Family Agreements: Seeking Certainty to Reduce Disputes

The Recognition and Enforcement of pre-nuptial and post-nuptial agreements in England and Wales

Executive summary

Introduction

Resolution is an organisation of over 5,700 family lawyers. Its members have extensive experience of dealing with the breakdown of families, both married and unmarried. In the course of their work with clients, members have found that an increasing number of couples wish to take steps to minimise the uncertainty of the court's approach to financial arrangements upon divorce and to decide for themselves what a fair outcome would be.

In 2005 *Resolution* published 'A more certain future: Recognition of pre-marital agreements in England and Wales'. We decided to review this policy in light of the increasing importance of this issue to individuals and couples seeking advice from our members; recent developments in case law and the Law Commission's current review of marital and civil partnerships agreements.

The Social Context

According to the most recent figures available from the Office for National Statistics (ONS) 231,450 marriages were registered in England and Wales in 2007. The ONS predicted in Spring 2008 that if divorce rates continue around 45% of marriages will end in divorce, with almost half of these happening before couples reach their tenth anniversary. Those who have been previously divorced have the highest proportion of marriages ending in divorce. We also live in a society where there are more women in the workplace than ever before, generating wealth independently and tending to marry later. Anecdotally, and in the experience of our members, both more men and women would now consider a pre-nuptial agreement. There could be many reasons, for example, because they are aware of the need to maintain financial independence should their marriage end or they wish to mutually agree how to protect particular assets, say for their children from a previous marriage. The number of people moving between countries and forming relationships with their citizens has also made pre-marital agreements more common.

The Case for Reform

The current law, which we analyse in Section 1 of the main part of this document, fails to provide sufficient clarity and certainty of outcome for couples before, during and after marriage. Financial outcomes on divorce are currently unclear and uncertain. Equally, those who are divorcing and who have made a pre-nuptial agreement often find that the other party to the marriage no longer accepts the terms of the agreement and does not wish to be held to it. Since English law has historically had an unclear and inconsistent attitude towards pre-nuptial agreements, such challenges are not infrequent. Both parties then face

uncertainty and potentially emotionally draining, protracted and expensive legal proceedings in the unhappy event of the ending of their relationship because there are currently no statutory rules about how the courts should approach such agreements.

Family breakdown is not only emotionally costly, it frequently causes substantial expense in legal fees. Such a drain on the family's resources is particularly unfortunate at a time of marital breakdown, when other more pressing expenses arise; such as the need to re-house. If people knew that the marital agreement they had made was highly likely to be enforced, instead of the current uncertain position, we think they would be more likely to adhere to the terms of the agreement, instead of having litigation which may be costly to the family justice system and other services as well as the couple involved. There is a need, at times, to protect the weaker person in a marriage but if a couple wishes to enter into a pre-nuptial agreement in the full knowledge of its effects and to avoid the fear of uncertain outcomes, the law should permit them to have it upheld by the court. They should also be entitled to choice at the outset of married relationships. We believe that the unenforceability of pre-nuptial agreements may in fact undermine marriage and lead to people deciding not to marry.

English domestic law is out of line with most other jurisdictions of the world, in particular with those of Europe, in not recognising agreements. This can lead to 'forum shopping' where the spouse seeking a divorce will try to secure the jurisdiction most favourable to them. Section 4 of the main part of this document sets out a comparison of jurisdictions.

Developments in case law

The need for reform in relation to pre-nuptial agreements became even greater in the light of the December 2008 decision of the Privy Council in the case of *MacLeod v MacLeod*. One of our highest courts decided that an agreement executed at any time after the marriage should be assumed to be binding, subject to normal contractual vitiating factors and the powers of the court to vary it if there had been a change of circumstances which would make the terms "manifestly unjust". Thus, we have the situation that married couples may in the course of their marriage execute a binding agreement regulating their financial affairs, but the same couple may not do so before and in contemplation of their marriage. We think this is anomalous and unfortunate.

In developing our policy we have also taken into account that other financial agreements between married couples, such as agreements made at or after separation about the division of their assets, are often treated as (in effect) binding by the courts. The courts recognise the important policy reasons, both private and public, for holding people to properly made agreements and only allowing them to depart from them exceptionally.

The opinions and recommendations expressed in this paper were provisionally formulated prior to the important Court of Appeal decision in *Radmacher v Granatino*, [2009] EWCA Civ 627, in July 2009. We welcome that decision and the three judgments of the Court of Appeal which are in line with our recommendations. The three Lords Justice were unanimous not only in holding that the pre-nuptial agreement entered into by those parties should have been given greater weight by the trial judge, but in expressing concerns about the current state of our law and the need for reform. For example, Lord Justice Wilson said in paragraph 127 of his judgment:

> "I suffer forensic discomfort about the lack of clarity in the treatment of pre-nuptial contracts under our present law and a loss of confidence in the justice of an approach which differs from that

> adopted by most of the other jurisdictions to which we have the closest links, even jurisdictions, such as Australia and most of the states of the U.S., in which there is no marital property regime of which the pre-nuptial contract is the mechanism for opting out. But the very basis of our present law also concerns me. Its usually unspoken premise seems to be an assumption that, prior to marriage, one of the parties, in particular the woman, is, by reason of heightened emotion and the intensity of desire to marry, likely to be so blindly trusting of the other as to be unduly susceptible to the other's demands even if unreasonable. No doubt in its application to each case the law must guard against the possible infection of a contract by one party's exploitation of the susceptibility of the other. But, as a general assumption, the premise is patronising, in particular to women; and I would prefer the starting-point to be for both parties to be required to accept the consequences of whatever they have freely and knowingly agreed."

And, chiming with the concern we have expressed above about the inability of responsible and mature adults to make nuptial agreements which are binding under our current law, Lord Justice Thorpe said, in paragraph 27 of his judgment:

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

Resolution's proposals

As explained in the main paper, we have considered a range of options ranging from "no change" of the law, through modest change, to a substantial reform of the law to make pre-nuptial agreements legally binding. We consider that, subject to clearly identified safeguards, the best option is a substantial reform of the law. It would permit, but not require, nuptial agreements and would provide those who make such agreements with a clear understanding of the approach the Court would apply when considering the agreement. The parties to the agreement would know that the agreement would be binding, unless it failed to satisfy clearly identified criteria.

The safeguards which we recommend, and which are included within the proposed new subsection 25(2A) of the Matrimonial Causes Act 1973 set out below, effectively include those contained within the Government's consultation paper Supporting Families, November 1998; except that under our proposal the existence of a child would not destroy the binding nature of the agreement unless enforcing it would cause substantial hardship.

We therefore propose new subsections 25(2A) and 25(2B) of the Matrimonial Causes Act 1973 (and a new provision to the same effect in the Civil Partnership Act 2004) in these terms:

> **s. 25(2A)** ***The court shall regard any agreement in writing 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 as binding upon the parties and shall make an order in the terms of the agreement unless:***
>
> ***(a) the agreement was entered into as a result of unfair pressure or unfair influence;***
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> ***(b) one or both parties did not have a reasonable opportunity to receive independent legal advice about the terms and effect of the agreement;***

(c) one or both parties failed to provide substantially full and frank financial disclosure before the agreement was made;

(d) the agreement was made fewer than 42 days before the marriage;

(e) enforcing the agreement would cause substantial hardship to either party or to any minor child of the family.

s. 25(2B) If one or more of the factors in paragraphs (a) to (e) of subsection 25(2A) applies, the Court shall give the agreement such weight as it thinks fit taking into account:

(a) all the facts surrounding the agreement;

(b) the matters in section 25(1) and (2).

It would also be necessary to make a consequential amendment to section 25(2) of the Act, in order to add to the list of factors in that subsection to which the court is required to have regard, any agreement within the new section 25(2A). While this is a point of detailed drafting, rather than principle, we suggest that it is achieved by adding a new s.25(2)(i) in these terms:

s.25(2)(i) any agreement falling within section 25(2A).

These proposals would provide greater predictability of outcome and make clear that agreements *will* be binding *unless* one of a number of clearly identified safeguards is breached, preserving the possibility of a review by the court of an agreement which has one or more hall-marks of serious unfairness.

Apart from providing couples with choice and a greater understanding and more clarity about how a court would treat any marital agreement made by them, the reform would be likely to reduce disputes, and therefore reduce expense to the parties and the burden on the courts, if the relationship breaks down.

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

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Recognition and Enforcement of pre-nuptial and post-nuptial agreements in England and Wales

Introduction

Resolution is an organisation of over 5,700 lawyers and family justice professionals who believe in a constructive, non-confrontational approach to family law matters. *Resolution* also seeks to improve the family justice system. We provide education and training for lawyers and mediators to improve their knowledge of the law and their understanding of the emotional and practical issues of family breakdown. *Resolution* encourages the use of other dispute resolution methods, such as mediation and collaborative law, where appropriate.

A. Remit

This paper explains the current state of the law relating to marital agreements, the particular issues which arise and possible options for reform including statutory reform. It does not include exploration of cohabitation contracts. It is also not intended to deal specifically with ante-nuptial settlements or trusts (where parties seek to regularise the financial affairs of spouses on and during marriage, but the agreement does not contemplate the dissolution of a marriage).

Civil partnerships: Where we refer to married couples, marriage and divorce, we intend also to refer to and include couples in registered civil partnerships and the equivalent terms arising from such relationships. It is merely for brevity that we use the terminology of marriage.

B. Definition

We would not seek to restrict the definition of a marital agreement. An agreement falling within our proposed new statutory provision will, if it is in writing, include:

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

(b) a mid-nuptial, or post-nuptial, agreement, whether an initial agreement or a variation of a prior agreement such as a pre-nuptial agreement; (such an agreement in a registered civil partnership would be treated in the same manner);

(c) a separation agreement made between a man and a woman or same sex partners in contemplation of or following separation;

(d) an agreement of the types referred to at (a) and (b) which involves a third party, such as a parent of one of the parties (who, for example, may

provide funds or property for the couple and who may want certainty about the status of his or her contribution.)

C. Format of the following sections of this paper

1. The current state of English law
2. The Government's position
3. The *Resolution* position
4. Other jurisdictions
5. Proposed policies for reform

1. The current state of English Law

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

1.2 Attempts by couples to control the outcome of future financial claims have been considered contrary to public policy because (it is said):

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

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

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

1.3 Dr Stephen Cretney (The Family & the Law - Status or Contract C&FLQ Vol.15 No.4 2003) at p 413 talks about "the remarkable anomaly" and the "distinctive character of marriage in English law which will not allow husband and wife by contract (whether pre or post nuptial) to exercise the right, which [is afforded] virtually all other partners, to make their own agreement as to the terms". He goes on to say "husband and wife are stuck with equality, however inappropriate they may both agree it to be and you must leave it to the judge who dissolves the partnership (if it should come to that) to decide whether the circumstances - which led you both to agree that equality was not for you, should determine the outcome or not. No doubt the Judge will apply the principle that a formal and freely negotiated agreement made by a couple with full knowledge of the circumstances is not lightly to be set aside (*see Edgar v Edgar* [1980] 1 WLR 1410). You cannot make such an agreement proof against the exercise of the overriding judicial discretion. On one view, this is to have the worst of all possible worlds. It is almost as if we insist that every time a business or professional partnership is dissolved, the terms should be approved by the court".

1.4 Notwithstanding the orthodox starting point of non-enforceability, practitioners continue to be asked to provide advice about pre-nuptial agreements and clients continue to enter into such agreements, albeit in the knowledge that the status of the agreement is uncertain and the outcome unpredictable if there is a later divorce. In the recent Court of Appeal decision in *Radmacher v Granatino*, in respect of which we have already cited passages from the judgments of Lords Justice Wilson and Thorpe, the third member of the court, Lord Justice Rix, said this (at paragraphs 64 and 65):

> "It follows that pre-nuptial agreements are at one and the same time both unenforceable and invalid as being against public policy and matters which the court is prepared to take into account (and possibly decisively) for the purposes of its section 25 jurisdiction. That is a situation which has been criticised as "the worst of both worlds" (see Hoffmann LJ in Pounds v. Pounds [1994] 1 WLR 1535 at 1550/1, cited by Baroness Hale in MacLeod at [29]) and has on the contrary been described by Mr Todd QC in this case as reflecting the "genius" of section 25. Be that as it may, it strikes me as anomalous, albeit plainly the present state of the law. On the one hand the pre-nuptial agreement is invalid as being contrary to public policy, and on the other hand it may be and is taken into account by the court. No doubt the court is obliged under section 25 to have regard to all the circumstances of the case (see the language of section 25 cited at para [120] in the judgment of Wilson LJ below). Nevertheless, there is a problem in having regard to an agreement which is contrary to public policy. Mr Mostyn QC made submissions to this effect, but, in the present state of the law, forlornly.
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> Although this state of the law is, as it seems to me, clear, the anomaly leads to problems. For instance, Thorpe LJ has said that insofar as the rule that pre-nuptial contracts are void survives, he describes that rule as increasingly unrealistic (at para [29] above); whereas Wilson LJ has argued that in MacLeod the Privy Council, in the opinion of Baroness Hale, "authoritatively swept away the considerations of public policy which had been constructed by reference to [the spousal duty] and therefore the voidity of such contracts at common law" (see at para [119] below), leaving only invalidity by reason of statute, as per Hyman v. Hyman [1929] AC 601. However, Baroness Hale has herself distinguished between pre- and post-nuptial agreements on grounds of public policy: see at [31], [35] and [36]. At least one of her reasons raises the question whether one party to a prospective marriage can lawfully extract a price for entering into that marriage: a ground of

policy which might be said to go to the heart of any regard being paid to a pre-nuptial agreement at all."

