

## The increasing importance of nuptial agreements in light of recent cases and statutory developments

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### Abstract

It has been argued that in a free society, adults should be entitled to enter into private contracts without the interference of the state. However, under English law, husband and wife (or a couple in a same-sex marriage) are not free to enter into a legally binding contract in which they can set out their own terms when this right is afforded to other partnerships. The purpose of this paper is to consider whether such protection can or should be afforded to couples when entering into marriage.

Divorce has financial consequences beyond those of the legal fees involved; the law holds that, despite the dissolution of the relationship, the parties retain obligations to support their former spouse. Such 'needs' are determined by the courts, with all property considered as appropriate for disposal.

The increased number of remarriages and the increased age of first-time marriages have led to a growing desire for parties to protect the assets of each party as they enter into the state of matrimony. The right to autonomy in respect of their assets is therefore a point of contention.

At a time when the legal system is trying to move to a more accessible, less court-driven system, to make divorce more accessible for individuals without the need for costly legal intervention, it has been suggested that a new approach is required to enable people to devise fair solutions for themselves.

The Supreme Court judgment in *Radmacher v Granatino* [2010] UKSC 42 supported the freedom of parties to determine their own division of assets, stating that nuptial agreements should be given 'decisive weight' unless the agreement itself is unfair – and it is the courts who determine what is considered 'fair'. One could, therefore, suggest that the apparent power of parties to determine the division of assets is not as it seems, as the final decision remains with the courts if the agreement is challenged by either party.

The government has recognised the need for clarity in this area of law, initially through the commissioning of Law Commission Report 208, *Matrimonial Property Agreements*. Shortly afterwards, this was extended to include the financial provision element of divorce, and Report 343, *Matrimonial Property, Needs and Agreements*, was commissioned. Unusually, the government commissioned Report 343 before the research on Report 208 was complete, such was the importance placed upon this additional element. Their aim was to discern whether a simple statutory framework could be created to guide couples through the division of assets following the breakdown of their marriage.

This paper discusses the impact of this judgment on the development of law in this area while critically analysing the future position following the recommendations of Law Commission Report 343, *Matrimonial Property, Needs and Agreements* (2014).

As an area of law of current interest both in legal practice and academia, this paper looks at the law in practice both before and after *Radmacher v Granatino* and Law Commission Report 343, and considers whether further reform is needed before the law is readily accessible to the 'common man'.

**Keywords:** *Radmacher v Granatino*; matrimonial property; marital agreements; nuptial agreements; marital contract; Matrimonial Causes Act 1973.

## Introduction

Marital agreements, often referred to as prenuptial or postnuptial agreements, were once seen as something for the rich, only in the news for involving footballers, movie stars and musicians, and certainly not something the ordinary couple would consider when getting married. However, at a time when marriage is not necessarily the 'forever' state it once was, parties often remain cautious around their desire to protect what is theirs. Nuptial agreements, as reported in the press, often involve large sums of money or inherited wealth, but for many the desire is a simpler one – that of protecting what they bring to a relationship should their marriage later fail, such as when parties are embarking on a second marriage with assets they wish to protect for their children (the marital home, for example).

It is important that the role the court plays in the division of assets is clear from the outset; everything is considered as 'fair game' by the courts. English law does not distinguish between marital and non-marital property (that is, assets not directly linked to the marriage). Consider the hypothetical situation of a couple, married with children from previous relationships, and one partner inherits part of a long-standing family business or a property on behalf of their children (on the basis that children under the age of 18 cannot own property). Is it fair that their share of the property should be divided with the new partner upon divorce, or should it be considered as non-marital property and thus not available when dividing the assets? It would appear unfair that someone unconnected with the initial business should benefit from this inheritance, but the law would allow for such a division, hence the desire of parties to protect such assets. As Fiona Kendall comments, '[m]arriage is the most important contract, for ourselves and for the wider world, that most of us will make, yet men and women sign up to it on an erotic high without mentioning the terms of the contract, still less examining them'.<sup>1</sup>

The growing trend in divorce, the increased number of second (or subsequent) marriages and the increased age of first-time marriages has led to a growing need to protect the assets of each party as they enter into the state.<sup>2</sup> It is this increase in agreements and the current uncertainty of their legal standing that continues to challenge the courts. This was recognised by the Law Commission in 2011 with its consultation on Marital Property Agreements,<sup>3</sup> later extended in 2012 with the supplementary consultation on Matrimonial Property, Needs and Agreements.<sup>4</sup>

This paper considers the role of nuptial agreements in English and Welsh law in light of the precedent-setting case of *Radmacher v Granatino*,<sup>5</sup> along with the recommendations set out by the 2014 Law Commission Report 343, *Matrimonial Property, Needs and Agreements*.<sup>6</sup>

### **The law before *Radmacher v Granatino***

In order to consider the impact of the Supreme Court judgment in *Radmacher*, we must first understand the position of the law under which this case was heard, in terms of both the statutory guidance and those cases that show how that guidance has been interpreted in action.

