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## **DOCTOR OF PHILOSOPHY**

### **Marital Property Agreements, The Family and The Law: Status and Contract?**

Parker, Marie

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**Marital Property Agreements, The Family and The Law:  
Status *and* Contract?**

**Marie Louise Parker, LLB (Hons), LLM**

**Thesis submitted to Bangor University  
for the degree of Doctor of Philosophy**

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## SUMMARY

### **Marital Property Agreements, The Family and The Law: Status *and* Contract?**

This thesis considers the balance between status, contract, the law and the family. The increasing acceptance being demonstrated towards marital property agreements in this jurisdiction forms the basis for this examination. Enforceable marital property agreements would provide a contractual option to marriage, and thus alter the present balance between status and contract. Both concepts are currently present, although contract is repressed in favour of status. This thesis proposes that status *and* contract can exist within our system, despite these concepts being antithetical in nature. Furthermore, the work suggests the status-contract continuum as a tool upon which these concepts can be analysed. The aim of this work is to provide answers to the profound and fundamental questions which enforceable marital property agreements raise for English family law.

The work begins by tracing the rules of public policy surrounding marital property agreements and the interpretation of status. It is suggested that this evolution has been evaded by recent decisions, and that this avoidance of history should be addressed prior to reform. Secondly, the nature of marriage is considered. If marriage becomes more contractual in nature then it is possible to contemplate what impact this may have on areas of family law which have been built upon this institution. The regulation of divorce, the restriction of legal provisions for separating unmarried couples and civil partnership have been examined. Each of these areas are placed on the status-contract continuum in order to assess the potential effect of adopting a more contractual approach. It is not suggested that any reforms should occur as a result of this change, but logical arguments are put forward as to what these changes might be.

The role of the court in financial division is examined within this work. The vast discretion held by the court can be directly linked to the understanding of marriage as creating a legal status. The desire for private agreements is in part a symptom of the dissatisfaction towards our current system. It is suggested that a more fundamental reform of financial relief should occur prior to the creation of legislation concerning marital property agreements. The possible models for reform are explored, and proposals are made as to the most suitable way forward which encompasses a balance between status and contract.

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## CHAPTER ONE

### INTRODUCTION

This thesis proposes that the relationship between the family and the law is not one of status *or* contract,<sup>1</sup> but one of status *and* contract. The rationale of this work is set out below, this reasoning will be explained further by examining status, contract and family law and the body of literature surrounding these issues. The status-contract continuum model hypothesis will then be introduced and analysis is provided as to why it is proposed that this model is the best theoretical foundation for family law in England and Wales. The structure and methodology of the work is set out within this introductory Chapter.

#### 1.1 THE RATIONALE OF THE THESIS

The acceptance being demonstrated towards marital property agreements in this jurisdiction provides the foundation upon which the relationship between status, contract, the family and the law can be analysed. The recent movement towards private autonomy being demonstrated by the judiciary when considering marital property agreements, in addition to the announcement of the release of the Law Commission's consultation paper on the subject in 2008,<sup>2</sup> formed the backbone for this thesis. The Law Commission released their Consultation Paper *Marital Property Agreements* in January 2011.<sup>3</sup> The tension between status and contract is outlined in the consultation:

Our consultation asks whether there should be legislative reform to enable couples effectively to contract out of ancillary relief, and out of the court's discretion, by entering into an agreement in a prescribed form and subject to appropriate safeguards. That is, at first sight, quite a narrow question. But it is a deep one and requires us to consider issues at the heart of family law, such as: what, if any, are the responsibilities of former spouses to each other after their divorce or dissolution?

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<sup>1</sup> S Cretney, 'The Family and The Law – Status or Contract?' [2003] CFLQ 403.

<sup>2</sup> The Law Commission, *Tenth Programme of Law Reform* (Law Com No 311, 2008) para 1.17: Project 4: Available electronically at <[http://lawcommission.justice.gov.uk/docs/lc311\\_10th\\_Programme.pdf](http://lawcommission.justice.gov.uk/docs/lc311_10th_Programme.pdf)> Last accessed 5 January 2010.

<sup>3</sup> The Law Commission's project on marital property agreements has been extended to include the court's treatment of non-matrimonial property in financial provision and to bring necessary clarity to the needs to be met following a divorce: *Matrimonial Property, Needs and Agreements* (Consultation Paper No 208, 2012). The supplementary consultation paper was released 11 September 2012. Further details of the extended project are available at <[http://lawcommission.justice.gov.uk/consultations/matrimonial\\_property.htm](http://lawcommission.justice.gov.uk/consultations/matrimonial_property.htm)> and E Cooke, 'Pre-nups and Beyond: What is the Law Commission up to now?' [2012] Fam Law 323. The issues raised from this extended project are dealt with specifically in Chapters Eight and Nine. See in particular p 236.

What is the place of autonomy in family law? What is the social cost of divorce and dissolution?<sup>4</sup>

It is evident that the prospect of legislative reform of marital property agreements raises fundamental questions about family law. The three questions outlined by the Law Commission are essentially an expansion on ascertaining the nature of marriage with the introduction of a contractual option, and the consequences of this change. The core of this thesis is encapsulated by Lady Hale when discussing enforceable marital property agreements in the Supreme Court, 'The issue may be simple, but underlying it are some profound questions about the nature of marriage in the modern law and the role of the courts in determining it.'<sup>5</sup> These quandaries should be of concern to policymakers considering legislative reform of marital property agreements. This research responds to these fundamental questions and provides answers to them.

The status-contract continuum is recommended as a tool upon which it is possible to scrutinise the existence and overlap of two antithetical concepts in family law. The continuum model supports the notion that marriage creates a legal status with the addition of optional contractual elements. The workability of the continuum model is scrutinised throughout the work. The continuum can be used to demonstrate the link between various areas of family law in order to show that these are not discrete concepts, but that are linked by our understanding of marriage.<sup>6</sup> Family law as we know it today was once the study of the law of matrimonial causes,<sup>7</sup> thus our understanding of family law stems from marriage. It can be seen that the regulation of adult relationships is still determined by our understanding of, and focus on, marriage.<sup>8</sup>

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<sup>4</sup> The Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) paras 1.11 and 1.12. Available at <[http://www.justice.gov.uk/lawcommission/docs/cp198\\_Marital\\_Property\\_Agreements\\_Consultation.pdf](http://www.justice.gov.uk/lawcommission/docs/cp198_Marital_Property_Agreements_Consultation.pdf)>

<sup>5</sup> *Radmacher v Granatino* [2010] UKSC 42, [132].

<sup>6</sup> R Probert, 'From lack of status to contract: assessing the French *Pacte Civil de Solidarité*' *Journal of Social Welfare and Family Law* 23(3) 2011: 257-269, 258: '...marriage, registered partnerships, institutionalized cohabitation and even laws conferring rights upon cohabitants may be seen merely as different points on the same spectrum, rather than distinct concepts.'

<sup>7</sup> S Cretney and others *Principles of Family Law* (7<sup>th</sup> edn Sweet and Maxwell, London 2003) 3. Cretney comments that the 2<sup>nd</sup> Programme of Law Reform by the Law Commission in 1968 and the publication of P.M Bromley's *Family Law* reinforced family law as a 'proper subject for academic study and research.' See also S Rowbotham, 'In the matter of *Cretney v Bromley* (1974): Stephen Cretney's *Principles of Family Law*' in R Probert and C Barton (eds) *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia, Cambridge 2012).

<sup>8</sup> See A Barlow and R Probert 'Le PACS est arrivé – France embraces its new style family' *I.F.L.* 2000, Dec, 182-184, 183, it is commented that, '...we are still reluctant to let go of marriage as the only real focus for regulating adult relationships.'

The influence of status on marriage forms the basis for several key areas in family law; notably divorce, cohabitation, civil partnership and financial orders.<sup>9</sup> If the nature of the foundation to these areas is altered, that is to say marriage becomes more contractual, then it raises the question as to how those areas themselves may change in the future. Three research questions have been applied to these areas of family law: (I) What is the link between the area of law and the continuum model? (II) To what extent has that area been influenced by upholding status? (III) Is there a possibility of the current legal provisions being influenced by a more contractual approach being applied to marriage? The research set out in this thesis does not suggest that any changes in the law should occur automatically as a result of this change, but it does demonstrate that there are logical proposals which can be made in light of this change.

## 1.2 STATUS, CONTRACT AND FAMILY LAW

The term 'contract' here denotes private dealings and arrangements, in contrast to conditions which are publicly imposed by 'status.'<sup>10</sup> Hunter comments on these two concepts and how they interact, 'The notions of contract and status present one of the great paradoxes in Anglo-American jurisprudence: the two concepts are antithetical, yet they overlap significantly in those areas where private interests and public interests collide or coincide.'<sup>11</sup> Family law is one area where both public and private interests coexist. More specifically, the terms status or contract are applied to denote this interaction within the laws surrounding marriage. Graveson comments on status and contract, 'Courts in England and America are agreed on the dual nature of marriage, dividing it into the preliminary contract (which is usually confused with the ceremony), and the status of which the State of the parties' domiciles may, and usually does, grant to them.'<sup>12</sup> The treatment of marital property agreements can be

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<sup>9</sup> For example, L Glennon, 'Obligations between adult partners: moving from form to function?' (2008) *International Journal of Law, Policy and the Family*: 'Recent policy and practice-based developments have reinforced the use of relationship *status* in the assignment, and content, of obligations between adult partners running contrary to predictions regarding its likely diminution in the latter half of the twentieth-century. There has been no disruption in the structural organisation of obligations between adult partners which means that relationship form remains determinative when defining the scope of these obligations.' It is noted that much comment could be made regarding financial consequences upon death, but this narrowing of scope is necessary in order to consider the broad view of these relationships against the proposed continuum model.

<sup>10</sup> See for example, *The Pall Mall Gazette*, 28.03.1870, 'The Marriage Laws': 'As far as legislation can affect it, marriage must be regarded as simply a civil contract or status – a contract, in as much as it is voluntary entered into by the parties to it; and a status, in as much as the term of the union it induces are determined by law and not left to the discretion of individuals.'

<sup>11</sup> H Hunter, 'An Essay on Status and Contract: Race, Marriage, and the Meretricious Spouse.' (1978) 64 *Va. L. Rev* 1039, 1039.

<sup>12</sup> R H Graveson, *Status in the Common Law* (The Athlone Press, London, 1953) 80. Comment is made on marriage at 78 – 91.

studied in order to gain further insight into the concepts of status and contract and the tension which lies between them.

### **The American Approach to Status *and* Contract**

The relationship between status, contract and family law has been studied to a far greater extent in the United States, and so this body of literature has helped to form the stimulus of this thesis and to shape the rationale. Prior to the 1970s, the American courts viewed marital property agreements as void as against public policy. The reasoning for this lay in the notion that having such an agreement in place would encourage couples, or provide an inducement, to divorce. The fear of one spouse becoming a 'public charge' was also taken into account.<sup>13</sup> The current approach is that such agreements are presumptively valid. The Uniform Premarital Agreement Act (2001) sets out the circumstances in which an agreement will not be regarded as enforceable by the courts.<sup>14</sup> The agreement must be entered into voluntarily.<sup>15</sup> The agreement will not be enforced if it is considered to be unconscionable when it was executed.<sup>16</sup> Furthermore, prior to the creation of an agreement, there must have been fair and reasonable disclosure.<sup>17</sup> In 2010 Halley commented that marriage is often considered by American academics to be status, with contractual elements and that this conclusion is reached through giving consideration to the enforceability of ante-nuptial contracts and the idea of a spectrum:<sup>18</sup>

...at least five contemporary family law casebooks pose the question whether marriage is status *or* contract, and then supplant that question by others that render it some mix of both, typically through the question of the enforceability of an antenuptial contract. Thus marriage is status, but with elements of contract. Depending on how many elements of contract we add, marriage moves down the spectrum towards contract.<sup>19</sup>

The rationale of this thesis is therefore embedded in the research produced by American academics, but most significantly, it demonstrates that this reasoning is applicable to family law in England and Wales.

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<sup>13</sup> D Weisberg and S Appleton, *Modern Family Law: Cases and Materials* (Aspen Publishers 2002) p146.

<sup>14</sup> The Uniform Premarital Agreement Act (2001) s.6 (a).

<sup>15</sup> (n 14) s.6 (1).

<sup>16</sup> (n 14) s.6 (2).

<sup>17</sup> (n 14) s.6 (2)(i).

<sup>18</sup> J Halley 'Behind the Law of Marriage (I): From Status/ Contract to the Marriage System' (2010) *Harvard Journal of the Law*, Vol. 6.1, 2.

<sup>19</sup> J Halley (n 18) 2.

It is possible to study the American position further. Weyrauch, Katz and Olsen comment on the meeting of contrary concepts in the law, 'Relational and contractual aspects of marriage have lived side by side relatively undisturbed...legal practice can live with and accommodate apparent contradictions with ease.'<sup>20</sup> Furthermore it is possible to trace the movement from a status position towards contractual freedom. When discussing marital agreements, Krause, Elrod, Garrison and Oldham examine the question 'Marriage: Contract or Status?'<sup>21</sup> Attention is drawn to the 1888 Supreme Courts of the United States case *Maynard v Hill*<sup>22</sup> where Justice Field commented:

Other contracts may be modified, restricted or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilisation nor progress.<sup>23</sup>

It is apparent that Justice Field's view that the contractual aspect of marriage is entirely controlled by the State. The idea of contract is present, but it is oppressed. Weisberg and Appleton<sup>24</sup> draw attention to the more recent case of *Simeone v Simeone*<sup>25</sup> from 1990. The case considered the validity of a pre-nuptial agreement. The dissenting judgement of Justice McDermott is notable:

I am not willing to believe that our society views marriage as a mere contract for hire...Our courts must seek to protect and not to undermine, those institutions and interests which are vital to our society. While I acknowledge the longstanding rule of law that pre-nuptial agreements are presumptively valid and binding upon the parties, I am unwilling to go as far as the majority to protect the right to contract at the expense of the institution of marriage.<sup>26</sup>

Although this view takes into account the possibility of the concept of contract within marriage, Justice McDermott goes to great lengths to uphold and protect the status element. In examining American literature on the subject, see below also, it becomes evident that the

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<sup>20</sup> W Weyrauch, S Katz and F Olsen, *Cases and Materials on Family Law: Legal Concepts and Changing Human Relationships* (West Publishing Company, Minnesota 1994) 90.

<sup>21</sup> H Krause, L Elrod, M Garrison and J Oldham, *Family Law: Cases, Comments and Questions* (5<sup>th</sup> edn, Thomson West 2004) Chapter 4, Section 1, 175.

<sup>22</sup> Supreme Court of the United States, 1888. 125 U.S. 190, 8 S. Ch. 723, 31 L. Ed. 654.

<sup>23</sup> The full case can be read at <<http://www.law.cornell.edu/supremecourt/text/125/190>> accessed 26 August 2012. There are no page numbers or paragraph numbers included in this report.

<sup>24</sup> D Weisberg and S Appleton, *Modern Family Law* (n 13) 140-141.

<sup>25</sup> 581 A.2d 162 (Pa. 1990).

<sup>26</sup> The full case is available at < [www.pennsylvaniafiduciaryliteration.com/.../Simeone%20v\\_%20Sim](http://www.pennsylvaniafiduciaryliteration.com/.../Simeone%20v_%20Sim)> accessed 26 August 2012. Quotation at 406-407.

balance between status and contract is an issue which has been scrutinised by American academics in light of enforceable private agreements. This thesis considers this balance within English family law. The work applies existing ideas to the developing area of law in this jurisdiction.

### **A Move from Status to Contract?**

Maine's thesis of 1881 used the concepts of status and contract to map the progression of society. He suggested that societies move from being bound to ideas of status to becoming increasingly autonomous.

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place...we may say that the movement of the progressive societies has hitherto been a movement from status to contract.<sup>27</sup>

It is acknowledged that there are critics of Maine's hypothesis,<sup>28</sup> however the growing acceptance and desire towards such agreements in this jurisdiction does concur with this hypothesis.<sup>29</sup> In 1981, Waterhouse J commented, 'The concept of marriage seems to be evolving from status towards contract, in accordance with Maine's generalisation, and recent changes in the law relating to divorce and matrimonial property may mark an acceleration of this process but it is not yet by any means complete.'<sup>30</sup> Silbough comments on this stance with regard to marital property agreements, 'The particular doctrinal question – are premarital agreements modifications of default terms of marriage or instead side deals in the otherwise non modifiable marriage status - provides a concrete programmatic reason to consider the contract / status tension.'<sup>31</sup>

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<sup>27</sup> H Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (Henry Holt and Company, 1881 New York) Chapter V. Primitive Society and Ancient Law. Quotation at 163-165.

<sup>28</sup> See R Pound, 'End of Law as Developed in Juristic Thought' 30 Harv. L. Rev. 201 (1916-1917). At 219 Pound states, '...Maine's generalization as it is commonly understood shows only the course of evolution of Roman law. It has no basis in Anglo-American legal history, and the whole course of English and American law today is belying it unless, indeed we are progressing backwards.' See also R H Graveson, (n 12) 33-54.

<sup>29</sup> This evolution is traced in Chapter Two.

<sup>30</sup> *Vervaeke v Smith (Messina and Attorney-General Intervening)* [1981] 77 Fam, [111].

<sup>31</sup> K Silbough 'Marriage Contracts and the Family Economy' (1998) 93 Nw. U.L. Review. 65. Quotation at 112.

## A Paradigm Shift Identified in English family law

It is notable that treatment of private agreements in America influenced the way in which English academics thought about status and contract. Most notable perhaps is the publication of Weitzman's work, *The Marriage Contract*<sup>32</sup> in 1981. This shift in thought can be illustrated by comparing the editions of Cretney's *Principles of Family Law* which were published either side of Weitzman's work. In the third edition of *Principles*, published in 1979, Cretney comments on marriage as a status, 'In an ordinary contract, the parties may decide on the terms, but in the marriage relationship this is not so.'<sup>33</sup> Yet when the fourth edition was published in 1984, Cretney comments, 'It may well be that the concept of marriage is now evolving away from status towards contract, so that there will be an increasing tendency to permit the parties to regulate some of the legal consequences of marriage for themselves.'<sup>34</sup> The footnote to Cretney's statement is, 'This evolution has been much discussed in the United States'<sup>35</sup> and specifically refers to Weitzman. Cretney also refers to the words of Waterhouse J and Maine's hypothesis. As noted by Miles, pre-nuptial agreements were not addressed until the seventh edition of *Principles* in 2002,<sup>36</sup> yet the idea of autonomous regulation was discussed in the early 1980s with regard to the connection between status and contract.

### 1.3 MARRIAGE: STATUS AND CONTRACT?

Marriage as a status is regarded as an institution, a public union, thus controlled by the State; all marriages within the jurisdiction are required to follow a set form as a result of this. Marriage as a contract is a private union, controlled by the parties in the marriage, and is therefore variable.<sup>37</sup> When considering 'status' and 'contract' it becomes apparent that the legal construction of marriage echoes elements of both of these legal forms,<sup>38</sup> this

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<sup>32</sup> L Weitzman, *The Marriage Contract: A Guide to Living With Lovers and Spouses* (Free Press, New York 1981).

<sup>33</sup> S Cretney, *Principles of Family Law* (3<sup>rd</sup> edn, Sweet and Maxwell, Oxford 1979) 4.

<sup>34</sup> S Cretney, *Principles of Family Law* (4<sup>th</sup> edn, Sweet and Maxwell, Oxford 1984) 10.

<sup>35</sup> S Cretney (n 34) 10, footnote 6.

<sup>36</sup> J Miles, 'Marital Property Agreements: 'The More Radical Solution'' in R Probert and C Barton (eds), *Fifty Years in Family Law: Essays For Stephen Cretney* (Intersentia, Cambridge, 2012) 98, footnote 8.

<sup>37</sup> See for example J Halley (n 18) See also P Swisher, A Miller and B Singer, *Family Law: Cases, Materials and Problems* (M Bender & Co, 2nd edn, October 1998.) The terminology of status and contract and the strain between these two concepts is explained at p 2 with the addition of public and private; 'tension between marriage as a public status and marriage as a private contract.'

<sup>38</sup> See for example K Silbough (n 31) 112: 'From the vantage point of a particular doctrinal question, we're able to see that neither a contractual nor a status conception of marriage can sensibly be said to prevail, as a legal understanding of marriage will reflect aspects of both.'

amalgamation of forms can be found in case law. In 1866 Lord Penzance stated, ‘Marriage has been well said to be something more than a contract, either religious or civil – to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status...’<sup>39</sup> This sentiment was repeated in 2010, Lady Hale stated, ‘Marriage is, of course, a contract, in the sense that each party must agree to enter into it and once entered both are bound by its legal consequences. But it is also a status.’<sup>40</sup> In examining the elements which make up marriage as status it is possible to draw out two distinct lines of thought relevant to the enforceability of marital property agreements.

### **Marriage as a Status**

Firstly, marriage as a status is a public union and therefore requires some standard or universal frame within the jurisdiction. Bix describes this as the more ‘superficial’ argument with regard to status, he comments:

...a certain status, e.g. “marriage,” has a particular meaning grounded in history and tradition; one may conduct one’s private domestic affairs as one sees fit, but if those arrangements do not fit the category “marriage,” then there is no reason to give those arrangements that name, or to honor them as we honor status arrangements that *do* have the right tie to history or tradition.<sup>41</sup>

Halley comments on this element of marriage as status, ‘...the idea that marriage was status not contract had specified meanings for its inventors in the middle of the nineteenth century, some of which persist to this day.’<sup>42</sup> The words of the Victorian judge Lord Penzance are once again useful to illustrate this element of status within this jurisdiction:

What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different nations but what are its essential elements and invariable features? If it be of common acceptance and existence, it must (however varied in different countries in its minor incidents) have some prevailing identity and universal basis. I conceive that marriage as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.<sup>43</sup>

Probert has commented that this description of marriage should be regarded as a defence rather than a definition.<sup>44</sup> One example of these words being used to ‘defend’ marriage is the

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<sup>39</sup> *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130.

<sup>40</sup> *Radmacher v Granatino* [2010] UKSC 42.

<sup>41</sup> B Bix, ‘Private Ordering and Family Law.’ 23 J. Am. Acad. Matrimonial Law. 249 (2010) 259.

<sup>42</sup> J Halley, (n 18) 4.

<sup>43</sup> *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130.

<sup>44</sup> R Probert, ‘*Hyde v Hyde*: Defining or Defending Marriage?’ [2007] CFLQ 322.

denial of marriage to same-sex couples in England and Wales.<sup>45</sup> In addition, this understanding has shaped our regulation of divorce law.<sup>46</sup> Llewellyn scrutinises the tension between a set description and changing social reality:

...once conceived, once accepted, the over-simple norm-concept maintains itself stubbornly, despite all changes in conditions; it becomes the socially given, right, ideal-type of “marriage”...The man of law, when first appealed to, takes the existing ideal-type – i.e., *his* version of it- as his official own...The variant facts are still present. They are felt. Decry them, ignore them, fight them: they press still...The drama is clear: the struggle of an older simpler pattern and ideology with the insurgent facts.<sup>47</sup>

The status of marriage, or the interpretation of it, resulted in two public policy grounds against the enforceability of marital property agreements. Firstly, the element of status setting out that all marriages are lifelong<sup>48</sup> is one facet of the creation of this concept which has resulted in marital property agreements being regarded as void against public policy.<sup>49</sup> Secondly, if marriage is considered to be a public union then it follows that the State and wider community holds an interest in the financial arrangements made by a couple on divorce.<sup>50</sup> Thus, vast discretion is granted to the judiciary enabling them to redistribute the assets of a couple, should this be required.<sup>51</sup> This element of status can be found in case law, Lord Aitkin commented, ‘In my opinion the statutory powers of the Court...were granted

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<sup>45</sup> For example, the inclusion of s. 11(c) Matrimonial Causes Act 1973 and *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), at para [11] Sir Mark Potter stated, ‘The common law definition of marriage is that stated by Lord Penzance in *Hyde v Hyde* (1866) LR 1 P & D 130 at 133, 35 LJP & M 57 “The voluntary union for life of one man and one woman, to the exclusion of all others.” This definition has been applied and acted upon by the courts ever since.’ This is discussed in further depth in Chapter Seven, see in particular pp. 206-207.

<sup>46</sup> The relevance of fault in divorce law is examined in Chapter Five.

<sup>47</sup> K N Llewellyn, ‘Behind the Law of Divorce’ 32 Colum. L. Rev. 1281 (1932), 1286-7.

<sup>48</sup> See for example, Wall J in *N v N (Jurisdiction: Pre-Nuptial Agreement)* [1999] 2 FLR 745, 752, ‘...an agreement made prior to marriage which contemplates the steps the parties will take in the event of divorce or separation is perceived as being contrary to public policy because it undermines the concept of marriage as a life-long union.’ Chapter Two traces both these public policy rules to their initial inclusion in case law, see p 84.

<sup>49</sup> See for example the words of Thorpe LJ in *Radmacher v Granatino* [2009] EWCA Civ 649, ‘In so far as the rule that such contracts are void survives, it seems to me to be increasingly unrealistic. It reflects the laws and morals of earlier generations. It does not sufficiently recognise the rights of autonomous adults to govern their future financial relationship by agreement in an age when marriage is not generally regarded as a sacrament and divorce is a statistical commonplace.’ This issue is dealt with in greater depth in Chapter Three, see p 104.

<sup>50</sup> See for example, R Probert, *Cretney's Family Law* (6<sup>th</sup> edition, Sweet and Maxwell, 2006, London) ‘...the emphasis on the desirability of resolving matters by private agreement has not wholly supplanted a much older and at first sight inconsistent philosophy. In this traditional view, the community as a whole has an interest in the financial arrangements made by a couple on divorce. The right to maintenance is matter of public concern which cannot be bartered away by private contract and accordingly a spouse’s rights are not bargained away by private agreement.’ 8-002.

<sup>51</sup> See M Harding, ‘The Harmonisation of Private International Law in Europe: Taking the Character Out of Family Law?’ *Journal of Private International Law*, April 2011, Vol. 7 No.1, 203 and 223, Harding links our approach to ancillary relief to the nature of marriage, ‘...the difficulties encountered in making the common law systems fit the mould are actually substantive problems linked to the common law understanding of marriage as a publicly recognised and enforceable commitment...sticking a round pin into a square hole...ignores the policy concerns behind “package solutions” to the consequences of divorce.’ See below at p 242.

partly in the public interest to provide a substitute for this husband's duty of maintenance and to prevent the wife from being thrown upon the public for support.<sup>52</sup> This component, or understanding, of marriage as conveying status has rendered marital property agreements to be unenforceable, such agreements were regarded as void for public policy as such an agreement should not be able to oust the jurisdiction of the court.<sup>53</sup> This thesis argues that this move away from both facets of status should be viewed against the wider movement in the regulation of relationships. This research demonstrates that the terms status and contract can be usefully deployed to chart the changes, or potential changes, to English family law.

### **Marriage as a Contract**

The case law discussed above describes marriage as encompassing both contract and status,<sup>54</sup> yet it is essential to acknowledge that the concepts are considered antithetical.<sup>55</sup> It is therefore possible to examine the understanding, and foreseeable consequences, of marriage as being regarded to be entirely contractual.<sup>56</sup> It is essential to explore what the desire for enforceable pre-nuptial and post-nuptial agreements indicates about the nature of marriage. Franck suggests, 'The debate on the enforceability of premarital contracts is embedded in a long-standing dispute on the nature of marriage. Should marriage be regarded as a contract, and therefore the mere result of a bargain by autonomous self-interested parties?'<sup>57</sup> To regard marriage as a contract would be to strip away the status ideals that have strongly influenced the regulation of marriage. Sir Francis Juene commented that English lawyers, 'have never been misled by an imperfect analogy into regarding it as a mere contract.'<sup>58</sup> Part of this 'long-

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<sup>52</sup> *Hyman v Hyman* [1929] All ER Rep 245, 258. A deeper exploration of this case is carried out in Chapter Two, starting at p 39.