1.5 Outcomes are subject to the lottery of the different views of different judges, with an increasing number of the judiciary taking the more progressive view by acknowledging that, where appropriate, the main factor in determining financial relief can be the pre-nuptial agreement. "Whether this is a satisfactory approach, bearing in mind the [clients'] desire for certainty, is a question on which opinions will differ," Gareth Miller (PC Business 2003 page 426).

1.6 The demand for agreements has increased because of:

- the higher number of second and subsequent marriages; in 2007, 88,010 marriages were remarriages for one or both parties, accounting for 38 per cent of all marriages; (source: Office for National Statistics);
- a wider multi-cultural, multi-national community with foreign nationals more attuned to their availability;
- the publicity that pre-nuptial agreements have had in the media;
- a greater desire towards parties self-determining outcomes;
- the fear of failing to protect wealth and taking the step as preventive medicine together with the costs that any litigation might entail.

At the same time and for similar reasons, many judges may be turning in favour of attaching more weight to the agreements, subject to an assessment in each case as to (1) whether the agreement was procedurally fair when it was made; (2) whether the agreement was substantively fair when it was made; and (3) whether or not if its terms were "enforced" the agreement would provide fairly for both parties in light of *White v White* [2000] 2 FLR 981. However, it remains "judge made law" and the position and the criteria are far from certain.

1.7 The starting point for any division of assets is section 25 of the Matrimonial Causes Act 1973, which governs the court's decision and cannot be avoided. The court cannot ignore the matters in the section or be bound by the terms of the pre-nuptial agreement because the section imposes on the court (section 25(1)) the duty to, "have regard to all circumstances of the case".

Overview of Case Law

1.8 *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45. Both husband and wife were German. They entered into two pre-nuptial agreements, one under Swiss/German law, the other under US law whereby the wife would receive fixed life income, pegged at the pension payable to a retired German judge. The wife had been training as a lawyer at the start of the relationship and, whilst the proposed income might have provided for her

reasonable needs (which was pre-White the relevant factor), it did not reflect the super rich level of standard of living enjoyed during the marriage (£1.75m per annum). The wife could not be sustained on the income proposed in the agreement. In addition, there were 3 young children who would observe a disparity between the standard of living enjoyed by their parents unless the agreement was avoided. The husband sought to rely on the agreement. Thorpe J referred to the ante-nuptial contract as a … "special condition which has to be considered…". He acknowledged that contracts were common place in society from which the parties had come, but if strictly applied would have the "ridiculous result of confining the wife to the pension". He then added, "in this jurisdiction they must be of very limited significance [emphasis added]. The rights and responsibilities of those whose financial affairs are regulated by statute cannot be much influenced by contractual terms which were devised for the control and limitation of standards that are intended to be of universal application throughout our society…". It is unclear as to whether or not these judicial comments related solely to this particular case or generally. It was clear that he "did not attach any significant weight to the contracts".

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

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

1.11 In *S v S (Matrimonial Proceedings: Appropriate Forum)* [1997] 2 FLR 100, Wilson J noted, in what might be seen as something of a watershed judgment, that he was "aware of the growing belief that no significant weight will be afforded to a pre-nuptial agreement, whatever the circumstances". He referred to sounding a "cautionary note in that respect". After stating respect for Thorpe LJ's comments in *F v F* and in particular with regard to section 25(1) [all circumstances of the case], he added:

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

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

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

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

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

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

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

1.14 *G v G (Financial Provision: Separation Agreement)* [2000] 2 FLR 18, Connell J; sub nom *Wyatt-Jones v Goldsmith* [2000] WL 976036, CA, was a case of a mid-nuptial agreement. At the time of the hearing before the Court of Appeal, the husband was 63 and the wife was 44. Each had previous marriages and children by those marriages. The parties had entered into a pre-nuptial agreement on the eve of their marriage. During the marriage, the wife entered into a further agreement at her suggestion in 1994, seemingly to mark the husband's birthday confirming her limited rights in the event of marriage breakdown. The parties separated in August 1996, the separation being preceded by a Separation Agreement dated six days earlier, which reaffirmed the pre-existing pre-nuptial agreement. Neither party took any legal advice in relation to the Separation Agreement.

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

On appeal, Thorpe L J found that:

> "I would emphasise that this was a couple who had each had previous experience of nuptial breakdown. Each of them had, from the outset of their relationship, elected to regulate their

future affairs contractually. The agreement of [July] 1996 was only a supplement to the two prior pre-nuptial contracts".

After recounting how the husband had acted upon the agreements, Thorpe LJ added:

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

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

1.16 In July 2001, in *M v M* [2002] 1 FLR 654, Connell J noted that "the existence of a pre-nuptial agreement can do more to obscure rather than clarify the underlying justice of the case". He spoke of the agreement as being "one of the more relevant circumstances" of the case. It was not determinative of the lump sum.

The courts have always been at pains to show that all criteria of section 25 are relevant, but not in any particular order. Connell J's order made here was substantially more than had been contained in the agreement, but less than had there not been one. (Lump sum order £875K as opposed to £275K in agreement – 5 year marriage, 5 year old child. H's net assets £6.5m, W's £300,000k). He also cast doubts on any public policy objection to agreements with divorce being "commonplace".

1.17 In the case of *X v X (Y and Z intervening)* [2002] 1 FLR 508, where a financial agreement had been made in divorce proceedings which was then reneged upon by one party, Munby J observed about pre-nuptial agreements (at 530 para [79]):

"It remains the rule that any agreement or arrangement entered into by a husband and wife, whether before or during the marriage, which contemplates or provides for the separation of husband and wife at a future time is against public policy and void."

Later at 531 para [81] he held:

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

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

- "The fact that the parties have made their own agreement is a "very important" factor in considering what is a just and fair outcome. The amount of importance will vary from case to case.
- The Court will not lightly permit parties who have made an agreement between themselves to depart from it. The Court should be slow to invade the contractual territory, for as a matter of general policy what the parties have themselves agreed should, unless on the face of it or in fact contrary to public policy or subject to some vitiating feature….. be upheld by the courts.
- A formal agreement, properly and fairly arrived at with competent legal advice, should be upheld by the Court unless there are "good and substantial grounds" for concluding that an "injustice" will be done by upholding the parties to it.
- The mere fact that one party might have done better by going to Court is not of itself generally a ground for permitting that party to resile from what was agreed.
- The Court would nonetheless have regard to all the circumstances. The circumstances are to be judged in their totality and with a broad perspective rather than individually one by one.
- In particular the Court must have regard to the circumstances surrounding the making of the agreement, the extent to which the parties themselves attached importance to it and the extent to which the parties themselves have acted upon it.
- The relevant circumstances are not limited to the purely financial aspects of the agreement; social, personal and, I would add, religious and cultural considerations, all have to be taken into account.
- The Court should bear in mind the undesirability of stirring up problems with parties who have come to an agreement.
- On the contrary, the Court should if possible and consistent with its duty under section 25, seek to bring about family peace and finality."

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

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

He had before him the authorities of *Edgar v Edgar* [1981] 1 WLR 1410; *F v F* (Ancillary Relief :Substantial assets) [1995] 2 FLR 45; *S v S* (Divorce: Staying Proceedings) [1997] 2 FLR 100; M v M (Pre-Nuptial Agreement) [2002] 1 FLR 654 and *Wyatt-Jones v Goldsmith* [2000] WL 976036 in which judgment was given in CA on 28 June 2000.

The facts were that 14 months prior to separation H was worth approximately £25m. W's father was wealthy. W had £1m assets, from which she enjoyed an income. The marriage followed an unintended pregnancy. The pregnancy was terminated under pressure from W's father and the marriage went ahead. W's father suggested a pre-nuptial

agreement. Financial disclosure and independent legal advice followed. W sought to avoid the agreement, which provided £100k a lump sum to be increased by 10% per annum. There was no maintenance provision for wife (although this had been part of earlier negotiations). The agreement was signed the day before the wedding.

The Deputy Judge held the wife to the capital provision contained in the agreement (£120k as against her £1.6m sought). He held that:

(a) the wife understood the agreement;

(b) was properly advised;

(c) there was no pressure to sign;

(d) she signed with knowledge that there would soon be a child;

(e) there was no unforeseen change of circumstances which would make it unfair to hold her to the agreement;

(f) there would be an injustice to the husband if the court ignored the capital agreement; and

(g) the agreement was both "circumstances of case" and "conduct".

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

1.19 In the case of *Parra v Parra* [2003] 1 FLR 492, CA, although not a pre-nuptial agreement case, the following passage from the judgment of Thorpe L J at para [27] might usefully be transposed in argument into a pre-nuptial agreement case:

> "the parties….. had in effect elected for a marital regime of community of property. In such circumstances what is the need for the Court's discretionary powers? The introduction of a "no order" principle into section 25 Matrimonial Causes Act 1973 might contribute to the elimination of unnecessary litigation ……"

1.20 In *A v T (Ancillary Relief: Cultural Factors)* [2004] 1 FLR 977, Baron J, it was held that, where the parties had entered into a marriage contract in Iran, the court could consider how the matter would be dealt with by the courts of that foreign country when dealing with ancillary relief proceedings because the foreign cultural background of the parties was a dominant factor. The decision of the Court of Appeal in *Otobo v Otobo* [2003] 1FLR 192, which was a forum conveniens case, was applied. In *Otobo* Thorpe LJ had held that, when carrying out the exercise under the MCA 1973, s 25 in a case involving a family with only a secondary attachment to the English jurisdiction and culture, an English judge should give due weight to the primary cultural factors, and not ignore the

differential between what the wife might anticipate from a determination in England as opposed to a determination in the alternative jurisdiction, including that as one of "the circumstances of the case". This approach was echoed in *C v C* [2004] EWHC 742 (Fam) by Wilson J in a case involving a post-nuptial discretionary settlement, where he held:

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

1.21 In *J v V* (Disclosure: Off-shore Corporations) [2004] 1 FLR 1042, Coleridge J held that a pre-nuptial agreement in which the wife relinquished all claims on the husband's interest in the family's business empire as well as other assets was of no significance, it having been signed on the eve of the marriage without proper legal advice or disclosure and making no allowance of the arrival of children.

1.22 In *NA v MA* [2007] 1 FLR 1760, Baron J had to consider a post-nuptial agreement entered into at a time when the marriage was crumbling. She held that the wife had been under "intolerable, undue and unwarranted pressure … caused by the Husband's behaviour and his ultimatum. …. the wife's free will was overborne as a direct result of the threats that the husband had made to her over the previous 24 – 48 hours and his course of conduct since the 9th December. By acting as she did [signing the post-nuptial agreement], the Wife bought herself a breathing space but had manifestly acted to her disadvantage whilst under duress".

She went on to say, having summarised the relevant case law, that it "characterises this type of behaviour as undue pressure and undue influence. For these reasons I will not implement the terms of this agreement." She said that "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." She made an order without regard to the terms of the agreement.

The case therefore represents an example of how the court can assess whether the circumstances surrounding the making of an agreement were fair or so far from fairness as to make it inappropriate to follow its terms. If the facts had been very different, and if judge had found that the circumstances surrounding its making had been fair and unpressured, she would still, under the existing law, have had a discretion whether, and if so to what extent, to follow and apply its terms.

1.23 In *Ella v Ella* [2007] 2 FLR 35, the parties had married in Israel and had entered into a pre-nuptial contract which made clear provision that the law of Israel should apply on any questions affecting property as between the spouses. Israeli property law was to apply between the spouses and the provisions of the agreement were to apply in any place or at any time.

Some 10 years later, the marriage broke down and divorce proceedings were issued by the husband in Israel and by the wife in England. In the English proceedings, the court had to decide whether the proceedings in England should be stayed in favour of the similar proceedings in Israel. The Court of Appeal dismissed the wife's appeal against the order of Macur J staying the English proceedings. Although the pre-nuptial agreement had been reached at "a time of considerable emotional turmoil for the parties" and it was common ground that the wife was not independently advised and that the contract was drawn up by the notary who had acted for the husband for some time, the Court of Appeal dismissed the wife's appeal. Thorpe LJ said that "the judge was perfectly right in my opinion to regard the pre-nuptial agreement as a major factor".

