

Can legally enforceable pre-nuptial contracts make the law clearer and more certain?

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As we know, a prenup is an agreement that is made before marriage, and it is used to resolve issues of property division if the marriage ends in divorce. This article shall explore whether uncertainties arise from current financial provisions on divorce and then evaluate whether legally enforceable pre-nuptial contracts can make the law clearer and more certain.

Current Law

The current law on divorce's financial provision is highlighted in the Matrimonial Causes Act 1973 (MCA). Under section 25, we can find the factors that the courts will look into when deciding what combination of orders to make. For example, section 25(1) states that in considering all circumstances of the case, the first consideration is to be given to the welfare of the child of the family¹ under the age of 18. Section 25(2)(a)-(h) then sets out eight factors that the Court must have regard to. These factors include each party's income, earning capacity, property that each party has or will have in the foreseeable future such as an increase in earning capacity; financial needs, obligations and responsibilities of the parties; the family's standard of living before the marriage broke down; the age of the parties and length of their marriage; any physical or mental disabilities; contributions made or to be made by the parties to the welfare of the family which includes domestic contributions; conduct of the parties during marriage or after separation, etc.

¹ Section 52(1) of the MCA 1973 states that child of the family includes any other child treated as if they were a child of the family.

The Law Commission, in its 2014 report, " Matrimonial Property, Needs and Agreements", highlighted that section 25 MCA 1973 has no overall objective to guide the Court in applying the statutory factors. Two key cases have however provided some guiding principles. In the case of *White v White*², Lord Nicholls adopted the idea of yardstick of equality to promote fairness which means that there should be no discrimination between breadwinner and homemaker. In other words, there must be no bias in favour of the money earner.

Furthermore, the joint appeal cases of *Miller v Miller; McFarlane v McFarlane*³ emphasised on three elements to fairness for the courts to consider: financial needs, compensation and equal sharing. The courts have to consider financial needs created by marriage, i.e. someone who takes on the domestic role may be less able to support themselves financially when the marriage ends. Secondly, the Court must take compensation into account where, for example, the wife has had time out of the workforce to support her family and whose future employment prospects may suffer. The case of *B v B*⁴ had a similar scenario, and the courts decided to compensate the wife.

After taking the relevant factors into consideration, a court can make income orders, property adjustment orders or pension orders.

² [2000] UKHL 54, [2001] 1 AC 596 at [45].

³ [2006] UKHL 24

⁴ [2002] EWHC 3106 (Fam)

a) Income orders

Income orders may be periodical payments or secured periodical payments. Section 23(1)(a) MCA 1973 states that the Court can order periodical payments which are payments of a specified amount for a specific time or secured periodical payments where the payments are tied to a certain property such as land or shares. The property can generate money to make the payments, or it can be sold to make payments if the payer fails to pay.

The problem with periodical payments is that the statute does not give guidelines on what circumstances the courts should issue this order and for how long those payments should go on. The period is at the Court's discretion.

b) Property adjustment orders

Section 24 MCA 1973 states that property orders can either be a transfer of property⁵, lump sum⁶, sale of property⁷ or settlement of the property⁸. The problem with property orders is that if the parties jointly own a property, a link remains between them, which may not allow a clean break.

⁵ S.24(1)(a) MCA 1973

⁶ 23(1)(c) MCA 1973

⁷ S.24A MCA 1973

⁸ S.24(1)(b) MCA 1973

c) Pension orders

The Court can also make a pension attachment order⁹ or a pension sharing order¹⁰. With a pension attachment order, once the pension has become payable, part of that pension will be paid to the other spouse. However, it means that the parties remain tied together until and beyond the point of retirement and the value of pension may be uncertain, depending on the age of the parties and their financial position. On the other hand, pension sharing order allows one party's pension to be shared with the other party.

Current law and uncertainty

Overall, we can see that even if the courts take into account the factors provided by statute and case laws, the statute does not state how the consideration of these factors will help the courts to make an order. According to the Law Commission's report in 2014, "Matrimonial Property, Needs and Agreements", there are practical problems with the current law circulating financial provision on divorce or dissolution. First of all, the law seems to lack transparency. It will be difficult for members of the public to understand the statute and know that orders to expect without a lawyer's guidance. Secondly, the law is not consistently applied across the country, and its application and understanding vary from judges to judges. The issues with transparency and consistency may arise mainly because of the fact that the statute does not state

⁹ S.25B(4) MCA 1973

¹⁰ S.21A(1) MCA 1973

the objective to be achieved in making financial orders. The courts have developed several objectives through case laws as we have seen above, but the presence of multiple objectives means that the courts have wider discretion and hence the possibility of lack of transparency and judicial inconsistency¹¹ arise.