<sup>53</sup> (n 52).

<sup>54</sup> This position is comparable to the situation in America, for example see H Hunter, (n 11). Hunter states, 'Examining the overlap reveals the tendency of late twentieth century American judges to intermingle contradictory legal concepts when faced with difficult social problems.'

<sup>55</sup> H Hunter, (n 11).

<sup>56</sup> See for example J Halley (n 18) Halley states, '...everyone tactically agrees that it can never go all the way, because some aspects of marriage are ineradicably different from ordinary contracts' when discussing the movement of marriage towards the contractual model.

<sup>57</sup> J U Franck, 'So Hedge Therefore, Who Join Forever'; Understanding the Interrelation of No-Fault Divorce and Premarital Agreements.' *IJLP&F* 2009 23 (235).

<sup>58</sup> *Moss v Moss* [1897] P.263, 267, Sir Francis Juene summarised: 'Lord Stowell said that it was both a civil contract and a religious vow—*Turner v. Meyers*—referring, no doubt, mainly to the incapacity of the contracting parties to dissolve it. Dr. Lushington spoke of it as more than a civil contract: *Miles v. Chilton*. Lord Hannen said: "Very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is, indeed, based upon the contract of the parties, but it is a status arising out of a contract": *Sottomayer v. De Barros*. The late President, Sir Charles Butt, said, in the case of *Andrews v. Ross*, that "the principles prevailing in regard to contract of marriage differ from those prevailing in all other contracts known to the law." It is not necessary to enumerate all those differences. The most striking of them are familiar. The parties who contract a marriage cannot at their will dissolve it.'

standing dispute' is articulated by Barton whilst questioning whether the use of contract could be considered a justifiable taboo, 'But can the – often heartfelt – objections be overcome? Most of them are based upon distaste for, indeed a fear of, allowing the cold outdoor wind of market forces and commercial practices into home and hearth.'<sup>59</sup> There are various schools of thought and influences on this issue; these have been explored throughout the thesis.<sup>60</sup>

Schneider describes the foreseeable problems if marriage became wholly contractual in nature, putting forward the idea that this model would allow parties to arrange their own affairs, whilst setting a limit on the inquiries that the law should make into these arrangements:

Indeed, just that preference accounts for much of the eagerness to introduce contract principles into family law, and the preference seems specially apt in the family context, where people's reasons for choosing "unequal" contracts may be based on deep-seated and well-considered social and religious views. To the extent that an egalitarian ethos prevails over contract law's preference for effecting the parties' intent, the problem of legally enforced paternalism will be raised. And that paternalism seems inconsistent with the egalitarian ethos itself.<sup>61</sup>

Schneider considers the interaction between the freedom to contract and the role of the law. If the role of the law is to protect the vulnerable, or the weaker party, then this is inconsistent with the unrestricted nature of marriage as being entirely contractual in nature. Weitzman discusses the possible functions that a contract could have within an intimate partnership, pushing the scope of a contract within marriage still further. Weitzman asserts that a contract could have the purpose of setting out what each parties expectations and aspirations are for the relationship, or it could set out the division of assets should the relationship end, or a contract could be a suitable mechanism for clearly setting out both of these areas:

What is the purpose of this agreement? Is it meant to be a statement of ideals, or a normative guide to the parties' relationship, or a practical blueprint for day-to-day living? It is primarily a property agreement that defines the parties' respective rights to ownership of current and future property? Or is it a guideline for the parties' interpersonal relationship? Or is it both?<sup>62</sup>

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<sup>59</sup> C Barton, 'Contract – A Justifiable Taboo?' in R Probert (ed) *Family Life and the Law Under One Roof* (Ashgate Publishing Limited, 2007, Hampshire) 82.

<sup>60</sup> An example is provided by L Weitzman (n 32) 254: '... society only has to gain by encouraging couples to order their financial relationships by private contract.' This is discussed in more detail in Chapter Nine, see p 271.

<sup>61</sup> C E Schneider, 'Moral Discourse and the Transformation of American Family Law', 83 Mich. L. Rev. 1803 (1984-1985), 1832.

<sup>62</sup> L Weitzman (n 32) 256.

In considering how such a contract could be utilised it would seem that a couple may find themselves in a position of greater understanding of what their partners needs and ideals are for their relationship, prior to getting married. Although this thesis is limited to looking at agreements regulating financial division,<sup>63</sup> it is of paramount importance to recognise that there could also be this other function of a marital agreement; the regulation of the non-financial aspects of a relationship.<sup>64</sup> There is the possibility that contract could provide the mechanism for individual choice and preferences within the functioning family.<sup>65</sup>

### **Marriage as Status *and* Contract: Some Initial Thoughts**

In conclusion there is the requirement for some contractual element within family law. Brinig comments, 'Some aspects of families make little sense without contractual analysis. For example, the bargaining that takes place at the time of divorce or during antenuptial and separation agreements speaks more to contract...'<sup>66</sup> There is therefore a requirement to acknowledge that there is a contractual facet to the family, yet a move too far towards the contractual model would have certain consequences on the nature of marriage and the wider community.

Schultz comments on the unsuitability of the set definition of marriage that marriage as status requires:

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<sup>63</sup> The scope of the thesis has been limited to only analysing financial agreements so as to provide a stronger focus on the work currently being carried out by the Law Commission on Marital Property Agreements. See The Law Commission, *Marital Property Agreements* (n 4) para 6.122: 'A different issue is whether there should be any restriction upon the content of the agreement, beyond what is imposed by the general law of contract. American pre-nuptial agreements are notorious for their non-financial provisions; examples include a promise to give a dinner party twice a week, or to accompany the other spouse to the ballet once a month. American courts cannot enforce such clauses; if included in a marital property agreement here under the current law they would simply be ignored when the agreement was considered within the ancillary relief exercise.'

<sup>64</sup> Weitzman provides several examples of American marital agreements, for example, 'Nancy promises to give a dinner party or to otherwise aid David's professional advancement by entertaining at least twice a week...David also agrees to schedule at least two-week vacations with her each year, at least one of them in Europe.' L Weitzman (n 32) 298, Contract 2. See also the arguments put forward in K Fleischmann, 'Marriage by Contract: Defining the Terms of Relationship.' 8 Fam. L.Q. 27 (1974) 27-50. This point is considered again in Chapter Nine, p 278.

<sup>65</sup> The use of contract within matrimony is certainly not a modern phenomenon; prior to 1753 there was the use of binding contracts in the regulation of an exchange of vows to marry independent of a formal marriage ceremony. The Marriage Act 1753, commonly referred to as Lord Hardwick's Act, was implemented on 25 March 1754. The Marriage Act 1753 affected the position of contracts created between couples, or contracts to marry, as clarified by Probert: 'Some scholars have used the term 'contract marriage' to describe an exchange of vows of marriage in words of the present tense, or *per verba de praesenti*. A close examination of contemporary sources suggests that it would be more appropriate to regard such exchanges as contracts *to* marry, not actual marriages.' R Probert 'Common-law marriage: myths and misunderstandings' [2008] CFLQ 1 March 2008. See R Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (Cambridge University Press, 2009) This work firmly categorises the contract *per verba de praesenti* as a contract to marry, rather than an alternative, less formal form of marriage.

<sup>66</sup> M Brinig, 'Status, Contract and Covenant' 79 Cornell L. Rev. 1573 (1993-1994) 1596.

A number of themes have been woven into the fabric of today's intimate relationships: diversity, tolerance, privacy, choice, impermanence, individualism. Each makes a distinct contribution to the emerging pattern while being entwined with the others. No one of these themes is novel in American family law, but the overall configuration and especially the emphasis placed on these values is both new and important. Together they produce compelling pressures toward private rather than public ordering of marital obligations.<sup>67</sup>

This view does demonstrate the range of changes in society and a desire for autonomy which have led towards preference being shown to private ordering. Indeed Eekelaar comments, 'The Victorian endeavour did not hold, and modern family law has moved towards private ordering and the decline in the importance of status. That is all uncontroversial.'<sup>68</sup> This thesis suggests that this movement away from this element of status can undoubtedly be attributed to the way in which status has been crafted and maintained in this jurisdiction. Status could be refined and partly redefined to better serve the needs of society. Schultz describes, 'Some new synthesis of private needs and public concerns, of freedom and structure, of flexibility and formality, must emerge to lend dignity and legitimacy to today's diverse forms of intimate commitment.'<sup>69</sup> This new synthesis of status can be created within the conceptual confines of status *and* contract.

#### 1.4 THE PROPOSED CONTINUUM MODEL

Several models have been proposed in an attempt to explain the coexistence of status and contract within the family, or more specifically, marriage. Models have been put forward to illustrate a link between several relationships in family law. Bailey-Harris has suggested that these relationships could be linked by placing them in a hierarchy, with marriage forming the top of this model.<sup>70</sup> This theory does not support the tracking of minor movements required in a model to demonstrate the influence of contact and status when taking this broad view of relationships. As noted above, the status-contract continuum proposed is rooted in American literature. The idea of a spectrum can also be found in relation to English family law. Probert discusses the possibility of taking a broad view of relationships and placing them on a spectrum, '...marriage, registered partnerships, institutionalized cohabitation and even laws conferring rights upon cohabitants may be seen merely as different points on the same

<sup>67</sup> M Shultz, 'Contractual Ordering of Marriage: A New Model for State Policy' 70 Cal. L. Rev. 205 (1982), 245.

<sup>68</sup> J Eekelaar 'Family Law: The Communitarian Message.' Oxford Journal of Legal Studies, Vol. 21, No. 1 (2001), 181-192, 184.

<sup>69</sup> M Shultz (n 67) 208.

<sup>70</sup> Issue discussed by R Bailey-Harris 'New Families for a New Society?' in S Cretney (ed), *Family Law: Essays for the New Millennium* (Jordan Publishing Limited, Bristol 2000) 67-77.



spectrum, rather than distinct concepts.<sup>71</sup> The spectrum discussed by Probert can be adapted to create the status-contract continuum, the position of each relationship being determined by the extent to which they are bound by status and the potential for contractual freedom.

### **Incorporating Reality**

Llewellyn comments, ‘...the law books tell us of marriage as “contract” and marriage as a “status”... Yet though they talk of legal doctrine, lawyers like other folk find the social reality colouring discussion and thought at every point.’<sup>72</sup> This sentiment highlights the requirement of incorporating social reality into any proposed model describing the coexistence of status and contract within family law. The creation of pre-emptive private agreements requires consideration of both reality and aspiration. The aspiration held by a couple about to marry, in most cases, is that the union will be life-long. In the report, *Looking to the Future: Mediation and the Ground for Divorce*, produced by the Lord Chancellor’s department in 1995, the period before marriage was considered alongside the expectations people have from married life:

Marriage remains the aspiration of most people. Young people today are more likely to postpone marriage in favour of living together. Most will eventually marry with the expectation that the relationship will be for life. Rapid social change in recent decades has had an unparalleled impact on family life to the extent that couples often enter marriage with unrealistic expectations, and little, if any preparation for the complexities of daily living and the demands of parenting.<sup>73</sup>

The reality of marriage is that a number of marriages do not last for life. Empirical research on this matter has been carried out in America and the results revealed some very significant results; ‘...the median response was an accurate estimate that 50% of U.S. couples who marry will divorce, the *median* response of the marriage licence applicants was 0% when assessing the likelihood that they personally would divorce.’<sup>74</sup> The aspiration remains, but in terms of private ordering it is feasible that the reality of marriage perhaps has some influence. The aspiration is nevertheless still present. The analogy to an insurance policy can be made; although it is possible to see the motivation for taking out insurance for the fear or expectation that something may go wrong, your hope is that it will not.

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<sup>71</sup> R Probert, ‘From lack of status to contract’ (n 6) 258.

<sup>72</sup> K. N Llewellyn (n 47) 1282.

<sup>73</sup> The Government’s Proposals, *Looking to the Future: Mediation and the Ground for Divorce* (Cm 2799, 1995) paragraph 3.2, 3.3. Available at < <http://www.official-documents.gov.uk/document/cm27/2799/2799.asp> > Last accessed 18 June 2011.

<sup>74</sup> L Barker and R Emery, ‘When Every Relationship is Above Average’ *Law and Human Behaviour*, Vol.17, No. 4, 1993, this result is set out at 443.

## **Dispersing Homeostatic Implications**

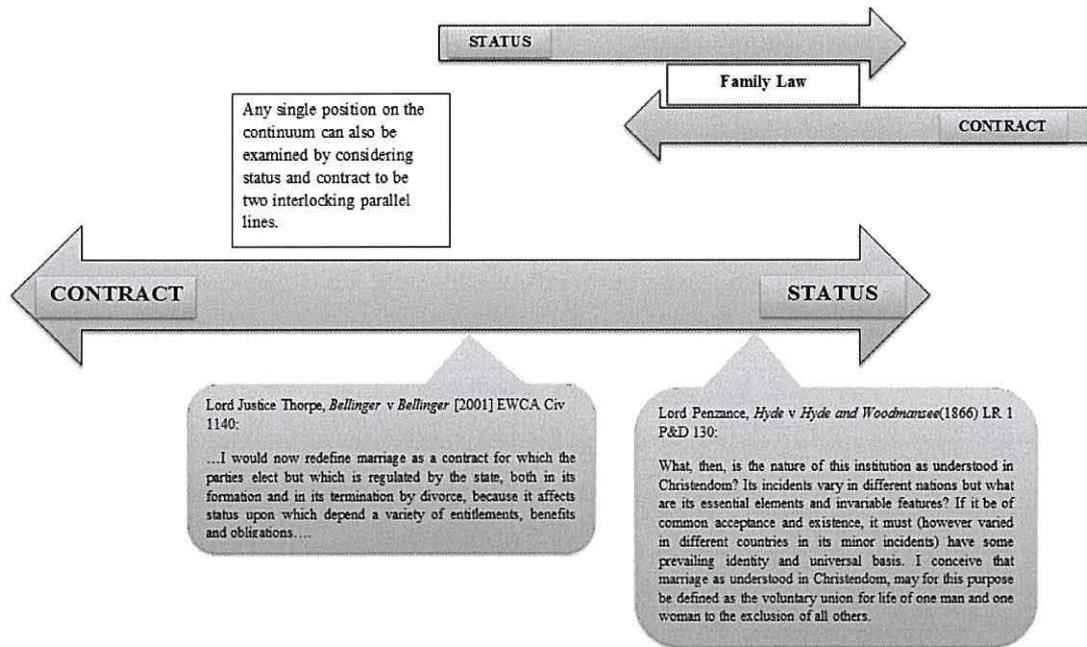
The position of any relationship on the proposed continuum will never be static. To take marriage as an example, every couple has choices available to them which would determine the position on the continuum. For example, private agreements and the life-long nature of the relationship. Secondly, the continuum also represents changing social reality which influences the position on the continuum. For this reason it will never be possible to diagrammatically represent the position of marriage, or any other relationship, on the continuum. Any attempt to do so would be far too subjective to be useful. To put it another way, the continuum can be considered to be similar to a radio which can never be tuned into a channel with any clarity.

## **From Rings to Parallel Bars**

One way in which to provide greater clarity to the position of any relationship on the continuum is to consider that each and every position on the continuum relates to two interlocking parallel bars. Although these bars will never meet,<sup>75</sup> they can move to represent the level of status or contractual elements at any given point on the continuum. Thus, it is possible to maintain a certain level of status, whilst introducing contractual elements. For the purposes of this thesis, the movement has been described by reference to the linear movement on the continuum model. Although it is not possible to locate any relationship on the continuum with mathematical accuracy, it is the most beneficial and accessible model in which to assess the balance of status and contract and evaluate the movement towards contract in English family law. The reasoning behind this assertion is now considered.

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<sup>75</sup> Although some argue that two parallel lines will meet at infinity. See for example: <<http://www.newton.dep.anl.gov/newton/askasci/1995/math/MATH089.HTM>>



### 1.5 IS THE CONTINUUM MODEL THE BEST THEORETICAL FOUNDATION?<sup>76</sup>

Various models have been proposed in order to accommodate the amalgamation of two concepts, which appear to be antithetical in nature, these can be considered against the continuum model that this thesis proposes.

#### Refining Maine's Hypothesis

Schwenzer takes the broader view of adult relationships in family law and argues that the movement can be understood as a move away from the marriage-based family towards the focus being on the actual relationship, irrespective of status. Furthermore, she explains this change by reference to 'secularization' and 'emancipation.'<sup>77</sup> These changes in social values and beliefs have resulted in this paradigm shift:

This change in values has significantly contributed toward the development of what one might call the plurality of private living arrangements...Family law could and indeed has not stayed unresponsive to these profound socio-demographic changes.

<sup>76</sup> A comparable debate is set out in S Honeyball, 'Is contract the best theoretical foundation for the employment relationship?' in *Great Debates: Employment Law* (Palgrave Macmillan, 2011) 36.

<sup>77</sup> Here, emancipation refers to both the emancipation of women towards gender equality and the progressions made for children's rights.

The legal development can be circumscribed as moving from status to contract and relation.<sup>78</sup>

This description has been composed from giving consideration to rising divorce rates and other diversifications of the family form, including increasing cohabitation outside marriage and legal recognition being given to same-sex couples across Europe. Schwenger concludes that if the role of the law is no longer to protect marriage, then it should not obstruct individuals creating their own family form. Moreover, the law should offer support to these relationships and give protection to a weaker party where this creation fails for whatever reason. This article demonstrates the movement away from status by taking a broad view of the changes taking place in Europe. It refines Maine's theory, stating that the emphasis is being placed on the relationship and not the status of marriage, the overall movement is however towards contract.

### **State-Imposed Contract**

Weitzman offers another interpretation of Maine's hypothesis, and outlines that the legal status given to marriage can be viewed as a state-imposed contract. Thus Weitzman argues that rather than moving from status to contract, marriage has in fact moved from status to status-contract; she comments that once married a relationship is dictated by the state.<sup>79</sup> Weitzman proposes that this status-contract model is unacceptable:

In the past the state has been able to justify the usual restrictions of the marriage contract by claiming that they were necessary to preserve the traditional family. However, our society has undergone profound transformations in the past century, and the structure of marriage and families has also changed. Yet the traditional contract continues to impose unnecessary and inappropriate sex-based obligations on both husbands and wives while new societal and individual needs require more flexibility and options in family forms, the rigid obligations imposed by traditional legal marriage appear increasingly anachronistic. Clearly, the purported state interest in preserving the traditional family may no longer be appropriate or important enough to override the equally important individual and societal needs.<sup>80</sup>

Weitzman suggests that this rigidity can be overcome by the contractual model. This model would allow married couples to tailor marriage to meet their individual needs. In addition, the contract model would extend to same-sex couples and also opposite-sex couples who reject the traditional marriage. Weitzman's contract model demonstrates the requirement for

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<sup>78</sup> I Schwenger, 'The Evolution of Family Law – From Status to Contract and Relation.' *European Journal of Law Reform*, Vol. 3, No. 3. Quotation at 200.

<sup>79</sup> L Weitzman (n 32) xix.

<sup>80</sup> L Weitzman (n 32) xx.

equality and increased choice in marriage, but does not consider that this can partially be attained by the redefining of legal marriage itself. The continuum model suggests that contractual freedom is only part of the change.

### **A Cyclical Model**

Isaacs argues that the move from status to contract described by Maine should be viewed as a cycle. Writing in the early twentieth century Isaacs proposed that Anglo-American law had gone through two such cycles.<sup>81</sup> He comments, 'It seems that once every millennium or so the laws of a people tend to become hardened, its way standardized.'<sup>82</sup> This hypothesis develops Maine's thesis and views it from a much wider perspective. The continuum model proposed in this work is far narrower in scope as the focus is current and prospective movements in marriage law in England and Wales. Singer's comment on the development and legal regulation of marriage in America as being from 'status to contract and back again,'<sup>83</sup> could certainly be viewed as being compatible with Isaacs' cycle theory.<sup>84</sup> The linear movement described by the continuum is not inconsistent with Isaacs' wider cycle hypothesis, as the movement viewed on the continuum could support this broader view of the movement between status and contract.

### **The Communitarian Approach to Status and Contract**

The communitarian approach seeks to balance the interests of the individual with the interests of society. This interpretation recognises that in order to enjoy autonomy there has to be a certain level of social order.<sup>85</sup> Alternatively, it could be stated that they seek a position between status and contract. Certain matters are determined by individual choice within the family, but there is undoubtedly an overlap with the wider social concerns. Eekelaar illustrates this concept with the example of a parent and child. The law can take

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<sup>81</sup> N Isaacs, 'The Standardising of Contracts,' 27 Yale L.J. 34 (1917-1918), 41. Further in the article, at p 45, Isaacs comments, 'If, now, we glance over these periods of Anglo-American legal history with standardized and unstandardized relations in mind, three places stand out as centres of standardizing, or status, we may say. They are the period of the Domesday Book, the period of King Edward's *Quo Warranto* inquests, and so far as we can foresee, the period we are entering upon.'

<sup>82</sup> N Isaacs (n 81) 41.

<sup>83</sup> J Singer 'Legal Regulation of Marriage: From Status to Contract and Back Again?' (Strategies to Strengthen Marriage: What Do We Know? What Do We Need to Know? Washington, DC, Family Impact Seminar, June 23-24, 1997. p. 129-134).

<sup>84</sup> This comment was made in relation to the view that some American commenters advocate that marriage should be re institutionalised as a public union, as status.

<sup>85</sup> J Eekelaar (n 68) 183: Eekelaar writes, 'Communitarianism seeks the position of equilibrium between autonomy and social order.'

from the parent's income in order to support the child, but it cannot require the parent to maintain a relationship with the child.<sup>86</sup>

Regan explores the communitarian approach to family law.<sup>87</sup> He advocates placing the focus on the commitment of the personal relationship, and that status rather than contract, promotes intimacy. In discussing 'Status, Contract and Family Law'<sup>88</sup> Regan considers the areas analysed in this thesis; namely divorce,<sup>89</sup> unmarried cohabitation,<sup>90</sup> same-sex marriage,<sup>91</sup> property and alimony<sup>92</sup> and marriage contracts.<sup>93</sup> In viewing these areas from this particular perspective Regan advocates for the retention of fault in divorce following the notion of focussing on commitment in relationships. He discusses the reintroduction of fault into American divorce law.<sup>94</sup> Furthermore, Regan shows support for same-sex marriage<sup>95</sup> and the legal protection of cohabitation outside marriage. He states that marriage should still be supported over cohabitation based on that original idea of basing the emphasis on the commitment shown in a personal relationship. This view asserts that cohabitants have not taken the step of demonstrating their commitment to society as a married couple have done.<sup>96</sup> The result of this deduction is to limit the social benefits available to a non-married cohabiting couple.<sup>97</sup>

Regan's hypothesis began close to the equilibrium point, but once applied to individual relationships returned to the notion of status. The work explores that placing a greater emphasis on status can promote identity and intimacy.<sup>98</sup> In his review of this book, Eekelaar comments, 'Regan is unwilling to let go of the shadows cast by legally defined

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<sup>86</sup> J Eekelaar (n 68) 190.

<sup>87</sup> M Regan Jr, *Family Law and the Pursuit of Intimacy* (New York University Press, 1993).

<sup>88</sup> M Regan Jr (n 87) Chapter Five.

<sup>89</sup> M Regan Jr (n 87) 137. Chapter Five of this thesis: 'A Departure from Status and the Relevance of Fault.'

<sup>90</sup> M Regan Jr (n 87) 122. Chapter Six of this thesis: 'Unmarried Cohabitants and a Narrowing of the Continuum.'

<sup>91</sup> M Regan Jr (n 87) 119. Chapter Seven of this thesis: 'Same-Sex Marriage and a Revival of Status.'

<sup>92</sup> M Regan Jr (n 87) 143. Chapter Eight of this thesis considers financial relief: 'The Court's Discretion: Propelling Movement towards Contract?'

<sup>93</sup> M Regan Jr (n 87) 148. This area of family law is the basis for this thesis, the models for reform are specifically dealt with in Chapter Nine: 'Proposals for Reform: Pinpointing Marriage on the Continuum.'

<sup>94</sup> M Regan Jr (n 87) 141.

<sup>95</sup> M Regan Jr (n 87) 120: 'My conception of status, then, invites an imaginative reconstruction of the traditional values promoted by marriage that supports legal recognition of same-sex relations.'

<sup>96</sup> M Regan Jr (n 87) 127: 'unmarried partners haven't been willing to declare their commitment to the larger public through the social institution that's designed to do so.'

<sup>97</sup> M Regan Jr (n 87) 127.

<sup>98</sup> M Regan Jr (n 87) This argument is presented most strongly by Regan in Chapter Four: Status and Intimacy at 89: '...status can foster commitment because it's sensitive to the connection between intimacy and identity in ways that an emphasis on private ordering is not...'

roles and the ‘messages’ they convey.’<sup>99</sup> The continuum model does support the communitarian approach, as it would be possible to reach equilibrium. Although the work carried out by Regan has touched upon the same areas as this thesis does, this is as far as the similarity goes. The proposed continuum model does not advocate either status or contract. The proposed continuum is simply a model to examine and explain the interrelation between status and contract in family law, and to identify the possible impact of a more contractual approach being adopted.

### **Status, Contract and Covenant**

Brinig promotes the use of the term ‘covenant’ to convey the paradigm which exists between status and contract. The concept of covenant is used by Brinig to describe the bond between husband and wife, parents and children, and bonds beyond the nuclear family.<sup>100</sup> Furthermore, Brinig explains that the covenant model would in fact include bonds to the whole community,<sup>101</sup> and so there are certainly strong elements of status within this model. This alignment is further clarified:

Some parts of family life, which I would attribute to covenant, are invariable because they are necessary for the family to meet its historical and present-day societal obligations. They make the family what it is: a set of relationships where intimacy and independence flourish. Covenant thus explains, at least in part, why moving family law too much toward individuality has large negative consequences.<sup>102</sup>

The model promotes gender equality<sup>103</sup> and conveys the notion of a permanent bond, Brinig describes, ‘A family covenant, much like a promise “running with the land,” cannot ever completely dissolve... In proposing the covenant alternative, I suggest that we can reassess the problems of family as contract without the baggage of status.’<sup>104</sup> The contractual influence on this model is clarified through the understanding of the covenant being an ‘especially solemn contract.’<sup>105</sup> The use of the covenant paradigm does explain why some aspects of family law can be altered by private agreement, and contains elements of both status and contract. In order to test this hypothesis Brinig runs the covenant model through a range of family forms. The covenant model is applied to same-sex couples who demonstrate

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<sup>99</sup> J Eekelaar (n 68) 188.

<sup>100</sup> M Brinig (n 66) 1574.

<sup>101</sup> M Brinig (n 66) 1595-6. Brinig comments, ‘...the family under the rubric of covenant extends beyond the nuclear arrangement. It includes such close relatives as grandparents, and ultimately, the whole community.’

<sup>102</sup> M Brinig (n 66) 1597.

<sup>103</sup> M Brinig (n 66) 1595. Brinig states, ‘The human parties to a covenant may enjoy horizontal equality.’

<sup>104</sup> M Brinig (n 66) 1576.

<sup>105</sup> M Brinig (n 66) 1598.

permanent commitment to one another.<sup>106</sup> The covenant model is withheld from unmarried cohabitants on the basis that, ‘cohabiting couples have no permanent commitment to each other or to a lifetime of co-parenting.’<sup>107</sup> Whilst this model demonstrates the advantage of equality between heterosexual and same-sex couples, it replicates the present model in withholding the position of covenant to cohabitants.

The covenant model is not tested on the availability of divorce, but in view of the assertion that a covenant is a permanent bond, coupled with Brinig’s view that the covenant, ‘cannot be broken without significant penalties’<sup>108</sup> it seems logical that this model would follow Regan’s view of requiring some element of fault in the divorce process. Halley confirms that covenant marriage can only be ended through death, fault-based divorce, or following a long period of separation.<sup>109</sup> Although the covenant model provides further understanding of the coexistence of status and contract within the family, it does not appear to be progressive when applied to many of the issues facing English family law.

