



Pre-nuptial agreements

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A pre-nuptial (or pre-marital) agreement is an agreement made by a couple before they marry or enter into a civil partnership which sets out how they wish their assets to be divided if they should divorce or have their civil partnership dissolved. Pre-nuptial agreements are not automatically enforceable in courts in England and Wales.

Traditionally, pre-nuptial agreements were unenforceable as being against public policy. However, more recently, courts have been prepared to attach weight to a pre-nuptial agreement as one of the relevant circumstances to be taken into account in exercising their discretion when deciding the division of assets on divorce or dissolution. In a landmark ruling in 2010, the Supreme Court held that courts should give effect to a pre-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. The ruling does not make pre-nuptial agreements binding in all cases; the fairness of upholding any particular agreement will be considered by the court on a case by case basis. However, some pre-nuptial agreements will now have effect in the absence of circumstances which would make this unfair.

In February 2014, following consultation, the Law Commission published its final report, *Matrimonial Property, Needs and Agreements*. Among other things, it recommended the introduction of “qualifying nuptial agreements” as enforceable contracts which would enable couples to make binding arrangements for the financial consequences of divorce or dissolution. These agreements, which would have to meet certain requirements, would not be subject to the court’s assessment of fairness. Couples would not be able to contract out of meeting the financial needs of each other and of any children. The Law Commission’s report includes a draft Bill. The Government has stated that it will publish an interim response to the Law Commission’s report by August 2014, and a full response by February 2015.

In Scotland, pre-nuptial agreements are generally regarded as being enforceable and not contrary to public policy.

This note deals with the law in England and Wales except where specifically stated.

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1 Introduction and background

1.1 What is a pre-nuptial agreement?

A pre-nuptial agreement (sometimes referred to as a pre-marital or an ante-nuptial agreement) is an agreement made by a couple before they marry, or enter into a civil partnership, which sets out how they wish their assets to be divided if they should divorce or have their civil partnership dissolved. The agreement may be updated after the marriage or civil partnership as the couple's circumstances change.

Pre-nuptial agreements are one type of marital property agreement. Other types include:

- post-nuptial agreements: these might be similar to pre-nuptial agreements but would be made after marriage or civil partnership;
- separation agreements: these might be made after separation and in anticipation of an imminent divorce or dissolution.

This note refers generally to spouses and marriage but similar considerations are relevant to civil partners and civil partnerships.

1.2 Are pre-nuptial agreements legally binding?

Pre-nuptial agreements are legally binding in various countries,¹ but they are not automatically enforceable in courts in England and Wales. In a landmark ruling in October 2010, in the case of *Radmacher v Granatino*, the Supreme Court held, by a majority of eight to one, that courts should give effect to a pre-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.² More information about this case is set out in section 2 of this note.

1.3 How are assets usually divided on divorce?

A couple may agree between themselves how to divide their assets on divorce, often, with the help of legal advice, taking into account what they consider might be ordered if the matter were taken to court. Their agreement may be embodied in a "consent order" approved by the court.

When this is not possible, an application for ancillary relief (financial provision) will be decided by the court. Financial provision may be awarded to either party to the marriage, depending on the facts of the case. Under section 25 of the *Matrimonial Causes Act 1973*, the court has very wide discretion regarding the division of assets on divorce; the court must take into account all the relevant circumstances of the case (and particularly the matters set out in the section), priority being given to the welfare, while a minor, of any child of the family who has not attained the age of eighteen. The court must also consider whether it is possible to make a "clean break".³

The *Civil Partnership Act 2004*, Schedule 5 Part 5, sets out similar provisions in relation to financial provision applications on dissolution of a civil partnership.