1.24 In *Charman v Charman* [2007] 1 FLR 1246, a case involving very high value assets, trusts, and a "special contribution" by the husband, but not requiring consideration of a pre-nuptial agreement or the principles relating to them, the judgment of the Court of Appeal nevertheless concluded with a section headed "*Postscript: Changing the Law*". The judgment referred to the recent history of discussions and consultation about pre-nuptial agreements, which included mention of the Report published by *Resolution* in 2005. The Court of Appeal described it as "a well argued report urging the government to give statutory force to nuptial contracts [which] was subsequently fully supported by the Money and Property Sub-Committee of the Family Justice Council." The judgment of the Court of Appeal also included this:

> "The difficulty of harmonising our law concerning the property consequences of marriage and divorce and the law of the Civilian Member States is exacerbated by the fact that our law has so far given little status to pre-nuptial contracts. If, unlike the rest of Europe, the property consequences of divorce are to be regulated by the principles of needs, compensation and sharing, should not the parties to the marriage, or the projected marriage, have at the least the opportunity to order their own affairs otherwise by a nuptial contract?"

1.25 In 2008 the greater weight to be given by courts to pre-nuptial agreements became more evident. In *Crossley v Crossley* [2008] 1 FLR 1467 the husband was 62, had been married before and had a fortune of £45 million. The wife was 50, had been married three times before and had a fortune of £18 million. They had met in June 2005, married in January 2006 and separated in March 2007. They entered into a pre-nuptial agreement in November 2005 which provided for them each to walk away from the marriage with the assets they had brought in and neither to seek financial provision from the other. The wife issued ancillary relief proceedings in September 2007. The husband issued a summons putting the wife to proof as to why her ancillary relief claim should not follow the terms of the agreement. The wife alleged that the husband had not given full disclosure. The Judge effectively directed that the husband's application should be heard as a preliminary issue and ordered that Forms

E should be completed without the accompanying documents and that the wife should set out her position on non disclosure so that the husband could deal with it in his Form E. The wife appealed but her appeal was dismissed. The Court of Appeal held that if ever there was a paradigm case in which the court would look at a pre-nuptial agreement not simply as one of the peripheral factors but as a factor of magnetic importance this was that case. They noted specifically that the Judge's approach reflected a developing view amongst the judiciary that pre-nuptial agreements were growing in importance. Also from an international perspective it was felt that greater reliance on pre-nuptial agreements also helped to an extent to narrow the 'European divide' as to how financial claims on divorce were adjudicated.

1.26 In *S v S* [2009] 1 FLR 254, Eleanor King J held that the critical part of her task at a case management directions hearing was to determine whether there was an agreement – in this case an agreement resolving claims on ancillary relief - and whether the wife should be held to it. Following a round table meeting an agreement was reached and after almost a year of correspondence and a further meeting of accountants and tax adviser the only apparent point outstanding was the amount the husband was to pay towards the wife's costs. The wife then issued proceedings for ancillary relief saying that proposed Capital Gains Tax changes in the forthcoming Finance Bill would made the proposals unworkable. The husband issued a Notice to Show Cause why an order should not be made in terms of the agreement reached. The Judge held that this was an appropriate application in this situation and that there was a very strong case that there was a concluded agreement despite the fact that not every detail had been concluded. She held that the court's focus should be on the importance attached to the agreement by the parties and the degree to which they had acted upon it. Here the arrangements had been put in place and substantial assets had been transferred to the wife. The Judge stated that the question of whether or not there was a concluded agreement needed to be considered in the context of the s.25 MCA factors and that there was a strong argument for saying that applying those factors would mean that an order would be made in the terms of the agreement. The agreement was of magnetic importance.

1.27 At the date of this document (30 September 2009), a further judgment in the same case, *S v S* , is awaited from Judith Parker J arising from a further hearing in April 2009 when the issue was whether to make an order in the terms of the agreement relied upon by the husband.

1.28 Not every pre-nuptial agreement is automatically regarded by the court as the determining factor. In *NG v KR (Pre-Nuptial Contract)* [2008] EWHC 1532 (Fam) Baron J refused to uphold a pre-nuptial agreement where the *Edgar* criteria were not satisfied. The husband had not received legal advice (but had had the opportunity to do so), there had been no disclosure, there was no provision for the two children of the marriage and no prospect of any financial settlement even in the case of real need. The agreement would have been binding in both Germany and France, the

home countries of the parties. Although Baron J held that the agreement was flawed under English law, and that its terms would not be followed by the Court, she also held that it was nevertheless a factor to be taken into account with the consequence that the amount of the award would be affected by the by the husband's decision to enter into the agreement. She made an award to the husband of £5.56 million. The wife appealed to the Court of Appeal and her appeal was allowed and the award to the husband was substantially reduced; see paragraph 1.30 below. The case is, however, an illustration of how uncertain our law is in relation to pre-nuptial agreements and how different judges approach such situations in ways which are at odds with one another.

1.29 Although *MacLeod v MacLeod* [2009] 1 FLR 641, decided by the Privy Council in December 2008, was a case on appeal from the Isle of Man, the Manx statutory provisions are identical to the English Matrimonial Causes Act 1973 and so the judgment is relevant. There, the parties entered into a pre-nuptial agreement on the day of the wedding in Florida. Eight years later they entered into a further agreement which was more generous to the wife but less generous than the award she would have been likely to obtain in court.

The Privy Council held that a pre-nuptial agreement is not binding on public policy grounds though it may be taken into account in ancillary relief proceedings as part of the circumstances of the case. However, it was held that an agreement executed at any time after the marriage is *prima facie* binding, subject to normal contractual vitiating factors, such as fraud or undue influence and the powers of the court to vary such an agreement under s35 of the MCA 1973 if there had been a change of circumstances which would make the arrangements in the agreement "manifestly unjust". They also held that an *Edgar* agreement will inevitably be a maintenance agreement for the purposes of s35 and therefore the court is looking for a change in circumstances in the light of which the financial arrangements were made, the sort of change which would make those arrangements manifestly unjust, or for a failure to make proper provision for any child of the family.

Baroness Hale said "*We must assume that each party to a properly negotiated agreement is a grown up and able to look after him or herself. At the same time we must be alive to the risk of unfair exploitation of superior strength. But the mere fact that the agreement is not what a court would have done cannot be enough to set it aside."*

It may be thought illogical that a post-nuptial agreement is, at least potentially, to be given binding effect and its parties assumed to be "*grown up and able to look after him or herself*", while a pre-nuptial agreement will never be binding and its parties, even if mature, willing and well-advised, not permitted to make an enforceable agreement regulating their financial affairs in the marriage and in the event of divorce.

1.30 When the decision of Mrs Justice Baron in *NG v KR*, referred to in paragraph 1.28 above, was reviewed by the Court of Appeal, *sub nom Radmacher v Granatino*, the three members of that court were unanimous not only in holding that she had failed to give the pre-nuptial agreement decisive weight, but in delivering judgments strongly in support of reform and of making such agreements much more influential. As Lord Justice Wilson said, "I would prefer the *starting-point* to be for both parties to be required to accept the consequences of whatever they have freely and knowingly agreed". Lord Justice Thorpe supported the reduction in the award to the husband by saying: "this approach is necessary to give proper weight to the ante-nuptial contract. Policy considerations fortify my conclusion." While it must be recognised that that decision involved a pre-nuptial agreement which was made in Germany between a German woman and a French man – to use the language of Lord Justice Wilson, "In the national and cultural milieu of the husband, as in that of the wife, the contract was a commonplace prelude to marriage" – it is likely that the decision and judgments will be influential in a case involving English nationals and a pre-nuptial agreement made here, but there may be a nuanced distinction to be drawn. It was, as recognised by all commentators, a strong shift towards giving decisive weight to such agreements.

1.31 The clear and strong judgments of the Court of Appeal in *Radmacher v Granatino* may prove to be impermanent. Further change may be foisted on the legal profession and, more importantly, on their clients the public. At the date of publishing this paper, it is not known whether Mr Granatino will be given permission to take the matter to the House of Lords (soon to be re-born as The Supreme Court); the Court of Appeal has refused him permission, but he has re-applied to the House of Lords. Nor, of course, is it known what the outcome will be if he is able to take the case to such a further appeal. Particularly in the light of the 2008 decision of the Privy Council in MacLeod, referred to above, it would not be entirely surprising if a further difference of judicial opinion were to emerge. Thus, the decision of the Court of Appeal might not survive.

1.32 Impact of recent case law: The specialist family solicitors' view is that, whilst pre-nuptial agreements are not the mainstay of any family lawyer's practice, nor the primary consideration of marrying couples, they have become and are likely to continue to be of increasing importance. This may in part be the result of increased media attention in celebrity cases, or it may be a result of a public (and, often, professional) perception that the current state of ancillary relief law, i.e. the law determining financial awards on divorce, is unpredictable, over-complex and subject to too much judicial discretion. Some commentators also say that the English courts have swung from being too "mean" to wives (and to husbands, if they are the financially weaker party), to being too generous to such claimants in many instances. Certainly, clients frequently raise these issues and ask about obtaining greater certainty and protection by means of a prior agreement. It is in the public interest that lawyers are able to advise their clients with greater certainty than is possible at present, both

in relation to likely outcomes in the event of a divorce and in relation to how a court would regard a pre-nuptial agreement.

1.33 While the position of the legal profession is less important than the interests of its clients – (the public) – lawyers are faced with relatively low volume, but high risk work. Conventional professional guidance is that clients should be given clear written advice about a possible pre-nuptial agreement and its likely consequences, having first checked whether professional indemnity insurance covers the area and the sums involved. Some specialist lawyers choose to refuse the work, while others charge a premium rate to cover the risks. It is perceived that the risk arises from forecasting which pre-nuptial agreements are likely to withstand a subsequent challenge, and which are not. Doing so not only involves making an assessment of the current facts and – more difficult – likely future circumstances, but also (a) analysing the extent to and circumstances in which pre-nuptial agreements are legally binding today, and (b) considering and, so far as possible, advising whether they may foreseeably become so in the future. There then arises the distinct issue of whether a family lawyer should advise his/her client to enter into a pre-nuptial agreement.

1.34 Post-nuptial agreements: Mention has already been made of cases where the parties have made a post-, as opposed to a pre-nuptial agreement. Further brief comments should be made.

1.35 Put shortly, the current position in English law is that a post-nuptial agreement is more likely, probably much more likely, to be upheld and in effect adopted by the Court if a divorce occurs. This largely follows from the fact that the English courts have historically disliked pre-nuptial agreements and regarded them as alien to our culture and practice, and tending to undermine marriage. Post-nuptial agreements, on the other hand, are seen in a different light, perhaps because of the historical incidence of "marriage settlements" dating from a time when a wife could not own assets in her own name.

1.36 In any event, it is clear from the December 2008 decision of the Privy Council in *McLeod v McLeod* (see para 1.29, above) that an agreement executed at any time after the marriage is *prima facie* binding, subject to normal contractual vitiating factors, such as fraud or undue influence, and the powers of the court to vary such an agreement under s35 of the MCA 1973 if there had been a change of circumstances which would make the arrangements in the agreement "manifestly unjust".

1.37 Thus, we have the situation that married parties may execute a binding agreement regulating their financial affairs, but the same couple may not do so before their marriage. Some might even have the post-nuptial agreement prepared before their marriage and execute it afterwards, in order to meet the rules laid down in *MacLeod*. We think this would be unhelpful to couples, yet it may be the appropriate course to take on the current state of the law if the parties wish to have a binding agreement

about their finances and what should happen on divorce. We also think that it is, frankly, an illogical dilemma and unwelcome difficulty for the Privy Council to have created.

2. The Government's position 10 years ago

2.1 In November 1998 the Government produced "Supporting Families - a consultation document". Its purpose was to raise a debate on measures which might strengthen the family.

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

Paragraph 4.1

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

Paragraph 4.3

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

Paragraph 4.4

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

Paragraph 4.20

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

Paragraph 4.21

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

Paragraph 4.22

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

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

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

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

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

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

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

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

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

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

These safeguards are almost equivalent to the saving protection given in the State of Connecticut, USA. However, a pre-nuptial agreement which

fell foul of any of the six safeguards would still be of fundamental importance.

2.4 There were 157 responses to the Consultation Document, 80 were in favour of allowing the agreements and 77 against. An important response was one dated 13 June 1998 by the Family Division Judges of the High Court, including the President. The judges collectively approved Wilson J's response ([1999] Fam Law 159) in which they unanimously set out their reservations about "whether the law should strive to encourage pre-nuptial agreements". After strongly supporting the institution of marriage, they wondered "whether the pre-nuptial agreement conditions the couple to the failure of their marriage and so helped to precipitate this. This deserves research". To date, no such research has commenced.

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

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

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

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

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

2.9 Since 1998, it is likely that the views of the Family Division Judges have evolved given the passage of time, not only to reflect the change in the constitution of the High Court Bench, but also because of greater experience of pre-nuptial agreements, increasing and increasingly costly

litigation, and changing attitudes among both the judiciary and the population as a whole. Increasingly, as in *Charman*, the view has been expressed that mature adults should be able to reach prior agreements about their marriage and finances, including division on divorce, just as they can in relation to other important aspects of their lives. Equally, when judges are minded to hold parties to properly made agreements about division of their assets where those agreements have been made after marriage or after separation (e.g., *Edgar v Edgar*, *X v X (Y and Z intervening)*, *S v S*, and *Crossley v Crossley*) there is seen to be contradiction and inconsistency in taking a markedly different approach to properly agreements made before and in contemplation of marriage.

