

Prenuptial agreements: the English position

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Abstract

English law has never developed a special regime for dealing with family assets and consequently has no notion of community of property. Whenever ownership of family assets are strictly in issue whether it be in the context of marriage or cohabitation regard is had to the ordinary rules governing property law which in our case rests upon the doctrine of separation of property. Grafted onto this basic position are the court's wide distributive powers under the court can make property adjustment orders.

Notwithstanding even more recent comments that prenuptial agreements are not enforceable it would be a mistake to think that English courts simply dismiss their relevance. Indeed, even before there had been indications that such agreements were a material consideration in deciding how property may be distributed after the divorce.

Keywords: English Family Law; Prenuptial Agreements; Matrimonial Causes Act

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1. Introduction

1.1. General Background to the English Position

To put the English position on prenuptial agreements into perspective some explanation of the general system for dealing with matrimonial property is required. In contrast to many (if not most) continental European legal systems, English law has never developed a special regime for dealing with family assets and consequently has no notion of community of property. Indeed in general (though see below in the context of *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618) it recognises no special concept of “family property” at all. Consequently whenever ownership of family assets are strictly in issue whether it be in the context of marriage or cohabitation regard is had to the ordinary rules governing property law which in our case rests upon the doctrine of separation of property which of course is the very opposite of the doctrine of community of property.

Grafted onto this basic position are the court’s wide distributive powers conferred by Parliament through the Matrimonial Causes Act 1973 (as amended) (hereafter “MCA 1973”) which can be exercised upon the ending of the marriage through divorce or even nullity and now, through the Civil Partnership Act 2004, upon the dissolution of the civil partnership. Under these powers the court can make property adjustment orders (including the out and out transfer of ownership from one spouse to the other or even to any child of the family); it can order the property to be sold and direct to whom the proceeds should be paid; it can order the one-off payment of lump sums; it can order the sharing of pension rights and it can order continuing maintenance payments (known under English law as “periodical payments”) both in favour of the former spouse and of any child of the family.

Not only are these powers wide ranging, effectively covering all aspects of family assets, but their exercise is subject to minimal statutory control. Indeed all the 1973 Act (through s 25) directs the court to do is

- (1) in deciding whether and how to exercise its powers “to have regard to all the circumstances of the case first [note, not paramount] consideration being given to the welfare while a minor or any child of the family who has not attained the age of eighteen”;
- (2) when exercising its powers “to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards each other will be terminated as soon after the grant of the decree as the court considers just and reasonable” [the “clean breach” principle]; and
- (3) when exercising its powers: to have regard to each party’s current and potential income, earning capacity, property and other financial resources, their (and their children’s) financial needs, the family’s standard of living before the marital breakdown, the

spouses' age and any disability, the duration of the marriage, each party's contribution (past, present and future) to the welfare of the family (including looking after the home or caring for the family) and each party's conduct insofar as it would be inequitable to disregard it.

What is notably absent from the statutory guidance is any statement of what the overall object of the courts powers is. It was with this in mind that the House of Lords in *White v White* [2001] AC 596 held that the underlying object was to achieve a fair outcome between the parties as judged against the yardstick of equality and without being biased in favour of the money-earner as against the home-maker and the child-carer. This approach (which, at a stroke, removed the so-called "glass ceiling" of any awards) has since been further refined by the House of Lords in *Miller v Miller; McFarlane v McFarlane*, above. That case recognised three principles upon which the redistribution of resources from one party to another following a divorce was justified, namely

- the *needs* (primarily housing and financial) generated by the relationship between the parties. This is often where the search for fairness begins and ends since in most cases the available assets are insufficient to provide adequately for the needs of two homes;
- *compensation* for relationship-generated disadvantage - women in particular may still suffer a disproportionate financial loss upon marital breakdown having sacrificed their careers looking after the home and family; and
- *sharing* of the fruits of the matrimonial partnership of equals (sometimes referred to as "entitlement").