Prenuptial agreements are considered to be binding legal contracts across the world; however, this is not the case in English law.<sup>7</sup> The Matrimonial Causes Act 1973 delegates the power for determining ancillary relief to the courts, and while these powers are considerable – including ordering the adjustment of ownership of spousal property, ordering the transfer of pensions, and granting financial orders – the only guidance provided to the courts to assist them is the list of factors set out in Section 25 of the Act.<sup>8</sup>

The judiciary cannot create new law to 'fill a gap', nor can they ignore a statute, but they can interpret the law as written to ensure the fairest outcome. It is this limitation that has previously guided the courts' policy not to consider prenuptial agreements as binding, as to do so would oust the jurisdiction of the court, something that only parliament can do through

legislation. It is this interpretation that guides future implementation through the doctrine of precedent, and a number of 'key' cases have set precedent for how the courts have historically implemented this legislation. 'It used to be contrary to public policy for a married couple ... to make an agreement that provided for the contingency that they might separate.'<sup>9</sup> Marriage is an agreement to be together, and an agreement making provision for separation conflicts with this.<sup>10</sup>

The legislation relating to financial/ancillary relief orders has therefore developed with the sociological needs of the nation. The Matrimonial Proceedings and Property Act 1970<sup>11</sup> gave the courts the power to adjust property ownership and to make orders that financial provision be arranged for the weaker spouse. This was reconsidered in the 1980s and a change of emphasis recommended, as established in the Matrimonial and Family Proceedings Act 1984<sup>12</sup>. Unfortunately, the guidance seemed contradictory, advocating both independence and the need to ensure that adequate financial provision is made for the spouse and children.<sup>13</sup> This led to inconsistent approaches and a lack of certainty as to how the courts should rule. The Law Commission likened the lack of clarity to 'a bus driver ... given a large number of instructions about how to drive the bus, ... authority to ... [turn] left or right ... the occasional advice or correction offered by three senior drivers', but, of key importance, he is not told the destination, simply that it must be a reasonable one.<sup>14</sup>

As has been mentioned, legislation does not distinguish between matrimonial and non-matrimonial assets, simply listing 'the income, earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future'.<sup>15</sup> This distinction is drawn by the common law in its search for fairness, but all of the couple's assets will be considered in the event of a divorce. Some countries do not recognise non-matrimonial property at all, though they offer the facility to allow couples to separate their property before marriage.<sup>16</sup> The purpose of this review is not an attempt to unravel the complex nature of how the courts have considered this previously, but to note that in respect of prenuptial agreements, it may be desirable and possible to try to protect certain assets. For example, in the case of *Hyman* [1929],<sup>17</sup> though not a prenuptial agreement, the courts held that parties could not, by agreement, prevent the courts from exercising their jurisdiction in financial matters. However, in *Edgar* [1980],<sup>18</sup> an agreement was upheld as it did not oust the courts' powers. More recently, in *N v N* [1999],<sup>19</sup> Judge Wall commented that although prenuptial agreements were unenforceable, that did not mean they would not be upheld where justice required; this was later followed in *M v M (Prenuptial Agreement)* [2002], when Judge Connell stated 'I do bear the agreement in mind as one of the more relevant circumstances of this case, but the court's over-riding duty remains ... to arrive at a solution that is fair in all the circumstances'.<sup>20</sup>

Though the judgment in *Radmacher* provides a shift in the way the courts consider prenuptial agreements, before that case came several examples of changes in the way 'financial needs' were considered; both elements are part of the Law Commission's report, so are important to understand.

In *White* [2000],<sup>21</sup> the courts set out the sharing principle: once both parties' financial needs are met, the starting point for the division of any surplus should be equal, and then weighted towards either party according to the circumstances in that particular case. In this case the court did consider non-matrimonial property when adjusting the weighting of the award, although it was at their discretion to do so.<sup>22</sup> Such a ruling could increase the number of parties interested in a prenuptial agreement, not to avoid all financial responsibilities, as the courts have shown they will not allow for this, but to potentially try to ring-fence and protect certain assets, specifically as regards non-marital property.

Another ruling of interest is the 2006 appeals of *Miller; McFarlane*,<sup>23</sup> which were heard together and are thus reported together. Giving judgment, Lord Nicholls made clear that the focus was fairness, firstly considering financial needs, then any compensation due, then sharing, postulating that marriage is a partnership with the yardstick of equality to be applied, unless there is good reason to the contrary.