2.10 In the period of more than 10 years since November 1998 when the Government produced "Supporting Families - a consultation document", there has been little contribution to the debate from that quarter. Perhaps the Government appreciates that, as is sometimes said, there are no votes in family law. Or perhaps, while legislating on a myriad of other issues across all areas of private and public life, the Government regards these issues as particularly difficult. It remains to be seen what response the government of the day will make in due course, probably in 2011 or 2012, when it receives the report of the Law Commission on these issues. We suggest that it would be unfortunate if no leadership were given by the state and if the issue were to be left, once again, to the judiciary – a judiciary which, rightly, expresses a reluctance to change the law in an area where such changes are more suited to legislative, rather than judicial, amendment.

3. *Resolution*

3.1 In 2005, *Resolution* 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.

It also considered making pre-nuptial agreements compulsory, subject to an option to opt out but this was considered too bold a step.

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

An alternative was there should be added as a separate factor in Section 25 of the Matrimonial Causes Act 1973: "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 was then (and is now).

On balance, *Resolution* recommended in 2005 that pre-nuptial agreements should become legally binding subject to an overriding safeguard where

there would be "significant injustice" if the agreement was upheld, and this should also be added as a separate section 25 Matrimonial Causes Act 1973 factor.

Resolution 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-nuptial agreements.

Thus it was proposed in 2005 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."

It was recommended that this would cover pre-nuptial agreements entered into in all countries that an English court might need to adjudicate upon. It was proposed that there be a Good Practice guide in relation to the drafting and financial disclosure which should accompany such agreements.

The courts would have retained the ability to use other discretionary factors to mitigate the need for satellite litigation on significant injustice.

The proposed amendment would have benefited both those who were entitled to public funding upon the breakdown of their marriage, as well as those who funded 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 those proposals had been implemented, have had 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 were consistent with statements made in 2004 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.

3.2 For the reasons given in the other parts of this paper, in particular, Section 5, and in the light of further experience and case law, *Resolution* now believes that the law should be more certain and less anomalous. Couples should have a clearer understanding of the status of pre- and post-nuptial agreements; they should know that they will normally be treated as binding; and they should know the (relatively rare) circumstances in which they will not be treated as binding. This will assist them both at the stage of contemplating and making such agreements, and in the vent of the breakdown of the marriage. This explains the shift in *Resolution*'s position since 2005.

4. Other jurisdictions

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

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

(b) whether or not they are compulsory;

(c) the format that they take;

(d) the circumstances in which they are enforceable;

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

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

The significant differences in law between England and Wales and civil law jurisdictions where community of property is common, has meant that pre-nuptial agreements are more common abroad than in England (International Aspects of Family Law; SFLA, April 2004).

4.2 In many community of property jurisdictions such as France and as identified in Annex 1, pre-nuptial agreements are executed for a variety of reasons other than for divorce. For example, it can protect spouses' assets against creditors. They can form part of tax and inheritance planning.

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

4.4 In many jurisdictions, pre-nuptial agreements may have a more lasting effect beyond divorce or dissolution and impact upon the death of either party whether the marriage endures or does not.

4.5 Following the implementation of Brussels II, jurisdiction clauses in cases involving another Brussels signatory country will be of less relevance because in essence, the country of first issues will be seised with the case. However, even if proceedings take place in a jurisdiction not anticipated by the parties at the time of the marriage, the contents of the pre-nuptial agreement are likely to be given some consideration by the judge when making a decision, which differs from the English judicial approach. The party for whom England is the less favourable jurisdiction will need to file

expert evidence, if relevant, on the effects of a pre-nuptial agreement in his home jurisdiction.

4.6 Since Resolution's last paper in 2005, the European Commission brought forward two measures aimed at improving legal certainty in cross border divorce proceedings. In July 2006, the draft regulation known as Rome III was produced and then a green paper on "conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition". This exploration of possible harmonisation of the rules governing choice of jurisdiction and law. However in October 2006, the British Government confirmed that the UK would exercise a right not to opt into the negotiations and the proposed regulations.

4.7 However, the European Commission's research revealed that 14 member states determined the applicable law in cross border divorces and divorces having a foreign element. Most determine the applicable law by reference to the number of criteria (most commonly nationality, but also common domicile and common habitual residence). This is aimed at identifying the law with which the parties have a close connection. Three member states, Belgium. Netherlands and Germany, include the possibility with the parties to choose the applicable law. The UK is therefore in a minority amongst EU member states in not allowing the application of a foreign law to "international" divorce in this country.

4.8 If parties enter into pre-nuptial agreements abroad, they may consider confirmatory or mirror agreements in England and Wales and care must be taken to ensure that there is consistency of drafting as well as procedural steps adhered to. Multiple jurisdiction concerns increase when parties may not be of the same nationality or jurisdiction or domicile, the habitual residence may be living in one country and working in another. The area is considered by practitioners to be low volume higher risk work where there is uncertainty as to whether or not a PMA will be binding as independent legal advice has historically been sought in every possible jurisdiction in which either party may have some connection.

5. Options for reform

5.1 Maintaining the status quo

Whilst the benefits of this are the flexibility offered by section 25 of the Matrimonial Causes Act 1973, the unsatisfactory and unpredictable outcomes as well as lack of certainty remain. In 2005, *Resolution* rejected as wholly unsatisfactory the idea that the status quo should be maintained. We are of the same view in 2009.

5.2 Practice Direction or Rule Change

Resolution would accept and endorse, by way of rule change (i.e. amendment to the Family Proceedings Rules) or Practice Direction, the idea that there would be some procedural reform which would have the effect of allowing a pre-nuptial agreement to be a preliminary issue in a case; see e.g. *Crossley v Crossley*, where this was, in effect, the course

taken. Thus, following the issue of a Form E, the pre-nuptial agreement would be scrutinised at a separate hearing and, dependant upon the outcome of that, the matter would proceed towards First Appointment. Its effect would be equivalent to a *Dean* Notice to Show Cause.

However, whilst this might be an interim step more easily introduced than new primary legislation, the change would be largely procedural and would not tackle the long-standing uncertainty about the approach to marital agreements.

5.3 **Pre-nuptial agreements be made compulsory subject to an option to opt out**

Resolution rejected this suggestion in 2005, knowing of no other jurisdiction which adopted this approach. The concern was that this step would inevitably undermine the institution of marriage. We remain of the view that there should be no such compulsion, not least because we regard this as a deeply personal area and one in which individuals should be able to choose whether or not to have a pre-nuptial agreement.

5.4 **Marital agreements should be added as a separate subsection of section 25 of the Matrimonial Causes Act 1973 factor**

In 2005, Resolution considered whether a new section 25(2) (i) should be added to the Matrimonial causes Act; namely, that the matters to which the court shall have regard shall include:

> "*the terms of any agreement reached between the parties in contemplation of, or subsequent to, their marriage*"
>
> (as per the wording suggested by Wilson J as author of the response of the Family Division Judges to Supporting Families).
>
> There could also be added: "*and, where any such agreement had been entered into by the parties under the laws of a foreign jurisdiction, the legal effect which that agreement would have in that jurisdiction*". This would make it a statutory requirement to consider the status of the agreement in the country where it was made, without automatically making that the applicable law; see e.g., *Radmacher v Granatino*, referred to above.

In 2005, *Resolution* concluded that such amendment(s) would not appreciably advance the law, nor increase people's understanding, beyond where it is now. That remains our view.

5.5 **Pre-nuptial agreements become legally binding subject to safeguards**

We consider that this is the best option. It would permit, but not require, marital agreements and would provide those who make such agreements with a clear understanding of the approach the Court would apply when considering the agreement. The parties to the agreement would know

that the agreement would be binding, unless it failed to satisfy clearly identified criteria.

The safeguards which we recommend, and which are included within the proposed new subsection 25(2A) of the Matrimonial Causes Act 1973, below, effectively include those contained within the Government's consultation paper Supporting Families, November 1998; except that under our proposal the existence of a child would not destroy the binding nature of the agreement unless enforcing it would cause substantial hardship.

We therefore propose new subsections 25(2A) and 25(2B) of the Matrimonial Causes Act 1973 (and a new provision to the same effect in the Civil Partnership Act 2004) in these terms:

> **s. 25(2A)** ***The court shall regard any agreement in writing 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 as binding upon the parties and shall make an order in the terms of the agreement unless:***
>
> ***(a) the agreement was entered into as a result of unfair pressure or unfair influence;***
>
> ***(b) one or both parties did not have a reasonable opportunity to receive independent legal advice about the terms and effect of the agreement;***
>
> ***(c) one or both parties failed to provide substantially full and frank financial disclosure before the agreement was made;***
>
> ***(d) the agreement was made fewer than 42 days before the marriage;***
>
> ***(e) enforcing the agreement would cause substantial hardship to either party or to any minor child of the family.***
>
> ***s. 25(2B) If one or more of the factors in paragraphs (a) to (e) of subsection 25(2A) applies, the Court shall give the agreement such weight as it thinks fit taking into account:***
>
> ***(a) all the facts surrounding the agreement;***
>
> ***(b) the matters in section 25(1) and (2).***

It would also be necessary to make a consequential amendment to section 25(2) of the Act, in order to add to the list of factors in that subsection to which the court is required to have regard, any agreement within the new section 25(2A). While this is a point of detailed drafting, rather than

principle, we suggest that it is achieved by adding a new s.25(2)(i) in these terms:

<u>s.25(2)(i)</u> any agreement falling within section 25(2A).

5.6 The factors in sub-paragraphs (a) to (e) of the proposed section 25(2A) are largely self-explanatory, as is the rationale behind each, but we add some comments about them, briefly in some instances.

5.7 In relation to sub-paragraph (a), there was and is no room for debate about treating unfair pressure or unfair influence as a vitiating factor. Any marital agreement entered into as a result of such circumstances is not that party's voluntary act and they should not be held to it as a matter of contract. This is, in any event, the underlying law about such agreements at present; see e.g. *NA v MA* [2007] 1 FLR 1760, referred to in paragraph 1.22 above.

5.8 We have discussed and considered whether sub-paragraph (b) of the proposed new section 25(2A) should provide (as we have concluded it should) that one of the vitiating factors is the absence of "*a reasonable opportunity to receive* independent legal advice about the terms and effect of the agreement", or merely the absence of "*independent legal advice … (etc.)*". In other words, should it be essential that both parties actually receive such advice and would the decision by one party to forego such advice be a factor which renders the agreement non-binding? Or is it enough that there is a reasonable opportunity to receive advice, even if it not in fact obtained?

5.9 We concluded that the material consideration should be "*a reasonable opportunity to receive* independent legal advice". Among the factors we took into account were that the alternative would provide a mischievous party with a means of escaping terms to which he or she was in fact willing to agree. In other words, they might decide not to obtain legal advice just so that they could argue later that they lacked advice and should not be held to the terms of the agreement. We also took into account that requiring people to take legal advice, and thus incur legal fees, was a potential financial burden on them and an infringement of their freedom to make their own decisions. Our final consideration was that there remain safeguards for the very rare situations where a party has been taken advantage of by an absence of independent legal advice; namely the proposed sub-paragraphs (a) and (e), under which the agreement would not be binding if there had been "unfair pressure or unfair influence" or if upholding the agreement would cause "substantial hardship". That said, we regard the point as quite finely balanced.

5.10 We concluded quite easily that the proposed s.25(2A) should provide, as we have in sub-paragraph (c), that an agreement would not be binding if one or both parties failed to provide substantially full and frank financial disclosure before the agreement was made. Although not a universally held view, most specialist lawyers and commentators, including judges, regard such prior disclosure as an essential ingredient of a fairly made marital agreement. Put shortly, without such disclosure the other party does not (or may not) know the extent of what he or she is foregoing under the agreement. An agreement to accept the terms of the proposed agreement in place of statutory rights should be on a fully informed basis. That requires full and frank financial disclosure by both parties. However, this important principle should not be misused so that any error or omission in disclosure, however, minor, can be relied upon in an attempt to escape its terms. Thus we have provided that it is only if the disclosure is not "*substantially full and frank*" that the proviso will apply.

5.11 The period of 42 days which, in sub-paragraph (d) of the draft section 25(2A) we recommend should be the minimum "buffer" between the date of the agreement and the date of the marriage, has also been the subject of internal debate and consideration. Although it is, of course, possible to propose any number of days or weeks, the main alternatives were 21 days (the period suggested by the government in its 1998 consultation document) or 28 days; longer periods such as 8 weeks were also discussed.