In this latter context their Lordships made a distinction between so-called "matrimonial property" - where the principle of equal sharing applies regardless of the duration of the marriage - and "non matrimonial property" which is not automatically shared since, in the words of Baroness Hale, "in a matrimonial property regime which started, as the English system did, with the premise of separate property, there remains some scope for one party to acquire and retain separate property". This distinction can be critical in short marriages but as Lord Nicholls pointed out in longer marriages non matrimonial property represents a contribution made to the marriage by one of the parties which in any event in many cases diminishes over time.

Precisely what amounts to non matrimonial property for these purposes generated a measure of disagreement though in general it refers to property brought into the marriage (other than that used as or to provide for the matrimonial home) and property acquired by gift or inheritance during the marriage. But whether it also includes business or investment assets that have been generated mainly or solely by the effect of one party admitted of different views nor were assets acquired after separation specifically considered.

The above mentioned debate, however, should not mask the basic fact that more or less *all* the spouses' assets, however and whenever acquired, are subject to the court's extraordinarily wide powers and are therefore at risk of being redistributed. This risk, one might have thought, makes the need to recognise prenuptial agreements all the more pressing. Yet, as will be seen, English law almost alone not only in Europe but also among other common law jurisdictions, has hitherto refused to recognise such agreements as binding.

1.2. Clarification of Terms

In considering the English position on prenuptial agreements it will be useful to clarify terms. By "prenuptial agreement" (also referred to as "antenuptial agreements") is meant an agreement made before marriage concerning what is to happen to all the parties' assets in the event of a divorce or separation. Although there must now be the equivalent "pre-civil partnership agreements" there has yet to be an established phrase for such agreements. One (perhaps frivolous) suggestion (Barton C, 2005, 994) is that they can be referred to as "pre-reggies" (as opposed to "pre-nups"); others (Harris-Short S and Miles J, 2007, 551) refer to them as "pre-cips". Prenuptial agreements must be contrasted with "antenuptial settlements" (which are variable under MCA 1973, s 24) which seek to regulate the spouses' financial affairs upon and during their marriage but which do *not* contemplate the dissolution of the marriage (per Wall J in *N v N (Jurisdiction: Pre-Nuptial Agreement)* [1999] 2 FLR 745 at 751-2). In turn these agreements are to be contrasted with "post separation agreements", which are commonly negotiated during the divorce process, and which, though not binding, are positively encouraged. Finally, all the above, are to be contrasted with "cohabitation contracts" which, as their name implies, governs the parties' position during and after cohabitation and in which neither marriage nor civil partnership is contemplated at all.

2. *Résumé of English Case-Law*

There is no formal statutory prohibition against the making nor indeed the enforcement of prenuptial agreements. Section 34(1) of the MCA does, however, provide that insofar as a "maintenance agreement" purports to "restrict any right to apply for an order containing financial provisions" it is void, though it also states that "any other financial arrangements contained in the agreement shall not thereby be rendered void or unenforceable". [There is now a similar provision concerning maintenance agreements between civil partners]. Strictly, prenuptial agreements fall outside the scope of s 34 since they are made before the marriage and are not therefore made between spouses. However, it is no doubt implicit that the prohibition extends to all agreements whenever made that purport to oust the court's jurisdiction. In any event, s 34(1)(a), a re-enactment of a series of provisions going back to s 1(2) of the Maintenance Agreements Act 1957, reflects the House of Lords' decision in *Hyman v Hyman* [1929] AC 601 that no spousal maintenance agreement can preclude a spouse from applying for financial relief in divorce proceedings. Based upon the premise that the court's power to order the husband to maintain his former wife after divorce was intended to protect not only her but also any third party dealing with her and indirectly the state since it may have had to support her, it was held

to be contrary to public policy to permit to oust the court's jurisdiction. Put another way, as Lord Atkin said, the "wife's right to future maintenance is a matter of public concern which she cannot barter away". So stated, it is evident that the wide ratio of *Hyman* is that no matter when it is made an agreement it cannot oust the court's jurisdiction. At any rate, it is generally taken as read that pre-nuptial agreements are not binding. As Wall J said in *N v N (Jurisdiction: Pre-Nuptial Agreement)* (above):

"The attitude of the English courts to antenuptial agreements... has always been that they are not enforceable.