*Charman*<sup>24</sup> followed a year later, still trying to answer the question of which property the sharing principle applies to. As with *Dart* and *McFarlane*, the marriage had been of significant duration (30 years); the couple had children, though because of their age they would not be considered as children.<sup>25</sup> The wife gave up work to raise the family and the husband was the breadwinner, and based upon this, the award of the court was a 63.5/36.5 split. When rejecting the appeal, the court stated: 'such a contribution should normally at least entitle the person who had made it to 55 per cent of the assets. However, it would be unlikely to entitle that party, after a very long marriage, to receive more than twice as much as the other party', going on to suggest a limit of 66.6%.<sup>26</sup> This followed the ruling in *GW v RW* that a partner who remains at home to look after the children retains a right to a share of the 'pool of assets that is the fruit of the marital partnership'.<sup>27</sup>

Newbury, writing in 2005, suggested that case law continued to re-emphasise the breadth of discretion that the courts have in applying the Section 25 factors, highlighting that as circumstances varied so significantly between cases, it was difficult to ascertain clear and consistent principles. What he felt was clear was that the relevance of each of the Section 25(2) factors varied from case to case, depending upon individual circumstances.<sup>28</sup> This could be seen to highlight the need for marital agreements to be given greater weight by the courts in allowing couples to retain some control over the assets of the relationship.

### ***Radmacher v Granatino* – The judgment and implications**

As has been shown, before *Radmacher*, if a spouse sought to rely on a prenuptial agreement, the weight attributed to this was at the discretion of the court. Going forward, it has been stated that the courts will attribute decisive weight to the agreement 'unless in the circumstances ... it would not be fair to hold the parties to their agreement'.<sup>29</sup> The court declined to be too prescriptive of the circumstances in which they would not hold a party to their agreement, instead reserving their discretion to assess each case on its merits.<sup>30</sup> Perhaps most importantly, the courts did not say that such agreements are binding, as to do so would oust the jurisdiction of the court.<sup>31</sup>

During his introduction, Lord Phillips references both the Six Safeguards proposed by the Home Office in 1998<sup>32</sup> and the 2009 Family Agreements paper.<sup>33</sup> It is interesting to note that the *Radmacher* agreement actually fell foul of the Six Safeguards insofar as there were children, and both parties did not obtain independent legal advice. On first hearing the case, Judge Baron referred to this failure and thus reduced the weight applied, but did not disregard it in full. This was overturned by the Appeal Court finding that the circumstances of the agreement should not have reduced the weight and that decisive weight should be applied. They ruled that the award should make provision for the husband's role as a father, but no further.<sup>34</sup>

The judgment in *Radmacher* considered the distinction between prenuptial and postnuptial agreements<sup>35</sup> with consideration of the *MacLeod* case, in which a prenuptial agreement was signed but later varied, by consent, twice during the duration of the marriage. In *MacLeod*, it was held that the most recent variation of the agreement was enforceable, though it still reserved the court's rights to vary the terms.<sup>36</sup> The application of the three-stranded approach to fairness, as set out in *Miller; McFarlane*, was considered and held that it would be the first two, needs and compensation, which would render it unfair to hold a party to an agreement, but that should resources suffice, the division of the surplus could be done in accordance with the signed agreements.<sup>37</sup>

The implications of this decision are, in many ways, yet to be truly tested, as it is only over time and through testing that a true precedent is established. Since the *Radmacher* judgment, the courts have been faced with few cases in which the principles established have been challenged. In *GS v L*, the court felt that as neither party had full appreciation of the implications of the agreement, little weight should be granted to the existence of the agreement, the grounds for this this being Lady Hale's (dissenting) question: 'Did each party

freely enter into an agreement, intending it to have legal effect ... with a full appreciation of its implications?'<sup>38</sup> In effect, both parties must enter into the agreement willingly (without any pressure to sign), understanding the terms of the agreement (ideally having received independent legal advice prior to signature) and in the understanding that it is intended to be legally binding. These are not, however, considered as prerequisites for the agreement to be considered binding, as in *V v V* the courts recognised the right of the individuals to determine how their assets should be distributed, despite the fact that the wife had not had legal advice, nor had full disclosure as to the value of property been made.<sup>39</sup> The courts found that as there had been no interest in the precise value being considered, it did not amount to material non-disclosure, and that although no independent legal advice had been sought, both parties were intelligent and had intended for the agreement to be effective; thus, it would not be unfair to hold the parties to their agreement. This can be distinguished from *Kremen v Agrest*, where the agreement was not upheld - the reasons given for this being lack of disclosure, lack of legal advice and pressure to sign with comment also made that that the party under pressure also had no understanding of the rights they were foregoing.<sup>40</sup>

If we consider the suggestion that the courts should consider such agreements binding unless it is manifestly unfair to do so, then the court's decision in *Z v Z* to uphold an agreement, insofar as it excluded the equal sharing principle but did not uphold the exclusion of maintenance claims, suggests that the courts are willing to be selective when considering the clauses contained in such agreements to ensure that the outcome is 'fair'.<sup>41</sup>

One of the challenges for marital agreements is this fairness obstacle. In her recent book, Sharon Thompson considers the unforeseeable ways in which financial positions may change over time, such as if one partner becomes very wealthy pursuing (and achieving) their goal while the other works to support the other, highlighting that fact that 'marriage and family life ... create dependence in a way that may not be anticipated by the terms of a prenup'.<sup>42</sup> Her solution to this is to incorporate a need for regular review of the agreement at certain intervals – Kendall suggests certain anniversary dates or the birth of children.<sup>43</sup> This suggestion of best practice would concur with the factors considered by the court when determining any settlement. Thompson then goes on to say that while matters do sometimes work out as anticipated and planned for, this should not detract from the reality that in many cases, particularly where the marriage is of a longer duration, the situations of the parties do change.