Legally enforceable pre-nuptial contracts

The Law Commission in 2014 proposed that having legally enforceable pre-nuptial agreements or prenups may make the law clearer and more certain. Previously, in the case of *Radmacher (formerly Granatino) v Granatino*¹², the Court considered whether and to what extent it should take an ante-nuptial agreement into account in exercising its discretion under section 25 MCA 1973¹³. The Court of Appeal and the Supreme Court gave decisive weight to the ante-nuptial contract between the parties mainly because the parties entered voluntarily into the agreement with a full appreciation of its implications and it was not unfair to hold the parties to their agreement. The Court also recognised that any undue pressure or lack of disclosure, information or legal advice would be factors that would reduce the weight given by the courts to ante-nuptial agreements. The Supreme Court, with a majority of eight to one emphasised the importance of respecting the parties' autonomy to decide how their financial affair should be regulated. However, Lady Hale dissented.

¹¹ http://lawcommission.justice.gov.uk/docs/lc343_matrimonial_property.pdf

¹² [2010] UKHL 42

¹³ <http://uksblog.com/case-comment-radmacher-formerly-granatino-v-granatino-2010-uksc-42/>

According to Lady Hale, parliament, after comprehensive research and debate, should be the one making changes to the duties and obligations of marriages and not the people. She was also of the opinion that prenups may deprive the economically weaker spouses the provision they would otherwise be entitled to. For example, prenups may not reward compensation to a spouse who left the labour force for taking care of the family. Moreover, if courts presume the prenups to be valid at the outset of a case, it could further weaken the position of the financially weaker party. Therefore, she argued that courts should not start with the presumption of giving effect to agreement and rather consider whether the agreement is fair in all the circumstances.

Following that case, the Law Commission introduced "qualifying nuptial agreements" in its 2014 report. For a prenup to be a "qualifying" nuptial agreement, procedural safeguards should be satisfied. The agreement must be a valid contract made by a deed at least 28 days before the wedding, and it should be fully understood by the parties. Each party must have received independent legal advice, and there must be full financial disclosure. The Law Commission proposed that prenups should be legally binding but only after the needs of the separating couple and any children have been taken into account¹⁴.

¹⁴ <https://www.theguardian.com/money/2014/feb/27/pre-nuptial-agreements-legally-binding-divorce-lawcommission>

The Law Commission argued that the assessment of the needs of the parties varies geographically between family courts as well as between cases, depending on the lifestyle of the parties and background of the case. A pre-nuptial agreement will empower couples to manage their financial affairs on separation. Professor Elizabeth Cooke¹⁵ supports qualifying nuptial agreements because it will make the financial outcome of the separation more predictable.

David Connor¹⁶ highlighted several practical consequences of having a prenup. Prenups will allow the wealthier party to ring-fence assets to prevent them from being shared and may include agreements in relation to children and maintenance in the eventuality of a divorce. It can make the relationship more transactional and unromantic. It may create trust issues and make the parties question their commitment to each other. On the other hand, it may alleviate any concern that one party is marrying the other for money.

Sharon Thompson¹⁷ argued that pre-nuptial agreements are not always made by parties with equal bargaining power. There can be gendered power imbalance, and the parties may not always be able to foresee future events. For prenups to function properly, power imbalance has to be ignored, and therefore it may be the dominant party exercising their autonomy. Therefore, if one party is unable to exercise autonomy due to power imbalance, the agreement should be given less weight.

¹⁵ Law Commissioner for property, family and trust law

¹⁶ <https://www.whnsolicitors.co.uk/newsroom/family/pros-cons-pre-nuptial-agreements/>

¹⁷ Sharon Thompson, "Pre-nuptial Agreements and the Presumption of Free Choice", (2015)

In the recent case of *Veersteegh v Veersteegh*¹⁸, the Court revisited the key points in *Radmacher*. Lewison LJ highlighted that it is irrelevant whether prenups are contractually binding or not as long as parties are well informed, and their decision is voluntary. In a nutshell, British courts now recognise pre-nuptial agreements as enforceable only where well-informed parties voluntarily came into agreement. If the agreement or its terms are unfair, the Court, at its discretion, will give less weight to it instead of completely eliminating it.

In conclusion, we can see that the current law does not treat prenups like a contract, and there is a lack of transparency and consistency when courts apply the law. In my opinion, the law regulating prenups is not clear in the situation where there is a power imbalance, unfair terms, etc. because it does not strictly guide the courts to declare the agreement invalid. How much the Court will reduce weight for prenups depends on the Judges' perspective and may vary from Court to Court. For example, in *Radmacher*, full financial disclosure was not present, and so the courts might have given a different response if prenups were legally enforceable and financial disclosure was mandatory at that time. The practical problems with prenups, as put forward by Lady Hale, Sharon Thompson and David Connor, can be dealt with if the courts start to treat pre-nuptial agreements as legally enforceable contracts which would then allow them to declare the agreement invalid if it fails to comply with the elements of

¹⁸ [2018] EWCA Civ 1050

fairness. Moreover, if the parties exercise autonomy after receiving independent legal advice and make a fair agreement, the courts will not have to intervene and make orders. This will help overcome the lack of guidance for the courts in the statute as well as issues of transparency and inconsistency in the application of the law. Therefore, legally enforceable pre-nuptial contracts are likely to make the law clearer and more certain, provided that the safeguards suggested by the Law Commission are strictly followed.