In fact the decision in *N v N* was especially strict since Wall J considered that the public policy argument applied to individual clauses even if they could be severed from the rest of the agreement.

Illustrative of this standpoint is *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45, which seems to be the first reported English decision on pre-nuptial agreements (though in that case they were called "antenuptial contracts"). In that case under an agreement drawn up in Germany the wife of a millionaire would have been restricted to receiving the equivalent of a pension of a German judge, a result which Thorpe J (as he then was) dismissed as being "ridiculous". Although he acknowledged that "contracts of this sort are commonplace in the society from which the parties come", Thorpe J considered that in "this jurisdiction they must be of very limited significance".

Despite these two decisions and notwithstanding even more recent comments that prenuptial agreements are not enforceable (see, for example, *C v C (Variation of Post-Nuptial Settlement)* [2003] EWHC 742 (Fam), [2004] 2 FLR 1 in which Wilson J commented "Even nowadays, notwithstanding the law's growing respect for properly negotiated prenuptial agreements, it is impossible to argue that they can succeed in ousting the jurisdiction of the court") it would be a mistake to think that English courts simply dismiss their relevance. (Indeed, simply to ignore a prenuptial agreement could be thought to violate Article 8 of the European Convention on Human Rights as being an interference with the right to respect for private and family life). Indeed, even before *N v N*, referred to above, there had been indications that such agreements were a material consideration in deciding how property may be distributed after the divorce. In *N v N (Foreign Divorce: Financial Relief)* [1997] 1 FLR 900, for example, in a case involving Swedish nationals, it was held that while their prenuptial agreement was not conclusive in England (as it was in Sweden) it was nonetheless a material consideration to which the court should have regard in applying the criteria set out in the MCA 1973. More strikingly still, in *S v S (Divorce: Staying Proceedings)* [1997] 2 FLR 100 Wilson J said that there was a danger that the words of Thorpe J in *F v F* (referred to above) might be taken out of context. Looking to the future his Lordship added

"There will come a case... where the circumstances surrounding the prenuptial agreement and the provisions therein contained might, when viewed in the context of other circumstances of the case prove influential or even crucial... I can find nothing in s

25 to compel a conclusion... at odds with personal freedoms to make agreements for ourselves... carefully struck by informed adults. It all depends”.

Although Wilson J's comments were obiter (as subsequently pointed out by Thorpe LJ in *Ella v Ella* [2007] EWCA Civ 99, [2007] 2 FLR 35) the clear thrust of the post-2000 case-law has been to confirm the basic proposition that prenuptial agreements are a material consideration in the post-divorce redistribution of property exercise either as part of “all the circumstances” or as “conduct” (according to Connell J in *M v M (Prenuptial Agreement)* [2002] 1 FLR 654 at 661) it does not matter which) which the court is directed to take into account under s 25 of the MCA 1973. Three cases illustrate the current position. In the first, *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120), the wife became pregnant and her mother pressured the husband to marry. Both parties came from wealthy backgrounds, the husband having wealth of around £25 million and the wife being a beneficiary of trusts valued at some £1 million. According to the prenuptial agreement, signed after each took legal advice, but without the husband making full disclosure, if the marriage ended within five years, the wife was to receive £100,000 from the husband (to be increased by 10% p.a. compound) and the husband was to make reasonable financial provision for any children. The agreement made no provision for periodical payments for the wife. The marriage ended after 14 months and the wife sought a lump sum of £1.6 million and periodical payments of £57,000p.a. for herself in addition to the £15,000 p.a. for their child. The husband offered a £120,000 lump sum (plus £600,000 to provide a home in which she could bring up the child). Given that the husband had agreed to marry the wife under pressure and upon the understanding that no capital claim in the event of an early termination of the marriage would be governed by their agreement, it was held that entry into the agreement constituted “conduct which it would be inequitable to disregard” under s 25(2)(g). Accordingly, it was decided that the capital element of the agreement should be upheld. However, it was thought wrong to confine provision to the wife to the husband's offer, since it failed to recognise her role as the child's mother. The court awarded the wife periodical payments of £15,000 p.a. It also ordered a lump sum of £1.2 million to be paid so as to provide the wife and child with a house that bore some relationship to the husband's standard of living.