### **The objectives of Report 343**

The current statutory framework for financial orders requires that judgment be considered and delivered by the courts, thus allowing the courts to tailor their ruling to ensure 'fair' distribution of assets, but requiring considerable involvement when the legal system is trying to be more accessible for individuals without the need for costly legal intervention.<sup>44</sup> As Cooke comments, 'however splendid this is for individually-tailored justice, it does not make for predictability and can only proliferate argument, risk, stress and costs'.<sup>45</sup> A new approach is required to enable people to devise fair solutions for themselves, or to use other methods of dispute resolution.

The original consultation<sup>46</sup> focused on Matrimonial Agreements and their enforcement, which, in turn, raised broader issues about financial provision orders. To combat this, and before any report on its findings could be determined, a supplementary consultation was opened on Matrimonial Property, Needs and Agreements.<sup>47</sup> The focus of this extension was financial provision on divorce. To what extent should one spouse be required to meet the other's financial needs? What exactly is meant by needs? And what happens to property that is owned by one party before the marriage or acquired during the course of it? It is the outcome of this later combined report that we will consider here.

The report was commissioned to review the current situation in order to establish whether a simple, statutory framework could be created to help guide couples through this period, the

intention being to render the law more certain and predictable 'without jeopardising the protection that the law offers to those who are made vulnerable by family breakdown'.<sup>48</sup>

The Law Commission drew no distinction between marriage and civil partnership in any matters covered in the report, nor did it anticipate that the introduction of same-sex marriage would make any difference to its recommendations.<sup>49</sup>

### **Conclusions and recommendations of Report 343**

The Law Commission is clear from the start that its recommendations are not intended to be a final solution, but 'staging posts in an ongoing journey', highlighting that this is an area of law 'constantly under pressure from social change, public opinion, economic pressures and legal influence from abroad'.<sup>50</sup>

The Law Commission found that the courts had gone as far as they could in 'endorsing the validity of marital property agreements without amendment of the statutory framework', highlighting that only the enforcement of new legislation could enable parties to enforce agreements without involving the courts.<sup>51</sup> In answer to this obstacle, the report included a draft bill suggesting that couples be allowed to create a Qualifying Nuptial Agreement (QNA) to define the allocation of assets in the event of divorce or dissolution of the marriage, setting out clear criteria to be met before it could be considered as binding.<sup>52</sup> It did not remove the discretionary powers of the court already granted under the Matrimonial Causes Act, retaining the right to make alterations to the agreement, thus allowing couples to legitimately challenge the matter.<sup>53</sup>

QNAs would not overrule or limit the courts' power in determining financial provision when the needs of the children are to be considered. Nor will they be binding if the terms are not considered to meet the financial needs of both parties.<sup>54</sup> The report does not provide a definition of financial means, deferring to future guidance to be published by the Family Justice Council.<sup>55</sup>

Owing to the date of publication, there was insufficient time for parliament to fully consider the proposed bill before it was dissolved and, as a result, it was held over until parliament was reconvened.<sup>56</sup> This remains a draft bill and has not yet been fully considered by parliament.

### **Family Justice Council report on financial needs in divorce**

The request by the Law Commission for clarification on the meaning of 'financial needs' was intended to ensure that the term is applied consistently by the courts.<sup>57</sup> The creation of a 'formula' to aid calculation was discussed, but caution was advised, suggesting that any developed would take the form of non-statutory guidance.<sup>58</sup> The Commission hoped that the guidance would provide 'words, not figures' to assist those without legal representation, or non-legally qualified mediators, to make practical arrangements, along with consistency from the courts.<sup>59</sup>

The Commission was of the opinion that clear guidance on financial needs would be invaluable. They recognised that most couples going through a divorce do not have their financial arrangements determined by a judge, but instead, make use of mediation, arbitration or assistance from lawyers.<sup>60</sup> It is therefore not appropriate for the law to say 'it is up to the judge' when, for many, they will not have their case considered and determined by the courts.

Initially expected to be published by the end of 2014,<sup>61</sup> the requested report was published in April 2016.<sup>62</sup> Owing to the time that has elapsed since publication, it is not yet possible to assess the value of this in practice. This new report, though providing the desired clarification in identifying a 'need', is unlikely to open the door for more couples to meet the prerequisites needed to form a binding QNA as it focuses on the most frequent situations –

those where the assets do not meet or exceed the 'needs' of both parties.<sup>63</sup> As was highlighted in the report, a prenuptial agreement will only be upheld when it is fair to do so, thus taking the circumstances that exist at the point of divorce into consideration, which is contingent upon both partners' needs being met.<sup>64</sup>

## Reflections on the consultation and report

This is not the first consultation by HM Government in which the status of nuptial agreements has been considered. In the 1998 Home Office *Supporting Families* consultation, the 'Six Safeguards' were set out as a safety net so that if one or more applied, the agreement would not be held to be legally binding.<sup>65</sup> The criteria set out at that time were not dissimilar to those now suggested, and the government of the time decided not to move forward with any statutory amendments.