### **Marriage: An Unnecessary Legal Concept?**

Clive proposes another line of thought and explores the possibility that marriage could be regarded as an unnecessary legal concept:

The question which I confront is whether it is conceivable that a legal system might ignore marriage altogether, regarding it as a private or religious matter, no more regulated by law than friendship or entry into a religious order. I am not attacking or defending the social institution of marriage. I am concerned with only the legal concept of marriage, a technical matter which has no necessary relationship to the social institution.<sup>110</sup>

This theory is tested by considering that marriage is not a necessary legal concept with regard to children as there is no difference in treatment based upon the parents’ marital status. With regard to maintenance Clive suggests that during the marriage spouses support for each other is voluntary and done so willingly regardless of a legal obligation. Maintenance following relationship breakdown could be provided through taxation and benefits, Clive proposes that it would be more logical to recover this social cost through

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<sup>106</sup> M Brinig (n 66) 1600.

<sup>107</sup> M Brinig (n 66) 1601.

<sup>108</sup> M Brinig (n 66) 1598.

<sup>109</sup> J Halley (n 18) 39.

<sup>110</sup> E M Clive, ‘Marriage: An Unnecessary Legal Concept?’ in J Eekelaar and S Katz (eds), *Marriage and Cohabitation in Contemporary Societies* (Butterworths, 1980) 71.

taxation than the specific maintenance currently obtained.<sup>111</sup> This model would ignore marriage and confer rights to cohabiting couples based on the dependency of children and economic disadvantages flowing from the end of the relationship. Finally, this hypothesis is tested by considering the overlap between the percentage of married couples not cohabiting and the percentage of unmarried couples living together. Clive suggests that if this division was approaching an equal figure then it would no longer be convenient or just to use marriage as the legal basis to govern these relationships.<sup>112</sup> This paradigm represents the ultimate movement away from the conferral of any status based on marriage. If cohabitation outside of marriage increases, then the use of this marriage as a legal concept becomes less justifiable.<sup>113</sup> The backbone of this thesis is the desire for private ordering prior to, or during marriage, and therefore the stance adopted is that marriage is still a justifiable legal concept. However, the influence of this change to the nature of marriage on unmarried cohabitants is considered in great depth in Chapter Six.

Halley does not go as far as Clive, but she does seek to avoid the use of the terms status and contract altogether and instead advocates the marriage system, ‘The very idea that marriage *is* anything at all is symptomatically classical.’<sup>114</sup> She instead proposes that marriage should be viewed from the perspective of its consequences and not the conceptual stance of categorising this relationship. In conclusion, Halley states the limitations of this proposal when discussing the concepts of status and contract, ‘Nothing will ever really make it go away, but we can stretch our imaginations...I offer the marriage system.’<sup>115</sup> This model does challenge the use of these concepts, yet concedes that the ‘ideological phantom’ of status and contract is potentially permanent.

### **The Continuum: Some Concluding Remarks**

There is the foreseeable objection with regard to the placing of these areas of family law, or relationships, onto the proposed continuum. This possible doubt can be seen in a debate regarding marriage held in the House of Lords in February 2011, Baroness Deech put forward the following suggestions:

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<sup>111</sup> E M Clive (n 110) 74.

<sup>112</sup> E M Clive (n 110) figure 2 at 78.

<sup>113</sup> The ‘function versus form dichotomy’ is discussed further in A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (Hart Publishing, Oxford, 2005) chapter 6.

<sup>114</sup> J Halley (n 18) 3.

<sup>115</sup> J Halley (n 18) 58.

I have some inexpensive proposals. First, we need to make sure that divorce law is not made any easier...Secondly, there should be no more legislation equating cohabitation with marriage. Statistics show that the best thing for children is to live with two married parents.... Thirdly, the Government should swiftly enact a law to validate prenuptial contracts. If these were certain to be upheld, it might encourage couples to enter into marriage without the fear of drastic rearrangements and loss of family assets if the end were to come.<sup>116</sup>

This speech indicates the promotion of private ordering with no other changes to family law. It is possible to analyse this in terms of the model. When viewed on the continuum, marriage would still shift towards the contractual side of the continuum, the parallel bars however would show no movement in status, but contract would overlap or interlock with family law somewhat more. It should be noted again at this point that the proposed continuum model provides a theoretical model to examine the balance between status and contract within English family law and to scrutinise current legislative provisions against this. It does not suggest that any legislative changes to other areas of family law should automatically flow from the move towards contract, but does allow consideration to be given to the potential influence of the movement towards contract and thus a narrowing of the continuum.

The movement being demonstrated by the judicial treatment of pre- and post- nuptial agreements exhibits the greater emphasis being placed on the contractual element in family law. This alteration in the balance opens up certain possibilities to other relationships. The desire for contractual freedom over financial matters upon divorce also raises questions about the role of the court, this current role has been crafted on the basis of marriage as conferring status.<sup>117</sup> Greater contractual freedom and a redefined status can be viewed in terms of a small move along the continuum towards the contractual end, providing a modification to legal marriage. Moreover, a number of the models analysed above can be considered to be promoting a particular approach to be taken in family law with regard to contract *or* status. The rationale of the proposed continuum model is to detect how status *and* contract coexist within family law and to observe this balance.

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<sup>116</sup> Baroness Deech, 'Marriage Debate,' Available electronically <<http://services.parliament.uk/hansard/Lords/ByDate/20110210/mainchamberdebates/part007.html>> Last Accessed 18 June 2011.

<sup>117</sup> See, S Cretney 'The Family and The Law – Status or Contract? (n 1): '...this article questions the justification for the survival, especially in its application to financial matters, of the principle that marriage creates a legal status the incidence of which the parties are debarred from amending.'

## 1.6 METHODOLOGY

The thesis is doctrinal legal research, using a ‘black-letter’ approach. Chynoweth defines doctrinal legal research:

Doctrinal research is concerned with the formulation of legal ‘doctrines’ through the analysis of legal rules. Within the common law jurisdictions legal rules are to be found within statutes and cases but it is important to appreciate that they cannot, in themselves, provide a complete statement of the law in any given situation. This can only be ascertained by applying the relevant legal rules to the particular facts of the situation under consideration...The methods of doctrinal research are characterised by the study of legal texts, and for this reason, it is often described colloquially as ‘black-letter law.’<sup>118</sup>

The topics covered in the thesis are necessarily wide ranging in order to provide answers to the fundamental questions that have been raised with regard to marital property agreements. Using a black-letter approach has enabled me to explore these areas in depth and analyse these areas against the proposed continuum model, whilst retaining a clear sense of direction. It is acknowledged that the strong direction that the black-letter approach offers has the inherent limitation of narrowing the scope of the thesis, yet this is necessary in order to scrutinise the proposed continuum model in England and Wales. Given the nature of the thesis the black-letter approach has been the most appropriate method. If specific areas of the thesis were to be examined in isolation in the future, for example cohabitation and the continuum model, then the potential for carrying out empirical research could be re-considered.

### **The Continuum as a Tool**

The thesis utilises jurisprudential research, and can therefore be categorised as doctrinal research in its pure form.<sup>119</sup> The Philosopher Gilles Deleuze commented that:

A theory is exactly like a box of tools. It has nothing to do with the signifier. It must be useful. It must function. And not for itself. If no one uses it, beginning with the theoretician himself (who then ceases to be a theoretician), then the theory is worthless or the moment is inappropriate.<sup>120</sup>

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<sup>118</sup> P Chynoweth, ‘Legal Research’ in A Knight and L Ruddock (eds), *Advanced Research Method in Built Environments* (Wiley-Blackwell 2008) 29.

<sup>119</sup> (n 118) 31. Chynoweth has made use of the taxonomy of legal research styles proposed in: H Arthurs, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law*. Information Division, Social Sciences and Humanities Research Council of Canada, Ottawa, 63-71.

<sup>120</sup> Quotation available at <<http://libcom.org/library/intellectuals-power-a-conversation-between-michel-foucault-and-gilles-deleuze>> accessed 26 July 2012.

This thesis proposes the status-contract continuum as a tool, or theoretical instrument, on which English family law can be examined. This tool permits the interlocking of two antithetical concepts. The aim of this thesis is to assess the workability of the proposed model by applying it to several areas of family law. Each chapter identifies the link between the area of law, the continuum and the movement being demonstrated by marital property agreements. The current position of that area of law is then analysed in order to evaluate to what extent that position has been influenced by the status side of the continuum. Each chapter concludes by scrutinising how that area could be influenced by a more contractual approach being applied to family law with the possibility of pre-emptive private ordering.

### **Empirical Research: Explored and Eliminated**

The use of empirical research was thoroughly explored at the outset, specifically the use of quantitative analysis to ascertain the current level of interest in marital property agreements by contacting practitioners across England and Wales. It would have also been possible to carry out empirical research to ascertain correlations between each area of family law considered and marital property agreements. For example, it may have been feasible to undertake research to establish the level of interest towards marital property agreements from unmarried cohabitants. This research could have been carried out by contacting solicitors and ascertaining whether they had received interest from couples wishing to create a pre-nuptial agreement, and significantly whether upon receiving the information that they are not binding, the couple decided to remain unmarried.

Consideration was given to the level of research that is presently available on all aspects that this thesis examines. For example, in relation to the example provided above with regard to cohabitants and marital property agreements, there is already evidence to suggest that this is a scenario which is occurring in solicitor's offices. The Law Commission comment:

Indeed, we have heard from a number of solicitors who have been obliged to point out to their clients that the only way to achieve their objective of preserving certain assets is to cohabit rather than to marry. Some have told us of clients who, as a result, did not marry. The availability of qualifying nuptial agreements could encourage marriage in such cases.<sup>121</sup>

This is discussed in more detail in Chapter Six. A further example would be the community of property regimes examined against the continuum model. These regimes have been

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<sup>121</sup> The Law Commission, *Marital Property Agreements* (n 2) para 5.20.

researched in 2006 by Cooke, Barlow, and Callus and their findings are set out in 'Community of Property: A Regime for England and Wales?'<sup>122</sup> With regard to marital property agreements specifically, recent empirical research has been commissioned by the Law Commission and two sets of data have been produced in 2009 and 2010.<sup>123</sup> It was concluded that the undertaking of empirical research would have produced somewhat tokenistic results given the scope and nature of this piece of work. The black-letter approach has been the most suitable methodology in order to assess the proposed continuum model across a necessarily wide range of areas.

### **Comparative Analysis: Value, Purpose, Apples and Oranges**

The Chapters examining divorce, cohabitation, same-sex marriage and financial relief include comparative analysis. The purpose and value of undertaking such work can be identified at this point. Zweigert and Kötz discuss the origins of comparative law, in particular the early eighteenth century vision of creating a common law of mankind held by Lambert and Saleilles. The initial purpose of the comparative legal approach was indisputably bold:

Comparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development and reduce the number of divergence into the law, attributable not to the political, moral, or social qualities of the different nations but to historical accident or to temporary or contingent circumstances.<sup>124</sup>

Although this initial purpose can now be viewed as untenable,<sup>125</sup> the use of comparative legal study can provide valuable guidance and understanding. That is, understanding in the sense of comprehension and knowledge, but also in the sense of appreciating and respecting the operation of the law in other countries.<sup>126</sup>

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<sup>122</sup> (The Nuffield Foundation, Produced by the Policy Press, Bristol, 2006).

<sup>123</sup> The initial findings and methodology were published in the Family Law Journal, E Hitchings, 'From Pre-Nups to Post-Nups: Dealing with Marital Property Agreements' [2009] Fam Law 1056. Both the Research Report of 2009 and the Supplementary Enquiry of 2010 are presented in full at <<http://www.justice.gov.uk/lawcommission/areas/marital-property-agreements.htm>>

<sup>124</sup> K Zweigert and H Kötz, *An Introduction to Comparative Law* (3<sup>rd</sup> edn, Oxford University Press, 1998) 3.

<sup>125</sup> Zweigert and Kötz comment 'Comparative law has developed continuously since the, despite great changes in man's attitude towards existence. The belief in progress, so characteristic of 1900, has died. World wars have weakened, if not destroyed, faith in world law.' (n 124) 3.

<sup>126</sup> For example, Cooke commented on the activities of the Commission of European Family Law, 'A unified European family law is hard to imagine, but a Europe in which family lawyers understand each other and can work together is becoming a reality.' E Cooke, 'Marital Property Agreements and the work of the Law Commission' in K Boele-Woelki, J Miles and J M Scherpe (eds) *The Future of Family Property in Europe* (Insertia, Cambridge, 2011) 113.

The pitfalls or drawbacks of comparative study also need to be identified and addressed. Platasas critically analyses the apple-oranges idiom in relation to comparative legal study:

An idiom which has captivated the English-speaking world as well as significant parts of the French-speaking is the one which asks people not to compare apples and oranges, they being different in essence...Where does all this leave us in law? In law things are broadly similar...That is not to say that broadly similar artefacts cannot and should not be compared...Theoretically, any law could be compared with any other law, if some common denominator of a valid comparison is found; yet the tendency – it would seem – in the comparative method of law is that we compare ‘corresponding’ areas of law or what is called ‘comparison of equivalents’.<sup>127</sup>

The comparative analysis in this thesis has been included in order to provide examples of reform which can be placed at either end of the contract-status continuum. Comparative research has primarily been included when answering the third research question, when examining how that particular area of law could be influenced by a more contractual approach. Llewellyn’s explanation of his methodology can be used to identify the purpose of the comparative content of this thesis, ‘Any reference to other times and places have a single purpose: to sharpen sight of what is with us here and now, by contrasting it with something different.’<sup>128</sup> Furthermore, Gordley comments, ‘I do not think the law of a single country can be an independent object of study. To understand law, even as it is within that country, one must look beyond its boundaries...’<sup>129</sup> The value and purpose of such research is encapsulated by Von Mahren:

...this kind of study is useful in that it gives a better understanding of the inherent strengths and weaknesses of given institutional forms. Such understanding has considerable theoretical interest and may also prove of directly practical value by providing perspective and direction for law reform efforts.<sup>130</sup>

An example of how comparative research has been used in this manner in order to assess the continuum model can be provided. Chapter Five examines the link between marital property agreements and no-fault divorce in England and Wales. Contrasts have been drawn with Scotland. Briefly, the Family Law (Scotland) Act 2006 has reduced the separation periods required in order to be granted a divorce in Scotland. Two years separation with consent was

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<sup>127</sup> A E Platasas, ‘The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks’ *Electronic Journal of Comparative Law*, vol. 12.3 (December 2008)

<sup>128</sup> K. N Llewellyn (n 47) 1284.

<sup>129</sup> J Gordley, ‘Comparative Legal Research: Its Function in the Development of Harmonized Law’ *The American Journal of Comparative Law* Vol. 43, No. 4, Autumn, 1995, 555.

<sup>130</sup> A Von Mehren, ‘An Academic Tradition for Comparative Law?’ (1971) 19 *AM. J. COMP. L.* 624, 628

reduced to one year<sup>131</sup> and five years separation without consent was reduced to two years.<sup>132</sup> The uptake of no-fault divorce in Scotland following this reform has been analysed against the use of no-fault based facts in England and Wales.<sup>133</sup>

## 1.7 THE STRUCTURE OF THE THESIS

The work is divided into three Parts. The link between status, marital property agreements and public policy is analysed and established in Part One. Lady Hale's statement with regard to the nature of marriage and the role of the court<sup>134</sup> has been used to construct Parts Two and Three. This quotation conveys the two facets of the status-contract tension which marital property produce. The public policy rules surrounding the changing nature of marriage and the role to be played by the court will then be explored in more detail. Parts Two and Three of the thesis will assess the implications of opening each one of these two previously firmly closed barriers of public policy to allow these agreements to become enforceable by using the continuum model. If it is now time for these public policy rules to be modified so as to best reflect the needs of society then this challenges the very basis upon which the regulation of intimate relationships has been built. The very fact that these policy areas are being assessed by the judiciary undeniably raises some far-reaching questions with regard to the law reflecting social reality in regulation of intimate relationships in England and Wales. The content of each of the three Parts is outlined below.

### **Part One: Marital Property Agreements, Status and the Rules of Public Policy**

Part One explores the public policy rules that have shadowed these agreements, thus establishing the link between their unenforceability and the desire of upholding marriage as legal status.

### **Chapter Two: From Status towards Contract: A Fragmented Evolution**

Chapter Two traces the evolution of these issues, bringing the debate up to the current interpretation of public policy. The public policy rule regarding the role of the court established in the *Hyman v Hyman*<sup>135</sup> is analysed. The unwavering public policy rule that one cannot contract out of responsibilities to one's children is explored. Much emphasis is placed

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<sup>131</sup> Family Law (Scotland) Act 2006, s.11 (a).

<sup>132</sup> Family Law (Scotland) Act 2006, s.11 (b).

<sup>133</sup> See in particular pp. 146-147.

<sup>134</sup> *Radmacher v Granatino* [2010] UKSC 42, [132].

<sup>135</sup> [1929] AC 601.

on the distinction between agreements dealing with a current separation and those contemplating a future separation, as it is argued in the following Chapter that this evolution has been overlooked in recent case law. Separation agreements are traced back to the 1603 case of *Sanky v Golding*.<sup>136</sup> The judicial reasoning contained in these early cases demonstrates a strong divide between agreements dealing with a current separation and those contemplating a future separation. The post-nuptial agreement created between the warring Westmeaths is considered, this 1830 case explicitly draws out differences between separation agreements and agreements which speculate a future separation.<sup>137</sup> The 1845 pre-nuptial agreement created by the Thomas Cocksedge and Ann Whale is also examined.<sup>138</sup> Researching this case has revealed the details of the short and financially disastrous life of Thomas Cocksedge. Again, this case sets out the public policy rule regarding future separation. The distinct development of separation and maintenance agreements is evaluated, and the current legislation is analysed. More recent case law concerning pre- and post-nuptial agreements is traced through to the present position of the law, as set out by the decision of the Supreme Court in *Radmacher v Granatino*.<sup>139</sup> The Chapter establishes the current relevance of the public policy rules regarding the nature of marriage and the role of the court.

### **Chapter Three: Recent Decisions: Supporting Contract by Evading Status?**

Chapter Three examines the *Radmacher* decision alongside the Privy Council decision in *MacLeod v MacLeod*<sup>140</sup> to establish where these cases have left the law in terms of public policy, and questions whether the interpretation and the utilising of sections 34, 35 and 36 of the Matrimonial Causes Act 1973 has evaded the historical evolution traced in the previous Chapter. The Chapter proposes that this evasion should be reconsidered and addressed by policymakers prior to any future reform.

### **Chapter Four: Status and Contract: A Human Rights Issue?**

The last Chapter in Part One examines whether there are any potential human rights based issues arising from the latest decisions regarding the enforceability of marital property agreements. Several human right based arguments were presented when *Radmacher* was in the High Court, yet none of these played a role in the judgment. None of the arguments were

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<sup>136</sup> (1603) Cary 87, 21 E.R. 46. See in particular Chapter Two, p. 48.

<sup>137</sup> *Westmeath v Westmeath* (1830) 1 Dow & CI 519. See in particular Chapter Two, p 57.

<sup>138</sup> *Cocksedge v Cocksedge* (1844) 14 Sim 244, 13 LJ Ch 384. See in particular Chapter Two, p 62.

<sup>139</sup> [2010] UKSC 42.

<sup>140</sup> [2008] UKPC 64.

pursued when the case went to appeal. Chapter Four analyses whether these arguments should be given more prominence in light of the most recent interpretation.

### **Part Two: Enforceable Marital Property Agreements and the Nature of Marriage**

Part Two has questioned if the divide between the aspirational view of marriage has moved to a point where it is simply idealistic to preserve a legal system which is growing ever further away from social reality.<sup>141</sup> Readjusting the levels of status and contract within family law would offer a solution to this. The position of cohabitants, same-sex couples and the regulation of divorce are placed on the status-contract continuum. Their position is dependent on the position of marriage and the balance between contract and status; thus providing the common link between these areas. There is a set distance on the continuum between civil partnership and marriage; and cohabitants and marriage which has been set by the law in order to uphold and preserve the legal status of marriage. The position of divorce on the continuum mirrors the current position of marriage. The introduction of enforceable marital property agreements pushes marriage towards the contractual side of the continuum, thus disturbing and distorting these current positions. Each of these areas of family law is explored by using three research questions.<sup>142</sup> These can be repeated at this point for clarity. (I) What is the link between the area of law and the continuum model? (II) To what extent has that area been influenced by upholding status? (III) Is there a possibility of the current legal provisions being influenced by a more contractual approach being applied to marriage?

### **Chapter Five: The Relevance of Fault and a Departure from Status**

Chapter Five scrutinises the interrelationship between no-fault divorce and enforceable marital property agreements. It has been suggested that no-fault divorce would reduce marriage to the contractual model, but that enforceable marital property agreements should be viewed as an additional feature to this movement.<sup>143</sup> Furthermore, Thorpe LJ has made it undeniably clear that the law should give recognition to private autonomy,<sup>144</sup> it becomes

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<sup>141</sup> The movement being demonstrated in the approach to marital property agreements forms the backbone of this examination. This is not the first occasion where there has been the opportunity to challenge the *Hyde* description of marriage. For example the introduction of legislative divorce. This is however undoubtedly a direct confrontation which offers little scope for the creation of legislation that would not disrupt this understanding.

<sup>142</sup> Set out above, see p 3.

<sup>143</sup> This argument is presented by J U Franck (n 57).

<sup>144</sup> When the *Radmacher* case was in the Court of Appeal in 2010, Thorpe LJ articulated In so far as the rule that such contracts are void survives, it seems to me to be increasingly unrealistic. It reflects the laws and morals of earlier generations. It does not sufficiently recognise the rights of autonomous adults to govern their future financial relationship by agreement in an age when marriage is not generally regarded as a sacrament and

questionable as to why a couple cannot therefore simply state that their marriage has broken down, without the requirement to support this with one of the fault- based or non-fault based facts contained in the legal framework. This Chapter explores the historical development of divorce law and analyses the influence that maintaining marriage as a status has had on this progress. The Chapter will also explore whether the fault-based facts are now serving a purpose in the divorce process and so can be justifiably be retained. Comparative analysis is made between our system and the recent changes to Scottish law in reducing the time requirements for their non-fault based facts. Conclusions are drawn as to whether it is simply the upholding of this objective which has led to the retention of fault, or whether there are other factors which still account for this. No-fault divorce is proposed as a logical consequence of the movement being shown on the continuum.

### **Chapter Six: Unmarried Cohabitants on a Narrowing Continuum**

Chapter Six explores the reasoning for the hesitation in providing a legal framework for cohabitants, and to what extent this has been determined by the drive to uphold marriage by not creating an alternative to it. The reasoning for this may have been to maintain the hierarchy of family relationships in England and Wales, with marriage being at the top of this.<sup>145</sup> It is also suggested that the autonomy which enforceable marital property agreements offer may make marriage a more attractive prospect to many currently cohabiting as the availability of such agreements may encourage marriage.<sup>146</sup> Enforceable marital property agreements would demonstrate an enthusiasm for a contractual solution within family law.<sup>147</sup>

Comparative analysis has been made between the regulations in place for cohabitants in Scotland, Australia and France. The law in Scotland and Australia place cohabitants towards the status end of the continuum, whilst the French registration system would show cohabitants being placed towards the contract side of the continuum. The strengths and weaknesses in these systems are examined. The Chapter concludes that if private agreements between intimate couples are legislated for in this jurisdiction it certainly raises the potential for similar provisions to be created for cohabitants. The fact that cohabitation contracts will

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divorce is a statistical commonplace' *Radmacher v Granatino*[2009] EWCA Civ 649, [2009] 2 FLR 1181, 1190- 1191.

<sup>145</sup> This is suggested in the model put forward by R Bailey-Harris (n 70) 67-77.

<sup>146</sup> The Law Commission, *Marital Property Agreements* (n 4) para 5.20.

<sup>147</sup> See, A Barlow and R Probert 'Le PACS est arrivé'(n 8) 184. It is commented that, 'Whilst a PACS style law may not be the answer in our common law jurisdiction, given a lack of enthusiasm for a contractual solution.'

never be a panacea for unmarried cohabitants is recognised, and it is therefore suggested that these should be in addition to the provision of safeguards, or status.

### **Chapter Seven: Same-Sex Marriage and the Revival of Status**

Chapter Seven traces the legal treatment of same-sex couples, and the division that still remains. When the *Hyde* description of marriage was made in 1866 it was to guard marriage in Victorian Britain against polygamy, with the inclusion of ‘one man and one woman,’ yet this has had more modern implications on the legal framework available for same-sex couples. If the law is moving away from this historical view of marriage, then it has been suggested that both marriage and civil partnership should now be gender neutral.<sup>148</sup> The enforceability of marital property agreements would be further recognition that the *Hyde* description of marriage is an ideological view and not necessarily representative of marriage in society. Taking the issue of equality in isolation, the status of marriage would remain unchanged, but the outdated restrictions on entering this institution could be replaced by a more useful description. Thorpe LJ explored this in *Bellinger v Bellinger*:<sup>149</sup>

...I would now redefine marriage as a contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations....even in the last 30 years there has been some shift in the status of marriage within our society that has some relevance to the question of whether a minority group should be denied the election to marry.<sup>150</sup>

This definition makes no mention of ‘lifelong’, nor does it set out gender requirements. It does preserve the legal status of marriage. The way in which agreements between civil partners are deemed as unenforceable in the same way as marital property agreements demonstrates that same-sex couples have been included in the policy argument regarding such agreements, the requirement to acknowledge the obligations that stem from these relationships. Yet, it is the legal defence of marriage as a status which denies same-sex couples marriage. Crompton questions ‘If gay and straight relationships are equally valued, what valid reason is there for not allowing homosexuals to marry?’<sup>151</sup> The status-contract continuum provides the basis for exploring the position recognised by Halley, ‘...both the

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<sup>148</sup> For example see the current campaign ‘Equal Love’ <<http://equallove.org.uk/>> Last accessed 26 April 2011.

<sup>149</sup> [2001] EWCA Civ 1140.

<sup>150</sup> *Bellinger v Bellinger* [2001] EWCA Civ 1140, [128].

<sup>151</sup> L Crompton ‘Civil Partnership Bill 2004: The Illusion of Equality’ [2004] Fam Law 888.

pro's and the anti's in the same-sex marriage debate love to think of marriage as status...'<sup>152</sup> This sentiment has been examined within this jurisdiction by studying *Wilkinson v Kitzinger*.<sup>153</sup> A comparative study has been carried out with regard to the status and contractual options available in the Netherlands, and the opening up of equal status in Spain. This Chapter suggests that the movement being shown by marital property agreements in this jurisdiction illustrates steps towards a more neutral definition of marriage, as shown in the status-contract continuum diagram above.

### **Part Three: Enforceable Marital Property Agreements and The Role of the Court**

The public policy rule established in the late 1920s in *Hyman* set out that a private agreement should not be able to oust the jurisdiction of the court. Marriage has created a status which the parties are barred from amending.<sup>154</sup> The movement away from such a principle raises two questions. Firstly whether some of the impetus for enforceable marital property agreements is being driven by dissatisfaction with the current provisions for financial relief, and secondly there is the issue of what role the court should retain in deciphering the enforceability of an agreement. The vast discretion granted to the judiciary in deciding the financial orders package is directly linked to the notion that marriage is a publicly recognised union and therefore the financial awards should reflect the nature of marriage. The introduction of enforceable marital property agreements moves marriage away from the status end of the continuum.