¹ Law Commission Consultation Paper No 198, *Marital Property Agreements*, 11 January 2011, Part 4 provides a comparative perspective, outlining the treatment of pre- and post-nuptial agreements in other jurisdictions

² *Radmacher v Granatino* [2010] UKSC 42

³ *Matrimonial Causes Act 1973* section 25A and *Civil Partnership Act 2004* schedule 5, part 5, para 23(2)

A Library standard note, [Financial provision orders on the breakdown of a relationship](#) provides more information.⁴

1.4 The previous Government's position

In 1998, the previous Government published a consultation paper, [Supporting families](#), which considered practical steps that could be taken to support families.⁵ The paper acknowledged that couples might be discouraged from making pre-nuptial agreements by the fact that there was no requirement for the courts to take any account of such agreements in deciding how to award property on divorce.⁶ One of the proposals being considered at that time was whether to make written pre-nuptial agreements about the distribution of money and property legally binding, for those who wished to use them.⁷ However, the paper stressed that pre-nuptial agreements would not be made compulsory for couples intending to marry and that the interests of the economically weaker party to the agreement, and the interests of children, would be protected by means of six specified safeguards.⁸

The [summary of responses](#) to the consultation paper, published in 1999, indicated that views were fairly evenly divided - 80 respondents agreed it would be helpful to allow pre-nuptial agreements to be legally binding, and 77 felt that this would foster negative expectations on the part of those contemplating marriage.⁹

Following this consultation exercise, the previous Government did not introduce any legislation to make pre-nuptial agreements legally enforceable.

In July 2007, in a written answer, Bridget Prentice, who was then a junior Minister at the Ministry of Justice, spoke of the use of pre-nuptial agreements, and said that they could never fully oust the jurisdiction of the court without putting vulnerable parties and children at risk:

Couples are free to make pre-nuptial agreements and apply them in the event of relationship breakdown. In those circumstances the courts will only intervene in their financial affairs if one party wishes to dispute that agreement. Even if the parties dispute it, an agreement is a factor taken into account in any ancillary relief proceedings relating to the couple who made the agreement.

The welfare of any child is the court's first consideration when resolving a couple's financial affairs. Enforcement of prenuptial contracts regardless of their content would displace that principle. An agreement which is very old, or one which does not deal with the couple's current circumstances, or on which the parties had not taken independent legal advice, could be unfair. The agreement might not have considered changes in circumstances, such as the illness of one of the parties, or the birth of children, which would change the parties' earning capacity.

(...)

The Ministry has not undertaken research on the impact of pre-nuptial agreements on parties with low incomes and vulnerable individuals. However, we believe that pre-nuptial agreements are most often used by wealthier couples. We think that pre-nuptial

⁴ SN/HA/5655

⁵ [Supporting families](#), November 1998

⁶ *Ibid* paragraph 4.20

⁷ *Ibid* paragraph 4.12

⁸ *Ibid* paragraph 4.23

⁹ [Supporting families: summary of responses to the consultation document](#), 1999, paragraph 4.6

agreements could never fully oust the jurisdiction of the court without putting vulnerable parties and children at risk.¹⁰

2 What is the status of pre-nuptial agreements after the *Radmacher v Granatino* case?

2.1 How has case law developed?

Traditionally, pre-nuptial agreements were unenforceable as being against public policy as it was considered that they might undermine the institution of marriage and attempt to fetter the discretion of the courts to award property on divorce. In a 1995 case, Thorpe J. (as he was then) spoke of the very limited significance of pre-nuptial agreements:

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.¹¹

More recently, courts have been prepared to attach weight to a pre-nuptial agreement as one of the relevant circumstances to be taken into account in exercising their discretion under section 25 of the *Matrimonial Causes Act 1973*, or as a factor to be treated as conduct which it would be unfair for the court to ignore (this is one of the matters specified in section 25).

In another case, (where the agreement was made after the marriage and in anticipation of divorce), the judge held that the fact that the parties had made their own agreement was a 'very important' factor in considering what was the just and fair outcome. He said that the amount of importance would vary from case to case and indicated how the court might treat such an agreement:

The court will not lightly permit parties who have made an agreement between themselves to depart from it. The court should be slow to invade the contractual territory, for as a matter of general policy what the parties have themselves agreed should, unless on the face of it or in fact contrary to public policy or subject to some vitiating feature ... be upheld by the courts.¹²