It has been suggested that the prerequisites to succeed as a QNA are such that they will be unobtainable to all but the most wealthy couples, purely on the basis that the majority will have insufficient capital or assets within the matrimonial pot to meet the needs of both parties and of any children of the union.<sup>66</sup> The Commission itself highlighted QNAs as being of particular use to high-net-worth couples to protect business interests or inheritance. It also identified a second group of beneficiaries, namely those who have been in a relationship previously and wish to safeguard property or assets for their children from that earlier union.<sup>67</sup>

Although the report provides some clarification as to how the law should be applied to financial provision in divorce, it could have gone further and provided a more definitive definition of financial needs in the post-divorce context, specifically as it relates to the distinction between matrimonial and non-matrimonial property, with one writer describing the lack of guidance as 'disappointing'.<sup>68</sup> Indeed, one of the questions raised by the Commission in the final report was which rules should apply when the profits from the sale of an inherited property are used to fund the marital home?<sup>69</sup> No guidelines for this were provided within the 2014 report, nor within the draft bill, with the lack of clarification justified on the grounds that there was no consensus of opinion among the consultees, that the question of non-matrimonial property only arises in a minority of cases, and that in such cases it is preferable to allow couples to make their own arrangement by way of a QNA.<sup>70</sup> The Commission did allow that statutory provision may be necessary in the future once more cases have been heard and the implication of non-matrimonial property has been further explored.<sup>71</sup>

## The argument for further reform

It has been said that it is only by the interference of the state that the binding nature of prenuptial agreements are not upheld.<sup>72</sup> Similarly, Cretney comments on the irrationality of the law, questioning why English law does not 'allow husband and wife by contract ... to make their own agreement as to the terms ... when this right is accorded to other partnerships'.<sup>73</sup>

Todd suggests that in a free society, adults should be entitled to enter into private contracts without the interference of the state and that only in cases of presumed undue influence should they step in; this does allow for the state to retain a supervisory role, albeit a very limited one. This libertarian position is that, absent of undue influence of state, the parties should be held to their bargains.<sup>74</sup>

The family law organisation Resolution has, for some time, pressed for the law to be made clearer. The intention is that couples should have a clearer understanding of the status of nuptial agreements, that such agreements will, subject to all the usual requirements of a contract, be held to be binding, and that only in the very rarest case would they be held to be otherwise.<sup>75,76</sup> Jo Edwards, speaking on behalf of Resolution, welcomed the report, highlighting that although since *Radmacher* prenuptial agreements have, in effect, been made legally binding, it is only when tested by the courts that this can be certain. She

commented that, where an agreement is put in place, the proposals 'make their legal situation much clearer and reduce uncertainty upon separation'.<sup>77</sup> She did go on to comment that Resolution would prefer to see change that would allow wider access to prenuptial agreements. Such clarification and altered expectation could reduce the cost of divorce, as assets and income would remain within the marital pot for division rather than being used on costly litigation. If we hold that the Commission report did not go far enough, and that the proposals will not benefit a wide enough group, it would support the need for further reform.

### **The argument to maintain the status quo**

In *Miller; McFarlane*, Baroness Hale comments '[t]he nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared', but goes on to caution that this approach might not be fair. 'What seems fair and sensible at the outset of a relationship may seem much less fair and sensible when it ends.'<sup>78</sup> Though this judgment predates both the *Radmacher* case and the Law Commission report, the sentiment is true to the intent of the statute in trying to ensure the fairest possible outcome. This would support the idea that any QNA would not be considered 100% binding and would remain subject to the jurisdiction of the court.

The Law Commission originally started work on this project in 2009, the enquiry being confined to the legal effects of nuptial agreements. The project itself was extended to take account of the *Radmacher* case and the publication in 2011 of the Family Justice Review report in which recommendation was made that a full review of the financial consequences of divorce was needed. The Commission has made its recommendations and has accepted that it did not feel it appropriate to legislate on all areas under consideration, but did allow that this may change in the future.<sup>79</sup>

### **Conclusion**

It is accepted that the cases discussed throughout this article involve high-value capital and assets; indeed, the courts themselves have recognised this discrepancy with the comment 'it seems ...unfortunate that our law ... should be largely dictated by cases which bear no resemblance to the ordinary lives of most divorcing couples and to the average case'.<sup>80</sup> The judgment then goes on to reflect that the sums involved are so far beyond the experience or contemplation of most, that whether the award is £5 million or £8 million, the recipient is still very rich, and that the application of the 'sharing' and 'needs' principles look very different in cases where the latter predominates and the parties' assets are a tiny percentage of those encountered in these high-profile cases. In the considered cases it is often possible to separate marital and non-marital property; this is not the case for most divorcing couples when the pool of assets is insufficient to sustain two households.