### **Chapter Eight: The Court's Discretion: Propelling Movement Towards Contract?**

Chapter Eight questions whether the mere pushing of this barrier of public policy is an indicator that a more fundamental reform is needed. If people wish to enter into either a pre-nuptial contract or a post-nuptial contract in the sole hope of not falling into a framework which has been described as 'not unlike entering a casino'<sup>155</sup> then it is feasible that a reform in this area may lessen the fear of uncertainty. The three research questions are applied to this area. The area of financial relief is placed on the continuum model, concluding the vast discretion vested in the judiciary is a direct result of regarding marriage as creating a legal status. This Chapter examines the developments in financial relief and the recent changes in

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<sup>152</sup> J Halley (n 18) 45.

<sup>153</sup> [2006] EWHC 2022 (Fam).

<sup>154</sup> See S Cretney, 'The Family and The Law – Status Or Contract?' (n 1).

<sup>155</sup> J Morley 'Enforceable Prenuptial Agreements: Their Time Has Come' [2006] Fam Law 768.

approach. The move towards the ‘yardstick of equality’<sup>156</sup> and the concepts of ‘needs, compensation and sharing’<sup>157</sup> has led to some academics to draw parallels to the introduction of a community of property regime.<sup>158</sup>

This Chapter has analysed the supplementary consultation paper *Matrimonial Property, Needs and Agreements*,<sup>159</sup> which was released in September 2012. The Chapter concludes that a more fundamental reform should occur prior to the creation of legislation dealing with marital property agreements. The Chapter sets out that it would be possible to make the meeting of needs more certain. The equal sharing of matrimonial property should become the default rule in cases where there is a surplus of assets once needs have been met. The use of marital property agreements could then be used to escape the default rules, ring-fence certain items and to clarify the distinction to be made between matrimonial property and non-matrimonial property. This reform would offer recognition to both status and contract.

### **Chapter Nine: Proposals for Reform: Pinpointing Marriage on the Continuum**

Chapter Nine brings the thesis full circle by analysing the potential role of the court to play in the supervision of marital property agreements. The Law Commission has suggested several models in their consultation paper, ranging from a cast-iron model through to the notion that such agreements will be considered enforceable unless they are deemed to be ‘unjust.’<sup>160</sup> The choice of model will also determine how effective marital property agreements will operate in this jurisdiction. Furthermore, this decision will influence who can benefit from these agreements. This will represent the most current statement of where marriage lies on the proposed continuum model as far as it is possible to do so, given that this will always be an optional contractual element as discussed above in relation to homeostasis. Refusal at this stage to provide reform will confirm the position of marriage being at the status end of the continuum. Furthermore, if reform is successful then the model selected will provide an indicator as to how far along the continuum these agreements are taking marriage, and thus determine the extent of the narrowing of the continuum. This Chapter will propose the most suitable method for reform based on the findings of the previous Chapter, and consider the safeguards required for this model to operate.

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<sup>156</sup> *White v White* [2000] 2 FLR 981.

<sup>157</sup> *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

<sup>158</sup> See S Cretney ‘Community of property imposed by judicial decision’ LQR 2003 119 (Jul) and A Barlow, ‘Community of Property – the logical response to *Miller* and *McFarlane*?’ Bracton Law Journal (2007) vol 39.

<sup>159</sup> The Law Commission, *Matrimonial Property, Needs and Agreements: A Supplementary Consultation Paper* (Consultation Paper No 208, 2012).

<sup>160</sup> The Law Commission, *Marital Property Agreements* (n 4) para 7.37.

## Chapter Ten: Conclusion

This concluding Chapter will bring together all of the areas discussed throughout the thesis. The Chapter discusses the proposals made at each stage of the research, and sets out the recommendations which can be made from the research findings.

### 1.8 OVERVIEW TABLE

Area of Family Law Examined on the Proposed Status-Contract Continuum					
Research Questions to Assess the Workability of the Status-Contract Continuum	Divorce	Unmarried Cohabitants	Same-Sex Couples	Financial Orders	MPA and the Possible Models for Reform
What is the link between the area of law and the continuum model?	Divorce is set at the same position of marriage on the continuum; it is therefore influenced by status.	Not currently placed on the family law continuum in terms of financial relief upon relationship breakdown. <i>Sutton v Mishcon de Reya and Gawor &amp; Co</i> [2004] 1 FLR 837 suggests the possibility of enforceable agreements.	With regard to marital property agreements, same-sex couples are bound by status.  The other component of status restricts same-sex marriage.	Influenced by status, the wider community has an interest in the financial division arranged by a couple upon divorce.	There is a gradual move being shown in the approach by the judiciary towards the contractual side of the continuum.
To what extent has this area been influenced by upholding status?	Divorce law still contains fault based facts to support the ground for divorce.	No provisions currently available in family law for separating unmarried cohabitants.	Marriage has been denied to same-sex couples. The arguments for and against same-sex marriage uphold the notion of marriage conveying status.	The judiciary hold vast discretion in deciding the division of assets upon divorce or dissolution. The jurisdiction of the court cannot be ousted by a private agreement.	Both elements of status have rendered MPA as void as being against public policy.
Is there a possibility of the current legal provisions being influenced by a more contractual approach being applied to marriage?	Enforceable MPA could be viewed as a move further towards the contractual side of the continuum, demonstrating that divorce is a private matter.	MPA demonstrate greater enthusiasm towards the use of contract in family law, therefore raises the possibility of provisions for unmarried cohabitants based on contract. MPA narrow the continuum, with the possibility of marriage becoming a more attractive prospect.	MPA move away from status with regard to all marriages being life-long. It is therefore feasible that status is still desirable, but in need of modification. Potential modifications could be viewed as marriage becoming more contractual: marriage becomes variable and offers more choice to the parties.	The desire for MPA raises questions regarding the suitability of the current provisions.  The move towards the contractual side of the continuum could be being partly driven in the search for greater certainty.	The model selected, if reform were successful, will more accurately pinpoint marriage on the status-contract continuum by considering to what extent the model is bound by status or allows for contractual freedom. There is still the potential for these two concepts to overlap.

**PART ONE**  
**MARITAL PROPERTY AGREEMENTS, STATUS**  
**AND THE RULES OF PUBLIC POLICY**

**INTRODUCTION**

Part One examines the gradual movement from status towards contract being demonstrated by the judiciary by analysing the case law in this area. The public policy rules are a direct result of our understanding of marriage as status.

Chapter Two will consider the case law concerning marital property agreements to trace the movement along the continuum. Chapter Three will consider whether the most recent cases have evaded the public policy argument regarding the ability to contemplate of a future separation. The Law Commission comment that, ‘The policy was scarcely consistent with modern values.’<sup>1</sup> Barton comments on this stance, ‘plumping for the view that qualifying nuptial agreements would neither devalue nor discourage marriage...thus not bringing CP 198 to an abrupt conclusion...’<sup>2</sup> Chapter Three has analysed how public policy has been dealt with, and evaluates whether the public policy rule regarding the nature of marriage has been evaded. Chapter Four evaluates whether the interaction between status and contract with regard to marital property agreements touches upon any human rights based issues.

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<sup>1</sup> The Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) para 1.8.

<sup>2</sup> C Barton, ‘Marital Property Agreements: The Law Commission’s Cut.’ Sept [2011] Fam Law.

## CHAPTER TWO

### FROM STATUS TOWARDS CONTRACT: A FRAGMENTED EVOLUTION

This thesis evaluates the public policy issues surrounding pre-nuptial and post-nuptial agreements relating to property, yet the enforceability of all types of agreements made during the course of a wider scope of intimate relationships reveals several issues relating to public policy. Bowen LJ commented on the potential for movement, 'Rules which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification.'<sup>1</sup> It is possible to examine the evolution of such agreements to observe the expansion or modification that has occurred since the public policy issues were first set out, therefore establishing which public policy arguments remain relevant today. It is suggested in Chapter Three that recent judgments have evaded this evolution. The type of agreement formed between domestic partners is dependent on the category of relationship and at what point the agreement was formed. Both of these factors are crucial in determining how far the judiciary are currently willing to give force to such an agreement, or how much weight will be granted to the agreement.

The aim of this Chapter is to provide a strong foundation for the thesis by tracing the public policy issues to their source and analysing their current relevance. The earliest cases concerning separation are considered in order to pinpoint the fragmentation of agreements which considered a future separation away from those which dealt with a present separation. The abandonment of the obligation to cohabit is mapped out, before examining the establishment of legislation which supports separation and maintenance agreements. Finally the Chapter returns to consider pre- and post-nuptial agreements and assesses the recent movements along the status-contract continuum. This Chapter demonstrates the development and alteration of views surrounding such agreements through to 2008. The following Chapter will deal exclusively with *MacLeod v MacLeod*<sup>2</sup> and *Radmacher v Granatino*<sup>3</sup> in order to demonstrate that these two cases have evaded the evolution mapped out in this Chapter.

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<sup>1</sup> Bowen, LJ, in *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* (11) [1893] 1 Ch at 661.

<sup>2</sup> [2008] UKPC 64.

<sup>3</sup> [2010] UKSC 42.

## 2.1 A NOTE ON TERMINOLOGY

Suggestions as to the terminology attached to these agreements has been based upon trying to denote both the type of relationship that the couple are in and at what point the agreement was formed, there is some varying opinion on how to best achieve this. Within 'marital property agreements' there are three possible forms of agreement: those made before the marriage, those made following the marriage ceremony and agreements entered into upon separation. Those formed prior to a marriage are normally referred to as pre-nuptial agreements, and the term pre-marital agreement is also widely used. The term 'pre-nuptial' is used throughout this thesis, although it is acknowledged that the term 'ante-nuptial' may well be adopted should there be a successful legislative reform in this area.<sup>4</sup> A distinction must also be drawn between pre-nuptial agreements and pre-nuptial settlements, Wall J comments:

The difference between an antenuptial settlement and an antenuptial contract or agreement is that the former seeks to regulate the financial affairs of the spouses on and during their marriage. It does not contemplate the dissolution of the marriage. By contrast, an agreement made prior to marriage which contemplates the steps the parties will take in the event of divorce or separation is perceived as being contrary to public policy because it undermines the concept of marriage as a life-long union.<sup>5</sup>

This thesis is not concerned with antenuptial settlements as they do not present any of the public policy concerns which are inherent to antenuptial contracts, that is to say pre-nuptial agreements. Agreements created after marriages are referred to here as post-nuptial agreements. The development of these branched away from the pre-nuptial agreements within the body of case law will be discussed later. Separation agreements are treated very differently, this varying attitude has been derived directly from public policy and the potential

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<sup>4</sup> Todd has argued that the term 'ante' should be used; stating that the term 'ante' carries the connotation of before, rather than immediately ahead of the wedding. Furthermore, it is extremely unlikely that a contract signed very close to a wedding ceremony would be ever considered to be binding due to the possible influence of duress under these circumstances, and so the use of 'ante' would convey the requirement for these agreements to be dealt with well in advance of a ceremony. Todd also raises the point that the term 'ante-nuptial' is currently used in the Matrimonial Causes Act 1973, under s.24 (1)(c) which mentions both ante-nuptial and post-nuptial settlements in the context of property adjustment orders. R Todd 'The Inevitable Triumph of the Ante-Nuptial Contract' [2006] Fam Law 539. It is certainly possible that the term 'pre-nuptial' has become too far rooted into our language to change at this point, although Todd presents a logical argument for doing so. Following the Supreme Court judgement in *Radmacher v Granatino* [2010] UKSC 42 in October 2010, in which Richard Todd QC acted for the respondent Katrin Radmacher, Davis commented 'As an aside, his success in *Radmacher* was so complete that Mr Todd can now drop the word "ante". As for whether "contract" or "agreement" is the correct terminology, that can await another blog. Jordan's Family Law, Sandra Davis Week: The Fairness of *Radmacher*. <<http://www.familylaw.co.uk/articles/SandraDavis291010>> Last accessed 11th November 2010. The point regarding terminology was highlighted in the Supreme Court's decision in *Radmacher v Granatino*, [2010] UKSC 42. Lady Hale stated, 'I propose to call these "ante-nuptial agreements" because our legislation already uses the term "ante-nuptial" to refer to things done before a marriage.' *Radmacher v Granatino* [2010] UKSC 42, [131].

<sup>5</sup> *N v N* (Jurisdiction: Pre-nuptial Agreement) [1999] 2 FLR 745, 752.

effect that giving force to these agreements may have on the status of marriage. If an agreement between a same-sex couple is created prior to the ceremony then they have been termed pre-registration or pre-partnership agreements.<sup>6</sup> The last type of agreement to be examined in this thesis are agreements made by couples who are cohabiting, these are scrutinised in in Chapter Six.

## 2.2 STATUS PRODUCES PUBLIC POLICY: TRACING THE ISSUES

It was identified in the Introduction that there are two elements of status which are at the root of the public policy arguments surrounding pre- and post-nuptial agreements.<sup>7</sup> If marriage is regarded to be a public institution it follows that the wider community has an interest in the financial arrangements made by a couple upon divorce.<sup>8</sup> In addition, there is the notion that as a public institution there must be a set form for marriage to take.<sup>9</sup> This section will trace the creation of the public policy rules to the cases where this interpretation was initially made.

### Ousting the Jurisdiction of the Court

The public policy rule stating that an agreement should not be able to oust the jurisdiction of the court is partly based upon the idea that spouses in these circumstances should be able to

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<sup>6</sup> Todd argues differently with regard to terminology 'For civil partnerships, either ante-nuptial (if the ceremony is believed to be a marriage), ante-consortial or partnership deed are used. As 'partnership deed' does not relate to the ceremony at all (and 'pre-partnership deed' is plainly wrong), it is suggested that the discerning (and technically correct) lawyer should use the expression 'ante-consortial'. R Todd 'The Inevitable Triumph of the Ante-Nuptial Contract' [2006] Fam Law 539. It would be unlikely that agreements between a same-sex couple would be given the term 'ante-nuptial,' as this would give a civil partnership the equivalent terminology as used to denote a contract made prior to a marriage. Legislators have quite deliberately avoided the position of 'same sex marriage' by creating new legislation for civil partnerships; rather than the removal of s.11(c) Matrimonial Causes Act 1973, as will be discussed in greater depth later. Todd's suggestion with regard to the term 'ante-consortial' could be adopted, yet it is possible that the terminology of pre-registration or pre-partnership contract is now too far entrenched into language to alter the term at this point. 'Consortial' is an unusual term to choose in relation to civil partnership given that the origins of the word are traceable to 'spouse' or 'husband and wife,' in addition to the broader term of 'partner.' Todd's rejection of 'partnership' in the terminology perhaps leaves 'pre-registration' as the most useful term here, although Todd would argue in favour of ante-registration as this term more accurately indicates that these agreements are dealt with before the ceremony or registration of the partnership. The 'partnership' could have easily been in existence for many years prior to registration. A property agreement could also be made following registrations, which are referred to as post-registration agreements. In addition, the Civil Partnership Act mirrors the Matrimonial Causes Act in making legislative provision for separation agreements to be made into court orders upon dissolution, Civil Partnership Act, Part 13.

<sup>7</sup> See above pp 7 – 13.

<sup>8</sup> See for example, R Probert, *Cretney's Family Law* (6<sup>th</sup> edition, Sweet and Maxwell, 2006, London) 8-002 and S Cretney, 'The Family and The Law – Status Or Contract?' [2003] CFLQ 403.

<sup>9</sup> See B Bix, 'Private Ordering and Family Law.' 23 J. Am. Acad. Matrimonial Law. 249 (2010), 259 and J Halley 'Behind the Law of Marriage (I): From Status/ Contract to the Marriage System' Harvard Journal of the Law, Vol. 6.1, 2010, 4.

access the legislation which they are entitled to and thus the rule is applicable to all marital property agreements. The most commonly cited case is concerned with a separation agreement from 1929, *Hyman v Hyman*.<sup>10</sup> The couple in *Hyman* were married in 1912, and in 1919 the deed of separation was executed.<sup>11</sup> The timing and historical background of this deed are very important as to why the wife signed such an agreement. There was a duty on the couple to live together, which could have been enforced by self-help, or by obtaining a decree of restitution of conjugal rights, both of these remedies are discussed in this Chapter.<sup>12</sup> Their private agreement set the amount of maintenance to be paid by the husband and also prevented the wife from taking any action which would force her husband to cohabit with her.

When the *Hyman* case was being scrutinised legislative divorce had only been available around seventy years previously. When the Matrimonial Causes Act 1857 came into force, divorce would have been viewed as relatively unusual, and there was vast inequality in the grounds for divorce between the sexes.<sup>13</sup> Divorce would have become slightly more familiar to the society in the early part of the twentieth century, in 1929 there were 3,400 divorces per year.<sup>14</sup> The mere scarcity of divorce would have facilitated the unease that people would have felt towards this concept. Hasson expresses that marriage, ‘might best be described as the ‘epitome’ of religious morality’<sup>15</sup> and therefore ‘divorce, thus, not only violated a familial morality but also a more fundamental religious one.’<sup>16</sup> Under the 1857 Act the wife would have needed to prove a great deal more in terms of the grounds for divorce. The wife in *Hyman* would have been unable to divorce her husband simply on the basis of adultery. In 1919 the wife would have had to prove something in addition: that the adultery was

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<sup>10</sup> [1929] AC 601.

<sup>11</sup> This public policy rule can therefore trace its conception to the issues surrounding a separation agreement, and more specifically in *Hyman*, a subsequent divorce.

<sup>12</sup> This discussion starts at p 68.

<sup>13</sup> For example, R Probert ‘*Hyde v Hyde: defining or defending marriage?*’ [2007] CFLQ 322. Probert comments on the impact the 1857 Act had on divorce rates in Victorian society, ‘...prior to the introduction of judicial divorce in 1857 there had been only 317 divorces over a period of almost 300 years. In 1858, the year that the Act came into force, there were 253 petitions for divorce, and 179 divorces were granted — almost 50 times the annual average for the decade leading up to the 1857 Act. Proportionately, the increase was greater than any that were to result from the more generous divorce reforms of the twentieth century, and Victorian society was understandably shocked. That the demand for divorce had not been anticipated is clear from the administrative framework that had been established by the 1857 Act, and which had had to be reformed within a few years of the passage of the Act.’

<sup>14</sup> R Todd, ‘The Inevitable Triumph of the Ante-Nuptial Contract [2006] Fam Law 539.

<sup>15</sup> E Hasson, “Wedded to Fault”: the legal regulation of divorce and relationship breakdown” (2006) Legal Studies Vol 26 No. 6 pp 267 – 290, 278.

<sup>16</sup> (n 15) 278.

incestuous; or that her husband had committed bigamy or had been cruel to her; or else wait for two years desertion to have taken place.

On 18 July 1923 the Matrimonial Causes Act gave equality to wives with regard to grounds for divorce.<sup>17</sup> Mrs Hyman started divorce proceedings in 1927, obtaining a decree nisi and applied for maintenance. The husband tried to rely upon the separation deed. Between signing the agreement in 1919, through to being granted a divorce, the options available to the wife had shifted dramatically. The case went to the House of Lords where it was decided that the deed of separation did not prevent a petition to the court for maintenance upon divorce. The position has since been clarified in *Edgar v Edgar*,<sup>18</sup> which will be discussed later.<sup>19</sup>

*Hyman* raised a further element to the idea of public policy by commenting on the position of the wife, 'she could not be bound by such a covenant so as to preclude the exercise by the court of its statutory power to award maintenance.'<sup>20</sup> This public policy argument perhaps therefore originally stems from the desire to safeguard the potential for divorced women to be left dependent upon the State. This public policy rule branches from the interpretation of status, that is to say that marriage is a public union and therefore the public holds an interest in the financial division of assets. Analysis of *Hyman* demonstrates this interpretation of status. Lord Halisham LC stated:

... the power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction.<sup>21</sup>

This comment places the emphasis on the idea of the court's jurisdiction being beneficial to the public interest, and in having the safeguard of the scrutiny of the court over maintenance does remove the possibility of one spouse being left economically dependent upon the State where this is unnecessary. It is also significant that when this 1920s judgment was made the potential for a woman to be economically independent would have been more difficult than it would currently. Lord Aitkin discusses and clarifies this element further:

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<sup>17</sup> These issues will be discussed in greater depth in Chapter Five, in particular see p 139.

<sup>18</sup> (1981) 2 FLR 25.

<sup>19</sup> See p 78.

<sup>20</sup> *Hyman v Hyman* [1929] All ER Rep 245, 247.

<sup>21</sup> (n 20) 251.

In the absence of any statutory enactment the former wife would be left without any provision for her maintenance other than recourse to the poor law authorities. In my opinion the statutory powers of the Court to which I have referred were granted partly in the public interest to provide a substitute for this husband's duty of maintenance and to prevent the wife from being thrown upon the public for support.<sup>22</sup>

The emphasis on the public's interest is very noticeable. When this judgement was made the judiciary would have acquired their powers to grant the wife maintenance from the Judicature Act 1925. The power to make provision for future maintenance was contained in the Matrimonial Causes Act 1857; and so from the point that legislative divorce was available the legislator also gave the judiciary this discretionary power.<sup>23</sup> The position of leaving one spouse dependant on the State remains undesirable.<sup>24</sup> The question now is how far the discretion held by the judiciary should be allowed to interfere with the private autonomy of a couple. Moreover, as the Law Commission commented, 'what, if any, are the responsibilities of former spouses to each other after their divorce or dissolution? What is the place of autonomy in family law? What is the social cost of divorce and dissolution?'<sup>25</sup> The outcome of these questions will partly be determined by what formula, if any, legislative reform will take. All of these underlying questions are addressed throughout this thesis.

### **Children, Agreements and Public Policy**

The idea that a person cannot contract out of their responsibilities towards their own children is a public policy argument that has remained unchanged.<sup>26</sup> Moreover, it is applied universally to all domestic partnership agreements. In *R (on the application of Kehoe) v Secretary of State for Work and Pensions*<sup>27</sup> Lady Hale commented on the idea of public policy, 'It is difficult to think of anything more important for the present and future good of society than that our children should be properly cared for and brought up.'<sup>28</sup> The origins of this value were recorded by Sir William Blackstone in the eighteenth century.<sup>29</sup> Part of his work focussed on the parent and child, and a division is drawn between legitimate and

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<sup>22</sup> (n 20) 258.

<sup>23</sup> The powers contained in the 1857 Act were subsequently extended by the 1866 Act and the 1907 Act.

<sup>24</sup> Prejudice to the public purse is classified as an 'inescapable proviso' in The Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) para 7.10. This is discussed further in Chapter Nine, p 286.

<sup>25</sup> The Law Commission, *Marital Property Agreements* (n 24) para 1.12. See above also at pp 1-2.

<sup>26</sup> The Law Commission, *Marital Property Agreements* (n 24) para 1.7.

<sup>27</sup> [2005] UKHL 48.

<sup>28</sup> [2005] UKHL 48, [50].

<sup>29</sup> Sir William Blackstone *Commentaries on the Laws of England (1765 – 1769)* Available electronically at <<http://www.lonang.com/exlibris/blackstone/>> Last Accessed 12 June 2011.

illegitimate children with regard to the duties a parent has towards them; parents' duties to a legitimate child were described as, 'their maintenance, their protection and their education.'<sup>30</sup> The duty to provide maintenance was studied in greater detail: 'The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation laid on them not only by nature herself, but by their own proper act, in bringing them into the world.'<sup>31</sup> This duty to provide maintenance was carried across to obligate parents of illegitimate children.<sup>32</sup>

There have, of course, been some sweeping changes in child law since this obligation was considered by Sir William Blackstone: the Family Law Reform Act 1987 removed the majority of distinctions previously drawn between children born to married parents and those born to unmarried parents.<sup>33</sup> Yet, the underlying policy of being duty-bound to maintain one's own children remains completely unchanged. This is currently represented in s.1 of the Child Support Act 1991, which sets out that every parent has a duty to provide maintenance for their children, regardless of whether they have been married to the other parent or if he or she lives with the child in question. Section 9 of that Act contains provisions for parents to create a maintenance agreement, setting out how the upbringing of their children will be funded; this will not oust the jurisdiction of the court and so a parent can still apply for child support under the Act.

When parents are divorcing, consideration is given to their children in the Matrimonial Causes Act 1973, both in relation to financial orders,<sup>34</sup> and also with regard to a property

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<sup>30</sup> Blackstone (n 29) Book 1, Chapter 16.

<sup>31</sup> Blackstone (n 29) Book 1, Chapter 16.

<sup>32</sup> Blackstone (n 29) Book 1, Chapter 16: 'Let us next see the duty of parents to their bastard children, by our law; which is principally that of maintenance. For, though bastards are not looked upon as children to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved... The civil law therefore, when it denied maintenance to bastards begotten under atrocious circumstances, was neither consonant to nature, nor reason, however profligate and wicked the parents might justly be esteemed.'

<sup>33</sup> This Act came into force 15 May 1987: 'An Act to reform the law relating to the consequences of birth outside marriage; to make further provision with respect to the rights and duties of parents and the determination of parentage; and for connected purposes.'

<sup>34</sup> s.23 of the Matrimonial Causes Act, Financial provision orders in connection with divorce proceedings:

(d) an order that a party to the marriage shall make to such person as may be specified in the order for the benefit of a child of the family, or to such a child, such periodical payments, for such term, as may be so specified;

(e) an order that a party to the marriage shall secure to such person as may be so specified for the benefit of such a child, or to such a child, to the satisfaction of the court, such periodical payments, for such term, as may be so specified;

(f) an order that a party to the marriage shall pay to such person as may be so specified for the benefit of such a child, or to such a child, such lump sum as may be so specified;

adjustment order.<sup>35</sup> These provisions are reflected in the Civil Partnership Act 2004.<sup>36</sup> Schedule 1 of the Children Act 1989 can be used to deal with the financial provision to be made for a child when the parents are unmarried, in this situation the parents have no obligations to one another<sup>37</sup> yet the parent will still have a duty to maintain the child; thus several orders can be made to reflect this obligation. The court has the power to order a lump sum, periodical payments and provide housing in favour of the child. These orders carry a limited time span, this being until the child turns eighteen or completes full-time education.

The power bestowed on the courts by virtue of the provisions in the three pieces of legislation dealing with the provision of child maintenance can not be ousted by a private agreement. The 1836 case *Urmston v Newcomen*<sup>38</sup> compared the respective duties of husband to wife, and father to child. Sir John Cambell, Attorney-General stated, 'The obligation must be as strong in the case of a child as in that of a wife. The foundation, in one case, is the duty on the part of the husband to provide for his wife; that foundation in the other case, because the primary duty is equally imperative.'<sup>39</sup> It may, of course, be possible at some point in the future to divorce one's spouse under the terms of a binding agreement which considerably limits the award that would usually have been granted.<sup>40</sup> With regard to the financial provision for children, the obligation lies between parent and child and so an agreement between two parents cannot diminish this duty in any way.

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<sup>35</sup> s.24 of the Matrimonial Causes Act, Property adjustment orders in connection with divorce proceedings: (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say— (a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion; (b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them; (c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage, other than one in the form of a pension arrangement (within the meaning of section 25D below).

<sup>36</sup> Schedule 5. Part 1: Financial provision in connection with dissolution, nullity or separation. Part 2: Property adjustment on or after dissolution, nullity or separation.

<sup>37</sup> Although, it should be noted that the parent may be viewed as gaining vicariously.

<sup>38</sup> (1836) 4 Ad & El 899.

<sup>39</sup> *Urmston v Newcomen* (1836) 4 Ad & El 899, 901.

<sup>40</sup> It seems extremely unlikely that reform would allow one spouse to be left dependant on the state: The Law Commission set out; 'If the argument for autonomy were pushed to its furthest, it would be possible to contract out of all responsibilities imposed by the law of ancillary relief, subject to the clear public policy consideration that a spouse should not be left dependent upon state benefits.' The Law Commission, *Marital Property Agreements* (n 24) para 5.44.

The Law Commission concluded that with regard to children, ‘Any term in a pre-nuptial agreement or post-nuptial agreement, or separation agreement that purports to contract out of financial responsibility to a child could not be enforced by the courts, and we saw nothing to cast doubt upon that principle.’<sup>41</sup> Following the evolution of the rules of public policy in this area it is worth bearing in mind what affect the remaining public policy rules regarding maintaining a child may have on the overall viability of any of the agreements made between domestic partners.