5.12 The rationale for any buffer period is to reduce the risk that the agreement is negotiated and made at a time when the proximity of the marriage might cloud the emotions and the judgment of the parties. In considering this, we took into account the words of Lord Justice Wilson in *Radmacher v Granatino*, where he described the premise "that, prior to marriage, one of the parties, in particular the woman, is, by reason of heightened emotion and the intensity of desire to marry, likely to be so blindly trusting of the other as to be unduly susceptible to the other's demands even if unreasonable" as being, as a general assumption, "patronising, in particular to women". While recognising that there is a risk that some people may be so influenced by the proximity of a wedding, including the fact that invitations have been sent out and cancellation would involve embarrassment, we concluded that the modern tendency to notify friends and family of the wedding date far in advance was such that a buffer period would have to be very long indeed to remove this potential consideration. Further, we take into account that if the agreement must be made, i.e. signed, 42 days before the marriage, it will have been under discussion and negotiation for quite some time

before that. Finally on this point, we also took account of the fact that other countries, where pre-nuptial agreements are common-place, have no such buffer period and there is scant evidence that it leads to injustice, pressure or other unfairness.

5.13 The proposal in sub-paragraph (e) of the draft section 25(2A) that an agreement would not be binding if enforcing it would cause substantial hardship to either party or to any minor child of the family largely speaks for itself. The concept of "*substantial hardship*" is clear and capable of determination by courts and parties, even though different opinions may exist. We considered, as an alternative to "*substantial hardship*", that an agreement should not be treated as binding if doing so would "*significant injustice*". However, we concluded that the concept of "justice" or "injustice" was covered by the conditions in subparagraphs (a) to (d), and that subparagraph (e) should have as its focus the consequence of enforcing the agreement. We envisage that "*substantial hardship*" will almost invariably be financial, but we have not in fact confined it to that since there may be non-financial elements which could cause hardship to a party or a child. Plainly, this provides a fair degree of protection for the interests of any children and, in any event, there remains the court's residual jurisdiction to make financial orders for the benefit of children, pursuant to the provisions of section 15 of, and Schedule 1 to, the Children Act 1989. Thus, even if the spouse is precluded by a marital agreement from making a claim on his or her own behalf, the interests of any child or children are not prejudiced because of this separate jurisdiction (which cannot, of course, be excluded by a pre-nuptial or any other agreement between the parties).

5.14 ***Resolution*** **recommends**

Resolution therefore recommends the introduction of new subsections 25(2A) and 25(2B) of the Matrimonial Causes Act 1973, as set out in paragraph 5.5 above.

The proposal takes the lead for change from the Government's initiative as contained in its Supporting Families paper of 1998, but goes rather further. It provides greater predictability of outcome and makes clear that agreements *will* be binding *unless* one of a number of clearly identified safeguards is breached. This would broadly bring English domestic law in line with most other jurisdictions of the world and, in particular, with Europe, yet still preserving the possibility of escape from an agreement which has one or more hall-marks of serious unfairness.

Apart from providing couples with a greater understanding and more clarity about how a court would treat any marital agreement made by them, the reform would be likely to reduce disputes, and therefore reduce

expense to the parties and the burden on the courts, if the relationship breaks down.

Family breakdown is not only emotionally costly, it frequently causes substantial expense in legal fees. Such a drain on the family's resources is particularly unfortunate at a time of marital breakdown, when other more pressing expenses arise; such as the need to re-house. If people knew that the marital agreement they had made was highly likely to be enforced, instead of the current uncertain position, we think they would be more likely to adhere to the terms of the agreement, instead of having litigation which is often protracted, expensive, emotionally draining, and a burden on the family justice system.

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

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

5.15 While this is neither the time nor the place to descend into the details of clauses that can be included in pre-nuptial agreements, we think we should give some brief examples. We do so in order to identify the sort of ingredients, not all of which are about the financial aspects of the relationship, which can assist the parties by resolving how matters are to be dealt with in the event of divorce (or death). Such examples include (and we stress that is by no means a full list of clauses often found in marital agreements):

(a) separation of assets; in other words, that the assets owned by each spouse prior to the marriage shall remain his or her separate property and not be treated as or become part of the marital or family assets;

(b) that if the marriage ends in divorce within a specified number of years the financially weaker party should receive an agreed sum; often, there will be "stepped" provision, so that (for example) £X is received if the marriage ends within (say) 5 years, but £Y is received if it ends after more than 5 years; there can be several such steps, with increasing (or even reducing) figures;

(c) index-linking, so that financial provision is related to, for example, the Retail Prices Index and its value is not eroded by inflation;

(d) that different and greater provision is made for the financially weaker party if children are born as a result of the relationship;

(e) that assets received by one party by gift or inheritance should, so far as possible, be protected and not susceptible to sharing on divorce;

(f) the religious upbringing of children;

(g) that any disputes relating to the marriage or to the agreement should in the first instance be referred to mediation, rather than resorting straight away to litigation;

(h) confidentiality of the parties' marriage and of the finances of each of them;

(i) provision in the event of death;

(j) which country should have jurisdiction in the event of divorce or other disputes;

and there are many other possible clauses. The aim is to agree in advance, so far as possible, what is to happen in the event of the ending of the relationship, in order to avoid the stress, uncertainty and expense of a dispute at that stage. Each party therefore embarks on the marriage in the knowledge of what he or she will receive or pay in that unhappy event, and knowing how other issues which frequently arise on the breakdown of marriage will be managed. Private expense and distress are reduced at the point of marital breakdown because issues have been agreed in advance, and thus the public interest is also served by reducing the pressure on the courts and other services.

Annex 1 - Jurisdictions other than England and Wales

Questions were posed to experienced family practitioners in a number of foreign jurisdictions in order to obtain evidence about the approach to pre-nuptial agreements elsewhere. The responses are set out below.

We also collated information about the approach taken to pre-marital agreements by the different states of the USA. The results are in the Table at page 70, below.

The other jurisdictions where we carried out research by means of questions to family law practitioners were: Australia; Austria; Belgium; China; Czech Republic; Denmark; Estonia; France; Germany; Greece; Guernsey; Hong Kong; Ireland; Isle of Man; Jersey, Netherlands; Norway; Portugal; Scotland; South Africa; Spain; Sweden; Switzerland.

The questions were as follows:

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

(b) Are they compulsory?

(c) What format do they take?

(d) In which circumstances are they enforceable?

(e) Do they stand judicial scrutiny?

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

The responses are set out below, country by country. The gist is also summarised in the Table at page 68 below.

When looking at the responses it should be borne in mind that in civil law jurisdictions the property regime by which spouses hold their assets during the marriage may also determine the distribution upon divorce and death. By way of example, this can include whether or not a spouse is responsible for the other spouse's debts to third parties. A pre-marital agreement in such circumstances may therefore not act so much as an agreement as to what happens in the event of divorce, but rather the prospective spouse's choice of property regime for the entirety of their marriage into effect the separation; personal bankruptcy; death and other circumstances. The basic regimes are community of property (where spouses hold all property jointly and are responsible for joint debts); separation of assets (where all property and debt is separate) or a community of accrued gains which is usually based on a separation of assets but with a mathematical rather than a discretionary power for compensatory redistribution upon divorce or death.

Annexes 1 and 2 have kindly been collated by the International Committee and coordinated by Andrea Woelke of Alternative Family Law.

Australia

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

Yes

b) Are they compulsory?

Not compulsory

c) What format do they take?

No set format but they must contain certain provisions required under our Family Law Act

d) In what circumstances are they enforceable?

So long as they are entered into in accord with the legislative requirements, they are "binding" and oust the jurisdiction of the Family Court to be able to make a property settlement or order spousal maintenance.

e) Do they stand judicial scrutiny?

Yes. They are only if tested in the court for the purpose of establishing if grounds exist to set them aside – e.g. fraud, duress, unconscionable conduct, giving of false evidence etc. Importantly, the "unreasonableness" of the terms within a pre-marital agreement" is not a basis to set aside.

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

Used quite regularly in second marriages and where there is a large imbalance in wealth and someone wants protection in case the marriage breaks down.

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Austria

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

Yes.

b) Are they compulsory?

Yes.

c) What format do they take?

Notariatsakt (special form in front of a notary public)

d) In what circumstances are they enforceable?

If they are confirm to the law.

e) Do they stand judicial scrutiny?

Yes, if they are done properly.

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

More and more.

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Belgium

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

Yes. Both in the format of marriage contracts[1] for people who are about to be married, and cohabitation agreements for unmarried couples who are about to cohabit or intend to cohabit[2].

[1] Civil Code art. 1387-1397 and 1451 -1465.
[2] Civil Code art. 1475-1479.

b) Are they compulsory?

No.

Belgium has a set of rules established by law governing the rights and duties of spouses and the division and ownership of marital property. Some of these rules are mandatory. Other rules can be replaced by pre-nuptial agreements.

c) What format do they take?

All pre-nuptial agreements made before the marriage and all changes to such agreements during the marriage, are acts which have to be executed before a notary public[3]. The same goes for co-habitation agreements. The pre-nuptial agreements are transcribed in the registry of mortgages and mentioned in the deed of marriage which is kept in the municipal Registry of Marriages.

d) In what circumstances are they enforceable?

Pre-nuptial agreements are enforceable both during the marriage with regards to some aspects (for instance regarding acts of administration of the matrimonial regime) and when the matrimonial regime is ended by death or divorce.

e) Do they stand judicial scrutiny?

Yes, provided that they do not infringe mandatory laws and constitutional rights. For instance, a pre-nuptial agreement in which a spouse would be excused from his obligation to provide for future children or for his spouse when she would be in financial need, would not stand judicial scrutiny.

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

Yes, but only in a minority of marriages or cohabitations[4]. They are used mostly when one of the spouses or partners stands a risk to become insolvent during the marriage due to his or her commercial activities, or when one or both spouses expect to receive considerable assets during the marriage which they wish to exclude from becoming marital property.

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[3] However, Belgians marrying a stranger abroad, can enter into an agreement made as a private deed, according to the laws of the jurisdiction where the marriage is entered into (*locus regit actum)*.
[4] No up to date statistics are available for Belgium.

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China

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

Yes. Pre-nuptial agreements have been widely used.

The legal basis of pre-marital property agreement, is China's "Marriage Law" Article 19. It provides that: "So far as the property acquired during the period in which they are under contract of marriage and the prenuptial property are concerned, the husband and wife may agree as to whether they should be in separate possession, joint possession or partly separate possession and partly joint possession. The agreement shall be made in writing. The provisions of Articles 17 and 18 of this Law shall apply to the absence of such an agreement or to a vague one."

Article 17 The following items of property acquired by the husband and wife during the period in which they are under contract of marriage shall be jointly possessed:

1) pay and bonus;
2) earnings from production and operation;
3) earnings from intellectual property rights;
4) property obtained from inheritance of gift except as provided for in Article 18(3) of this Law; and
5) Any other items of property which shall be in his or her separate possession.

Article 18 The property in the following cases shall belong to one party of the couple:

1) the property that belongs to one party before marriage;
2) payments for medical expenses received by one party who suffers physical injury, subsidies for living expenses granted to the disabled subsidies, etc.;
3) the property to be in the possession of one party as determined by will or by an agreement on gift;
4) articles for daily use specially used by one party; and
5) other property which should be in the possession of one party.

b) Are they compulsory?

No.

c) What format do they take?

Pre-marital property agreements are in writing in general, but not necessary. Elements in form, the agreement of property between husband and wife should be in writing. If it is a verbal agreement, it is effective if neither condition is that the husband and nor the wife have raised no any objections to it.

If in writing, there is no uniform text, as long as both sides can clearly express their wishes. Both parties should sign the agreement.

d) In what circumstances are they enforceable?

After two sides signed the agreement, in general they should take the initiative to fulfil in accordance with the agreement. If a party acts in violation of the agreement, the other party can resort to the court. The court issued the verdict, or mediation which are enforceable.

e) Do they stand judicial scrutiny?

If the agreement is based on voluntary basis, there is no statutory revocable situation, then in general the agreement will be supported by the Court.

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

Generally speaking, pre-marital agreements are used in foreign-related marriage more frequently than domestic cases.

At present, those seeking advice on pre-marital agreements have several characteristics:

1) One party is a foreigner and the other party is often Chinese.
2) One or other or both parties have previously been married.
3) The large disparity in property between husband and wife.

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Czech Republic

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

Yes.

b) Are they compulsory?

No, they are not compulsory. The husband and wife may use them, but they are not obliged to do so.

c) What format do they take?

They take a form of a written agreement in form of a notarial registration where a copy is stored.

d) In what circumstances are they enforceable?

They are enforceable between spouses if they are valid and enforceable between spouses if in the correct format. They are only enforceable against third parties if the third party knew of the existence of such an agreement. . But in relation to a third person is a pre-nuptial or marital agreement valid just in case that the person knew about the existence of such an agreement.

e) Do they stand judicial scrutiny?

Yes

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

Pre-nuptial and marital agreements are not very common in Czech Republic and are used quite rarely.

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Denmark

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

Yes, both pre and post-marital agreements exist in Denmark.

However, according to Danish law, it is not possible to make marital agreements regarding spousal maintenance or lump sum need based compensations (which can, however, be awarded in some circumstances if the spouses have separate property and consequently, the situation is intolerable for one of the spouses). Therefore, Danish marital agreements only include choice of property regime.

b) Are they compulsory?

No. If there is no pre-marital agreement, there is automatically community of property between spouses. This regime includes all assets apart from pension rights and gifts/inheritance which have been classed by the testator or the one that gave the gift as separate property.

c) What format do they take?