Society itself is changing, and as it does so the requirements of the law alter accordingly. At the 2015 Family Law Association AGM in St Andrews, the point was raised that in the USA, the ownership and use of computer content, digital images and social media accounts have begun to be considered within prenuptial agreements, with 'social media executors' starting to be appointed and even explicitly legislated for in some jurisdictions.<sup>81</sup> With more families making use of shared online accounts (iTunes, for example), there is potential for conflict as to who should retain the right to this asset. Twenty years ago this would not have been a consideration, but in the current age of technology, individuals could have accounts worth thousands of pounds once films, apps, books, etc. are all considered.

The Commission's final report does not provide answers to all the questions it set out to consider, and the Commission itself accepts this point as regards 'non-matrimonial property'.<sup>82</sup> We can hope that future cases to be determined by the courts will provide further guidance and clarity, but the Commission does make reference to the right of autonomy and the right to decide in respect of such assets.<sup>83</sup> A draft bill has been composed, but not yet accepted into law. It is an ongoing situation and one that will continue to develop, and the Commission recognises this and highlights that further intervention may be required in the



future.<sup>84</sup> Indeed, as was noted in *Miller; McFarlane*, '[f]airness is an elusive concept. It is an instinctive response to a given set of facts ... grounded in social and moral values ... they change from one generation to the next'.<sup>85</sup> With the delay in publication of the Family Justice Council report on financial needs, this, too, has yet to be truly tested by the courts.

In *Miller; McFarlane*, it was commented that 'there remains a widespread feeling in this country that ... a judge should know who was to blame for the breakdown of the marriage'.<sup>86</sup> Although this case predates both *Radmacher* and the Law Commission report, I suspect it is still a belief held by many – that the innocent party should not suffer 'unfairly'.

The purpose of this paper was to assess any underlying shift in the approach of the courts following both the *Radmacher* case and the Law Commission report. However, it suggests that for the majority of couples looking to divorce, the report will have little impact. This research has also highlighted that, despite the recommendations of the Law Commission report, legislation continues to provide no clear guidance on the financial responsibilities of each party to their former spouse. Thus, it could be rationally surmised that the legal system will continue to evolve as cases come before it.

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<sup>1</sup> Fiona Kendall, 'Planning for relationship breakdown: some practical considerations' (2013) 5 PCB 267-272.

<sup>2</sup> Office for National Statistics, 'Number of marriages and divorces, 1933-2013'; Office for National Statistics, 'Divorces in England & Wales Statistical Bulletin'.

<sup>3</sup> Law Commission, *Marital Property Agreements* (Consultation Paper No. 198, 2011).

<sup>4</sup> Law Commission, *Matrimonial Property, Needs and Agreements, A Supplementary Consultation Paper* (Consultation Paper No. 208, 2012).

<sup>5</sup> *Radmacher v Granatino* [2010] UKSC 42.

<sup>6</sup> Law Commission, *Matrimonial Property, Needs and Agreements* (Report No. 343, 2014).

<sup>7</sup> Law Commission, *Marital Property Agreements* (Consultation Paper No. 198, 2011, Part 4).

<sup>8</sup> Matrimonial Causes Act 1973, s21-s25.

<sup>9</sup> *Radmacher v Granatino* [2010] UKSC 42.

<sup>10</sup> *Cocksedge v Cocksedge* (1844) 14 Sim 244; 13 LJ Ch 384.

<sup>11</sup> Matrimonial Proceedings and Property Act 1970

<sup>12</sup> Matrimonial and Family Proceedings Act 1984

<sup>13</sup> S Gilmore and L Glennon, *Hayes & Williams Family Law* (4th edn, Oxford University Press 2014) 154.

<sup>14</sup> Law Commission, *Matrimonial Property, Needs and Agreements, A Supplementary Consultation Paper* (Consultation Paper No. 208) para 3.3 referring to P Parkinson 'The Diminishing Significance of Initial Contributions to Property' (1999) 13 AJFL 52.

<sup>15</sup> Matrimonial Causes Act 1973, s25 (2)(a).

<sup>16</sup> M Stowe, 'Non-matrimonial property: what is it, and why is it under scrutiny?' September 2012

<http://www.marilynstowe.co.uk/2012/09/17/non-matrimonial-property-what-is-it-and-why-is-it-under-scrutiny/>

<sup>17</sup> *Hyman v Hyman* [1929] AC 601.

<sup>18</sup> *Edgar v Edgar* [1980] 1 WLR 1410, [1980] 3 All ER 887, [1980] EWCA Civ 2, [1980] 2 FLR 19.

<sup>19</sup> *N v N (Jurisdiction; prenuptial agreement)* [1999] 2 FLR 745.

<sup>20</sup> *M v M (Prenuptial Agreement)* [2002] 1 FLR 654.