The second and most recent of the illustrative decisions is *Ella v Ella* (above). In that case the spouses had dual British/Israeli nationality. They married in Israel in 1996 having made a prenuptial contract that provided for Israeli law to apply to any questions concerning their property and provided for separation of property with future assets belonging exclusively to the spouse creating them. The spouses made their marital home in London but in 2006 the marriage ran into difficulties and the wife petitioned for divorce in London. The husband countered by petitioning in Israel and in due course the Rabbinical court issued a consent order under which it would first determine the question of jurisdiction. Subsequently, on the husband's without notice application, the Israeli court ruled that it had exclusive jurisdiction. The husband then sought a stay of the English proceedings. At first instance the husband succeeded, Macur J holding that in reaching the decision the prenuptial agreement was a “major factor”. This decision was upheld by the Court of Appeal. As Charles J (with whom Kay LJ agreed) said

“I agree with the submission made on behalf of the wife that absent the prenuptial agreement, this would be an English case and the husband would not be able to show that Israel was clearly the

appropriate forum. The judge clearly recognises the connecting factors connecting the family to Israel. In my judgment the judge was right to conclude that, taken together with those factors, the prenuptial agreement is a major factor in this case, and in my view it is one that results in Israel being clearly the more appropriate forum”.

Ella is interesting on a number of counts: it is the first Court of Appeal decision in which a prenuptial agreement has been held to be relevant (though none of the judges made anything of that); it provides a rare example of a really influential role played by such an agreement, and it was held to be a major factor notwithstanding that the wife did not take independent legal advice before making the agreement (though in this respect it was acknowledged that the wife might not be deprived of a remedy in the English courts under Part III of the Matrimonial and Family Proceedings Act 1984).

A third illustrative case, in fact the first to be decided out of the trilogy is *M v M (Prenuptial Agreement)* (above). Here the parties were Canadian. The woman became pregnant and the man was opposed to her having an abortion. She refused to have the child unless they married. But having undergone an acrimonious and expensive divorce from his first wife, the man refused to marry her unless she signed a prenuptial agreement he had had drawn up by his lawyers, under which the wife would receive £275,000 in the event of a divorce. Despite being advised by an independent experienced matrimonial lawyer not to do so the woman signed the agreement since that was the only way she was able to ensure that marriage went ahead as planned. The marriage lasted five years by which time the husband’s net worth was about £7.5 million. The wife sought £1.3 million. Connell J commented:

“The circumstances of this case illustrate vividly that the existence of a prenuptial agreement can do more to obscure rather than clarify the underlying justice of the case. On the one hand this husband would not have married the wife unless she signed the agreement. On the other hand this wife signed the agreement because she was pregnant and did not relish single parenthood either for herself or for her child and because she wanted to marry the husband. In my view it would be as unjust to the husband to ignore the existence of the agreement and its terms as it would be to the wife to hold her strictly to those terms. I do bear the agreement in mind as one of the more relevant circumstances of this case, but the court’s overriding duty remains to attempt to arrive at a solution which is fair in all the circumstances, applying s 25 of the Matrimonial Causes Act 1973”.

In the event Connell J ordered the husband to pay the wife £875,000 which because of the prenuptial agreement was “a more modest award than might have been made without it”.

3. Should The English Position be Reformed?

The current law on prenuptial agreements has attracted considerable comment from academics, judges and policy makers and serious consideration has been given to reforming the law.

A key criticism of the current law is that it is paternalistic and anachronistic (see Clarke B, 2004; Harris-Short S and Miles J, 2007 at 7.9.2 and Lowe N and Douglas G, 2007, 1013-1014). It has been pointed out that when *Hyman* was decided wives did not then have full legal capacity and it