The agreements must be prepared in writing and signed before being registered at the Court.

There are restrictions as regards the content, e.g. which type of separate property may be chosen.

d) In what circumstances are they enforceable?

Provided that they fulfil the formal requirements, pre-marital and post-marital agreements are enforced in all circumstances.

There are no requirements of separate legal advice or full disclosure according to current law or case law.

e) Do they stand judicial scrutiny?

Yes, generally they do. There is no case law that sets aside pre-marital agreements. In addition, there are very few examples in court practice of post-marital agreements that have been declared non-binding due to very special circumstances of pressure when they were signed.

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

Pre-marital agreements are fairly regularly used. Every year, app. 10,000 marital agreements are registered. This includes both pre- and post-marital agreements. In Denmark, about 37,000 couples marry each year.

No statistics show what the contents of the agreements are. My own experience is that the content depends very much on the family situation and the assets involved. However, in my experience, a typical standard agreement would provide that assets/wealth brought into the marriage were regarded as separate property whereas assets/wealth accumulated during the marriage would be included in the regime of community of property.

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Estonia

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

Yes.

b) Are they compulsory?

No.

c) What format do they take?

Pre-marital agreements have to be executed by the notary public and registered in the special Register.

d) In what circumstances are they enforceable?

They are enforceable in the case of divorce. It is also enforceable upon death so that the beneficiaries do not have any right to the part of an estate which is settled for the surviving spouse.

e) Do they stand judicial scrutiny?

Yes they do if they have been executed by the notary public. In practice, it is not possible to contest unless there is duress, a mistake if they have been executed by the notary public. In any event, it can only be contested within six months after the date of signing.

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

They are not used regularly. It is mainly older and wealthy people who use them. Sometimes business men use them to manage the personal risk of losing personal property in the event of bankruptcy.

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France

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

Yes. French Law has a long established tradition of recognising the validity and enforceability of *contrats de marriage* the intention and purpose of which is to organise the matrimonial regime of the parties.

A distinction has to be made between French *contrats de marriage* and a foreign marriage contract. The former (which is by definition only dealing with matrimonial property rights) will bind the parties and will be applied by the French Courts.

On the other hand, pre-marital agreements entered into validly outside France will be binding and enforceable in France insofar as they deal with matrimonial property rights (Hague Convention 14 3 78) but with regard to financial compensation upon divorce (based upon their needs) a French judge will only find such agreements enforceable if the following requirements are satisfied:-

i) if the law applicable to the divorce recognises the validity and enforceability of pre-marital agreements; and

ii) provided that the provision of the pre-marital agreements are not contrary to international public policy rules as recognised by French Law.

For example, pursuant to French Law, spouses cannot negotiate and set spousal maintenance, child support or financial compensation in their *contrats de marriage*. These issues must always be left to judicial

discretion. If a foreign pre-marital agreement contains such provision then it will only be enforceable in France if such financial provision is permitted by the law applicable to the divorce and it is not contrary to French internal public policy rules.

According to French case law the provisions of a foreign pre-marital agreement can include spousal maintenance or compensatory benefit.

The matrimonial regime of a married couple is set by rules which organise the asset administration and entitlement within the marriage, both during the marriage and if the marriage terminates.

Various matrimonial regimes exist and amongst the most commons are the regime of community of assets, separation of property, universal community and participation.

When the marriage terminates, the matrimonial regime of the couple is wound up and each spouse, according to the regime chosen, is allocated a portion of the assets accrued during the marriage.

This allocation of assets is determined by the matrimonial regime chosen by the spouse and is independent from the cause of the dissolution of their marriage.

Therefore if the marriage is dissolved by death, the allocation of assets as determined by their matrimonial regime will be combined with the inheritance rights of the surviving spouse. Likewise, if the marriage dissolved by divorce, along with the assets received pursuant to the matrimonial regime, one of the spouses may receive a compensatory benefit, usually a lump sum, to compensate for the disparity the breakdown of the marriage created in the respective lifestyles of the spouses.

b) Are they compulsory?

No. Contrats de marriage are not compulsory.

In France, the matrimonial regime of a couple is determined either by a contract entered by the spouses (*contrat de mariage*) or by the virtue of the law, in the absence of contract. If the future spouses reside and marry in France and if they have not entered a *contrat de marriage* they will be deemed to have opted implicitly for the community of assets regime ("*le régime de la communauté d'acquets"*).

With respect to international aspects, France has ratified the Hague Convention on matrimonial regimes dated of 14 March 1978. It applies to all spouses who have an international element in their marriage or matrimonial regime. This convention only applies to matrimonial property rights and does not cover spousal maintenance/ financial compensation on

divorce (compensatory benefit) and inheritance rights. Pursuant to this convention the parties may choose the applicable law to their matrimonial regime and enter a prenuptial agreement, covering their matrimonial property rights, which will be recognised and enforced in France. If the parties have not chosen an applicable Law, it will often and primarily be the Law of their first habitual residence after marriage (article 4, alinéa 1) that applies.

c) What format do they take?

For a French *contrat de marriage* to be valid and enforceable in France, it must be signed by both parties present at the same time before a Notary (Cass, I, 5 February 1957, B n°57).

A condition for validity is that the contract precedes the marriage. However there is no time limit / cooling off period and the contract may be entered on the day of the marriage if the spouses so choose.

Unlike English Law, the assistance of two separate advisers and financial disclosure by way of schedule of assets is not required.

d) In what circumstances are they enforceable?

A *contrat de marriage* will be enforceable, if necessary against third parties and the judge will have no discretion in applying its terms in the event of divorce or death.

Unlike section 35 of the MCA 1973, the French Judge will have no power to amend or set aside the terms of a *contrat de marriage* entered by the parties in case a change of circumstances.

e) Do they stand judicial scrutiny?

If a French c*ontrat de marriage* is properly entered into (see c) above), then it will bind the parties and will be upheld by the court. However, pre-marital agreements drafted outside France which address matrimonial property rights, spousal maintenance and compensation upon divorce (compensatory benefit) will only be valid if they comply with the Hague Convention on matrimonial regimes (14 March 1978) and with French public policy.

Because in French law maintenance and financial compensation upon divorce are always subject to judicial discretion, it is not possible to oust the jurisdiction of the court in a pre-marital agreement and any provision within a pre-marital agreement which addresses divorce compensation will not be valid or enforceable as it is against French public policy.

Please note that, if the applicable law upon divorce is not French law but another jurisdiction which does recognise that its validity and

enforceability of pre-marital agreements including for ancillary relief, then such agreements will be enforced by a French judge upon divorce.

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

Without knowing the precise statistic, *contrat de marriage* are fairly common in France.

The most regularly chosen regime is the separation of property regime which is usually selected because it affords the maximum protection to the parties with respect to their personal assets. It is often advised to couples where one of the spouses is a professional (such as bankers, lawyers, doctors), or involved in trade, and wants to avoid putting at risk the other spouse's assets in case of a professional liability or financial risk.

In such circumstance, the separation of property regime affords protection to both spouses, where for instance, a professional liability or financial risk could otherwise impact upon them both had they not chosen such regime.

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Germany

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

Yes

b) Are they compulsory?

No. The default property regime of a separation of assets with equalisation of marital gains on divorce or death applies. Marital contracts can provide for a separation of assets, or, rarely a community of property, and can make provision for post-separation and post-divorce maintenance and pension sharing.

c) What format do they take?

Most issues regulated in a marital agreement have to be signed by both parties at the same time under control and explanation of a notary. The notary has to read the whole contract to the parties and has to explain the issues regulated and their consequences so that it should be avoided that parties sign the contract without knowledge of the legal consequence. The notary acts for both parties and is independent. Sometimes one or both parties have their own lawyers who may also prepare a draft.

d) In what circumstances are they enforceable?

Generally agreements are binding under German law due to freedom of contract about any issue that is not prohibited or offends common decency. Until 2004 all martial agreements were regarded as binding. In 2004 the Federal Constitutional Court and later the Federal Supreme Court changed former jurisdiction which stated that nearly every marital agreement would be binding – provided it does not violate statutory exemptions. Now the jurisdiction allows judicial scrutiny and under some requirements given by the Constitutional and Supreme Court a marital contract can be changed or declared invalid.

The contract can be made in a form that means it has the same status as a court order and the maintenance for example can be directly enforced. This is not necessarily included, but can be done.

e) Do they stand judicial scrutiny?

Following actual jurisdiction a marital agreement can be declared invalid or changed by the court if it fails a two-step-test. First step is to look whether the contract is valid at the time it was made. It is completely void if core parts of the legal regulations for divorce (maintenance and pension split) are removed by the contract without giving any compensation. If it is not completely void the second step is to look whether to enforce the contract at the time of divorce would lead to an inequitable outcome. If so, the court can change certain provisions.

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

For most spouses the general provision is adequate, namely the default property regime of a separation of assets with a compensatory payment on divorce or death to share the accrued gains, together with an equal split of the pension rights accrued during the marriage. If one party runs their own business, the consequence of a default regime can be that if the company has reached a higher value during marriage, the business will normally have to be sold to release the money for paying half of the difference of the increase in value to the other party. In such circumstances, a marital agreement with separation of assets is sensible.

Alternatively, excluding the business from the division of accrued gains upon divorce should be made. Separation of assets is also included in the agreement agreed upon second marriages, or when one party is wealthier than the other, or where the parents of one party wish to make lifetime gifts of family wealth for inheritance tax purposes, without running risk that the other spouse will share in it upon divorce.

Agreements can include provision for spousal maintenance but cannot include child maintenance, pension splitting and division of chattels.

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Greece

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

Yes, both pre and post marital agreements.

b) Are they compulsory?

No. The default matrimonial property regime in Greece (in the absence of a prenuptial agreement) is the system of separation of assets where the assets that each spouse has obtained before or after the marriage remain a separate, individual property. This means that if the couple do not conclude a prenuptial agreement, the system of separation of assets applies automatically. Under this system, if the marriage is dissolved and the financial status of one of the spouses has been increased during the period of the marriage, then the other spouse, given that he/she has contributed to such an increase, has the right to demand the share in the increase that is equivalent to his/her contribution to the increase.

Such contribution is considered, by way of a rebuttable assumption, to amount to 1/3 of the increase unless more or less contribution is proven (article 1400 of the Greek Civil Code "*claim for the participation to the acquisitions*").

Pursuant to para. 3 of article 1400 C.C., assets acquired by the spouse by way of gift, inheritance or bequest is not included in the above rule. More precisely it is provided for: *"To the increase of the spouses' fortune no account is taken of what they obtained by way of gift, inheritance or bequest or through disposition of the acquirements from such causes*".

c) What format do they take?

In order for the agreement to be valid, it has to be drawn up as a notarial deed. For it to be valid towards third parties, it must also be registered in the public book (article 1403 para. 2 sub para, 2) at the secretariat of the Athens Court of First Instance.

Provision for or exclusion from maintenance after divorce can be included within the agreement. There is no provision in Greek law to facilitate pensions being shared upon divorce.

d) In what circumstances are they enforceable?

It is possible under Greek law to elect only full community property, meaning equal division (50% each spouse) of assets built up during (or even before) the marriage.

Please note that the spouses can choose any type of community property, namely:

- the general one, includes all of their assets (both mobile and real property) acquired before and after the marriage,
- the community property that includes all the mobile property and acquisitions, i.e. all the mobile property acquired before or after the celebration of the marriage, as well as all the acquisitions (real property) incurred after the celebration of the marriage and
- the community property of those assets that become common, provided they are acquired during the marriage no matter if mobile or real property.

If there no express provision in the agreement it includes only assets acquired during the marriage.

e) Do they stand judicial scrutiny?

Yes. Upon an application each party can seek a judicial determination as to the validity of a pre-nuptial agreement. It is stressed that the pre-nuptial agreement would not be considered by the Court as a whole, but each clause would be examined separately.

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

Pre-nuptial agreements are seldom used in Greece. This is because the spouses can only elect full community property, meaning equal division (50% each spouse) of assets built up during (or even before) the marriage.

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Guernsey

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

Yes.

b) Are they compulsory?

No.

c) What format do they take?

We follow a similar format to that in the United Kingdom (as indeed we follow their case law).

d) In what circumstances are they enforceable?

Pre-nuptials are given considerable weight by the Court, albeit it is not possible to exclude the jurisdiction of the Court. The Court's instinct is to uphold bargains fairly reached, that contain reasonable provisions.

The existence of a pre-nuptial is one of the circumstances of the case and a very important one.

It is necessary to ensure that there is/has been, inter alia:

- No undue pressure.
- No exploitation of a dominant position.
- Lack of financial disclosure.
- Lack of awareness of the legal position.
- Any important change of circumstances.
- Make proper provisions for the parties and/or the children.
- Adequate time to consider the terms of the judicial separation.

Both parties should have independent legal advice.

e) Do they stand judicial scrutiny?

The final decision is at the discretion of the Judge. A Judge can choose to ignore it if it is deemed unfair to one party. The difficult is that the interpretation of what is fair changes with society's changing values.

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

Pre-nuptials are becoming an increasing useful tool and are used more frequently particularly in the case of second marriages (where there are children from first marriages to protect) and/or in cases where one party has substantially more assets that the other.