In 2003, a court largely upheld a pre-nuptial agreement on the basis that the wife (who was seeking a capital settlement above that set out in the agreement) understood the pre-nuptial agreement, was properly advised as to its terms, and signed it willingly without pressure. There had been no unforeseen circumstances arising since the agreement which would make it unjust to hold the parties to it. It was held, therefore, that the agreement should be considered by the court as one of the circumstances of the case under section 25 of the *Matrimonial Causes Act 1973* and that entry into the agreement constituted conduct which it would be unfair to disregard.¹³

Conversely, in another case, a pre-nuptial agreement was disregarded on the particular facts involved. The judge set out the reasons for this decision:

Nowadays [the existence of a prenuptial agreement] can be of some significance but not in this case. This contract was signed on the very eve of the marriage, without full

¹⁰ [HC Deb 10 July 2007 c1465W](#)

¹¹ *F v. F (Ancillary Relief: Substantial Assets)* [1995] 2 F.L.R. 45 at 66

¹² *X v X (FD)* [2002] 1 FLR 508 at 537 (Munby J)

¹³ *K v K (Ancillary relief: prenuptial agreement)* [2003] 1 FLR 120 (Roger Hayward-Smith QC sitting as a Deputy High Court Judge)

legal advice, without proper disclosure and it made no allowance for the arrival of children. It must, in my judgment, 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.¹⁴

In a 2008 case, *MacLeod v MacLeod*, the Privy Council considered whether a pre-nuptial agreement was binding.¹⁵ Two nationals of the US, who were resident in the Isle of Man, had entered into a pre-nuptial agreement. Several years later, after they were married, they made a further agreement which confirmed the earlier agreement but made substantial variations to it. When the marriage broke down, the wife claimed that the agreements should be disregarded and the husband claimed that the wife should be bound by their terms. The Privy Council held that it was not open to them to reverse the long standing rule that pre-nuptial agreements were contrary to public policy and thus not valid or binding in the contractual sense, and said that the issue was more appropriate to legislative than judicial development. However, the courts could give effect to post-nuptial agreements (agreements entered into after marriage) which provided for a future separation, in the same way and under the same principles as separation agreements.

2.2 *Radmacher (formerly Granatino) v Granatino*

The facts

The wife was a German heiress, said to have a fortune of £100m. The husband, who was French, was a former investment banker who, during the course of the marriage, left banking and embarked on research studies at Oxford. They had two children. In 1988, four months before their marriage, the parties entered into a pre-nuptial agreement in Germany, in which each agreed not to make a claim against the other in the event of divorce. The agreement would be enforceable both in Germany and France. Notwithstanding the agreement, following their separation in 2006, the husband made a claim for financial provision and in the High Court was awarded a lump sum of £5,560,000.

Court of Appeal decision

In July 2009, the Court of Appeal allowed the wife's appeal and set out its views on the status of pre-nuptial agreements for the purposes of section 25 of the *Matrimonial Causes Act 1973*.¹⁶ Lord Justice Thorpe referred to his own comments in the 1995 case, *F v F*.¹⁷ He said that he "would not be so dismissive if such a case were now to come before this court on appeal" and indicated that courts should give "due weight" to pre-nuptial agreements:

Thus, pending the report of the Law Commission, in future cases broadly in line with the present case on the facts, the judge should give due weight to the marital property regime into which the parties freely entered. This is not to apply foreign law, nor is it to give effect to a contract foreign to English tradition. It is, in my judgment, a legitimate exercise of the very wide discretion that is conferred on the judges to achieve fairness between the parties to the ancillary relief proceedings.¹⁸

¹⁴ *J v V (Disclosure: Offshore Corporations)* [2004] 1 FLR 1042

¹⁵ *MacLeod v MacLeod* [2008] UKPC 64

¹⁶ [2009] EWCA Civ 649

¹⁷ See section 2.1 of this note above

¹⁸ [2009] EWCA Civ 649 paragraph 53

Lord Justice Thorpe agreed with the conclusion in *MacLeod v MacLeod* that “wholesale reform is for Parliament and not the judges, particularly now the Law Commission is at work”.¹⁹

Supreme Court decision

The husband’s appeal to the Supreme Court was dismissed.²⁰ In October 2010, in a majority judgment (eight to one), the Supreme Court advanced a proposition, to be applied in the case of both pre- and post-nuptial agreements:

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.²¹

This means that some pre-nuptial agreements will have effect in the absence of circumstances which would make this unfair. The ruling does not make pre-nuptial agreements binding in all cases but, in the right case, an agreement can have decisive or compelling weight. A pre-nuptial agreement will not prevent a divorcing party from asking the court to decide how assets should be divided, but, depending on the circumstances, the court might make its decision in the light of the terms of that agreement.