<sup>21</sup> *White v White* [2000] UKHL 54; [2001] AC 596.

<sup>22</sup> *White v White* [2001] AC 596, 610.

<sup>23</sup> *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

<sup>24</sup> *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246.

<sup>25</sup> Matrimonial Causes Act 1973, s25 (1).

<sup>26</sup> Sir Mark Potter, President of Family Division - *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246

<sup>27</sup> *GW v RW (Financial Provision – Department from Equality)* [2003] 2 FLR 108; EWHC 611 (fam) para 85.

<sup>28</sup> A Newbury, 'Short but not necessarily sweet' *Family Law Week* (2005)

<http://www.familylawweek.co.uk/site.aspx?i=ed233>

<sup>29</sup> *Radmacher v Granatino* [2010] UKSC 42 at 75.

<sup>30</sup> *Radmacher v Granatino* [2010] UKSC 42 at 76.

<sup>31</sup> *Radmacher v Granatino* [2010] UKSC 42 para 161.

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- <sup>32</sup> Home Office, *Supporting Families: A Consultation Document* (1998) <http://webarchive.nationalarchives.gov.uk/+http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/P2/ACU/SUPPFAM.HTM>
- <sup>33</sup> Resolution, *Family Agreements: Seeking Certainty to Reduce Disputes: The Recognition and Enforcement of pre-nuptial and postnuptial agreements in England and Wales*, [2009] [http://www.resolution.org.uk/site\\_content\\_files/files/family\\_agreements.pdf](http://www.resolution.org.uk/site_content_files/files/family_agreements.pdf)
- <sup>34</sup> *Radmacher v Granatino* [2010] UKSC 42 para 15.
- <sup>35</sup> *Radmacher v Granatino* [2010] UKSC 42 para 16-83.
- <sup>36</sup> *MacLeod v MacLeod* [2008] UKPC 64.
- <sup>37</sup> *Radmacher v Granatino* [2010] UKSC 42 para 16-81.
- <sup>38</sup> *GS v L* [2011] EWHC 1759.
- <sup>39</sup> *V v V* [2011] EWHC 2330.
- <sup>40</sup> *Kremen v Agrest (No11) (Financial Remedy: Non-Disclosure Post Nuptial Agreement)* [2012] EWHC 45.
- <sup>41</sup> *Z v Z (No2)* [2011] EWHC 2878 (Fam).
- <sup>42</sup> S Thompson, *Pre-nuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Bloomsbury 2015) 199.
- <sup>43</sup> F Kendall, 'Planning for relationship breakdown: some practical considerations' (2013) 5 PCB 267-272.
- <sup>44</sup> Law Commission, *Matrimonial Property, Needs and Agreements Report Impact Assessment*.
- <sup>45</sup> E Cooke, 'Pre-Nups and Beyond: What is the Law Commission up to now?' [2012] FL 323, 324.
- <sup>46</sup> Law Commission, *Marital Property Agreements* (Consultation Paper No. 198, 2011).
- <sup>47</sup> Law Commission, *Matrimonial Property, Needs and Agreements, A Supplementary Consultation Paper* (Consultation Paper No. 208).
- <sup>48</sup> Law Commission, *Matrimonial Property, Needs and Agreements Report* (Report No. 343, 2014) Executive Summary [1.1].
- <sup>49</sup> Law Commission, *Matrimonial Property, Needs and Agreements Report* (Report No. 343, 2014) Introduction, 2.
- <sup>50</sup> Law Commission, *Matrimonial Property, Needs and Agreements Report* (Report No. 343, 2014) Executive Summary [1.2].
- <sup>51</sup> Law Commission, *Matrimonial Property, Needs and Agreements* (Report No. 343, 2014) [1.34].
- <sup>52</sup> The Nuptial Agreements Bill can be found within Law Commission *Matrimonial Property, Needs and Agreements Report* (Report No. 343, 2014) 181.
- <sup>53</sup> Nuptial Agreements Bill s5 (4).
- <sup>54</sup> Law Commission, *Matrimonial Property, Needs and Agreements Report* (Report No. 343, 2014) [5.3].
- <sup>55</sup> Law Commission, *Matrimonial Property, Needs and Agreements Report* (Report No. 343, 2014) [1.27].
- <sup>56</sup> C Fairburn, 'Pre-nuptial agreements', SN/HA/3752, House of Commons Library, 25/11/2014.
- <sup>57</sup> Law Commission, *Matrimonial Property, Needs and Agreements Report* (Report No. 343, 2014) Executive Summary [1.8].
- <sup>58</sup> Law Commission, *Matrimonial Property, Needs and Agreements Report* (Report No. 343, 2014) Executive Summary [1.9].
- <sup>59</sup> Law Commission, *Matrimonial Property, Needs and Agreements Report* (Report No. 343, 2014) Executive Summary [1.19-1.20].
- <sup>60</sup> Law Commission, *Matrimonial Property, Needs and Agreements Report* (Report No. 343, 2014) Executive Summary [1.14].
- <sup>61</sup> S Hughes (on behalf of Ministry of Justice), Press Release: 'Divorce myths to be dispelled', 17/04/2014 <https://www.gov.uk/government/news/divorce-myths-to-be-dispelled>
- <sup>62</sup> Family Justice Council, *Sorting out Finances on Divorce*, 2016, <https://www.judiciary.gov.uk/wp-content/uploads/2016/04/fjc-financial-needs-april-16-final.pdf>
- <sup>63</sup> Family Justice Council, *Sorting out Finances on Divorce*, 2016, 9 <https://www.judiciary.gov.uk/wp-content/uploads/2016/04/fjc-financial-needs-april-16-final.pdf>
- <sup>64</sup> Family Justice Council, *Sorting out Finances on Divorce*, 2016, 24-25, <https://www.judiciary.gov.uk/wp-content/uploads/2016/04/fjc-financial-needs-april-16-final.pdf>
- <sup>65</sup> Home Office, *Supporting Families: A Consultation Document*, 1998 [4.23] <http://webarchive.nationalarchives.gov.uk/+http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/P2/ACU/SUPPFAM.HTM>
- <sup>66</sup> S Thomas, *Should nuptial agreements be made available to all?* [2015] FLJ Jan. [http://www.familylaw.co.uk/news\\_and\\_comment/should-nuptial-agreements-be-made-available-to-all#.VzI13W6DFBc](http://www.familylaw.co.uk/news_and_comment/should-nuptial-agreements-be-made-available-to-all#.VzI13W6DFBc)
- <sup>67</sup> Law Commission, *Matrimonial Property, Needs and Agreements Report* (Report No. 343, 2014) [1.36-1.37].
- <sup>68</sup> S Gilmore and L Glennon, *Hayes & Williams Family Law* (4th edn Oxford University Press 2014) XIV.
- <sup>69</sup> Law Commission, *Matrimonial Property, Needs and Agreements* (Report No. 343, 2014) [1.39].