### **Contemplating a Future Separation.**

An earlier public policy rule was based on the notion that pre-and post- nuptial agreements were void for contemplating a future separation. The Law Commission comment on the current stance being taken on this rule of public policy:

The first has, until recently, meant that pre-nuptial and post-nuptial agreements were contractually void. The policy was scarcely consistent with modern values; married couples no longer have an enforceable duty to live together, and the law makes provision for marriage and civil partnership to be brought to an end. The Supreme Court has recently stated that the rule “is obsolete and should be swept away.”<sup>42</sup>

It is proposed in this thesis that this element of public policy has been misinterpreted in *MacLeod v MacLeod*,<sup>43</sup> where a post-nuptial agreement was assimilated with a separation agreement. Furthermore, the Supreme Court in *Radmacher v Granatino*<sup>44</sup> acted upon this misconstrued judgment in order to state that this rule of public policy was now obsolete. These decisions are scrutinised in greater detail in Chapter Three. Initially however the historical development of separation agreements, pre and post-nuptial agreements needs to be examined in order to demonstrate the inaccuracy which presently exists in our system.

### **Separation in the Ecclesiastical Court, Common Law and Equity**

Firstly, it is essential to contemplate the reasoning behind a couple’s decision to create a deed of separation. Prior to the provision of judicial divorce under the Matrimonial Causes Act 1857 a spouse could apply to the ecclesiastical court to decree a divorce *a mensa et thoro*, ‘from the table and the bed.’ The ecclesiastical courts were however concerned with enforcing matrimonial obligations. It was influenced by the canon law duty placed on a

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<sup>41</sup> The Law Commission, *Marital Property Agreements* (n 24) para 1.7.

<sup>42</sup> The Law Commission, *Marital Property Agreements* (n 24) para 1.8.

<sup>43</sup> [2008] UKPC 64.

<sup>44</sup> [2010] UKSC 42.

married couple to cohabit,<sup>45</sup> and so in order for the court to give permission for one spouse to cease cohabitation certain criterion had to be met.<sup>46</sup> This would be particularly demanding for a wife, who would need to prove her husband's adultery, cruelty, or unnatural offences. Furthermore, such proceedings would have been extremely costly.<sup>47</sup> When successful the court would also order the husband to provide his wife with an annual sum calculated against his income. This ancillary order was necessary as upon marriage the whole of a wife's property would have passed to her husband prior to the Married Women's Property Acts 1870 and 1882. Stone lists separation by private deed as one of the methods of breaking a marriage,<sup>48</sup> commenting, 'We do not know just how many private separations there were among the élite, but it is likely that the numbers were substantial, but most of them only came to light because they were brought into court after the arrangement had broken down...'<sup>49</sup> The 1788 case of *Hobbs v Hull*<sup>50</sup> provides further details on the reasoning behind the creation of separation agreements. The husband had committed adultery and upon separation the wife accepted that the husband would pay her £300 per year for her separate maintenance and for their children. Master of the Rolls, Sir Lloyd Kenyon heard the case and stated:

...I am now bound to decide the question, whether the husband, having behaved so ill as to entitle the wife to obtain a divorce in the Spiritual Court *a mensa et thoro*, and to have a proper allowance from him, if the wife, instead of strictly prosecuting that right, meets the husband in the threshold, and says she will accept the maintenance proposed by him without litigation...<sup>51</sup>

The agreement in this case was upheld, and thus the autonomy of the couple was recognised by the judiciary.

Case law can be traced back a century earlier than *Hyman* drawing distinctions amongst the three possible types of marital property agreements. The 1830 case of *Westmeath v*

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<sup>45</sup> This obligation remains evident: *The Canon Law, Letter and Spirit* (Prepared by the Canon Law Society of Great Britain and Ireland in Association with the Canadian Canon Law Society, Published by Geoffrey Chapman, 1996): Book IV The Sanctifying Office of the Church, Part I The Sacraments, Article 2, Separation while the Bond Remains Can. 1151 Spouses have the obligation and the right to maintain their common conjugal life, unless lawful reason excuses them.

<sup>46</sup> This is discussed in more detail in Chapter Five, this analysis starts at p 132.

<sup>47</sup> J L Barton, 'The Enforcement of Financial Provisions' in R H Graveson and F R Crane (eds), *A Century of Family Law* (Sweet and Maxwell Ltd, London, 1957) 353-354.

<sup>48</sup> The others being: desertion and elopement; wife sale; judicial separation from bed and board; criminal conversation litigation; and Parliamentary divorce. L Stone, *Broken Lives, Separation and Divorce in England 1660-1857* (Oxford University Press, 1993) 18-25.

<sup>49</sup> L Stone, *Broken Lives, Separation and Divorce* (n 48) 21.

<sup>50</sup> 1 Cox, 466.

<sup>51</sup> *Hobbs v Hull* 1 Cox, 446, 446.

*Westmeath*<sup>52</sup> drew a distinction between an agreement dealing with an existing separation and an agreement which set out the arrangements in the contemplation of a future separation created whilst the marriage was on-going. The consequence of a pre-nuptial agreement was considered in the case of *Cocksedge v Cocksedge*<sup>53</sup> in 1844, extending the principle regarding post-nuptial contracts from *Westmeath*. This section will trace the approach taken towards separation: the duty to cohabit; the self-help remedy of reasonable confinement and the restitution of conjugal rights. These developments in the law have resulted in separation agreements being deemed to be enforceable. It is therefore possible to demonstrate the splintering of approach taken towards these agreements, dividing those which provide for an existing separation and agreements which contemplate a future separation in order to display that this historical division has recently been overlooked.<sup>54</sup>

The *Royal Commission on Marriage and Divorce 1951-1955*<sup>55</sup> proposed to clarify the position of voluntary agreements for separation. Comment is made on the nature of these agreements and the developments leading up to the 1950s:

The essential feature of a separation agreement is that the parties agree thenceforth to live separate and apart. The Ecclesiastical Courts looked on these agreements as contrary to public policy and void, but, as a result of a series of judicial decisions, it became accepted that it is a matter between husband and wife if they choose to live separate and apart.<sup>56</sup>

This provides a definition of a separation agreement, the use of ‘thenceforth’ is important to distinguish these from those agreements which may contemplate a future separation. Furthermore it is identified that a series of cases had moved the position of considering separation agreements to be void to them being enforceable. In fact, the public policy rule regarding the duty on a husband and wife to cohabit was eroded to the point that in 1957 it was possible to pass an Act of Parliament to give greater certainty to these agreements. The reasoning behind this legislation and the passing of this Bill is examined later in this Chapter.<sup>57</sup>

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<sup>52</sup> (1830) 1 Dow & CI 519.

<sup>53</sup> (1844) 14 Sim 244, 13 LJ Ch 384.

<sup>54</sup> This assertion forms the basis for Chapter Three.

<sup>55</sup> The Royal Commission has since been called ‘The Morton Commission.’

<sup>56</sup> *Royal Commission on Marriage and Divorce Report 1951 – 1955* (Cmd. 9678 Presented to Parliament by Command of Her Majesty March 1956) para 192.

<sup>57</sup> See in particular p 75.

## **Void as Against Public Policy in the Ecclesiastical Courts**

The ecclesiastical courts did not recognise private deeds of separation and regarded them as void and against public policy. Sir William Scott stated in 1820:

The objection taken against these articles is, that deeds of separation are not pleadable in the Ecclesiastical Court: and most certainly they are not, if pleaded as a bar to its further proceedings; for this Court considers a private separation as an illegal contract, implying a renunciation of stipulated duties—a dereliction of those mutual offices, which the parties are not at liberty to desert—an assumption of a false character, in both parties, contrary to the real status personæ, and to the obligations which both of them have contracted in the sight of God and man, to live together “till death them do part,” and on which the solemnities, both of civil society and of religion, have stamped a binding authority from which the parties cannot release themselves by any private act of their own, or for causes which the law itself has not pronounced to be sufficient, and sufficiently proved.<sup>58</sup>

The courts of equity were mindful not to interfere with the decisions taken by the ecclesiastical courts, which held the jurisdiction over matrimonial and separation cases.<sup>59</sup> However, where the parties had come to a private agreement in order to avoid the possible publicity or costs of any other form of separation the court of chancery would uphold the arrangements made by the parties whilst they were living separately.

## **Separation Agreements in the Court of Chancery**

The case law which passed through the court of chancery will now be examined, culminating in the case of *Hunt v Hunt*<sup>60</sup> in 1862 which saw Equity upholding the decision from the House of Lords in *Wilson v Wilson*,<sup>61</sup> and therefore recognising separation agreements.

## **Acceptance of Agreements Dealing with a Current Separation**

In the 1603 case of *Sanky v Golding*<sup>62</sup> the husband and wife had separated following some conflict between them. Prior to their separation they had sold some land which had formed part of the wife’s inheritance, and upon separation £100 from the funds raised was allotted to provide her with maintenance. The money was placed in the hands of two trustees, Nicholas

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<sup>58</sup> *Mortimer v Mortimer* (1820) 2 Haggard (Consistory) 310, [318].

<sup>59</sup> Such observation was made by Lord Cottenham in *Wilson v Wilson* (1848) 1 HL Cas 538; 12 Jur 467; 9 ER 870, HL; 27 Digest (Repl) 220, 1757, [554].

<sup>60</sup> (1862) 4 De GF & J 221; 31 LJ Ch 161; 5 LT 778; 26 JP 243; 8 Jur NS 85; 10 WR 215; 45 ER 1168, LC; 27 Digest (Repl) 291, 2369.

<sup>61</sup> (1848) 1 HL Cas 538; 12 Jur 467; 9 ER 870, HL; 27 Digest (Repl) 220, 1757.

<sup>62</sup> (1603) Cary 87, 21 E.R. 46. Also found under the alternative spellings of *Mary Sankey alias Walgrave v Aurthur Goldinge*.

Mine and Henry Golding. Following the death of Henry Golding the bonds passed to the husband, Arthur Golding, as the administrator of this estate. Arthur Golding later refused to pay Mary Sanky any of the agreed amount. The court held that the husband was to pay the agreed amount. The case is regarded as the first instance in which separate property was conferred upon the wife.<sup>63</sup> Cioni comments on the use of the trust in this case:

The case established that whenever an estate was conveyed to trustees, to the separate use of a married woman, Chancery would allow her prerogative to hold or dispose of that estate unhampered by her husband's interference. Chancery's mechanism, the trust, enabled the evolution of the property rights of married women throughout succeeding centuries.<sup>64</sup>

This case illustrates the first steps being taken by equity to enforce an arrangement between a husband and wife who were living separately and who had established that the wife would receive separate maintenance so as to achieve this.<sup>65</sup> A similar decision can be found in *Ashton v Ashton*<sup>66</sup> in 1650 where the court enforced the £300 per annum to be paid by the husband to his wife, so long as they lived apart.

*Seeling and Elizabeth Crawley v Crawley*<sup>67</sup> in 1700 involved father and daughter trying to enforce an agreement against the husband. Following a quarrel the husband and wife decided to separate, the husband gave his wife's father a note stating that he would repay him the £160 which had passed upon marriage, on the condition that the father protect him against any debts created by the wife and any claims for maintenance. Elizabeth Crawley went with

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<sup>63</sup> W L Carne, 'A Sketch of the History of the High Court of Chancery from the Chancellorship of Wolsey to that of Lord Nottingham' 13 Va. L. Reg. n. s. 602 (1927-1928): '...the Chancery modified this view, and ceased to regard the wife as completely submerged in her husband's personality. This new doctrine first arose in cases of separations; in *Sanky v Golding*, W, the wife, joined in the sale of her realty; on her separation from H, a trust fund was created for W, out of part of the proceeds; W had occasion to sue the representative of the trustee to enforce the trust; he demurred for the non-joinder of H; but the demurrer was overruled, and he was ordered to answer at once.' p 88. See also O Freeman Haynes, 'Outlines of Equity: Being a Series of Elementary Lectures Delivered at the Request of the Incorporated Law Society.' 98 Law Libr. 109 (1858), 109: 'The earliest instances of conferring anything in the nature of separate property upon the wife during the coverture were, to the best of my research, those in which, upon a separation between husband and wife by agreement, a separate maintenance was secured to the latter. Such were the cases of *Sanky v Golding*..(In the footnote it is noted:) This is the earliest reported case that I have hitherto met with recognising separate maintenance.'

<sup>64</sup> M L Cioni, 'The Elizabethan Chancery and women's rights' in J Delloyd and J W McKenna Guth (eds), *Tudor Rule and Revolution: Essays for G R Elton from His American Friends* (Cambridge University Press 1982) 173-74.

<sup>65</sup> See O Freeman Haynes, 'Outlines of Equity: Being a Series of Elementary Lectures Delivered at the Request of the Incorporated Law Society.' 98 Law Libr. 109 (1858), 109: 'The earliest instances of conferring anything in the nature of separate property upon the wife during the coverture were, to the best of my research, those in which, upon a separation between husband and wife by agreement, a separate maintenance was secured to the latter. Such were the cases of *Sanky v Golding*. (In the footnote it is noted: This is the earliest reported case that I have hitherto met with recognising separate maintenance.')

<sup>66</sup> (1650) 1 Reports in Chancery 164. 21 E.R. 538.

<sup>67</sup> (1700) 2 Vernon's Cases in Chancery 386, 23 E.R. 847.

her child to live with her father, who maintained them both. The father and daughter now wished to compel the payment of the agreed £160, the father having agreed to the attached conditions. In response the husband offered to take his wife and child back and maintain them himself. The court upheld the agreement.<sup>68</sup> This judiciary in this case demonstrated that it was possible for someone to be held to their agreement, even when they were prepared to offer something which was perhaps more socially acceptable, that is to say the reunion of husband and wife.

### **Agreements and Ill Behaviour**

*Lady Oxenden v Sir James Oxenden*<sup>69</sup> was heard in 1705. The factual matrix is similar to that in *Sanky v Golding*; money had been placed on trust for the wife's separate maintenance of £300 per annum and the court upheld this arrangement. There is some discussion in the case that it would have been a far more problematic situation if there had not been the money held on trust to draw upon.<sup>70</sup> The overriding objective of the court in this case was to ensure that Lady Oxenden was taken care of financially, by ensuring that the husband made provision for his wife, from what was her own fortune.<sup>71</sup>

The use of a trust appeared again in *Williams v Callow*<sup>72</sup> in 1717. The wife's mother had placed £500 with a trustee, with the interest generated from this sum of money to be paid to the husband and wife. The husband is described as cruel, extravagant, rude and abusive,<sup>73</sup> and there are comparisons drawn with the behaviour of Sir James Oxendale, stating that relief had been granted to Lady Oxendale on the basis of his ill behaviour and beastliness, yet in this case the husband also displayed cruelty towards his wife.<sup>74</sup> The court upheld the wife's claim to have the interest of her portion of the trust money to provide her separate maintenance on

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<sup>68</sup> Comment on the effect of this case can be found in S Smith Bell, 'The Law of Property as Arising from the Relation of Husband and Wife' 67 Law Libr. i (1849-1850), 333: 'If, therefore, a trustee for the wife covenant with the husband to indemnify him against the debts of the wife, and the husband, on the other hand, covenant with the trustee to pay him an annuity for the maintenance of the wife, which they shall live separate, these covenants are between person competent to contract with each other, and the indemnity given to the husband by the trustee's covenant would be good and valuable consideration for the husband's covenant to pay the annuity, which latter would therefore be specifically enforced in equity, although the necessary effect of this would be to enable the wife to continue living apart from the husband.'

<sup>69</sup> (1705) Gilbert 1, 25 E.R. 1.

<sup>70</sup> *Lady Oxenden v Sir James Oxenden* (1705) Gilbert 1, 25 E.R. 1: '...the Lord Keeper doubted what to have done, had there been no such Trust Estate to have laid hold on, and said, he would give no Opinion, it not being the Case in Question.'

<sup>71</sup> *Lady Oxenden* (n 70): '...the constant Practice in this Court was to take Care of a Woman that had a Fortune.'

<sup>72</sup> (1717) 2 Vernon's Cases in Chancery 752, 23 E.R. 1091.

<sup>73</sup> *Williams v Callow* (1717) 2 Vernon's Cases in Chancery 752, 23 E.R. 1091, 1091.

<sup>74</sup> *Williams v Callow* (n 73) 1092.

the basis that this was a stronger case than the case between the Oxendales.<sup>75</sup> Once again the court ensured that the wife was provided for from her own wealth by upholding a private agreement.

The court considered the characteristics of the husband and wife in *Angier v Angier*<sup>76</sup> in 1718. The husband had beaten and abused his wife and had torn her clothes, the wife prevented the husband's friends and relatives coming to the house and is described as having a malicious temper. There is a description of the wife wearing dirty clothes in an attempt to vilify her husband, alongside details of her addiction to brandy.<sup>77</sup> Upon separation the husband had agreed to pay separate maintenance to his wife, of 20s. per week, but had withdrawn this payment due to his wish for reconciliation. The court concluded that the separate maintenance of £52 per annum should be paid to the wife. If reconciliation should ever occur, then the agreement would no longer be binding.<sup>78</sup> This decision did not go as far as to decree that separation had occurred, yet the court did facilitate monetary practicalities whilst the couple were living apart.

### Agreements and Creditors

The involvement of a creditor was tested in *Fitzer v Fitzer and Stephens*<sup>79</sup> in 1742. The wife, Catherine Adair, had previously been married to Lord Rivers, who upon his death had left her a £50 annuity. In 1726 the widow married Fitzer, but the couple separated in 1728. They created a deed of separation setting out that Fitzer would pay his wife £14 a year out of his own estate, and £24 from the £50 annuity, and £12 a year to his daughter. Subsequently all of Fitzer's property had been assigned to his creditor, Stephens.<sup>80</sup> Lord Hardwicke decided that the agreements was not good against the creditor, but would be good against the husband as per *Seeling* and *Angier*, thus upholding these previous decisions. Once the debt had been paid to Stephens he was to release all his right to the annuity.<sup>81</sup> A similar case was heard in 1786,

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<sup>75</sup> *Williams v Callow* (n 73)1092: 'Mrs. *Williams*, the wife, brought her cross bill to have the interest of her portion for her separate maintenance; and the *Chancellor* decreed it accordingly, declaring that this was a stronger case than that of Sir *James Oxenden* there only relieved from the ill behaviour and beastliness of Sir *James*, here cruelty mixed with it. Sir *James Oxenden* of substance to have maintained his wife, and lived suitable to his estate; here the husband has wasted all, and has no fixed habitation, but goes from alehouse to alehouse; and both cases alike in that the wife's fortune was in trustees, the bond for the £500 being taken in Mr. *Callow*, the wife's brother's name.'

<sup>76</sup> (1718) Gilbert 152, 25 E.R. 107.

<sup>77</sup> *Angier v Angier* (1718) Gilbert 152, 25 E.R. 107, 107.

<sup>78</sup> *Angier v Angier* (76) 108.

<sup>79</sup> (1742) 2 Atkyns 511, 26 E.R. 708.

<sup>80</sup> *Fitzer v Fitzer and Stephens* (1742) 2 Atkyns 511, 26 E.R. 708, [512].

<sup>81</sup> *Fitzer v Fitzer and Stephens* (n 80) 515.

*Stephens v Olive*.<sup>82</sup> In this case however the agreement held good against the creditor due to the covenants made by the trustees to protect the husband against the debts which the wife might create after the separation which provided valuable consideration.<sup>83</sup>

### Temporary Agreements and Reconciliation

More clarity with regard to the court's jurisdiction over such agreements was granted in the 1757 case *Wilkes v Wilkes*.<sup>84</sup> The husband and wife agreed to separate, and an agreement was created to the effect that the wife would receive £200 a year. A trust was created in the December of 1756, however the trustees refused to act without the direction of the court. In the March of the following year, the judge dismissed the Bill presented by the husband so far as it established an agreement for separation, as this was not within the jurisdiction of the court, but the court did uphold the terms of the agreement.<sup>85</sup> Further to this, the court would not uphold a mere temporary agreement in *Head v Head*<sup>86</sup> in 1747. The evidence contained in a letter from the husband to the wife's father only suggested a temporary separation,<sup>87</sup> and the husband had offered to maintain his wife again if she would return to him. Lord Hardwicke held that if she did not return within one month then the maintenance should cease, however the separate maintenance would be payable if the husband refused to take his wife back.<sup>88</sup>

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<sup>82</sup> (1786) 2 Brown's Chancery Cases 90, 29 E.R. 52. Full name of the case: Thomas Stephens, Executor of George Stephens v Edward Olive, Senior, and Jane his Wife; Deborah Mighell, Executrix of Samuel Mighell, Samuel Drawbridge, and Sukey his Wife; John Olive and Edward Olive, Infants; which Sukey Drawbridge and John and Edward Olive are the Children of said Edward and Jane Olive; Thomas Cripps and Richard Watts, and Others.

<sup>83</sup> *Stephens v Olive* (1786) 2 Brown's Chancery Cases 90, 29 E.R. 52, [92].

<sup>84</sup> (1757) Dickens 791, 21 E.R. 478.

<sup>85</sup> *Wilkes v Wilkes* (1757) Dickens 791, 21 E.R. 478, [792].

<sup>86</sup> (1747) 3 Atkyns 547, 26 E.R. 1115.

<sup>87</sup> The letter was used in the case: 'Dear Sir William, I shall always with pleasure remember my dear Quinette's many good qualities, and be far from imputing her misfortunes as faults, but as it will be much easier for me not to be a constant witness to what we can neither of us help, I am willing to send her £100 and no more, between this and Christmas next, and to continue her such quarterly payments, when it shall best suit my convenience, so long as we shall continue separate, with this one proviso, that if you should think at any time my pretty Gabrielle should want any kind of instructions, she may be sent to me, who will always receive and instruct her as my child, according to my parental duty; and have nothing further to add but my prayers that we may all enjoy quiet here, and everlasting quiet hereafter, and am, Dear Sir William, Your most dutiful son, Francis Head.' *Head v Head* (1747) 3 Atkyns 547, 26 E.R. 1115, [547].

<sup>88</sup> This position was also made clear by Lord Lyndhurst in later case of *Warrender v Warrender* (1835) II Clark & Fennelly 488, 6 E.R. 1239. The case involved deciphering the wife's legal domicile. He stated, 'It is at the most a mere temporary arrangement, a permission to live elsewhere; but the legal domicile remains as it was. One may pledge himself not to claim or institute a suit for conjugal rights; but he cannot be bound by any such pledge, for it is against the inherent condition of the married state, as well as against public policy.' *Warrender v Warrender* (1835) II Clark & Fennelly 488, 6 E.R. 1239, [561]-[562]. For further discussion of the case see: 'On the Conflict between the Law of Divorce in England and in Other Countries' 3 Monthly L. Mag. & Pol. Rev. 333 (1839): A summary of the issues is provided, 'The case of *Warrender v Warrender* has been carried by appeal from the Scotch courts to the House of Lords. The question in this last case, divested of all special circumstances, was, whether or not a Scotch divorce could dissolve a marriage contracted by a domiciled

The 1788 case of *Fletcher v Fletcher*<sup>89</sup> shed further light on when the court would enforce an agreement. The couple had married in 1774, and had lived together for ten years. The difficulty in the relationship was the wife's desire to live far beyond her means, and during their married life the couple had spent £100 a year more than her husband's £300 a year income.<sup>90</sup> In 1784 the husband proposed that a separation should take place and offered her an annual maintenance of £110. Such an agreement was drawn up, however, he refused to carry out the agreement and before the case reached the court of chancery he had been awarded the restitution of conjugal rights in the ecclesiastical court, thus the agreement was not enforced.<sup>91</sup> This collection of cases endorse the paradoxical position that it was not separation *per se* that was being recognised by the judiciary, but only the terms of the various agreements which made this possible in each case.

*Bateman v Countess of Ross*<sup>92</sup> was concerned with the effect of reconciliation. Olivia, Countess of Ross, became entitled to the estate of Castle Gore upon the death of her husband in 1764. She went on to marry Bateman in 1777, Bateman conveyed Castle Gore to trustees to provide Olivia with pin money of £500 per annum. A property in Dublin was also conveyed on trust for her.<sup>93</sup> A suit for divorce was instigated by Olivia in 1780, and in the following year a bill was filed against Bateman for her pin money and a separate maintenance. Furthermore, the bill stated that Bateman had failed to pay the encumbrances on the estate.<sup>94</sup> In 1784 the decision was taken that so long as separation should continue, Bateman would be able to use the remaining parts of Castle Gore, subject to outgoings and debts.<sup>95</sup> In 1795 Bateman was allowed to return to the property, Olivia also returned. Bateman stated that this was reconciliation, but Olivia stated she was simply protecting her property. Lord Eldon considered the decision of the ecclesiastical court, that reconciliation

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Scotchman in England, the parties to that marriage being *bona fide*, and not collusively for the purposes of the suit domiciled in Scotland. The Peers decided in the affirmative.' p 431. See also, C.K., 'The Conflict of the English and Scotch Law on the Subject of Marriage' 26 Law Mag. Quart. Rev. Juris. 135 (1841), 132-135.

<sup>89</sup> (1788) 2 Cox 99, 30 E.R. 46.

<sup>90</sup> *Fletcher v Fletcher* (1788) 2 Cox 99, 30 E.R. 46, [99]-[100].

<sup>91</sup> *Fletcher v Fletcher* (n 90)[99]: The jurisdiction of the court is discussed at the outset of the case: 'There is no doubt of the general jurisdiction of a Court of Equity to decree the specific performance of articles between husband and wife for a separation and a separate maintenance. But the Court exercises its discretion in this case very cautiously, and will not give its assistance until it has seen whether from the circumstances of the case, there is or is not a probability of the parties being reconciled. A sentence in the Ecclesiastical Court for the restitution of conjugal rites, is a reason for this Court refusing to give its assistance in such a case; and in general if such an agreement is not fit to be enforced, the Court will, on a cross bill, order it to be delivered up, though there may be cases in which no relief will be given to either party.'

<sup>92</sup> (1813) 1 Dow 235.

<sup>93</sup> *Bateman v Countess of Ross* (1813) 1 Dow 235, [235].

<sup>94</sup> *Bateman v Countess of Ross* (n 93) [236].

<sup>95</sup> This award was decided by arbitrators, see *Bateman v Countess of Ross* (n 93) [236]-[240].

following separation would remove the effects of any arrangement.<sup>96</sup> Lord Eldon continued by considering the case details and thus enforced the claim made by Olivia. The court was not convinced that this was reconciliation, yet the potential impact on private arrangements of reconciliation is evident.<sup>97</sup>

The focus of *Guth v Guth*<sup>98</sup> in 1792 was a German couple's private agreement. Differences had increased between the couple following their marriage and they had agreed to separate. The agreement created in 1785 stated that they would separate from each and that the wife was to move abroad immediately, and that she would receive £100 per annum from her husband for her maintenance and the upbringing of their son. The maintenance was duly paid until 1789, when the figure dropped to £10 per quarter due to the husband's bankruptcy.<sup>99</sup> Sir Richard P Arden, MR considered that the wife should be satisfied with the £40 per year, but in examining the authorities he concluded that he was bound to enforce the agreement.<sup>100</sup> This decision unequivocally follows the precedent that had been set by earlier case law, despite the judge's viewpoint on the matter and the particular circumstances of this case.

### **Doubts Expressed in the Court of Chancery: Too Late?**

By the end of the eighteenth century it is evident that not all members of the judiciary were satisfied with the case law which had passed through the court of chancery. Lord Rosslyn stated in 1797:

The Ecclesiastical Court according to the jurisdiction of this country has exclusive cognizance of the rights and duties arising from the state of marriage. Therefore I am completely at a loss to discover an equity to control the common law and admit a suit between husband and wife upon a personal contract (the case I am now putting),

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<sup>96</sup> *Bateman v Countess of Ross* (n 93) [245]: 'In regard to the point of reconciliation, notwithstanding what might be found in some of the Reports, he held the general doctrine to be clear, that a reconciliation after a separation entirely did away with the effects of it. This rested upon the ground of public policy; as it must not be permitted to parties to make agreements for themselves, to hold good whenever they chose to live separate.'