The fairness of upholding any particular agreement will be considered by the court on a case by case basis:

There can be no question of this Court altering the principle that it is the Court, and not any prior agreement between the parties, that will determine the appropriate ancillary relief when a marriage comes to an end, for that principle is embodied in the legislation. What the Court can do is to attempt to give some assistance in relation to the approach that a court considering ancillary relief should adopt towards an ante-nuptial agreement between the parties.²²

The Supreme Court said that it would not be desirable to lay down rules that would fetter the flexibility that the court requires to reach a fair result. However, the Court considered that, in future, it would be natural to infer that parties who entered into a pre-nuptial agreement, to which English law was likely to be applied, intended that effect should be given to it.

In this case, the pre-nuptial agreement was freely entered into and both parties fully appreciated its implications. A [press summary](#) set out three issues which arose in relation to the agreement for the court to consider:

(i) Were there circumstances attending the making of the agreement which should detract from the weight which should be accorded to it? Parties must enter into an ante-nuptial agreement voluntarily, without undue pressure and be informed of its implications. The question is whether there is any material lack of disclosure, information or advice [69].

(ii) Did the foreign elements of the case enhance the weight that should be accorded to the agreement? In 1998, when this agreement was signed, the fact that it was binding under German law was relevant to the question of whether the parties intended the agreement to be effective, at a time when it would not have been recognised in the

¹⁹ *Ibid* paragraph 25. See section 3 below for information about the Law Commission consultation and report

²⁰ [\[2010\] UKSC 42](#)

²¹ *Ibid* paragraph 75

²² *Ibid* paragraph 7

English courts. After this judgment it will be natural to infer that parties entering into agreements governed by English law will intend that effect be given to them [74]

(iii) Did the circumstances prevailing at the time the court made its order make it fair or just to depart from the agreement? An ante-nuptial agreement may make provisions that conflict with what a court would otherwise consider to be fair. The principle, however, to be applied is that a 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 [75]. A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family [77], but respect should be given to individual autonomy [78] and to the reasonable desire to make provision for existing property [79]. In the right case an ante-nuptial agreement can have decisive or compelling weight [83].²³

Applying these principles to the facts, the Supreme Court held that the Court of Appeal had been correct to conclude that there were no factors which rendered it unfair to hold the husband to the agreement:

He is extremely able and his own needs will in large measure be indirectly met from the generous relief given to cater for the needs of his two daughters until the younger reaches the age of 22 [120]. There is no compensation factor as the husband's decision to abandon his career in the city was not motivated by the demands of his family but reflected his own preference [121]. Fairness did not entitle him to a portion of his wife's wealth, received from her family independently of the marriage, when he had agreed he should not be so entitled when he married her [122].

Contrary to the decision in *MacLeod v MacLeod*,²⁴ the Supreme Court decided that pre-nuptial agreements should not be treated differently from post-nuptial agreements.

Dissenting judgment

Lady Hale gave the dissenting judgment. She considered the nature and status of marriage:

Marriage is, of course, a contract, in the sense that each party must agree to enter into it and once entered both are bound by its legal consequences. But it is also a status. This means two things. First, the parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and for the state. Nowadays there is considerable freedom and flexibility within the marital package but there is an irreducible minimum. This includes a couple's mutual duty to support one another and their children. We have now arrived at a position where the differing roles which either may adopt within the relationship are entitled to equal esteem. The question for us is how far individual couples should be free to re-write that essential feature of the marital relationship as they choose.²⁵

She said that "the law of marital agreements [was] in a mess and ripe for systematic review and reform", but that it was for Parliament to reform the law. Lady Hale considered that this particular case had "very unusual features" and that difficult issues cannot be resolved in an individual case. She also considered the gender dimension:

