage agreements are more common than in England. They are also enforceable in many of the accession states that joined the European Community in May 2004. Not all such agreements deal with maintenance, marital property and other financial provision. In many countries, even if proceedings take place in a country which was not anticipated by the parties at the time of the marriage, the contents of a pre-marriage agreement are likely to be given some consideration by the judge when making a decision. This differs from the English judicial approach.

Does one include a review clause after period of years? It was originally recommended by Law Society. But what if not reviewed? Does it lapse? If reviewed and one party then refuses to sign up, was the marriage entered into under false pretences?

Does one include review on an event e.g. birth of a child? If so, why? In most marriages, it is the one expected event (at least after sex and the marital row on the second day of the honeymoon)!

How relevant is the disclosure? How much scrutiny now of disclosure? How detailed should it be?

How goes the negotiations? Totally different to all other forms of family law negotiations. One sole reason. These parties still love each other! They may live with each other. They will live with each other. They are spending huge sums of money and masses of time and energy on an event which shows their love for each other. One or both may be reluctant to enter into the negotiations for the agreement. Both hope it will never be needed. It is one of the most odd agreements to be drafted by English family lawyers. Yet, on the continent, it is the norm. This is purely cultural! Or is it?

In any event, what different skills and abilities does the lawyer need? Do we need special training? Are we aware of the difference?

How goes the risk? On the lawyer. It is one of the most liability risky steps to take as a family lawyer. In the US, some family lawyers simply won't do them. Why? At a time of divorce, the pre marriage agreement receives incredible word by word, clause by clause, scrutiny; especially if it means one party pays a huge amount or the other receives a small amount in contrast to what they expected or would get at court. If no success against the other spouse, often the claim is then against the lawyer who drafted the agreement. It is high risk. In part, the risk is because of the uncertainty of the many situations which may arise in the future. The English family lawyer, and her partners now and in the decades to come, will be much happier if there are no pre marriage agreements in the files in archives. It cannot be a cheap and badly paid job, simply because of the risk factor.

When? Get it signed as early as possible before the wedding, to give greater chance of acceptability.

Who decides on terms? Ask the parties? But some are too close and want a significant level of guidance. Appropriate to suggest possible terms but take care of how the client sees that process.

What terms? Cover both capital and income? Just cover one asset e.g. agreement not to claim against it for a sale etc.

Always include a forum clause if any chance of international element in the future. If a real issue already, consider advice from the other countries in which family will have their base. A combined multi national pre marriage agreement which holds water in various countries. May be influential on forum especially if Brussels I; S v S (Divorce: Staying Proceedings) above.

Both need representation. In the past, the wealthier spouse often paid for the other to receive legal

advice, and the lawyer suggested names.

Recommending a client to say no. Don't sign. But the wedding date is fixed, the venue is booked, the invites have gone out, the dress fits (just), the groom is eager for it to be over and is getting commitment wobbles. Then you recommend against signing the pre nup. Against your client's interests. Bad deal. Do better using the law if a divorce. Disadvantageous position in the marriage relationship. Don't do it.

What remote chance is there of that advice being accepted? The client may be able to negotiate a better deal but their eye is on the cake, the garter and the honeymoon, not the pre nup. They may decide to abandon it altogether but one may insist or, sometimes, his advisers may insist. So what does the client do? More crucially (for this seminar), what do you do?

The SFLA has produced excellent precedents. Use them.

It has produced excellent notes on guidance. Read them.

Then decide if you, and/or your practice will do this sort of work! If you do, good luck. You and your clients and your insurance premiums will need it. The only guarantee is that the marriage will not turn out as they expect, as it never does.

And Finally, a fantasy case study.

David Hodson
dh@davidhodson.com
© February 2007