<sup>97</sup> *Bateman v Countess of Ross* (n 93) [245-246]: 'The question then was, whether, in the present case, there was a reconciliation? It appeared to him that there was not; unless their Lordships were prepared to say, that living under the same roof amounted to a reconciliation, though in a state of the highest animosity, which was the case here. He had no doubt but the decree and orders appealed from were correct, and he should therefore propose that they be affirmed, taking notice that the money decreed to be due having been paid into Court pending the appeal, Lady Ross should be at liberty to take it out, on satisfying the Court that Bateman was using harassing and vexatious delays.'

<sup>98</sup> (1792) 3 Brown's Chancery Cases 614.

<sup>99</sup> *Guth v Guth* (1792) 3 Brown's Chancery Cases 614, [615].

<sup>100</sup> *Guth v Guth* (n 99) [620]: Sir Richard P Arden, MR, 'After these authorities, independent of any other circumstances, and without proof, the question nakedly comes before me, whether I ought not to enforce this agreement; and I am of opinion, that I am bound, by the cases, to do so.'

and supersede the exclusive jurisdiction of the Ecclesiastical Court by entering into the consideration of it.<sup>101</sup>

Furthermore, Lord Eldon cast doubt on such agreements in 1805 in *Lord St. John v Lady St. John*.<sup>102</sup> Lord Eldon comments:

The contract of marriage cannot be affected by any contract between the parties. It is admitted every where, that by the known law, founded upon policy, for the sake of keeping together individual families, constituting the great family of the public, there shall be no separation.<sup>103</sup>

It is evident that Lord Eldon felt bound to enforce the agreement, despite his own opinions on the matter:

If this were *res integra*, untouched by *dictum* or decision, I would not have permitted such a covenant to be the foundation of an action, or a suit in this Court. But if *dicta* have followed *dicta*, or decision has followed decision, to the extent of settling the Law, I cannot upon any doubt of mine, as to what ought originally to have been the decision, shake what is the settled law upon the subject.<sup>104</sup>

Similar thoughts can be found in *Worrall v Jacob*<sup>105</sup> in 1817. Sir William Grant commented on the somewhat contradictory point raised above in *Wilkes v Wilkes*; that although the court of chancery would not recognise an agreement for separation it would enforce the terms contained within.

It should seem to follow, that the Court would not acknowledge the validity of any stipulation that is merely accessory to an agreement for separation. The object of the covenants between the husband and the trustee, is to give efficacy to the agreement between the husband and the wife; and it does seem rather strange, that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit, and the policy, of the law.<sup>106</sup>

Voluntary separation was not forbidden at common law, and a deed of separation was viewed as any other legal contract. The wife in *Wilson v Wilson*<sup>107</sup> had left her husband, and had filed a suit for nullity by reason of her husband's impotency. The husband was anxious to stop this

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<sup>101</sup> *Legard v Johnson* (1797) 3 Vesey Junior 352, 30 E.R. 1049, [358]-[359].

<sup>102</sup> (1805) 11 Vesey Junior 526, 32 E.R. 1192.

<sup>103</sup> *Lord St. John v Lady St. John* (1805) 11 Vesey Junior 526, 32 E.R. 1192, [532].

<sup>104</sup> *Lord St. John v Lady St. John* (n 103) [537].

<sup>105</sup> (1817) 3 Merivale 256, 36 E.R. 98.

<sup>106</sup> *Worrall v Jacob* (1817) 3 Merivale 256, 36 E.R. 98, [268]. Sir William Grant goes on to uphold the statement of Lord Eldon at [269], 'I am, therefore, only to repeat what the Lord Chancellor has said in the case of *Lord St. John v Lady St. John* - "If this were *res integra*, untouched by *dictum* or decision, I would not have permitted such a covenant to be the foundation of an action, or a suit in this Court. But, if *dicta* have followed *dicta*, or decision has followed decision, to the extent of settling the law, I cannot, upon any doubt of mine, as to what ought originally to have been the decision, shake what is the settled law upon the subject."'

<sup>107</sup> (1848) 1 HL Cas 538; 12 Jur 467; 9 ER 870, HL; 27 Digest (Repl) 220, 1757.

suit and instead proposed a separation agreement stating that the wife would receive a £1500 annuity and after some negotiation an agreement was created.<sup>108</sup> The House of Lords upheld the specific performance of the articles, and in addition upheld the injunction to prevent the husband applying to the ecclesiastical court for the restitution of conjugal rights. The court of chancery commented on the progression of separation agreements and the influence of the common law and the ecclesiastical courts in *Hunt v Hunt*,<sup>109</sup> the Lord Chancellor, Lord Westbury stated:

There was, however, for a very long period, still a great reluctance to recognize them to their full extent. That reluctance, as I have already observed, I think partook in great measure of religious principle, and was derived from religious impressions, and accordingly there has been a gradual advance in the doctrine of the validity of these deeds of separation.<sup>110</sup>

The court of chancery in *Hunt* considered the decision in *Wilson*, considering the unsatisfactory scenario of where a wife's family may have paid the husband for her separation, and after a short while the husband could simply apply to the ecclesiastical courts for the restitution of conjugal rights.<sup>111</sup> In *Hunt* an injunction was granted to prevent the separation agreement being defeated by the husband's application to the ecclesiastical court, thus upholding and supporting an agreement of separation.<sup>112</sup>

### **Pre- and Post- Nuptial Agreements Distinguished**

In 1802 Mr Justice Le Blanc cast doubt on the distinct treatment of agreements which contemplated future separation and the position of agreements for present separation:

But it is objected, that any agreement of this sort is contrary to the policy of the law in respect to the marriage-state. But if so, the objection would have weighed as much in every case where the contract tended to facilitate separation between husband and wife. If the principle of such contracts be illegal, the Court cannot weigh the degree of facility; but every contract which at all facilitates such a separation must be void. Yet it has been holden that deeds of separation are not illegal; though the argument would apply as well to those cases. I cannot see how it can be more illegal to contract for separate maintenance in case of future than of present separation.<sup>113</sup>

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<sup>108</sup> *Wilson v Wilson* (1848) 1 HL Cas 538; 12 Jur 467; 9 ER 870, HL; 27 Digest (Repl) 220, 1757, [537].

<sup>109</sup> (1862) 4 De GF & J 221; 31 LJ Ch 161; 5 LT 778; 26 JP 243; 8 Jur NS 85; 10 WR 215; 45 ER 1168, LC; 27 Digest (Repl) 291, 2369.

<sup>110</sup> *Hunt v Hunt* (1862) 4 De GF & J 221; 31 LJ Ch 161; 5 LT 778; 26 JP 243; 8 Jur NS 85; 10 WR 215; 45 ER 1168, LC; 27 Digest (Repl) 291, 2369. [228].

<sup>111</sup> *Hunt v Hunt* (n 110) [231].

<sup>112</sup> *Hunt v Hunt* (n 110) [237].

<sup>113</sup> *Lord Rodney and the Honourable John Rodney v Chambers* (1802) 2 East 283, 102 E.R. 377, [297].

This reasoning was not upheld in future cases however, where it was established that agreements which contemplated a future separation were void, as will be seen below.<sup>114</sup>

### **The Warring Westmeaths**

*Westmeath* involved the creation of a post-nuptial agreement and a separation agreement between Lady Emily Cecil and George Nugent Lord Delvin, later the Marquis and Marchioness of Westmeath, a title in the Peerage of Ireland. The ‘War of the Westmeaths’ has been documented by Stone,<sup>115</sup> concluding that:

...the legal wars between the Westmeaths includes examples of almost all the possible causes of marital breakdown, from cruelty to adultery; from disputes over money to quarrels over where to live; from incompatibly to sex to occasional blows; from battles over child custody to struggles over the descent of property; from quarrels within the family to basic flaws in personal character and temperament.<sup>116</sup>

She was extremely wealthy and he was an impoverished Irish Peer whose mother had been divorced for her adultery, and who himself already had a child with a mistress.<sup>117</sup> George evidently had a short temper and there is evidence of his rage leading him to be imprisoned for three months and also reports of him physically fighting in the House of Lords.<sup>118</sup> Emily is shown to be the mentally stronger character, being quite a cold and calculating bully who used vengeance and the fear of scandal in order to manipulate George. This volatile combination of personalities within a marriage produced a legal battle which lasted fifteen years, and most importantly in terms of this thesis, the creation of a post-nuptial agreement.

The couple married in May 1812, and there were signs of violence within the first few years of marriage, possibly linked to the friction on where they should live. Following a two year stay at his family seat, Clonyn Castle in County Westmeath, Ireland, Emily insisted on a move back to London, perhaps more accustomed to the luxurious Hatfield House. The violence within the relationship seems to disappear upon the birth of their daughter Rosa in 1814. However that changed when Emily discovered that George was still seeing his mistress and they had since had another child, furthermore George was supporting this second family.

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<sup>114</sup> J F MacQueen, ‘The Rights and Liabilities of Husband and Wife.’ 66 Law Libr. i (1849): Comment is made on subsequent decisions, ‘However, a distinction has been taken, and is still maintained on grounds of policy.’ 343.

<sup>115</sup> L Stone, *Broken Lives, Separation and Divorce* (n 48) 284-346. See also D C Wright, ‘Well-Behaved Women Don’t Make History: Rethinking English Family, Law, and History’ 19 Wis. Women's L.J. 211 (2004).

<sup>116</sup> L Stone, *Broken Lives, Separation and Divorce* (n 48) 284-344, 344.

<sup>117</sup> L Stone, *Broken Lives, Separation and Divorce* (n 48) 284.

<sup>118</sup> L Stone, *Broken Lives, Separation and Divorce* (n 48) 295.

In 1815 the relationship deteriorated to the point where it was necessary for the couple to come to an agreement with the help of a mutual friend, Henry Wood. George agreed that he would never see his mistress or children again and would only provide them with limited financial support, in return Emily promised never to mention them again. The couple left for a nine month stay in Paris.<sup>119</sup>

The trip did not help the couple save their relationship. One event on the trip was to be later used as evidence of the husband's cruelty. The Judge, Sir John Nicholl, considered the acts of violence used against Emily and was particularly persuaded by the use of violence during a trip to Paris:

Lord and Lady Westmeath, Miss Wood and Janet Serres, having stopped at the posthouse in this village, Lady Westmeath, who had suffered from sea-sickness, observing the wretchedness of the accommodation said, "Good God, Lord Westmeath, what place have you brought us to!" upon which Lord Westmeath struck Lady Westmeath with a violent blow, which staggered her, and would have fallen, but she was caught by Miss Wood, who said, "Lord W., how can you be such a brute?" And Lord W. said, addressing Lady W., "D-n you to h-, I wish I had never seen you."<sup>120</sup>

In addition to acts of violence, Emily learned that George was still in touch with his second family despite their agreement. She left in 1817, taking Rosa with her; her plan was to sue him for a divorce *a mensa et thoro* the ecclesiastical court. Emily's parents desperately opposed this action for the fear of scandal, and George was eager for her to return and apologised for his ill treatment of her. Emily waited for two months before agreeing to reconciliation, and had in the meantime undoubtedly manipulated George into agreeing to her terms. In the December of 1817 an agreement was drafted stating that if she should decide to leave him in the future he would allow her separate maintenance and the custody of Rosa. The marriage only continued for a few months and a separation agreement was created in May 1818. Again, Emily wanted to take the case to the ecclesiastical court, but was persuaded to accept the separation agreement. An agreement was drafted, very much in Emily's favour, upholding the terms of the 1817 agreement. In order to conceal their separation however, George was permitted to live as a lodger with Emily. The couple only

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<sup>119</sup> L Stone, *Broken Lives, Separation and Divorce* (n 48) 284-289.

<sup>120</sup> *The Examiner*, Report on the Arches Court, 28.01.1827.

met at meal times. This would prove disastrous for Emily when the courts came to consider their second agreement.<sup>121</sup>

The *Westmeath* case is not the first case in which a husband and wife have tried to establish an agreement for future separation. The Court of Exchequer in *Durant v Titley*<sup>122</sup> in 1819 declared that, ‘the deed being made in contemplation of a future separation of a husband and wife, at the pleasure of the wife, it was contrary to the policy of marriage, and void in law.’<sup>123</sup> In *Lord St. John v Lady St. John*,<sup>124</sup> it was stated that, ‘Consenting to live together they cannot stipulate, that at a future period they will not live together as husband and wife.’<sup>125</sup> In *Westmeath*, however, there is the contrast between the court’s treatment of an agreement which contemplates a future separation and an agreement created upon separation.

The case reached court in 1820, yet the wife’s maintenance had not been paid since 1819. Contemporaneous attitude towards the non payment of maintenance can be observed, ‘Even admitting that, in point of law, there was some ground for resisting the payment, still as a man and gentlemen, he should have felt himself bound to afford to his wife at least the means of subsistence, if not of supporting her rank in society.’<sup>126</sup> It seems extremely likely that George’s solicitor would have been aware of Lord Eldon’s personal dislike of such agreements. It is notable that George’s legal advisor was Attorney General J. S Copley, later Lord Lyndhurst, who would hear the case when it reached the House of Lords in ten years time. True to form Lord Eldon did indeed present his aversion to separation agreements, ‘If the question, whether the Courts would or would not act upon articles of this sort, were not prejudiced by any decisions, I should say, that I think no Court ought to act on them...’<sup>127</sup> In considering the deed of 1817 he states, ‘the first deed cannot stand for a moment.’<sup>128</sup> There are several further cases between the couple,<sup>129</sup> and in 1826 the Consistory Court considered

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<sup>121</sup> The consequences of this were discussed in *Westmeath v Westmeath* (1827) 162 ER 1012, 2 Hag Ecc Supp 6, this is considered below at p 61.

<sup>122</sup> (1819) 7 Price 577, 146 E.R. 1066.

<sup>123</sup> *Durant v Titley* (1819) 7 Price 577, 146 E.R. 1066, [579].

<sup>124</sup> (1805) 11 Vesey Junior 526, 32 E.R. 1192.

<sup>125</sup> Mr Romilly in *Lord St. John v Lady St. John* (1805) 11 Vesey Junior 526, 32 E.R. 1192, [528].

<sup>126</sup> *The Morning Post*, 20.04.1829.

<sup>127</sup> *The Earl of Westmeath v The Countess of Westmeath* (1821) Jacob 126, 37 E.R. 797, [134]-[135].

<sup>128</sup> *The Earl of Westmeath v The Countess of Westmeath* (n 127) [136]. In 1827 Bayley J added, ‘The case of *Durant v Titley* shews clearly that the first deed was bad, inasmuch as it provided not for an immediate but a future separation of the parties.’ *Hindley v The Marquis of Westmeath* (1827) 6 Barnewall and Cresswell 200, 108 E.R. 427, [214].

<sup>129</sup> *Lady Westmeath v Marquess of Westmeath* Court of King’s Bench, 162 E.R. 987; (1829) 2 Hag. Ecc. 653; *Westmeath v Westmeath* Court of King’s Bench 162 E.R. 1043; (1829) 2 Hag. Ecc. 148; *Hindley v The Marquis of Westmeath* Court of King’s Bench 108 E.R. 427; (1827) 6 B. & C. 200; *The Earl of Westmeath v The*

that the circumstances met the demands of matrimonial cruelty and granted her the judicial separation she sought. Malcomson describes this as a 'freak verdict' based on the degree of cruelty experienced falling below the normal criteria of establishing such a claim.<sup>130</sup> It is evident that class played a role in the decision:

In a low rank of life, persons of different sexes might exchange blows, without its causing any great degree of injury to feelings; yet even in this rank, as well as others, it had been considered unmanly to strike a woman; but in a higher rank, where a Nobleman or a Gentleman, in whose mind ferocity might be supposed to be softened by education, was proved to inflict personal violence on his wife, the crime became more aggravated.<sup>131</sup>

In 1830 the validity of the two deeds was finally decided in the House of Lords. The public policy surrounding the separation agreement was discussed, 'The law has imposed upon husband and wife duties of the most sacred nature, which one would have supposed that no Court would allow them to engage not to observe. But there are many cases...breaking in upon the principle.'<sup>132</sup> This demonstrates a growing acceptance towards abolishing this public policy rule. The Lord Chancellor, Lord Lyndhurst, distinguished between the 1817 post-nuptial agreement and the 1818 separation agreement:

This was the deed of 1817, and on the face of that deed it is contrary to the policy of the law and cannot be supported. About that part of the decree, therefore, which declares that deed to be null and void, there can, I think, be no question. Then came the other deed, dated the 30 May 1818, but which was executed in August of that year. The differences had still continued, and then this deed of separation was executed, and on the face of it the same objection as that to the deed in 1817 does not apply.<sup>133</sup>

The Earl of Eldon commented on separation agreements:

I know that about thirty years ago a doctrine prevailed there that a husband and wife had the power to separate themselves by deeds of this kind, almost to all intents and purposes. That doctrine was founded on an opinion of one of the greatest Judges that ever sat in Westminster-hall, Lord Mansfield.<sup>134</sup>

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*Countess of Westmeath* Court of King's Bench 162 E.R. 992; (1826) 2 Hag. Ecc. 1; *The Marquess of Westmeath v The Marchioness of Westmeath* Court of King's Bench 162 E.R. 334; (1824) 2 Add. 380.

<sup>130</sup> A P W Malcomson, *The Pursuit of the Heiress: Aristocratic Marriages in Ireland 1740-1840* (Ulster Historical Foundation 2006, Belfast) 143.

<sup>131</sup> *The Examiner*, Report on the Arches Court, 28.01.1827.

<sup>132</sup> *Westmeath v Westmeath* (1830) 1 Dow & CI 519, 624.

<sup>133</sup> *Westmeath v Westmeath* (n 132) 627.

<sup>134</sup> *Westmeath v Westmeath* (n 132) 628.

The judgment mentioned here can be found in the 1784 case *Barwell v Anne Brooks*,<sup>135</sup> in which Lord Mansfield declared, ‘The fashion of the times has introduced an alteration, and now husband and wife may, for many purposes, be separated, and possess separate property, a practice unknown to the old law.’<sup>136</sup> In discussing the agreement made during marriage however Eldon states, ‘As to the deed of 1817, it is impossible that it can be supposed for a moment to be sustainable.’<sup>137</sup> As to the validity of the 1818 agreement, the House of Lords upheld this reasoning from the ecclesiastical court in 1827 in where it had been decided that the cohabitation following the execution of the second deed rendered it null and void.<sup>138</sup>

Stone reports that Emily died in 1858, and within four weeks of her death George remarried, aged 73,<sup>139</sup> the details provided on this relationship are however sparse. Further research shows that he married Maria Jarvis on 8 February 1858,<sup>140</sup> who later he divorced due to her adultery. A newspaper report describes his second wife and the relationship she had with George:

She was a person of humble position in life, and was considerably younger than the Marquis. She possessed great personal beauty, singularly pleasing manners, and a winning address. Previous to the marriage the Marquis made a settlement upon her. The settlement was liberal, considering his circumstances; for his estate was small and his income strained for a person of his rank. He was also liberal to her and to her family as long the cohabitation lasted, and there was no reason why they should not have lived happily together, in spite of the disparity of position, for she was not an educated woman and not of age. They did live happily down to July or August, 1860. Lady Westmeath then went to Dieppe. She was shortly followed by his Lordship, who did not stay long, but returned and left her there. At Dieppe she made the acquaintance of George Edward Chapman, the son of the British Consul, and he became intimate with her.<sup>141</sup>

This seems to indicate that George had perhaps mellowed with age, and the financial toll of the legal battles with Emily had an impact on his funds is apparent. George remarried;

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<sup>135</sup> (1784) 3 DOUGL. 372.

<sup>136</sup> *Barwell v Ann Brooks* (1784) 3 DOUGL 372, 374.

<sup>137</sup> *Westmeath v Westmeath* (1830) 1 Dow & CI 519, 628, [545].

<sup>138</sup> *Westmeath v Westmeath* (1827) 162 ER 1012, 2 Hag Ecc Supp 61.

<sup>139</sup> L. Stone, *Broken Lives, Separation and Divorce* (n 48) 343.

<sup>140</sup> Marriage certificate found at <[http://search.ancestry.co.uk/cgi-](http://search.ancestry.co.uk/cgi-bin/sse.dll?rank=1&new=1&MSAV=1&msT=1&gss=angs-g&gsfn=maria&gsln=jarvis&msgdy=1858&msgdy_x=1&cpxt=1&catBucket=rstp&uidh=iv6&cp=11&pcat=RO)

[bin/sse.dll?rank=1&new=1&MSAV=1&msT=1&gss=angs-g&gsfn=maria&gsln=jarvis&msgdy=1858&msgdy\\_x=1&cpxt=1&catBucket=rstp&uidh=iv6&cp=11&pcat=RO](http://search.ancestry.co.uk/cgi-bin/sse.dll?rank=1&new=1&MSAV=1&msT=1&gss=angs-g&gsfn=maria&gsln=jarvis&msgdy=1858&msgdy_x=1&cpxt=1&catBucket=rstp&uidh=iv6&cp=11&pcat=RO)  
OT\_CATEGORY&h=7699888&recoff=11+12+34&db=LMAmarriages&indiv=1.>

<sup>141</sup> *The Derby Mercury*, 02.04.1862.

Elizabeth Charlotte Verner was to be his third and last wife, the couple married in 1864.<sup>142</sup> George died in 1871.

### The Clash of the Cocksedges

The effect of a financial agreement contemplating future separation created before marriage was first considered in the case of *Cocksedge v Cocksedge*<sup>143</sup> in 1844. The decision extended the principle regarding contemplating future separation from *Westmeath*. In *Cocksedge* it is explained, ‘The present case is distinguished from the reported cases by the fact that the settlement was not made after marriage, but was entered into before marriage.’<sup>144</sup> The agreement set out the level of maintenance to be paid to the future wife in the event of the couple’s separation or the husband’s death. It was stated, ‘The policy of the law is opposed to deeds providing for the event of future separation.’<sup>145</sup> The position was reinforced by referring to Lord Hardwicke in *Moore v Moore*,<sup>146</sup> ‘These separate maintenances are not to encourage a wife to leave her husband, whatever his behaviour may be; for, was this the construction, it would destroy the very end of the marriage, and be a public detriment.’<sup>147</sup> However, unlike *Westmeath*, there is currently little known about the circumstances surrounding the agreement and details of the parties’ lives following the agreement.

The parties created their ‘strange’<sup>148</sup> agreement on 13 September 1836, the agreement was signed by Thomas Martin Cocksedge, Ann Whale, and her father, William Whale. The agreement stated that Cocksedge would charge his freehold property with the provision for the maintenance of his wife of £400 per year upon their separation or his death.<sup>149</sup> The couple subsequently married on 14 September 1837. The parties were originally from Essex and Bury; local papers from these areas announce the marriage and provide further details. The *Essex Standard* announces the marriage of Marianne, the second daughter of William Whale, of the Crown Inn, Billericay to Cocksedge Esq of Bury at Great Burstead.<sup>150</sup> The *Bury and*

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<sup>142</sup> Marriage certificate found at < <http://search.ancestry.co.uk/cgi-bin/sse.dll?rank=1&new=1&MSAV=0&msT=1&gss=angs-c&gsln=Westmeath&msgdy=1864&sbo=0&uidh=iv6&msgdm=7&pcat=34&h=30811870&recoff=7&db=FreeBMDMarriage&indiv=1>>

<sup>143</sup> (1844) 14 Sim 244, 13 LJ Ch 384.

<sup>144</sup> *Cocksedge v Cocksedge* (1844) 14 Sim 244, 13 LJ Ch 384, 396.

<sup>145</sup> *Cocksedge v Cocksedge* (n 144) 397.

<sup>146</sup> (1 Atk. 272).

<sup>147</sup> *Moore v Moore* (1 Atk. 272) at p 276.

<sup>148</sup> *The Morning Post*, 26.07.1844.

<sup>149</sup> This amount being the equivalent to approximately £20,000 on 1 August 2012. Calculation carried out at <<http://www.nationalarchives.gov.uk/currency/>>

<sup>150</sup> *The Essex Standard*, 22.09.1837.

*Norwich Post* announces the marriage of the eldest son of the late M. T. Cocksedge of St Edmunds Hill to Ann Whale.<sup>151</sup> The case reports provide some evidence as to why such an agreement was wanted, stating, ‘What is there unlawful in a father absolutely refusing his consent to the marriage of his infant daughter, unless the proposed husband will agree to settle an annuity for her separate use from the time of the marriage so long as she lives?’ In addition, ‘Why may not the father in this manner guard himself against the possibility of having at some future time, the maintenance of his married daughter cast upon him?’<sup>152</sup> The 1841 Census shows a 44 year old William Whale living with eight other people between the age of 1 and 19 with the surname Whale, in addition to thirteen other household members.<sup>153</sup> There is no spouse listed on the census.<sup>154</sup> Securing the future of his young daughter may have been the driving force behind the agreement. Given the events which subsequently occurred it is possible that William Whale’s views on Cocksedge’s character and his suitability for his daughter may have influenced this decision, this is of course purely speculative.

The couple lived together until August 1843<sup>155</sup> and divorce proceedings can be found on 6 June 1844.<sup>156</sup> As noted above, obtaining a divorce prior to the Matrimonial Causes Act 1857 would have been costly. Thomas Martin Cocksedge set about establishing that his wife had committed adultery,<sup>157</sup> his wife brought the allegation of adultery and cruelty against him by providing details of his episodes of intoxication, threats and use of violence against her, most notably firing a pistol at or near to her.<sup>158</sup> The legal question arising from this charge by the wife was whether this could be pleaded in bar to, or defence to, a suit for adultery. Previous case law had established that cruelty alone could not be pleaded in this way,<sup>159</sup> in this case it

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<sup>151</sup> *Bury and Norwich Post*, 20.09.1837.

<sup>152</sup> *Cocksedge v Cocksedge* (1845) 5 HARE, 396, 398.

<sup>153</sup> It is certainly possible that the Crown Inn had lodgings, and so the other people on the census may not be relatives: <<http://deadpubs.co.uk/EssexPubs/Billericay/crown.shtml>> Last accessed 1 August 2012.

<sup>154</sup> 1841 England Census. Cross referenced for accuracy with the details of William Whale’s Will, accessed at: <[https://secureweb1.essexcc.gov.uk/SeaxPAM/result\\_details.asp?DocID=975705](https://secureweb1.essexcc.gov.uk/SeaxPAM/result_details.asp?DocID=975705)> Last accessed 1 August 2012.

<sup>155</sup> *Cocksedge v Cocksedge* (1844) 14 Sim 244, 245.

<sup>156</sup> *Cocksedge v Cocksedge* (1844) 1 ROB.ECC.91.

<sup>157</sup> S Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press, Oxford 2005) 161: ‘A man could have his marriage dissolved before as well as after the 1857 Act if he could establish that his wife had committed adultery, that he had not done so, and that there was no connivance or collusion between the parties.’

<sup>158</sup> *Cocksedge v Cocksedge* (n 156), [97].

<sup>159</sup> *Chambers v Chambers* (1 Hagg. Con. 439) referred to.

was decided that the wife could plead adultery in addition to cruelty.<sup>160</sup> This decision was to have very little significance within the following three years of their lives.