²³ [Supreme Court press summary, *Radmacher \(formerly Granatino\) \(Respondent\) v Granatino \(Appellant\)* \[2010\] UKSC 42 On appeal from the Court of Appeal \[2009\] EWCA Civ 649](#), 20 October 2010 [accessed 20 August 2014]

²⁴ See section 2.1 of this note above

²⁵ [\[2010\] UKSC 42](#) paragraph 132

137. Above all, perhaps, the court hearing a particular case can all too easily lose sight of the fact that, unlike a separation agreement, the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually although by no means invariably she – would otherwise be entitled... In short, there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman.

Lady Hale disagreed with the majority on a number of points,²⁶ and proposed a different test to be applied to marital agreements:

“Did each party freely enter into an agreement, intending it to have legal effect and with a full appreciation of its implications? If so, in the circumstances as they now are, would it be fair to hold them to their agreement?”

That is very similar to the test proposed by the majority, but it seeks to avoid the “impermissible judicial gloss” of a presumption or starting point, while mitigating the rigours of the MacLeod test in an appropriate case. It allows the court to give full weight to the agreement if it is fair to do so and I adhere to the view expressed in MacLeod that it can be entirely fair to hold the parties to their agreement even if the outcome is very different from what a court would order if they had not made it.²⁷

Lady Hale considered that important policy considerations justified a different approach for agreements made before and after a marriage.²⁸

2.3 So, what is the present position?

Following the decision in *Radmacher v Granatino*, the enforceability of any particular pre-nuptial agreement will depend on the court’s view of its fairness. Accordingly, there is still a degree of uncertainty as to whether a court would make an order which reflects the terms of the agreement.

Cases continue to be decided on their facts, and since the decision in *Radmacher v Granatino*, some weight has been given to marital property agreements in some cases,²⁹ but not in others.³⁰

In a judgment delivered in 2014, Holman J set out the law on nuptial agreements:

I said at the outset of this judgment that the law is not difficult to state. Such agreements must always be given weight, and often decisive weight as part of the circumstances of the case. They may affect not only whether to make any award at all, but also the size and the structure of any award. I could at this point cite passages from the majority judgment in *Granatino v Radmacher* but, helpfully, all three counsel have agreed the following propositions of law which are drawn from *Granatino v Radmacher* and which I gratefully adopt....

1. It is the court, and not the parties, that decides the ultimate question of what provision is to be made;
2. The over-arching criterion remains the search for 'fairness', in accordance with section 25 as explained by the House of Lords in *Miller/McFarlane* (i.e.

²⁶ Set out in paragraph 138 of the judgment

²⁷ [2010] UKSC 42 paragraph 169

²⁸ *Ibid* paragraph 162

²⁹ See, for example, *Z v Z* [2011] EWHC 2878 (Fam)

³⁰ See, for example, *Kremen v Agrest (No 11)* [2012] EWHC 45 (Fam)

needs, sharing and compensation). But an agreement is capable of altering what is fair, including in relation to 'need';

3. An agreement (assuming it is not 'impugned' for procedural unfairness, such as duress) should be given weight in that process, although that weight may be anything from slight to decisive in an appropriate case;

4. The weight to be given to an agreement may be enhanced or reduced by a variety of factors;

5. Effect should be given to an agreement that is entered into freely with full appreciation of the implications unless in the circumstances prevailing it would not be fair to hold the parties to that agreement. i.e. There is at least a burden on the husband to show that the agreement should not prevail;

6. Whether it will 'not be fair to hold the parties to the agreement' will necessarily depend on the facts, but some guidance can be given:

i) A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children;

ii) Respect for autonomy, including a decision as to the manner in which their financial affairs should be regulated, may be particularly relevant where the agreement addresses the existing circumstances and not merely the contingencies of an uncertain future;

iii) There is nothing inherently unfair in an agreement making provision dealing with existing non-marital property including anticipated future receipts, and there may be good objective justifications for it, such as obligations towards family members;

iv) The longer the marriage has lasted the more likely it is that events have rendered what might have seemed fair at the time of the making of the agreement unfair now, particularly if the position is not as envisaged;

v) It is unlikely to be fair that one party is left in a predicament of real need while the other has 'a sufficiency or more';

vi) Where each party is able to meet his or her needs, fairness may well not require a departure from the agreement.