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Hong Kong

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

Yes.

b) Are they compulsory?

No, they are not compulsory – quite the reverse - their status is exactly the same as in England and Wales – they cannot oust the jurisdiction of the court.

c) What format do they take?

No particular format – although there are standard clauses (e.g. accepting that whilst agreements may not be binding on a Hong Kong court, that nevertheless the parties intend to be bound by them; that there has been an acceptable level of financial disclosure, usually with schedules attached; that each party has received independent legal advice, that there is no duress, coercion or pressure and the agreement is reached freely. Some of the agreements provide for all pre-marital property to remain separate, others provide in detail for an increasing level of capital settlement depending on length of marriage, most if not all exclude

spousal maintenance, some even attempt to provide for children's maintenance by way of lump sums.

d) In what circumstances are they enforceable?

They are not enforceable but may be relied upon substantially by the court if all of the above factors are evident as well as the terms of the agreement being reasonable and there having been no significant or unanticipated change in circumstances since the agreement was reached.

e) Do they stand judicial scrutiny?

No case law as far as aware and no working knowledge of them being scrutinised by the Hong Kong court.

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

No clear statistics as to the level of usage. Practitioners report an increase from, say, one or two enquiries per year have increased to once a month.

Professionals are quite wary of advising on pre-nups primarily because there is no legislation and no firm guidelines on what the court would consider acceptable. It is anticipated that it will be a minefield when they fall to be considered by the court. The other problem is that most of the clients who seek a pre-nup have assets in multiple jurisdictions and there really is no guarantee where they will be when the marriage fails.

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Ireland

a) Do pre marital agreements exist in this jurisdiction?

Yes, but rarely rather than routinely. Post-marital agreements also possible

b) Are they compulsory?

No.

c) What format do they take?

Inter partes Agreements;

d) In what circumstances are they enforceable?

They are not "enforceable" as such, save that Section 113 of the Succession Act, 1965, which came in to force over 30 years ago provides that:-

> *"The legal rights of a spouse may be renounced in an anti-nuptial contract made in writing between the parties to an intended marriage or may be renounced in writing by a spouse after marriage and during the lifetime of the testator"*

This section allows a spouse to renounce the legal right share provided it is done in writing.

There is no direct authority on the application of the Act. In the case of O'Dwyer –v- Keegan & others (1997) 2 ILRM 401 the Supreme Court referred to the ability to renounce the legal right share, without considering any Constitutional or other implications of a renunciation.

There is no Irish case on the issue of "enforceability" or what "weight" would be given to a pre-nuptial agreement. It is likely that the Irish courts would have regard to English precedent case-law as well as certain elements of the existing Irish legislation requiring the Courts to consider a variety of circumstances as well as, "the interests of justice" and "overall balance of fairness" having taken into consideration all the statutory factors to be weighed in the balance.

There is no legislation prohibiting the use of pre-nuptial agreements. This tends to a view amongst practitioners and academics that such agreements are no longer "contrary to public policy".

Most solicitors and barristers in Ireland take the view that a properly structured pre-nuptial agreement entered into on legal advice and after full disclosure by each of the parties will have a bearing on the outcome of divorce or judicial separation proceedings if that marriage subsequently breaks down. There have been some judicial *dicta* which refers to a marriage as a "partnership", but there is no case in which a pre-marriage contract was considered so we really have no idea as to what a Court would do with a pre-nuptial agreement. The generally held view amongst practitioners in the area, however, is that a Court will give some weight to

a pre-nuptial agreement but equally it will not determine the financial relief available to the spouses on separation or divorce.

e) Do they stand judicial scrutiny?

See d) above.

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

They tend to be used after one marital breakdown and before entering into a second marriage, especially where parties wish to ring fence "business assets". In rural areas, they are used by middle-aged farmers who are widows or widowers and are generally very conservative and will not live together unmarried but want to keep "the farm" for the sons and daughters of the first marriage.

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Isle of Man

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

Yes.

b) Are they compulsory?

No.

c) What format do they take?

Written and tailor made.

d) In what circumstances are they enforceable?

As England and Wales.

e) Do they stand judicial scrutiny?

As England and Wales.

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

Limited extent, mainly by those from other countries where they are more widely recognised or remarriage situations (usually only wealthy) – probably as much as England and Wales.

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Jersey

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

Yes

b) Are they compulsory?

No. Whilst couples may choose to enter into a pre-marital agreement there is no legal obligation for them to do so.

c) What format do they take?

The format will differ depending on who is drafting. They will frequently reflect the Resolution precedent however certain clauses will require amendment to take account of Jersey provisions such as the forced heirship regime in relation to personal (removeable) property known as "legitime".

d) In what circumstances are they enforceable?

As England the court remains the final arbiter of the division of matrimonial property. The pre-marital agreement will not be enforceable as a stand alone contract and the parties cannot oust the jurisdiction of the court despite Jersey being self governing with its own laws, the Jersey courts look to English family law jurisprudence as a guide and the Matrimonial Causes (Jersey) Law 1949 (as amended) is largely based upon English divorce law albeit with some notable exceptions. There is an equivalent Section 25 Matrimonial Causes Act 1973 set of factors to be considered. The courts balances these factors with the need to try and achieve equality and fairness between the parties.

e) Do they stand judicial scrutiny?

At the time of writing there has been no test case in Jersey in which a pre-marital agreement has been scrutinised by the court. Jersey family lawyers note a Court of Appeal decision in *Radmacher v Granatino*.

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

Whilst not a regular feature of family lawyers practice, there are more couples with their own substantial assets wishing to take advice about protecting them. This is especially so where couples are embarking on a second or subsequent marriage.

In Jersey it is best practice for each party to be separately advised regarding the strengths and limitations of agreements which includes advice to provide full and frank financial disclosure. In addition sufficient time prior to the marriage must be allowed for disclosure and the advisory process to avoid ocncerns regarding pressure to sign an agreement.

Should the assets of the parties prove particularly complex, UK counsel often assist in advising on and drafting of an agreement and advice may be given also to enter into a post-nuptial agreement reflecting the pre-marital agreement. Collaborative law is beginning to be used to ensure that such agreements are understood by both parties with full legal advice being provided.

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Netherlands

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

Yes.

b) Are they compulsory?

No. Spouses are free to make pre-nuptial agreements; if they wish to do not they will be married in community of property.

c) What format do they take?

Pre-marital agreements have to be written and inserted in a notarial deed (if not they are invalid).

d) In what circumstances are they enforceable?

They are enforceable during the marriage between spouses and also against third parties; they are also enforceable in divorce proceedings.

e) Do they stand judicial scrutiny?

Yes they stand judicial scrutiny, although the judge is free to overrule the marital agreement on grounds of reasonableness.

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

Yes they are regularly used; looking at my practice I think that about 60% of couples have made pre-marital agreements.

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Norway

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

Yes. The Marriage Act defines the procedure of making such agreements, which in order to secure the parties against third parties, also shall be filed with the so-called Marriage Register, which is a state-operated register.

b) Are they compulsory?

No. If no such agreement exists, the relationship between the spouses is regulated by the Marriage Act, both as to the situation in the marriage, and in the event of dissolution of the marriage.

c) What format do they take?

Such agreements normally are executed through a form stating the parties' name, address and social security number; whether it is a pre-nuptial or marital agreement; whether it institutes a joint ownership or separate ownership in the event of dissolution of the marriage; if assets are transferred from one of the spouses to the other as a gift, room for specifying items belonging to each of the spouses and any other terms

that the spouses would like to put in, in addition to columns for signature and filling the date.

d) In what circumstances are they enforceable?

Provided such agreements are made in writing, they are enforceable between the spouses, and binding also for their heirs. To secure legal validity towards third parties, such agreements have to be made out in the form as described above under (c), and registered in the Marriage Register. If so, they are enforceable.

Norwegian law has a general rule censoring agreements that are regarded as unfair. This rule will also be applicable when it comes to agreements of this kind.

It should also be mentioned that Norwegian tradition concerning interpreting of agreements gives the court a wider room to try to clarify the intentions of the parties behind the agreement, thus giving the court a freer position in relation to the actual wording of the agreement.

e) Do they stand judicial scrutiny?

Please see (d) above.

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

Such agreements are mandatory if the parties want any other arrangement than so-called joined ownership, which as a basic rule stipulate equal shares when dissolving a marriage, with exception of possibly substantial importance. Such agreements are quite common, but probably only comprise comprehend less than 10 % of marriages in existence.

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Portugal

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

Yes. They are known as pre-nuptial conventions.

b) Are they compulsory?

No.

c) What format do they take?

Notarial deed.

d) In what circumstances are they enforceable?

Death or divorce

e) Do they stand judicial scrutiny?

Yes. The Portuguese civil code specifically recognizes their validity provided the provisions within such agreements follow statutory mandates.

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

They cannot alter inheritance rights of the spouse (Article 1699); they must be registered to bind a third party (Article 1711). Once married, they cannot be revoked (Article 1713) nor altered (Article 1714). In addition, if the marriage is not consummated within a year of celebration, the agreement lapses by operation of law (Article 1716).

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Scotland

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

Yes. Scotland has a long history of both pre and post-nuptial marriage contracts, dating back many centuries.

b) Are they compulsory?

No.

c) What format do they take?

There is no style contract. The contract can be informal (for example, handwritten by the couple without legal advice being taken) or formal, (for example, with the couple having taken legal advice).

d) In what circumstances are they enforceable?

There is specific provision for the court to take account of the terms of "any agreement between the persons on the ownership or division of any of the matrimonial property or partnership property" when deciding on what financial provision should be made on divorce or dissolution.

There is no case law on the specific question of whether the courts would enforce a pre or post-nup. This is almost certainly because no-one has felt comfortable litigating the issue as the common view of senior practitioners, both solicitors and counsel, is that the court would take account of, and give effect to, the provisions of a properly draft, and freely entered into, pre or post-nup. We all practice on the basis that they are enforceable.

e) Do they stand judicial scrutiny?

There is no direct case law on whether pre or post-nups would stand judicial scrutiny, but there is no reason to suggest that they would not.

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

Pre and post-nups have not been routinely used for the last 100 years or so (though were routine in the moneyed classes in the 19th and early 20th century). They have become more common again in the last 10 to 15 years and we are now advising regularly on their application.

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South Africa

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

Yes. They are known as ante-nuptial contracts "anc's".

b) Are they compulsory?

No. If no anc is entered into then spouses will be married in community of property. Most ancs are in writing although very rarely there are oral agreements which are exceedingly rare.

To be binding on third parties (creditors), the anc must be registered at the Deeds Office where it is a public document. If an anc is in writing but not registered then it is only binding on the parties.

c) What format do they take?

Usually written. There are standard clauses used. The parties cannot contract out of the invariable consequences of marriage (e.g. right to spousal or child maintenance on divorce.) A "without accrual anc" results in no assets being shared upon divorce unless the parties purchased a property or acquired assets jointly.

d) In what circumstances are they enforceable?

Always.

e) Do they stand judicial scrutiny?

Yes, unless through poorly drafted the intention of the parties is unclear in which case the rules governing contracts will apply to the agreement.

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

Often entered into – a very popular form of marital system.

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Spain

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

Spain has a system of "*matrimonial economic regimes*", this is, a set of legal rules relating to the spouses' financial relationships resulting from their marriage, both with each other and with third parties.

Pre-marital agreements are not specifically provided for under Spanish law, which simply allows the spouses to make any kind of agreement between them, provided that those agreements are not against law, moral or public policy.

Leading authors are often of the opinion that the concept of pre-marital agreements as understood in Anglo-Saxon countries has no equivalent under Spanish law, as the basis for the financial relationships between the spouses are always governed by the "*matrimonial economic regime*".

In an effort to adjust the English concept to the Spanish contracts between the spouses it could be said that pre-marital agreements are those agreements made before marriage regulating any financial or personal aspect not included within the scope of the "*matrimonial property regime*" in the event of a separation or divorce.

b) Are they compulsory?

Pre-marital agreements as such are not compulsory. In Spain all marriages must be governed by a "*matrimonial property regime*". The spouses may agree their property regime in a Deed signed before a Notary Public.

In default of such an agreement, the "regime of community of assets" (*sociedad de gananciales*) shall be applicable, except for those Spanish communities where regional law provides for a different regime, such as Catalonia, Aragón, Baleares, País Vasco or Navarra where, as a general rule, a "regime of separation of assets" (*separacion de bienes*) applies by default.

Under the "regime of community of assets", all property and rights acquired for valuable consideration by any of the spouses during the length of the marriage are jointly owned. Each spouse owns an undivided one half in all such commonly owned property and in the event of divorce, each spouse is entitled to his/her share of this community.

According to the "regime of separation of assets", each spouse shall keep exclusive ownership of his/her goods and is the sole administrator of all his/her goods. Household work carried out by any of the spouses during the time of the marriage shall entitle him/her to compensation from the

other spouse to be determined by the courts upon the termination of this economic regime.

c) What format do they take?

There are no specific formal requirements to comply with.