Case reports dating from 25 July 1844<sup>161</sup> and 27, 30 June, 3 July 1845<sup>162</sup> show the claim by Ann Cocksedge and her father seeking specific performance of the agreement. In the midst of the case the appointment of a receiver on behalf of a married lady named Cocksedge over Mr Cocksedge's property is announced in a local newspaper on 31 July 1844.<sup>163</sup> However what the case reports do not indicate is that in July 1845 Thomas Martin Cocksedge and his business partner Walter Westrup, Millers and Biscuit Bakers, were declared bankrupt.<sup>164</sup> Details of the sale of their 'extensive' business premises, including a bake house and a warehouse, alongside a list of creditors appeared in the January of 1845.<sup>165</sup>

On 5 May 1846 Thomas Martin Cocksedge died in a fire, aged 31.<sup>166</sup> The report appears in the local paper and details of this death were also recorded by a local diarist, James Maggs. It was concluded that he had been reading in bed and had fallen asleep causing the candle to fall onto his bedding, which set fire to his bed. He died within hours of being rescued from his bedroom.<sup>167</sup> Ann Cocksedge married John Hull Walton Harris on 12 June 1847 in Bloomsbury, London.<sup>168</sup> A rather blunt summary of Thomas Martin Cocksedge's life appears in *The Oakes Diaries 1778-1827*, 'Thomas Cocksedge eldest son of Martin Thomas Cocksedge...married a barmaid and ran through his money...'<sup>169</sup> This somewhat short and ruinous life however marks the first instance in which an agreement contemplating future separation was deemed to be void by the judiciary.

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<sup>160</sup> A report of the divorce appeared in the *Bury and Norwich Post and East Anglian*, 10. 07.1844.

<sup>161</sup> *Cocksedge v Cocksedge* (n 144).

<sup>162</sup> *Cocksedge v Cocksedge* (1845) 5 HARE, 396.

<sup>163</sup> *Bury and Norwich Post*, 31.07.1844.

<sup>164</sup> *London Gazette*, 18.07.1845, 159.

<sup>165</sup> *London Gazette*, 24.01.1845, 229.

<sup>166</sup> *Essex Standard*, 08.05.1846.

<sup>167</sup> *The Era*, 10.05.1846 and *Southwold Diary of James Maggs*, 1818-1876 at 132.

<sup>168</sup> Their marriage certificate is available at:

<[http://search.ancestry.co.uk/iexec?htx=View&r=5538&dbid=1623&iid=31280\\_19517600253&fn=Ann&ln=Cocksedge&st=r&ssrc=&pid=5121856](http://search.ancestry.co.uk/iexec?htx=View&r=5538&dbid=1623&iid=31280_19517600253&fn=Ann&ln=Cocksedge&st=r&ssrc=&pid=5121856)>

<sup>169</sup> *Oakes' Diaries 1778-1827*, p 333 Accessed at:

<http://search.ancestry.co.uk/browse/view.aspx?dbid=7548&iid=7548-Volume2-0343&rc=340,355,471,394;998,662,1146,699;1192,1093,1318,1130;498,1267,627,1305;896,1266,1022,1303;205,1482,445,1521;1012,1481,1121,1518;1133,1480,1262,1517;1275,1479,1443,1524;1112,1524,1239,1561;205,1612,444,1652;471,1615,579,1651;1251,1609,1377,1646;1394,1609,1562,1654;653,1656,820,1700;204,1742,443,1782;463,1744,574,1781;582,1743,711,1781;1301,1737,1428,1775;1441,1737,1609,1783;204,1872,442,1912;461,1874,588,1912;1054,1870,1161,1907;1171,1867,1335,1912;203,2003,442,2042;461,2004,588,2042;920,2002,1029,2038;1038,1999,1165,2037;1176,1996,1340,2041;202,2133,441,2172;1222,2126,1388,2170&pid=758&ssrc=&fn=Thomas+Martin&ln=Cocksedge&st=g>

## Subsequent Decisions: Maintaining the Distinction

The 1853 case of *Cartwright v Cartwright*<sup>170</sup> involved the creation of an agreement which contemplated a future separation. Henry Cartwright married Ellen Grimes in 1839, Ellen's mother had previously married Henry's father. Prior to the marriage Henry and Ellen created an agreement containing a clause setting out that in the event of any separation, due to a disagreement or otherwise, that the rents received on certain properties would be paid to the husband and not the wife. If however, the wife were to live longer than her husband, the rents would be payable to her.<sup>171</sup> The two couples lived together until Ellen left her husband in 1846, she left the house with her mother, but she continued to correspond with Henry.<sup>172</sup> In 1849 Ellen's mother died, and Henry requested that his wife should return to him, following this request he sought the restitution of conjugal rights. Ellen raised the allegation of adultery against him and was successful in obtaining a divorce on 26 June 1851.<sup>173</sup>

Following the divorce, Henry Cartwright tried to claim for the payments to be made over to him as per the agreement. The claim was dismissed, as it was decided the husband could not rely on the agreement. Vice Chancellor Wood's decision was made on the basis of preventing the husband from benefiting from his misconduct.<sup>174</sup> Henry appealed against this decision. Lord Justice Knight Bruce stated:

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<sup>170</sup> (1853) 3 De GM & G 982.

<sup>171</sup> *London Standard*, 07.03.1853: 'Provided always, and it is hereby further declared and agreed by and between the parties to those present, that in a case separation shall take place, by Henry Cartwright and Ellen Grimes, after the solemnisation of the said intended marriage, then, and in such case the rents, issues, and profits of the said lands and premises limited in use to the said Moses Cartwright and Robert William Haud, and their heirs, during the natural life of the said Ellen Grimes, in remainder expectant upon the decease of the said Thomas Cartwright and subject to the aforesaid two several terms of years aforesaid, shall from the time of such separation, and thenceforth during the joint natural lives of the said Henry Cartwright and Ellen Grimes, but subject and without prejudice to the life estate of the said Thomas Cartwright, and also without prejudice to the said two terms, or such one of them as shall be capable of being exercised in the event which may happen, and the trust thereof, be paid or shall be permitted to be received and taken by the said Henry Cartwright and his assigns, to and for his and their own use and benefit, instead of being paid to the said Ellen Grimes for her sole and separate use, as hereinbefore directed, but without prejudice to the right of the said Ellen Grimes to receive such rents and profits for the remainder of her natural life, in case she should happen to survive the said Henry Cartwright.'

<sup>172</sup> Details found in the *London Standard*, 26. 05.1853.

<sup>173</sup> *London Standard*, 27.06.1851: 'Arches' Court – Thursday. (Before Sire H Jenner Fust) *Cartwright v Cartwright*. This suit was originally promoted by Mr. Cartwright against Mrs Cartwright, for restitution of conjugal rights; and in reply an allegation had been given in by her, charging her husband with adultery, and subsequently, additional articles, charging him with further adultery. Dr. Jenner was opening the case when The Queen's Advocate (with whom was Dr. Robinson) admitted on behalf of the husband his inability to deny the charge of adultery, and could not resist the prayer of Mrs. Cartwright. The court pronounced against Mr. Cartwright, and condemned him in costs.'

<sup>174</sup> *London Standard*, 08.03.1853: 'His Honour, who had perused a long correspondence between the parties, involving matters of a domestic nature connected with their differences, said that if the general question of the

I apprehend that the theory of the law is, that a man and wife cannot live in a state of separation, such as is meant here, without failing in some of the duties in which society has an interest. Property has here been settled for the benefit of the wife, subject to the proviso for varying her rights in a way favourable to the husband, if a separation take place. I am of the opinion that such a provision is against public policy, and is therefore void.<sup>175</sup>

Lord Justice Turner added, ‘the policy of the law is founded on the relation of husband and wife, and the importance to society of maintaining that relation.’<sup>176</sup>

*H v W*,<sup>177</sup> reported as *Bailey v Pinnock*,<sup>178</sup> was concerned with an agreement made before marriage setting out that property was to be conveyed to the intended wife, the case suggests that there may have been something about the husband’s character which rendered him unsuitable to trust him with the entire income.<sup>179</sup> The 1835 agreement set out the term as, ‘if she should so long continue to live with him, and should not live separate and apart from him through any fault of her own.’<sup>180</sup> The wife left in 1838 and the husband died in 1851. The case was brought on behalf of one of the couple’s two children. It was noted that if the clause had made mention of the wife committing adultery then it would not have been considered as contrary to the law. Vice Chancellor Wood could not distinguish the substance of this case from *Cartwright* and so allowed the wife to take the property, concluding:

...it seems to me to be decided that, by the policy of our law, no state of future separation can ever be contemplated by agreement made either before or after the marriage. It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate.<sup>181</sup>

*Lily, Duchess of Marlborough v Duke of Marlborough*<sup>182</sup> was distinguished from *Cocksedge*, *Cartwright* and *H v W*. It is suggested in the following Chapter that the *Marlborough* case

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legality of such a clause were the sole question before him, he should have probably taken time to consider his judgment, as the authorities were somewhat conflicting. But the conduct and position of the parties in this case, the wife’s separation being caused by the husband’s own act, and being justified afterwards by the sentence of divorce, made it impossible for him to hold that the plaintiff could ask to have the rents and profits paid over to him instead of his wife. To hold otherwise would be to say that a party could gain a benefit by his own misconduct.’

<sup>175</sup> *London Standard*, 26.05.1853.

<sup>176</sup> *London Standard* (n 175).

<sup>177</sup> (1857) 3 K & J 382.

<sup>178</sup> See *London Standard*, 08.05.1857 and *London Daily News*, 08.05.1857.

<sup>179</sup> *H v W* (1857) 3 K & J 382, 385.

<sup>180</sup> *H v W* (n 179) 382.

<sup>181</sup> *H v W* (n 179) 387.

<sup>182</sup> [1901] 1 Ch. 165.

was inaccurately used in 2008 to justify the enforceability of post-nuptial agreements.<sup>183</sup> The case involved the settlement of family estates belonging to the Duke of Marlborough, then the Marquis of Blandford. Part of the deed provided him with the power, ‘to appoint any woman whom he may marry’ so that she would receive an annual sum of money provided by the estate. The Marquis of Blandford married Lady Albertha Hamilton in 1869, and appointed her under the power granted in the settlement. The Marquis became the Eighth Duke following the death of his father, the Seventh Duke, in July 1883. The Seventh Duke left Frances Anne as his widow. In the November of that year the Duke and Albertha divorced. He subsequently married Lillian Warren Price in 1888, and created a post-nuptial settlement which appointed her as per his power under the settlement.<sup>184</sup> The Eighth Duke died in 1892, and Frances Anne died in 1899. The defendant in the case was the Ninth Duke, the son of Albertha. He had disentailed the settled estates upon his twenty-first birthday, and had appointed his wife under the power of the deed. The cases *Cocksedge*, *Cartwright* and *H v W* were presented in an attempt to demonstrate that the power, ‘to appoint to any woman whom he may marry’ was contrary to public policy and therefore rendering the post-nuptial settlement between the Eighth Duke and his second wife to be void. The judiciary did not agree. Rigby LJ stated:

...there is not a syllable to be found in the deed which is contrary to public policy... Three cases were cited, one of them being a decision of the Court of Appeal, which, of course, we should follow if we thought it was binding upon us in the present case. All these cases are alike in one respect. The parties to a marriage settlement, or what was equivalent to it, chose to bargain as to what should take place in the event of a future separation of the spouses. There can be no doubt that such a bargain is absolutely bad. All that was there held was that, if persons choose to bargain about an event which they are not entitled to anticipate, their bargain will be bad... I cannot see any resemblance between the present case and any of those three cases.<sup>185</sup>

No uncertainty is cast here over the principle established in previous case law that it is contrary to public policy for a couple to create a private agreement which contemplates their future separation. Vaughn Williams LJ commented on the position of divorce and the

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<sup>183</sup> This is discussed in detail in the following chapter, see below at p 98. In *MacLeod v MacLeod*, the Board stated, ‘It has long been of uncertain scope, as some provisions which contemplate future marital separation have been upheld: see, *Lily, Duchess of Marlborough v Duke of Marlborough*. [1901] 1 Ch. 165’ [2008] UKPC 64, [39].

<sup>184</sup> *The Cheltenham Looker-On*, 24.11.1900: ‘There were at one time four Duchesses of Marlborough, Jane Frances, third wife of the Sixth Duke; Frances Anne Vane, widow of the Seventh Duke; Lily Warren (Mrs. Hammersley), now Lady William Beresford, and Consuelo, present Duchess, There was in addition the Marchioness of Blandford who had divorced the Eighth Duke, and retained only the title taken at her marriage.’

<sup>185</sup> *Lily, Duchess of Marlborough v Duke of Marlborough* [1901] 1 Ch. 165, 170-1.

settlement, 'It seems to me very doubtful, whether, on the balance of considerations, if a divorced husband, exercising the right which the Legislature has given him of marrying again, were to make provision out of his property for his second wife and her family, the making of such a provision would be against public policy.'<sup>186</sup> Further to this, Romer LJ concluded that this case enforced the notion that *Cocksedge*, *Cartwright* and *H v W* were distinct from the current case, 'Such a settlement is perfectly valid, and there is nothing in it contrary to public policy. The cases cited have nothing whatever to do with the case now before us.'<sup>187</sup> The settlement was upheld, but as can be seen this case did not establish that a couple could privately negotiate arrangements for a future separation. The power granted by the settlement was detached and remote from the private dealings of the couples involved in the case.

Writing in 1957 Morrison confirms the division between agreements dealing with a present separation and those which contemplated a future separation:

Agreements for future separation were not and are not generally recognised as they are too open an invitation to desert the duties of marriage. But even agreements to part which were followed by immediate separation have only clearly been recognised in the courts during the nineteenth century.<sup>188</sup>

The rule meaning a married couple had a duty to live together may have been gradually abandoned, yet an agreement contemplating a future separation would still be void. This point will be returned to in the following Chapter.

### **The Gradual Abandonment of Enforcing the Obligation to Cohabit: 1891 – 1970**

In addition to the duty to live together discussed above the court may have ordered the restitution of conjugal rights and there was also the possibility of the use of reasonable confinement in order to uphold the obligation on husband and wife to cohabit. *R v Jackson*<sup>189</sup> in 1891 can be viewed as the case in which the use of reasonable confinement was extinguished. The husband in the case moved to New Zealand in 1887, with the understanding that his wife would join him in six months time. She did not join her husband but instead wrote to him urging him to return. Upon his return, his wife refused to live with him and so he obtained a decree for the restitution of conjugal rights; his wife refused to

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<sup>186</sup> *Lily, Duchess of Marlborough* (n 185) 172.

<sup>187</sup> *Lily, Duchess of Marlborough* (n 185) 173.

<sup>188</sup> C A Morrison, 'The Family in Contract' in R H Graveson and F R Crane (eds), *A Century of Family Law* (Sweet and Maxwell Ltd, London, 1957) 136.

<sup>189</sup> [1891] 1 QB 671.

obey.<sup>190</sup> In 1891 the husband, accompanied by two other men, seized the wife as she left church in Clitheroe. The wife struggled and clung on to her sister, but she was dragged backwards into a carriage, in full view of the rest of the congregation. The wife was then confined to the house in Blackburn, in the hope that the husband could regain her affection.<sup>191</sup> The doctor's affidavit stated that the wife had complained of bruising to her arm and the throwing of her bonnet into the fire upon entering the house.<sup>192</sup>

The Lord Chancellor, Lord Halsbury commented on the facts of the case, 'I confess to regarding with something like indignation the statement of the facts of this case, and the absence of a due sense of the delicacy and respect due to a wife whom the husband has sworn to cherish and protect.'<sup>193</sup> Furthermore, Lord Esher criticised the basis of the husband's claim, 'It was said that by the law of England the husband has the custody of his wife. What must be meant by "custody" in that proposition so used to us? It must mean the same sort of custody as a gaoler has of a prisoner. I protest that there is no such law in England.'<sup>194</sup> Fry LJ concludes, 'I agree in the result at which the Lord Chancellor and the Master of the Rolls have arrived on the ground that the right set up by the husband does not exist by the law of England.'<sup>195</sup> There was great public interest in this case.<sup>196</sup>

Furthermore, it was reported that friends of Mr Jackson had stated that this was not the end of the matter and that, 'his next move will be a greater surprise even than the abduction.'<sup>197</sup> The Lord Chancellor, perhaps pre-empting such a declaration, had stated whilst leaving the court that if the decision was not adhered to then the husband would be in gross contempt.<sup>198</sup>

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<sup>190</sup> *R v Jackson* [1891] 1 QB 671, 672.

<sup>191</sup> *R v Jackson* (n 190) 673.

<sup>192</sup> *R v Jackson* (n 190) 674.

<sup>193</sup> *R v Jackson* (n 190) 681.

<sup>194</sup> *R v Jackson* (n 190) 682.

<sup>195</sup> *R v Jackson* (n 190) 686.

<sup>196</sup> *Blackburn Standard*, 21.03.1891: 'On Thursday the Clitheroe case attracted a crowd of such size as not to be seen in this makeshift court (originally intended as a room for counsel) for many a long day. The only comparison that readily suggests itself is the pit or gallery entrance of a popular theatre when a new play is performed. There was not a spare inch of standing room, and this crush continued the whole time.'

See also *Manchester Courier and General Advertiser*, 21.03.1891 for a description of the husband and wife: 'She was thin, refined and expressive face, was dressed in black, and looked younger than her age as deposed to by her sister; whilst her husband, an iron grey man, looks older than his age.'

<sup>197</sup> *Leeds Mercury*, 20.03.1891: 'Some excitement prevailed here last night, in consequence of the decision of the Court of Appeal in the abduction case. Crowds of excited people thronged the streets. The decision caused general surprise, and the prevalent opinion is that matters will not be allowed to rest where they are. The friends of Mr Jackson assert that he is not beaten, and that his next move will be a greater surprise even than the abduction.'

<sup>198</sup> *London Standard*, 20.03.1891: 'The Lord Chancellor said he desired to state that if, after the authoritative declaration of the law by the Court, the husband should make any effort to attempt to carry out the right which he supposed existed in him, it would be a gross contempt.'

Evidently the decision that a husband could not lock away his wife was not viewed as a positive decision by everyone. Perhaps the most notable example is provided by Lynton writing, 'Marriage as hitherto understood in England was suddenly abolished one fine morning last month!'<sup>199</sup> In response to Lynton's article, 'The Judicial Shock to Marriage,' Manson wrote:

Not the least remarkable thing is that people seem to imagine that the eminent judges who constituted the Court of Appeal in the *Jackson* case were making the law to suit their own notions of the fitness of things that the decision was an innovation, because it was new to them. So far from being an innovation, the *Jackson* case merely declared the law of England as it has been for quite a century and a half.<sup>200</sup>

More recently the *Jackson* decision was upheld in *R v Reid*<sup>201</sup> where a husband was found guilty of kidnapping and false imprisonment when he used force and threats of violence to compel his wife to return to him.<sup>202</sup>

The abolition of the matrimonial remedy of the restitution of conjugal rights took a little longer, not being abolished until 1970.<sup>203</sup> However the requirement and justification for retaining this remedy had been waning prior to this. The Matrimonial Causes Act 1923 established that a wife could divorce her husband based on adultery alone, and so at this point it was superfluous to being granted a divorce to demonstrate a husband's failure to comply with a restitution decree. The Matrimonial Causes Act 1950 contained the provision that a wife could apply for maintenance based on her husband's wilful neglect. Wilful neglect was

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<sup>199</sup> *Nineteenth Century Magazine* for May 1891.

<sup>200</sup> E Manson, 'Marital Authority' 7 L.Q. Rev. 244 (1891).

<sup>201</sup> [1973] QB 299.

<sup>202</sup> The case concluded with following reasoning, 'In the opinion of this court *Reg. v. Jackson* [1891] 1 Q.B. 671 itself goes strongly to support the proposition of the Crown in the present case. *Reg. v. Miller* [1954] 2 Q.B. reading the judgment as a whole, favours the same view rather than the contrary. With the additional support provided by the American cases we reach without any doubt the conclusion that the crime of kidnapping can be committed by a husband against a wife. Nor do we see any reason why a wife who is not separated from her husband, even a wife who is still to be regarded as cohabiting with her husband, should lack this protection of the criminal law. The notion that a husband can, without incurring punishment, treat his wife, whether she be a separated wife or otherwise, with any kind of hostile force is obsolete and if that force results in carrying her away from the place where she wishes to remain then this court is quite satisfied that the offence of kidnapping is committed.' *R v Reid* [1973] QB 299, 303.

<sup>203</sup> Matrimonial Proceedings and Property Act 1970, s 20. See also The Law Commission *Proposal for the Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights* (Law Com. No. 23, 1969): Comment is made regarding the use of this remedy: 'The remedy of restitution of conjugal rights is today seldom used: in the three years 1965- 1967 there were 105 petitions (60 by husbands and 45 by wives) and 31 decrees made (11 granted to husbands and 20 to wives) making an annual average of 35 petitions filed and 10 decrees made.' para 4. Furthermore, 'The comments we have received in reply to our Working Paper have shown an overwhelming support for the abolition of the remedy of restitution of conjugal rights. We recommend, therefore that this remedy should be abolished.' para 7.

considered by the Royal Commission 1951 – 1955 when contemplating the abolition of the remedy:

It was suggested that, since a wife can now apply to the High Court for maintenance on the ground of her husband's wilful neglect to provide reasonable maintenance for her or the children, there is no longer any justification for keeping the remedy of restitution of conjugal rights; there are no steps which the court can take to enforce its order that conjugal rights be rendered and the court is in fact rarely obeyed.<sup>204</sup>

The Commission however held back due to the arguments put forward, namely that if the occurrence of separation is unclear then the remedy can be deployed in order to provide a record of the circumstances.<sup>205</sup> The Commission concluded:

If opinion had been unanimous against the retention of the remedy, we might have come to the conclusion that there was no justification for keeping it. However, one group on the legal profession is in favour of retention and we think that since that group considers that the remedy still serves a useful purpose, and there are arguments of some weight in support, it should be retained.<sup>206</sup>

The 1968 case of *Nanda v Nanda*<sup>207</sup> exemplifies the limited practicality of a decree for the restitution of conjugal rights. The wife demanded to be accommodated by her husband, his new partner and their young family based on being awarded such a decree. The husband wished to obtain an injunction against his wife. The court felt that his wife had 'misunderstood' the remedy and accepted her word that she would desist in such actions in lieu of an injunction. This examination illustrates that the remedy of restitution of conjugal rights being deployed as a remedy to enforce the duty to live together had lost its force long before its abolition in 1970, and moreover that its abolition was being contemplated prior to the passing of legislation to make voluntary agreements for separation or maintenance enforceable.

### 2.3 SEPARATION AND MAINTENANCE AGREEMENTS

The judiciary were indicating more respect for adult autonomy in recognising that a decision to live separately between husband and wife should not be void for public policy. Such was the move away from that original public policy rule that it was possible to look at creating

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<sup>204</sup> *Royal Commission on Marriage and Divorce Report 1951 – 1955* (n 56) para 322.

<sup>205</sup> This argument was subsequently dismissed by The Law Commission *Proposal for the Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights* (Law Com. No. 23, 1969): 'In so far as restitution proceedings are brought to establish desertion, this can be effected equally well, and more suitably, by obtaining an order on the ground of desertion in the magistrates' court.' para 6.

<sup>206</sup> *Royal Commission on Marriage and Divorce Report 1951 – 1955* (n 56) para 324.

<sup>207</sup> [1968] P 351.

legislation to streamline the law and to provide more certainty to couples creating these agreements. It is also important to consider that these were primarily wanted to prevent a later allegation of desertion.<sup>208</sup> There are many reasons as to why a couple may wish to create a separation agreement rather than obtain a divorce. Pabani summarises:

An older couple, for example, might not wish to jeopardise pension arrangements. Others may have no grounds for divorce... Some couples may object to divorce on religious, moral or ethical grounds, but wish to be released from the marital obligation of living with one another...For many, divorce is often seen as a last resort.<sup>209</sup>

The Royal Commission on Marriage and Divorce in 1951-1955 start their examination by providing a definition of a separation agreement, as discussed above, 'The essential feature of a separation agreement is that the parties agree thenceforth to live separate and apart.'<sup>210</sup> The use of 'thenceforth' is extremely important, setting out that these contracts were created at a point where they had already decided to live separately, and the agreement was simply there to give legal effect to this decision.<sup>211</sup> These agreements did not contemplate future separation. Maintenance agreements were also dealt with. The Royal Commission commented that a separation agreement usually set out the terms for making financial provision for the wife. However, it may be the case that a couple will not wish to bind themselves to a separation agreement but wish to set out financial provision for the wife whilst they are living separately, and so a maintenance agreement would be used. A maintenance agreement may also set out other financial issues: the examples given were with regard to the education of children and the disposition of the home.<sup>212</sup>

*Hyman* established that it was contrary to public policy for such a contract to bar the wife from applying to the court for maintenance, thus overriding the jurisdiction of the court. A spouse had this right by virtue of statute, and so an agreement should not be able to remove this right. During the early 1940s through to the early 1950s there were several cases which explored this principle further. There had been cases where the wife had agreed not to apply to the court for maintenance, and the husband had followed the terms of the contract in making payments to the wife, but the sum being paid was no longer considered to be a

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<sup>208</sup> *Royal Commission on Marriage and Divorce Report 1951 – 1955* (n 56) para 192.

<sup>209</sup> Z Pabani 'In Practice: Separation and Maintenance Agreements Explored' [2006] Fam Law 1081.

<sup>210</sup> *Royal Commission on Marriage and Divorce Report 1951 – 1955* (n 56) para 192.

<sup>211</sup> As outlined above these are used where the couple did not wish to obtain a divorce, but no longer wished to cohabit. It was therefore essential that a couple could agree upon certain financial provisions against a background of legal certainty and access to a court.

<sup>212</sup> *Royal Commission on Marriage and Divorce Report 1951 – 1955* (n 56) para 192.

reasonable amount. Using the decisions from, *Morton v Morton*,<sup>213</sup> *Tulip v Tulip*<sup>214</sup> and *Dowell v Dowell*<sup>215</sup> the Royal Commission recognised that the wife still held the right to apply to the magistrates' court of the High Court for maintenance, on the basis of wilful neglect to provide maintenance.<sup>216</sup> The husband in *Morton* was not found guilty of wilful neglect when he stopped making the payment for their son once their son had started earning. The husband and wife in *Tulip* had agreed to a set amount of maintenance, nineteen years after this was set there had been a change in circumstances: the husband had become wealthier, the wife was now a partial invalid and poorer, and in addition the cost of living had increased. The majority in the Court of Appeal agreed: '...that the wife's appeal should be allowed, and that there should be a new trial on the issue whether the husband has been guilty of wilful neglect to provide reasonable maintenance for his wife.'<sup>217</sup>

*Dowell* built upon this concept from *Tulip* of reviewing the contract if the circumstances were to change. Here the husband and wife had agreed to a set amount of money to be paid weekly, no further action would be taken by the wife on the condition that the payments were punctual. Upon falling ill the wife asked for more money from her husband, he refused to pay more, but did continue to pay the agreed amount. It was agreed that this was wilful neglect. Lord Merriman commented:

The jurisdiction is absolute, and cannot be bargained away, but it is a question for the discretion of the court in each case, taking all the circumstances into account, whether there has been wilful neglect to provide reasonable maintenance in spite of the punctual performance of the agreement.<sup>218</sup>

These three cases sent a clear message that such agreements cannot oust the jurisdiction of the court, and moreover that the wife's maintenance can be increased by the court if they see fit giving regard to a change in circumstances. Another aspect of maintenance dealt with by the Royal Commission was the idea of the Welfare State, a relatively new concept at the time the Report was written. The 1940s saw the creation of what we now term the Welfare State. The Beveridge Report of 1942 led to the creation of two pieces of legislation in 1948: the National Insurance Act and the National Assistance Act. The National Assistance Board was established to assist people who had limited means, abolishing the Poor Law. The existence

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<sup>213</sup> [1942] 1 All ER 273.

<sup>214</sup> [1951] 2 All ER 91.

<sup>215</sup> [1952] 2 All ER 141.

<sup>216</sup> The claim for wilful neglect to provide maintenance under s. 5(1) of the Law Reform (Miscellaneous Provisions) Act 1949.