(...)

To counsel's propositions of law I add one other, which needs no citation of authority. The court must be scrupulous to avoid gender discrimination or gender bias. Of course gender may, and often does, impact heavily on outcome. If in fact a wife, in her role as mother, is the primary carer for the children, then her need for secure and suitable accommodation may outweigh that of the husband. If a wife, due to her commitments to caring for the children, is less able to work than is the husband, than that is likely to impact upon maintenance needs. So, too, if it is a fact of a case that a wife has lower earning capacity because of gender discrimination in the relevant employment markets. But there must be no discrimination or bias based on gender alone, nor on any stereo-typical view that a wife may be dependent upon her husband but not vice versa.³¹

³¹ [Luckwell v Limata](#) [2014] EWHC 502 (Fam) paragraphs 129 to 132

The Law Commission has summarised the uncertainty of the current effect of pre-nuptial and post-nuptial agreements, noting that they are being used with increasing frequency:

[They] cannot be enforced as contracts and they cannot take away the parties' ability to ask the court to make financial orders nor the courts' powers to make orders. As a result, the only way to achieve legal finality is to ask the court to make orders that reflect the terms of the agreement; and the Supreme Court has said that this should be done unless the agreement is unfair.

That means that people who want to make agreements in advance know that the agreement may not be enforced and that when they go to court financial orders will be made which may or may not follow the terms of the agreement, depending upon the court's views about fairness. That in turn will depend upon issues such as the availability to the parties of legal advice, the extent to which they entered into the agreement with full awareness of its implications, the level of provision made for need, and so on. Although advisers have over recent years become more used to drafting pre- and post-nups that they think the court will uphold, they cannot say for certain what the eventual outcome will be.³²

3 What next? The Law Commission consultation and report

3.1 Law Commission consultation

In 2009, the Law Commission started a project to examine the status and enforceability of marital property agreements (pre-nuptial, post-nuptial and separation agreements). Their consultation paper, *Marital Property Agreements*, which was published on 11 January 2011, reviewed the current law and discussed options for reform.³³ The consultation closed on 11 April 2011. The consultation was subsequently extended in 2012 in order to cover two further issues of financial provision on divorce or dissolution of a civil partnership: financial needs and the definition and treatment of non-matrimonial property.

3.2 Law Commission report

On 27 February 2014, the Law Commission published its final report, *Matrimonial Property, Needs and Agreements*,³⁴ together with an *Executive Summary*.

Among other things, the Law Commission recommended the introduction of "qualifying nuptial agreements" as enforceable contracts which would enable couples to make binding arrangements for the financial consequences of divorce or dissolution. These agreements would not be subject to the court's assessment of fairness. Certain requirements would have to be met in order for the agreement to be a "qualifying nuptial agreement":

- (a) The agreement must be contractually valid (and able to withstand challenge on the basis of undue influence or misrepresentation, for example).
- (b) The agreement must have been made by deed and must contain a statement signed by both parties that he or she understands that the agreement is a qualifying nuptial agreement that will partially remove the court's discretion to make financial orders.
- (c) The agreement must not have been made within the 28 days immediately before the wedding or the celebration of civil partnership.

³² Law Commission, *Matrimonial property, needs and agreements: the future of financial orders on divorce and dissolution. Executive Summary*, 2014, paragraphs 1.26-1.27

³³ Law Commission Consultation Paper No 198, *Marital Property Agreements*, 11 January 2011

³⁴ Law Commission, Law Com No 343, *Matrimonial Property, Needs and Agreements*, 27 February 2014

- (d) Both parties to the agreement must have received, at the time of the making of the agreement, disclosure of material information about the other party's financial situation.
- (e) Both parties must have received legal advice at the time that the agreement was formed.³⁵

The Law Commission recommended that it should not be possible for a party to waive their rights to disclosure and legal advice.