made sense to protect them. Now, however, since they do have full competence and particularly because marriage is regarded as a partnership of equals together with the doctrine of separation of property there should be full freedom for both parties to make their economic arrangements. It has in any event been further argued that the decision in *Hyman* is illustrative of the former law's ambivalence about private agreements when as one commentary (Cretney C and Masson J, 1999, 359a) has put it "the fact that the parties had come to an agreement between themselves was... regarded not as a matter of satisfaction but rather as something which should arouse the court's vigilance", i.e. to be satisfied that the divorce was not collusive. But again all this has changed: the parties are encouraged to settle their financial affairs amicably. Indeed, post separation financial agreements either made independently or as a result of financial dispute resolution appointment, whilst not strictly binding, are normally followed provided the court is satisfied that each party was properly and independently advised (as established by *Edgar v Edgar* [1980] 3 All ER 887 and see *Xydhias v Xydhias* [1999] 1 FLR 683). Accordingly it can be argued that the law is wrong to treat prenuptial agreements differently. Furthermore, given that some of the sensitivities regarding prenuptial agreements are peculiar to marriage it is not absolutely certain that so-called "pre-cips" will be treated the same way. Yet it surely cannot be right to treat prenuptial and pre-cips agreements differently. That would only compound another awkward comparison, namely, the apparently developing recognition of cohabitation contracts at any rate with regard to financial arrangements contained therein (see *Sutton v Mischon de Reya and Gawor and Co* [2003] EWHC 3166 (ch), [2004] 1 FLR 837)(though in this last respect it has been pointed out (Herring J, 2007, 243) that since there are no redistributive powers following the breakdown of cohabitation between unmarried couples cohabitation contracts cannot be said to be "robbing" the court of such power).

In defence of the current position there are a number of so-called *public policy* arguments but, say advocates for reform, they are either unpersuasive or point to other alternatives for dealing with the problem. In the former category is the argument that prenuptial agreements diminish the importance/sanctity of marriage. But as Connell J said in *M v M* this is hardly a strong argument given the high number of divorces. Ironically it is now being said that the inability both of wealthy people and those already divorced to protect their already accrued property acts as a deterrent to marriage or remarriage. Indeed, some say that an ability to make binding prenuptial agreements could add stability to marriage second time round. In any event such binding agreements could lead to greater certainty and hence to reduced costs in the event of divorce.

One concern commonly expressed about making prenuptial agreements binding is that they could inappropriately transfer the burden of maintaining an ex-spouse away from the individual onto the State. But so the argument goes, that problem could and should be dealt with by appropriate social security laws. Other issues include the adequate protection of children, the appropriateness of agreements made long ago or where circumstances have entirely changed, and protection of the weaker party. These problems could be solved respectively by dealing separately with children, having so-called "sunset clauses" or by simply relying on standard contractual principles such as duress, frustration and so on. Of course, as many have observed, the danger of making agreements binding is that the uncertainties and arguments are simply shifted onto the validity and meaning of the agreement as opposed to the current settlement

issues on divorce – thus negating the argument that prenups lead to greater certainty and thus reduced divorce costs.

One further argument is that English law is simply out of line internationally, not just with the civil systems of continental Europe but also many common law systems as well. Australia, New Zealand have changed their laws relatively recently and Ireland are currently considering doing so (see e.g. Fehlberg B and Smyth B, 2002, 127 and the Report of the Study Group on Pre-nuptial agreements, 2007). In the European context there is, against the background of freedom of movement so dear to the EU, an arguable need for harmonisation. Is it fair that a couple having made a binding prenuptial agreement in one Member State should on divorcing in England find that the agreement can be totally undone? In his postscript to his judgment in *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [124] Potter P commented

“The difficulty of harmonising our law concerning the property consequences of marriage and divorce and the law of civilian member states is exacerbated by the fact that our law has so far given little status to prenuptial contracts. If, unlike the rest of Europe, the property consequences of divorce are to be regulated by the principle of needs, compensation and sharing, should not the parties to the marriage, or the projected marriage, have at least the opportunity to order their own affairs otherwise by a nuptial contract?”

How then have the English policy makers reacted to these type of arguments?