By analogy with the formal requirements for the validity of Deeds establishing the "*matrimonial economic regime*", pre-marital agreements should be signed as a Deed before a Notary Public by both parties simultaneously as evidence of mutual consent.

d) In what circumstances are they enforceable?

Deeds establishing the "*matrimonial economic regime*" are binding and enforceable upon separation or divorce in order to divide the assets between the spouses.

When courts deal with pre-marital agreements, this is agreements between the spouses concerning matters not contained in the "*matrimonial economic regime*", they take a different approach depending on the subject:

1) *Spouses' maintenance:* Courts generally consider agreements dealing with the spouses' maintenance valid provided that they do not imply that any of the spouses renounce its right to receive maintenance and that they are not seriously damaging to one of the spouses. Courts are not bound by those agreements and can either enforce them or merely consider them as one of the relevant circumstances of the case.
2) *Allocation of the use of the family home*: Courts shall enforce these provisions provided that there are no children involved and they are not seriously damaging to one of the spouses.
3) *Children:* Arrangements regarding children's maintenance and parental responsibility are not enforceable, nor do they have any significant effect on orders that might be made by a court following the breakdown of a marriage, as the paramount interest of the child is the yardstick when making those orders.

e) Do they stand judicial scrutiny?

See d) above.

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

As "*matrimonial economic regimes*" are always applicable by agreement or by default, very room little is left to the use of pre-marital agreements. It

is expected however that its use will increase to counteract the rigid nature of "*matrimonial economic regimes*".

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Sweden

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

Yes. Pre-nuptial and marital agreement exist in Sweden. They are frequently used and it is the only way for spouses to enter into agreements between the two of them.

b) Are they compulsory?

No, but if two spouses want to make an agreement concerning financial matters or choice of applicable law, it has to be in the format of a prenuptial or postnuptial marital agreement.

If you want to agree that a pre-nuptial or marital agreement shall no longer be valid there is only one way to do that and that is by signing a new agreement and have that agreement registered also.

c) What format do they take?

The agreement has to be in writing signed by both parties (but not witnessed) and to be registered by court before it is valid and a central marriage register is held in order to keep all agreements official and registered.

A pre-nuptial agreement becomes valid from the first day of the marriage if it is registered within 30 days of the wedding.

d) In what circumstances are they enforceable?

Generally enforceable as it is difficult to have a prenuptial or marital agreement voided in Sweden.

The parties quite often are advised together by one lawyer, even though some professionals are hesitant to do that these days.

Agreements can either include agreement that all property remains in one spouse's sole name; that part or named property remains the sole property of one spouse and the balance is considered marital property; or that pre-marital assets or one or other of them or acquired by one or other party during the marriage will remain separate property and not divided in the case of divorce or death.

If you want to agree that a prenuptial or marital agreement shall no longer be valid there is only one way to do that and that is by signing a new agreement and have that agreement registered also.

The agreements are also used to agree on applicable law, for example if spouses move away from Sweden or if they move to Sweden.

e) Do they stand judicial scrutiny?

Yes. If drafted, signed and registered in Sweden they will survive even if the disadvantaged party contest the agreement in court to attempt to modify rather than avoid the impact of an agreement but it would only be possible if the disadvantaged party was without any assets after division of property in accordance with the agreement.

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

Pre-nuptial and marital agreements are used quite regularly, but that most marriages are entered into without an agreement. Some marital agreements are signed after the wedding and during marriage and mostly those agreements have to do with gifts between spouses since this is the only way to formally give away something between spouses.

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

Yes. Marriage contracts have a statutory basis (Article 182 et seq., Civil Code). Marriage contracts concern the marital property regime, that is the property regime under which the spouses lived during their marriage. The

property regimes that can be chosen are limited to (a) the statutory default regime of sharing of accrued gains, (b) community of property or (c) separation of assets. The property regime can only be amended as far as it is allowed by statute (Article 182, paragraph 2, Civil Code) which is very limited. The community of property regime is the one where there is most scope for individual arrangements. For civil partnership for same-sex couples, the equivalent is a property contract, which is similar to the marital contract. However, the freedom to individualise the contract is a lot greater.

Recently, more and more couples enter into so-called "stored divorce agreements", which are now also sometimes done as part of the marital agreement. In these agreements, the parties agree either before or at the wedding (in any case, without their being a separation or divorce) the consequences of the divorce, in case there is a divorce later on. As far as assets are concerned other than pension sharing, these agreements are principally valid, but are subject to the divorce court's approval, which can also refuse to approve them if the agreement is unreasonable. These agreements cannot be made for any issues concerning children, which means that they are generally confined to spousal maintenance.

b) Are they compulsory?

No.

c) What format do they take?

Marital agreements have to be made before a notary. Stored divorce agreements have to be made in signed writing.

d) In what circumstances are they enforceable?

See above.

e) Do they stand judicial scrutiny?

Marital agreements certainly do. Stored divorce agreements are a more recent and rarer phenomenon and it is not clear how courts will deal with these in all circumstances.

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

Marital agreements are used in about 20% of cases. Stored divorce agreements are rare, but they are on the increase.

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Table 1: Summary of Responses from jurisdictions other than the USA

Country	Is there a marital property regime?	Do PMAs exist?	Are they compulsory?	Are they enforceable?	Are they regularly used?
Australia	✓	✓		✓	✓
Austria	✓	✓	✓	✓	✓
Belgium	✓	✓		✓	
China	✓	✓		✓	
Czech Republic	✓	✓		✓	
Denmark	✓	✓		✓	✓
Estonia	✓	✓		✓	✓
France	✓	✓		✓	✓
Germany	✓	✓		✓	✓
Greece	✓	✓		✓	
Guernsey		✓			✓
Hong Kong		✓			
Ireland		✓			
Isle of Man		✓			
Jersey	✓				✓ increasingly
Netherlands	✓	✓		✓	✓
Norway	✓	✓		✓	
Portugal	✓	✓		✓	
Scotland		✓			✓
South Africa	✓	✓		✓	✓
Spain	✓	✓		Yes if it is a deed establishing the "matrimonial economic regime". No if it concerns anything else.	
Sweden		✓		✓	✓

Switzerland	✓	✓		✓	

Table 2: The Position in the USA

The Uniform Premarital Agreement Act Was Drafted By The National Conference Of Commissioners On Uniform State Laws In 1983. It has been adopted by many states, but not by all.

States which have not enacted their own version of the UPAA may still have state laws governing marital property which will be enforceable for divorcing couples in that state who have not entered into a PMA.

The columns headed "property" and "maintenance" indicate the extent to which each state has enacted laws which establish a marital property regime in relation to property and/or maintenance. These regimes will obviously differ from state to state.

State	Property	Maintenance	Statute: property	Statute: Maintenance	Adopted the UPAA?
Alabama	Yes[5]	Yes	None[6]	None	No
Alaska	Yes[7]	Yes	None	None	No
Arizona	Yes	Yes	A.R.S. § 25-203	A.R.S. § 25-203	Yes
Arkansas	Yes	Yes	AR ST § 9-11-403	AR ST § 9-11-403	Yes
California	Yes	Yes	CA FAM § 1500	CA FAM § 1500	Yes
Colorado	Yes	Yes	CO ST § 14-2-304	CO ST § 14-2-304	No
Connecticut	Yes	Yes	CT ST § 46b-36d	CT ST § 46b-36d	Yes
Delaware	Yes	Yes	DE ST TI 13 § 323	DE ST TI 13 § 323	Yes
District of Columbia	Yes	Yes	DC CODE § 46-503	DC CODE § 46-503	Yes
Florida	Yes	Yes	FL ST § 61.079	FL ST § 61.079	No
Georgia	Yes[8]	Yes	None	GA ST § 19-6-8	No
Hawaii	Yes	Yes	HI ST § 572D-3	HI ST § 572D-3	Yes
Idaho	Yes	Yes	ID ST § 32-923	ID ST § 32-923; ID ST § 32-925	Yes
Illinois	Yes	Yes	IL ST CH 750 § 10/4	IL ST CH 750 § 10/4	Yes
Indiana	Yes	Yes	IN ST 31-11-3-5	IN ST 31-11-3-5	Yes
Iowa	Yes	No	IA ST § 596.5	IA ST § 596.5	Yes

[5] *See Hubbard v. Bentley*, 2008 WL 747902 (Ala. Civ. App. 2008)
[6] Right to contract between husband and wife is granted in AL ST § 30-4-9, but Alabama has not enacted a statute governing premarital agreements.
[7] *See Brooks v. Brooks*, 733 P.2d 1044 (Alaska 1987) (premarital agreements are judicially recognized in Alaska)
[8] *See Carlos v. Lane*, 571 S.E.2d 736 (Ga. 2002) (premarital agreements are valid and treated as contracts); *Kreimer v. Kreimer*, 552 S.E.2d 826 (Ga. 2001)

Kansas	Yes	Yes	KS ST § 23-804	KS ST § 23-804	Yes
Kentucky	Yes[9]	Yes	None	None	No
Louisiana	Yes	Yes	LA C.C. Art. 2328	LA C.C. Art. 2328	No
Maine	Yes	Yes	ME ST T. 19-A § 604	ME ST T. 19-A § 604	Yes
Maryland	Yes	Yes	MD FAMILY § 8-101	MD FAMILY § 8-101	No
Massachusetts	Yes	Yes	MA ST 209 § 25	MA ST 209 § 25	No
Michigan	Yes	Yes	MI ST 557.28	None	No
Minnesota	Yes	Yes	MN ST § 519.11	MN ST § 518.552	No
Mississippi	Yes[10]	Yes	None	None	No
Missouri	Yes	Yes	MO ST 451.220; MO ST 452.325	MO ST 451.220; MO ST 452.325	No
Montana	Yes	Yes	MT ST 40-2-605	MT ST 40-2-605	Yes
Nebraska	Yes	Yes	NE ST § 42-1004	NE ST § 42-1004	Yes
Nevada	Yes	Yes	NV ST 123A.050	NV ST 123A.050	Yes
New Hampshire	Yes	Yes	NH ST § 460:2-a	NH ST § 460:2-a	No
New Jersey	Yes	Yes	NJ ST 37:2-34	NJ ST 37:2-34	Yes
New Mexico	Yes	No	NM ST § 40-3A-4	NM ST § 40-3A-4	Yes
New York	Yes	Yes	NY DOM REL §236[11]	NY DOM REL §236	No
North Carolina	Yes	Yes	NC ST § 52B-4	NC ST § 52B-4	Yes
North Dakota	Yes	Yes	ND ST 14-03.1-03	ND ST 14-03.1-03	Yes
Ohio	Yes	Yes	OH ST § 3103.05; OH ST § 3103.06	OH ST § 3103.06	No
Oklahoma	Yes	Yes	OK ST T. 43 § 121	OK ST T. 43 § 121	No
Oregon	Yes	Yes	OR ST § 108.710	OR ST § 108.710	Yes
Pennsylvania	Yes	Yes	23 Pa.C.S.A. § 3106	23 Pa.C.S.A. § 3106	No
Rhode Island	Yes	Yes	RI ST § 15-17-3	RI ST § 15-17-3	Yes
South Carolina	Yes	Yes[12]	SC ST § 62-2-204	None	No
South Dakota	Yes	Yes	SD ST § 25-2-13	SD ST § 25-2-13	Yes

[9] *See Bamberger v. Hines*, 2009 WL 1025122 (Ky. Ct. App. 2009) (premarital agreements are enforceable); *Garritson v. Timmons*, 2008 WL 2696322 (Ky. Ct. App. 2008)
[10] *See Mabus v. Mabus*, 890 So.2d 806 (Miss. 2003) (a premarital agreement is just as enforceable as a contract)
[11] There is pending legislation that may overturn this law
[12] *See Hardee v. Hardee*, 585 S.E.2d 501 (S.C. 2003) (a premarital agreement with provision which waived alimony is enforceable and not against public policy); *Abate v. Abate*, 660 S.E.2d 515 (S.C. Ct. App. 2008);

Tennessee	Yes	Yes	TN ST § 36-3-501	TN ST § 36-3-501	No
Texas	Yes	Yes	TX FAMILY § 4.003	TX FAMILY § 4.003	Yes
Utah	Yes	Yes	UT ST § 30-8-4	UT ST § 30-8-4	Yes
Vermont	Yes[13]	Yes	None	None	No
Virginia	Yes	Yes	VA ST § 20-150	VA ST § 20-150	Yes
Washington	Yes	Yes	WA ST 26.16.250	WA ST 26.16.250	No
West Virginia	Yes	Yes	WV ST § 48-1-203	WV ST § 48-1-203	No
Wisconsin	Yes	Yes	WI ST 766.58	WI ST 766.58	Yes
Wyoming	Yes[14]	Yes	WY ST § 2-5-102	None	No

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[13] *See Gamache v. Smurro*, 904 A.2d 91 (Vt. 2006) (premarital agreements are interpreted according to the rules for construing a contract)
[14] *See Seherr-Thoss v. Seherr-Thoss*, 141 P.3d 705 (Wyo. 2006) (premarital agreements are valid and enforceable and are governed by the same rules of construction that are applicable to other contracts)