Couples would not be able to contract out of meeting the financial needs of each other and of any children. Agreements about financial needs would still be subject to the court's scrutiny for fairness. A qualifying nuptial agreement would not remove the parties' ability to apply for, and the courts' jurisdiction to make, financial orders to meet their financial needs.

The Law Commission's report includes a draft *Nuptial Agreements Bill*, which would introduce qualifying nuptial agreements in England and Wales.

The Law Commission's report also sets out recommendations for reform which would:

- clarify, through the provision of guidance by the Family Justice Council, the meaning of "financial needs", in order to ensure that the term is applied consistently by the courts and to give people without legal representation access to a clear statement of their responsibilities and the objective of eventual independence that a financial settlement should strive to achieve; and
- investigate the possibility of whether an aid to calculation of "financial needs" could be devised, to take the form of non-statutory guidance, which would give a range of outcomes, in figures, within which separating couples might negotiate.³⁶

3.3 What will happen next?

In April 2014, Justice Minister, Simon Hughes announced that the Ministry of Justice had asked the Family Justice Council to take forward the Law Commission's recommendation to clarify the law of "financial needs" on divorce or dissolution of a civil partnership, and that separating couples would be given new guidelines setting out what they should expect when property and income were distributed by the courts. He also said that the Ministry of Justice was considering the Law Commission's report more fully, including considering the next steps on pre-nuptial agreements.³⁷

In March 2014, in a written answer, Simon Hughes said that an interim response to the Law Commission's report would be published by August 2014, and a full response by February 2015. He said that "these are the timescales established in protocol between the Law Commission and Government".³⁸

³⁵ Law Commission, *Matrimonial Property, Needs and Agreements: The Future of financial orders on divorce and dissolution, Executive Summary*, February 2014, paragraph 1.35

³⁶ Law Commission, *Matrimonial Property, Needs and Agreements* [accessed 20 August 2014]

³⁷ Gov.UK, Ministry of Justice press release, *Divorce myths to be dispelled*, 17 April 2014 [accessed 20 August 2014]

³⁸ [HC Deb 31 March 2014 cc530-1W](#)

4 What is the position in Scotland?³⁹

The law in Scotland on pre-nuptial agreements is different from in England and Wales. Whilst pre-nuptial agreements have not been the subject of extensive case law, they are generally regarded as being enforceable and not contrary to public policy.⁴⁰

Specifically, section 10 of the *Family Law (Scotland) Act 1985* makes provision for 'matrimonial property' in Scotland to be shared fairly on divorce. Fair sharing is usually equal sharing unless 'special circumstances' justify different proportions. Special circumstances include an agreement between the parties as to the division of matrimonial property on divorce (1985 Act, section 10(6)(a)).

In practice, pre-nuptial agreements are typically used to ring fence certain assets, in order to exclude them from the statutory definition of 'matrimonial property'. Pre-nuptial agreements making comprehensive provision to override the legislative principles otherwise governing the division of matrimonial property on divorce are relatively unusual, although this may change in the future.

By virtue of section 16 of the 1985 Act, the court has power to set aside a pre-nuptial agreement when it was not "fair and reasonable" at the time it was entered into and subsequent case law has developed this test with reference to a number of individual principles.⁴¹ Significantly, the fact that the terms of an agreement led to an inequitable outcome is not itself enough to justify varying it or setting it aside. Furthermore, in practice, the power contained in section 16 is a safety net, rarely used by the courts.

³⁹ Information provided by the Scottish Parliament Information Centre (SPICe) on 12 August 2014

⁴⁰ See, for example, *Thomson v Thomson* 1981 SC 344, a case relating to the terms of a pre-nuptial agreement, where the validity and enforceability of such an agreement was assumed by the parties and the judge in the case

⁴¹ The case of *Kibble v Kibble* 2010 SLT (Sh Ct) 5 clarified that section 16 could apply to pre-nuptial agreements as well as to agreements made on the separation of the parties, as previously there had been uncertainty associated with this point. The leading case of *Gillon v Gillon (Number 3)* 1995 SLT 678 sets out the individual principles to be applied in determining whether or not to set aside an agreement under section 16