In its Consultation Paper *Supporting Families* published in 1998 the government itself suggested that prenuptial agreements could usefully be made binding but subject to safeguards, namely, that the parties received independent legal advice before entering the agreement; that there be full disclosure of each parties’ assets and property before the agreement was made and that the agreement is made no fewer than 21 days before the marriage. Furthermore, the agreement would not have been binding if there was a child of the family whether *or not* that child was born at the time the agreement was made or where under the general law of contract the agreement would be unenforceable or, finally, where the agreement would cause significant injustice to one or both parties or a child of the marriage. These safeguards are so wide-ranging that most agreements would have difficulty negotiating the hurdle. Indeed the point has been made that *Ella* apart, all the English cases referred to would fail to do so. In other words, had the proposed reform been enacted it would have made little or no difference to the current law. In the event the proposal did not find favour apparently mainly because of concern that parties’ circumstances could change as time passed following the agreement so that it would be unfair to keep them to its terms and was abandoned. At one stage the majority of judges of the Family Division proposed that the terms of any prenuptial agreement should be made an additional factor for the court to take into account under s 25 of the MCA 1973. A minority would have gone further and provided that both pre and post nuptial agreements should be presumptively binding (see Wilson N, 1999 at 162-3). Building on that opinion, Resolution (the Solicitors’ Family Law Association, 2004) proposed that s 25 be amended so as to provide that agreements should be

considered binding “unless to do so will cause significant injustice to either party or to any child of the family”.¹

While this latter proposal might be useful inasmuch as it would at least potentially harmonise the approach to prenuptial agreements it seems doubtful that any of the decisions cited in this paper would have been decided differently had it been enacted which raises the question of whether any such reform is worth the candle.

In any event does not English law have the best of all worlds, namely, to accept prenuptials as being a material consideration in deciding how to redistribute the family assets but not to being bound by them so as to prevent the court being able to do justice or more importantly able to avoid injustice between the parties? In this sense those continental systems which simply view prenuptial agreements as binding are surely too rigid and inflexible – a position, it is submitted, that is exposed by the trilogy of cases, *F v F*, *K v K*, *M v M* (discussed above) which I would argue were rightly decided. Whether there is a material difference between agreements which aim to set out or limit what assets each are to have and those such as *Ella v Ella* determining which law is to apply can possibly be debated. In principle, however, it is submitted that there is no real difference but then the author comes from a jurisdiction that espouses the *lex fori* approach!

4. Table of cases

| Case | Year | Ref. |
|---|------|-----------------------------------|
| <i>Ella v Ella</i> | 2007 | EWCA Civ 99, [2007] 2 FLR 35 |
| <i>Charman v Charman</i> | 2007 | EWCA Civ 503, [2007] 1 FLR 1246 |
| <i>Miller v Miller; McFarlane v McFarlane</i> | 2006 | UKHL 24, [2006] 2 AC 618 |
| <i>Sutton v Mischoon de Reya and Gawor and Co</i> | 2003 | EWHC 3166 (ch), [2004] 1 FLR 837 |
| <i>K v K (Ancillary Relief: Prenuptial Agreement)</i> | 2003 | 1 FLR 120 |
| <i>C v C (Variation of Post-Nuptial Settlement)</i> | 2003 | EWHC 742 (Fam), [2004] 2 FLR 1 |
| <i>M v M (Prenuptial Agreement)</i> | 2002 | 1 FLR 654 at 661 |
| <i>White v White</i> | 2001 | AC 596 |
| <i>Xydhias v Xydhias</i> | 1999 | 1 FLR 683 |
| <i>N v N (Jurisdiction: Pre-Nuptial Agreement)</i> | 1999 | 2 FLR 745 at 751-2 |
| <i>N v N (Foreign Divorce: Financial Relief)</i> | 1997 | 1 FLR 900 |
| <i>S v S (Divorce: Staying Proceedings)</i> | 1997 | 2 FLR 100 |
| <i>F v F (Ancillary Relief: Substantial Assets)</i> | 1995 | 2 FLR 45 |
| <i>Edgar v Edgar</i> | 1980 | 3 All ER 887 |
| <i>Hyman v Hyman</i> | 1929 | AC 601 |

¹ Note: a Private Member’s Bill – the Pre-Nuptial Agreements Bill – promoted by Quentin Davies MP which aimed to make such agreements binding – did have a First Reading in July 2007 but lapsed in October 2007.

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