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- <sup>70</sup> Law Commission, *Matrimonial Property, Needs and Agreements* (Report No. 343, 2014) [1.39].
- <sup>71</sup> Law Commission, *Matrimonial Property, Needs and Agreements* (Report No. 343, 2014) [1.40].
- <sup>72</sup> R Todd, 'The Inevitable Triumph of the Ante-Nuptial Contract' [2006] 36 FLJ 509-616.
- <sup>73</sup> S Cretney, 'The family and the law – status or contract?' [2003] 15 C&FLQ 403.
- <sup>74</sup> R Todd, 'The Inevitable Triumph of the Ante-Nuptial Contract' [2006] 36 FLJ 509-616.
- <sup>75</sup> Resolution, *Family Agreements: Seeking Certainty to Reduce Disputes: The Recognition and Enforcement of pre-nuptial and postnuptial agreements in England and Wales* [3.2]  
[http://www.resolution.org.uk/site\\_content\\_files/files/family\\_agreements.pdf](http://www.resolution.org.uk/site_content_files/files/family_agreements.pdf)
- <sup>76</sup> Resolution, *Family Agreements: Seeking Certainty to Reduce Disputes: The Recognition and Enforcement of pre-nuptial and postnuptial agreements in England and Wales* [5.14]  
[http://www.resolution.org.uk/site\\_content\\_files/files/family\\_agreements.pdf](http://www.resolution.org.uk/site_content_files/files/family_agreements.pdf)
- <sup>77</sup> M Mueller, 'Law Commission's Report on Matrimonial Property, Needs and Agreements' FLJ, Feb 2014  
[http://www.familylaw.co.uk/news\\_and\\_comment/law-commission-report-on-matrimonial-property-needs-and-agreements#.VzI8M26DFBc](http://www.familylaw.co.uk/news_and_comment/law-commission-report-on-matrimonial-property-needs-and-agreements#.VzI8M26DFBc)
- <sup>78</sup> *Miller v Miller, McFarlane v McFarlane* [2006] 2 WLR 1283, para 153.
- <sup>79</sup> Law Commission, *Matrimonial Property, Needs and Agreements Report* (Report No. 343, 2014) Executive Summary.
- <sup>80</sup> *Jones v Jones* [2011] EWCA Civ 41 para 69.
- <sup>81</sup> P Motion and L Irvine, 'EX-RATED: revenge content, social media and family proceedings – reflections on using social media in court proceedings' [2016] 140 FLB 5-8.
- <sup>82</sup> Law Commission, *Matrimonial Property, Needs and Agreements Report* (Report No. 343, 2014) [1.39].
- <sup>83</sup> Law Commission, *Matrimonial Property, Needs and Agreements Report* (Report No. 343, 2014) Executive Summary [1.25].
- <sup>84</sup> Law Commission, *Matrimonial Property, Needs and Agreements Report* (Report No. 343, 2014) Executive Summary [1.2].
- <sup>85</sup> *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 para 4.
- <sup>86</sup> *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 para 60.