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 partnership 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 more 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, perhaps for their children from a previous marriage. The number of people moving between countries and forming relationships with their citizens has also made pre-nuptial agreements more common.

The case for reform
The current law, which we analyse in section 1 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 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 wish 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 marriage. 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 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:

**s25(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.

**s25(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 s25(1) and (2).

It would also be necessary to make a consequential amendment to s25(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 s25(2A). While this is a point of detailed drafting, rather than principle, we suggest that it is achieved by adding a new s25(2)(i) in these terms:
s25(2)(i) any agreement falling within s25(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 hallmarks of serious unfairness.

Apart from providing couples with more choice, understanding and 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.