<sup>217</sup> [1951] 2 All ER 91, 98.

<sup>218</sup> [1952] 2 All ER 141, 143.

of an agreement would not provide immunity to a husband from a claim from the National Assistance Board to support the wife.<sup>219</sup>

*Bennett v Bennett*<sup>220</sup> illustrates the potential consequences of the whole contract being deemed as unenforceable for public policy reasons. The wife petitioned for divorce, however before the decree nisi was granted she entered into a deed with her husband agreeing that he would make certain financial provisions for the wife and their child. The wife agreed to three things in consideration for the contract: not to proceed to claim for maintenance; that the claim could be dismissed; and she also agreed not to claim for maintenance in the future. The decree absolute was granted, no award of maintenance was granted by the court. The husband later failed to pay the wife, and subsequently fell into arrears. The wife sought to claim for the missed payments, however it was decided that she could not do so as the whole deed that she was trying to rely on was void for public policy. Lord Denning did point out at the start of his judgement, 'In this case the only question to my mind is whether the wife can sue upon the deed by action at law or whether her proper remedy is by application to the Divorce Court. I would not subscribe to a decision which deprived her of all remedy.'<sup>221</sup> The Royal Commission commented on the practical side of this, '...she can apply to the Divorce division for a maintenance order, though usually she would have to obtain leave to make an application as the time for doing so would have expired.'<sup>222</sup> This case demonstrates the slightly precarious position a spouse may have been left in by agreeing to accept maintenance using a contract which potentially could be considered void in its entirety and so unenforceable.

The Royal Commission was faced with tackling some of these issues.<sup>223</sup> The Commission concluded that a change in the law would be appropriate. Certainty was required as to the effect of a term restricting the wife's ability to apply to the court on the rest of the contract,

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<sup>219</sup> *The Morton Report* cited the case *National Assistance Board v Parkes* [1955] 3 WLR 347 in support of this stance.

<sup>220</sup> [1952] 1 KB 249.

<sup>221</sup> [1952] 1 KB 249, 260.

<sup>222</sup> *Royal Commission on Marriage and Divorce Report 1951 – 1955* (n 56) para 724.

<sup>223</sup> *Royal Commission on Marriage and Divorce Report 1951 – 1955* (n 56) para 724: 'The present law was criticised by witnesses on two grounds. In the first place, it was said that it was unjust that the husband should be strictly bound by the maintenance agreement while his wife was free to obtain provision for her maintenance over and above the amount stated in the agreement. Secondly, it was said that the decision in *Bennett* has caused hardship to some wives who now found that they could not enforce the maintenance terms in their agreements. In particular, if the former husband had died, the wife would have no remedy at all, since under the present law she has no right to apply to the Divorce Division for maintenance to be paid to her out of her former husband's estate.'

exploring the possibility of this term being severed. The case law only demonstrated that the wife could show that the set amount should be increased; the Commission considered that the husband should be able to decrease the agreed amount in certain circumstances.<sup>224</sup> These recommendations formed the basis for a Bill presented by Mr Denis Keegan:<sup>225</sup> the Maintenance Agreements Act 1957<sup>226</sup> received Royal Assent on 17 July 1957.<sup>227</sup>

The position was examined again in 1969 by the Law Commission.<sup>228</sup> The first criticism of that legislation was the restrictive wording of ‘for the purposes of living separately.’<sup>229</sup> This had the effect of limiting the court’s powers, so that if a contract was made for the restarting of cohabitation the court would not be able to vary the agreement. It was recommended that this be re-defined.<sup>230</sup> This change is notable and the overlooking of this alteration is discussed in the following Chapter.<sup>231</sup> There was also a time limitation on the court’s power to vary an agreement, meaning that if an agreement had been created more than six months following a dissolution or annulment of the marriage the provisions would not apply, it was

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<sup>224</sup> The Royal Commission set out: ‘Various possibilities were open to us but after careful examination we have concluded that as a general rule maintenance agreements should be binding and enforceable on the parties to them. If, however, owing to fresh circumstances the terms regulating the financial position of the parties have become inequitable, either party should be able to apply to the court for an order varying the agreements.’ *Royal Commission on Marriage and Divorce Report 1951 – 1955* (n 56) para 727.

<sup>225</sup> Mr Keegan comments on the ease in which the Bill reached the third reading: ‘The House may well have the impression that discussing these Amendments is rather an "Alice Through the Looking Glass" affair, for the Second Reading of the Bill was obtained "on the nod" and its consideration in Standing Committee was achieved in the well-nigh record time of about thirteen minutes.’ *Hansard*, HC Deb 10 May 1957 vol 569 cc1346-63, 1346. On the third reading of the Bill praise is given by Mr Marcus Lipton: ‘I should like to join in the expression of good will extended to the hon. Member for Nottingham, South (Mr. Keegan), who has been fortunate enough to get the Bill through to its present stage. I merely rise to express the hope that the Bill will induce the Government to pay further attention to some of the other recommendations made by the Royal Commission on Marriage and Divorce. The comparative ease with which the Bill has gone through should, perhaps, persuade the Government to sponsor further legislation in giving effect to some, at any rate, of the recommendations of that Royal Commission. Quite a number of the recommendations represent the unanimous view of the members of the Royal Commission, and I hope that, in the circumstances, further legislation in this connection will not be too long delayed.’ *Hansard*, HC Deb 10 May 1957 vol 569 cc1346-63, 1361.

<sup>226</sup> This Act was repealed by the Matrimonial Causes Act 1965. Provisions contained in sections 23 to 25.

<sup>227</sup> *Hansard*, HC Deb 17 July 1957 vol 573 c1211.

<sup>228</sup> The Law Commission *Financial Provision in Matrimonial Proceedings* (Law Com No 25, 1969).

<sup>229</sup> The Matrimonial Causes Act 1965, s.23(2).

<sup>230</sup> The Law Commission *Financial Provision in Matrimonial Proceedings* (n 228) para 96.

<sup>231</sup> For clarity at this point, the Supreme Court in *Radmacher* commented on the *MacLeod* decision: ‘Our first reservation in relation to this reason is that we question whether the Board was right to hold that sections 34 and 35 apply to all post-nuptial agreements rather than just to separation agreements. We consider that the original provisions in the Maintenance Agreements Act 1957 applied only to separation agreements. The preamble to the Act and the statement in section 1(1) that the section applies to any agreement between the parties to a marriage for the purpose of their living separately so indicate. Furthermore post-nuptial agreements of couples living together that provided for the contingency of future separation were void, so Parliament cannot have intended the Act to apply to them. When the provisions of the 1957 Act were incorporated into the 1973 Act, they did not include the preamble or the words that we have emphasised above. But it remained the case that post-nuptial agreements that made provision for the contingency of separation were considered to be contrary to public policy. For this reason we find it hard to accept that Parliament intended to extend the ambit of the relevant provisions.’ *Radmacher v Granatino* [2010] UKSC 42, [54]-[55].

recommended that this period be extended.<sup>232</sup> Yet, in both of these scenarios a term in the agreement restricting the wife's maintenance was still considered void and so she could nevertheless apply to have her maintenance increased, as demonstrated in those earlier cases.

Another concern was raised with regard to the judicial interpretation of the provision stating that a variation could be made upon, 'a change in the circumstances in the light of which any financial arrangements contained in the agreement were made.'<sup>233</sup> An illustration of this is provided in the maintenance agreement case *K v K*:<sup>234</sup>

We think that "a change in the circumstances in the light of which any financial arrangements...were made" means something quite outside the realisation of expectations. The parties make their bargain on certain basic facts and expectations. When those facts unexpectedly change or those expectations are not realised, there is then a change of circumstances which may produce unfairness.<sup>235</sup>

The Law Commission expressed concern that this interpretation had the potential to lead to injustice to the husband. In order for a husband to have the agreed maintenance reduced he would have to demonstrate a change to be 'outside the realisation and expectations.' In contrast, s.22 allowed for the wife to apply for an increase in maintenance if the payments had become 'inadequate,' and the husband was aware of this.<sup>236</sup> It was recommended that a change be made so that the fact a change was foreseeable would not prevent a variation.<sup>237</sup> The concerns raised by The Royal Commission on Marriage and Divorce 1951-1955 regarding the position of varying a maintenance agreement following the death of the husband had been addressed in legislation so that the wife could apply for an increase of maintenance.<sup>238</sup> The Law Commission highlighted however that this provision meant that a wife could apply for an increase, yet other dependants were unable to apply for a reduction.<sup>239</sup> A recommendation was made so that a personal representative of the husband could apply to vary the agreement.<sup>240</sup> There were also concerns raised as to the provisions set

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<sup>232</sup> The Law Commission *Financial Provision* (n 228) para 96.

<sup>233</sup> Originally contained in the Maintenance Agreements Act 1957, s 1(3).

<sup>234</sup> [1961] 2 All ER 266.

<sup>235</sup> (n 234) at 269.

<sup>236</sup> The Law Commission *Financial Provision* (n 228) para 94.

<sup>237</sup> The Law Commission *Financial Provision* (n 228) para 96.

<sup>238</sup> The Matrimonial Causes Act 1965, s.25.

<sup>239</sup> The Law Commission *Financial Provision* (n 228) para 95.

<sup>240</sup> The Law Commission *Financial Provision* (n 228) para 96.

out for the children of the marriage,<sup>241</sup> and a call for an extension of the jurisdiction of the court.<sup>242</sup>

The recommendations put forward by the Law Commission in 1969 were subsequently acted upon and implemented in the Matrimonial Proceedings and Property Act 1970. These provisions are now contained in the Matrimonial Causes Act 1973, and have been derived from the 1970 Act.

### **The Current Legislation**

Section 34 of the MCA 1973 contains provisions setting out the validity of maintenance agreements, s.35 sets out the alteration of agreements by the court during lives of parties and s.36 is concerned with the alteration of agreements by court after death of one party. Section 34(2) MCA 1973 defines a Maintenance Agreement as:

...any agreement in writing made, whether before or after the commencement of this Act, between the parties to a marriage, being—(a) an agreement containing financial arrangements, whether made during the continuance or after the dissolution or annulment of the marriage; or (b) a separation agreement which contains no financial arrangements in a case where no other agreement in writing between the same parties contains such arrangements.

This definition fuses the originally distinct maintenance and separation agreement. The public policy rule from *Hyman* is reflected in the legislation.<sup>243</sup> The legislative provisions confirm the stance that marriage is a public union and thus the financial arrangements of a separated couple are of interest to society. This interpretation thus requires the judiciary to maintain this jurisdiction. Furthermore, s.35 gives power to the court to vary the agreement in certain circumstances.<sup>244</sup> This legislation works within the boundaries of public policy: the concept of a married couple living separately no longer renders these agreements to be void, yet the court's jurisdiction has been upheld.

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<sup>241</sup> The Law Commission *Financial Provision* (n 228) para 95.

<sup>242</sup> The Law Commission *Financial Provision* (n 228) para 95.

<sup>243</sup> Section 34(1)(a) and (b) Matrimonial Causes 1973 set out, (1) If a maintenance agreement includes a provision purporting to restrict any right to apply to a court for an order containing financial arrangements, then—(a) that provision shall be void; but (b) any other financial arrangements contained in the agreement shall not thereby be rendered void or unenforceable and shall, unless they are void or unenforceable for any other reason (and subject to sections 35 and 36 below), be binding on the parties to the agreement.

<sup>244</sup> Section 35 Matrimonial Causes Act 1973 (a) that by reason of a change in the circumstances in the light of which any financial arrangements contained in the agreement were made or, as the case may be, financial arrangements were omitted from it (including a change foreseen by the parties when making the agreement), the agreement should be altered so as to make different, or, as the case may be, so as to contain, financial arrangements, or (b) that the agreement does not contain proper financial arrangements with respect to any child of the family.

## The Acknowledgement of Agreements upon Divorce

Observation must be made as to the potential for these agreements to be considered under s.25 Matrimonial Causes Act 1973 in the event of a subsequent divorce. Pabani explores the weaknesses of these agreements, commenting that they should only be considered to be interim measures.<sup>245</sup> Ormrod J discussed the role of the judiciary in considering all the circumstances, including preceding agreements, in *Edgar v Edgar*.<sup>246</sup>

To decide what weight should be given in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel, all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant.<sup>247</sup>

It is however important to bear in mind that under these circumstances the agreement only derives its power from the court order, again this is governed by the public policy rule setting out that a contract cannot oust the court's jurisdiction. If the agreement is not contained in an order from the court then it will remain as a maintenance agreement and still be open to variation. It is also possible for a couple to request a consent order under s.33A MCA 1973. The couple in *Xydhias v Xydhias*<sup>248</sup> had reached an agreement reducing the ancillary relief application, the court stated that this contract would not be enforceable, but could be converted into a court order.

The only way of rendering the bargain enforceable, whether to ensure that the applicant obtains the agreed transfers and payments, or whether to protect the respondent from future claims, is to convert the concluded agreement into an order of the court. The decision of the Privy Council in *de Lasala v de Lasala* [1979] 2 All ER 1146, [1980] AC 546 demonstrated that thereafter the rights and obligations of the parties are determined by the order and not by any agreement which preceded it.<sup>249</sup>

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<sup>245</sup> Z Pabani (n 209) Pabani sets out: '...as no finality is guaranteed, separation agreements might only be suitable in certain limited circumstances. Clients should perhaps be encouraged to look on them as interim measures only and be made aware to the fact that they are subject to be varied or overturned, especially where circumstances have changed since they were drafted, even if both they and their spouse took independent legal advice and the agreement is fair on the surface. In reality, divorce and ancillary relief proceedings are the only means by which a clean break in life and death can be achieved. Only by severing the marriage bond once and for all will financial certainty be assured.'

<sup>246</sup> [1981] 2 FLR 19.

<sup>247</sup> [1981] 2 FLR 19,25.

<sup>248</sup> [1999] 2 All ER 386.

<sup>249</sup> [1999] 2 All ER 386, 394.

When an agreement is made upon relationship breakdown it is likely that the circumstances will be unchanged if the couple subsequently decide to divorce. The court is reluctant to depart from the agreement, although of course they retain the jurisdiction to do so in the exercise of discretion. Oliver LJ indicated the weight that should be attached to these agreements in *Edgar*:

...the court must, I think, start from the position that a solemn and freely negotiated bargain by which a party defines her own requirements ought to be adhered to unless some clear and compelling reason, such, for instance, as a drastic change of circumstances, is shown to the contrary.<sup>250</sup>

*X v X (Y and Z intervening)*<sup>251</sup> illustrates an agreement being converted into an order of the court. The couple were practicing Jews, and so in order to remarry they also required the divorce to be recognised under Jewish law.<sup>252</sup> The wife did not want her husband to divorce her using the fact of her adultery, and so a contract was drawn up to ensure that this would not happen and that the divorce would be recognised under Jewish law. The wife's brother agreed to pay £500,000 to secure this. The divorce was granted using the fact of 'unreasonable behaviour', but the district judge refused to make this agreement an order of the court due to the issue that the husband was far wealthier than the wife. Upon appeal by the husband the contract was made an order of the court. Munby J stated:

The starting point, and this is common ground, is that there is no public policy objection to the agreement at which the parties have arrived, notwithstanding that it provides amongst other things for the parties to divorce on agreed terms. Indeed, I would say, if anything quite the contrary.<sup>253</sup>

This statement brings together the public policy arguments that originally surrounded this type of agreement: they cannot oust the jurisdiction of the court, yet autonomy is granted over the decision to live separately and so a contract made upon separation is not void for public policy. The duty to cohabit was eroded and so the movement of separation agreements can be seen to be from status towards contract on the proposed continuum. Furthermore, there is encouragement shown from the judiciary towards the drafting of an agreement upon divorce, thus allowing couples to set out how they wish to separate assets.

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<sup>250</sup> [1999] 2 All ER 386, 889.

<sup>251</sup> [2002] 1 FLR 508.

<sup>252</sup> This position will be discussed further within this Chapter at p 84 when considering *N v N (Jurisdiction: Pre-nuptial Agreement)* [1999] 2 FLR 745.

<sup>253</sup> [2002] 1 FLR 508, 530.

## 2.4 PRE- AND POST-NUPTIAL AGREEMENTS: MORE RECENT MOVEMENTS ALONG THE CONTINUUM

So far this Chapter has examined the distinction drawn in early cases between agreements which contemplated a future separation from those created upon separation. This section will trace more recent movements towards agreements which contemplate a future separation or divorce. The Law Commission comments in 2011, ‘Over the last 15 years or so we have seen a movement in the courts’ approach to pre- and post-nuptial agreements, from entrenched caution, bordering on hostility, to growing acceptance.’<sup>254</sup> In terms of the proposed continuum model there is a break away from the status side of the continuum, and a little movement being demonstrated towards the contractual end of the continuum being led by the judiciary. This last part of the Chapter will trace the evolution of pre-nuptial and post-nuptial agreements up to 2008, a year which saw two cases make significant steps towards their enforceability. These cases will be considered in isolation in the following Chapter in order to analyse how these cases have evaded the evolution outlined so far.

*Brodie v Brodie*<sup>255</sup> provided some clarification on the necessary division required between the formation of a pre-nuptial agreement and a post-nuptial agreement. The wife was expecting a child with the respondent and had put some pressure on him to marry her. He had agreed to the marriage, but on the condition that they would never live together and the couple signed an agreement to this effect.<sup>256</sup> On 19 December 1913 the couple signed a pre-nuptial agreement. They married the following day and afterwards re-signed the contract at the Register Office in the hope that this would endorse the original contract. In 1917 Mrs Brodie brought a case for the restitution of conjugal rights, contrary to the contract but claimed that as the agreement was void her husband could not rely on it, Mr Brodie gave no evidence at court. Horridge J held that the agreement was void. Furthermore, he reiterated the stance taken by Kelly CB in the 1871 case *Brook v Holt*,<sup>257</sup> ‘Although a voidable act may be ratified by matter subsequent, it is otherwise when an act is originally and in its inception

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<sup>254</sup> The Law Commission, *Marital Property Agreements* (n 24) para 3.27.

<sup>255</sup> [1917] P.271.

<sup>256</sup> The contract stated that it would be lawful for them to live apart as if they were in fact unmarried. In addition the wife should never attempt to compel the husband to live with her through taking legal action for desertion or restitution of conjugal rights or any other method; neither should the wife take steps to obtain a judicial separation.

<sup>257</sup> (1871) LR 6 Exch 89; 40 LJ Ex 50; 24 LT 34; 19 WR 508; 12 Digest (Repl) 289.

void.<sup>258</sup> He held that the second signing of the agreement merely formed part of the same agreement, and therefore was in fact just the couple resigning the same agreement which was void in any event.

Mrs Brodie's evidence stated that she was aware of the requirement of the second signing prior to the marriage certainly upholds this idea that it was the same agreement. In order to create a post-nuptial agreement that is distinct from a pre-marital agreement there should certainly be a greater passage of time between the signing of a post-nuptial contract. In addition, it would be wise for the post-nuptial agreement to be created on a separate piece of paper. To avoid the issue of the notion of endorsing a void contract it would also perhaps be advisable to make some variation to the terms contained in the agreements. This guidance may be useful given that the approach taken towards post-nuptial agreements has stemmed away from the development of the enforceability of pre-nuptial agreements; yet it would seem that some of the reasoning used to make this distinction is now being doubted.<sup>259</sup>

The case law surrounding pre-nuptial agreements from the late 1990s can be viewed against the release of the Government Green Paper *Supporting Families*<sup>260</sup> in November 1998. The paper made the recommendation that pre-nuptial agreements should be binding and provided details of six safeguards.<sup>261</sup> Where one or more of the following circumstances applied then the contract would not be binding: the existence of a child, whether the child was born before or after the contract was formed; where the contract would be unenforceable under law of contract; if independent legal advice had not been sought by both parties; if it was considered that the agreement would cause significant injustice; where there had been a failure to give full disclosure of assets; and finally where the agreement had been completed less than 21 days prior to the wedding.<sup>262</sup> With such a wide-ranging set of safeguards it is perhaps reasonable to say that the Government were approaching the subject with great caution, yet the suggestion to make pre-nuptial agreements binding had been made. Moreover, the proposal was delivered in a Chapter of the paper titled, 'Strengthening Marriage,' based on the supposition that binding marital property agreements may encourage marriage. It was

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<sup>258</sup> Kelly CB in *Brook v Holt* (1871) LR 6 Exch 89; 40 LJ Ex 50; 24 LT 34; 19 WR 508; 12 Digest (Repl) 289, 2221.

<sup>259</sup> Much more light will be shed on the current position of these contracts in Chapter Three, see in particular p 95. As mentioned in the introduction to this section the 2008 Privy Council case *MacLeod v MacLeod* [2008] UKPC 64 will be looked at in Chapter Three in conjunction with *Radmacher v Granatino* [2010] UKSC 42.

<sup>260</sup> The Home Office, *Supporting Families: A Consultation Document* (1998).

<sup>261</sup> These will be considered again against the more recent suggestions put forward by the Law Commission in Chapter Nine, see in particular p 281.

<sup>262</sup> The Home Office, *Supporting Families* (n 260) 4.23.

commented that, 'Providing greater security on property matters in this way could make it more likely that some would marry, rather than simply live together. It might also give couples in a shaky marriage a little greater assurance about their future than they might otherwise have had.'<sup>263</sup> The public policy argument surrounding the undermining of the institution of marriage had been effectively turned on its head. The paper recognised that the narrowing of the status-contract continuum through the introduction of this optional contractual element to marriage may in fact make it more likely that a couple may make the step to marry.<sup>264</sup>

The Judges of the Family Division responded to the Government proposals. The thinking was unanimous with regard to this being a problematic area of law:

We have reservations about whether the law should strive to encourage pre-nuptial agreements. We all still believe strongly in the institution of marriage as a source of personal and social stability and wonder whether the pre-nuptial agreement conditions the couple to the failure of their marriage and so helps to precipitate it. This deserves research. Some of us also feel that the institution of marriage is devalued if, while entering it, a couple can elect to sever some of its most important, if contingent, legal effects. Others of us consider, hesitantly, that marriage is made for mankind, not vice versa, and that, subject to obvious limits, adults should be allowed to cast their relationships in their own way. We are at one that this is profoundly difficult terrain.<sup>265</sup>

The overlap between the paradoxical concepts of status and contract is present in this statement. The varying of opinion amongst the members of the judiciary is dependent on the weight given to the importance of either status or contract, consideration is given to both the wider social concerns of severing important legal effects and adult autonomy. This tension can be seen in case law.

### **A Shift from 'Limited Significance' to 'Influential'**

Movement along the continuum can certainly be seen in the approach towards dealing with pre-nuptial agreements prior to the release of *Supporting Families. S v S (Divorce: Staying Proceedings)*<sup>266</sup> involved a wealthy husband, he was born in Austria and was also a national of Turkey and Israel. The wife was Swedish, and had spent a number of years living in New York prior to her move to London in 1984. The couple married in London in 1987, this was

<sup>263</sup> The Home Office, *Supporting Families* (n 260) 4.22.

<sup>264</sup> This consideration is explored further in Chapter Six, see in particular p 156.

<sup>265</sup> N Wilson, 'Ancillary Relief Reform Response of the Judges of the Family Division to Government Proposals' [1999] 29 Fam Law 159.

<sup>266</sup> [1997] 2 FLR 100.

the wife's second marriage and the husband's third. Both parties had children from their previous marriages. The husband wished to have a pre-nuptial contract in place to protect his wealth. The contract was made in New York, setting out that the husband was obliged to set up a trust fund, to be released to the wife in the event of divorce. On 8 November 1996 the wife petitioned for divorce in England, the husband petitioned for divorce in New York less than a fortnight later. Furthermore, the husband applied for the wife's petition to be stayed so that the divorce could take place in New York, and hence the division of property be carried out according to the pre-nuptial agreement. The decision was made to allow the divorce to take place in New York, yet within the judgement from Wilson J there is some useful discussion on the movement towards the recognition of pre-nuptial agreements. Firstly, Wilson J gave consideration to the judgement of Thorpe J in the *F v F (Ancillary Relief: Substantial Assets)*<sup>267</sup> case two years prior:

In this jurisdiction [prenuptial agreements] must be of very limited significance. The rights and responsibilities of those whose financial affairs are regulated by statute cannot be much influenced by contractual terms which were devised for the control and limitation of standards that are intended to be of universal application throughout our society.<sup>268</sup>

*S v S* represents a point in case law where pre-nuptial agreements are not being dismissed altogether, to the extent that Wilson J reflected on the point that had the case taken place in this jurisdiction then he may have had to give weight to the agreement, certainly moving away from this concept of universal application:<sup>269</sup>

But there will come a case – were I to refuse a stay, might this be it? – where the circumstances surrounding the prenuptial agreement and the provision therein contained might, when viewed in the context of the other circumstances of the case, prove influential or even crucial.<sup>270</sup>

There is a shift in attitude towards the recognition and force pre-nuptial agreements could potentially have; Thorpe J used the phrase 'limited significance,' to describe the influence of contractual terms over the wider public status marriage conveys. Wilson J however describes such agreements as 'influential or even crucial.' David Slater comments on the position of pre-nuptial agreements eight years following this dictum:

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<sup>267</sup> [1995] 2 FLR 45.

<sup>268</sup> *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45, 66 per Thorpe LJ.

<sup>269</sup> This aspect of *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45 is discussed later with regard to proposals for reform in Chapter Nine, see in particular pp. 288-289.

<sup>270</sup> [1997] 2 FLR 100, 102.

This dictum so pithily encapsulates the trend towards private ordering contrasting with the traditional legal backcloth of regarding pre-marital agreements as unenforceable and simply a factor for the court to consider in the s 25 discretionary exercise either as one of all the circumstances of the case or as conduct. But where is the momentum for change?<sup>271</sup>

There seems to be some level of dissatisfaction here, highlighting that when this dictum was first heard it may have seemed to herald a point in time where there would be a rapid change in approach. The position stated in this case from 1997 still remains accurate, yet the acknowledgements made towards the enforceability of these agreements did in fact grow stronger, demonstrating further movement along the status-contract continuum.

### **Undermining the Life-Long Union: Discussed and Diminished**

*N v N (Jurisdiction: Pre-Nuptial Agreement)*<sup>272</sup> was examined in 1999, the case involved an Orthodox Jewish couple who had created a pre-nuptial contract prior to their marriage in 1996. The agreement set out how the property would be divided and also that they would be bound by the decision taken by their religion should a matrimonial dispute to arise. In 1998 the couple were granted a divorce under the Matrimonial Causes Act 1973. The husband refused to apply for a Bill of divorce under Jewish law and therefore in the eyes of their religion they were in fact still married; the wife tried to rely upon the pre-nuptial agreement to compel her husband to apply for this. The position of public policy was stated by Wall J:

...an agreement made prior to marriage which contemplates the steps the parties will take in the event of divorce or separation is perceived as being contrary to public policy because it undermines the concept of marriage as a life-long union. Although held to be unenforceable, the courts have accepted that antenuptial agreements may have evidential weight when the terms of the agreement are relevant to an issue before the court in subsequent proceedings for divorce.<sup>273</sup>

An argument was put forward that it would be possible for severance of the part of the contract regarding religion to become binding. This argument was rejected based on public policy issues.<sup>274</sup> Bruce commented on this case and the wider judicial handling of the public policy issues:

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<sup>271</sup> D Slater 'Pre-Marital Agreements: Where Now?' [2005] Fam Law 435.

<sup>272</sup> [1999] 2 FLR 745.

<sup>273</sup> (n 272) 752.

<sup>274</sup> (n 272) 754.

Successive governments have not discouraged judges from being the arbiters of public policy in this respect. Without any legislative framework to guide the process, the judges' treatment of premarital agreements has therefore been subject to the normal vagaries of case-law and recently they have been reflective of public opinion: a changing public policy is beginning to emerge.<sup>275</sup>

Although the case confirms the strength of the public policy issues in this area, it also reiterates the position that it would be possible for such an agreement to carry weight when considered as one of the factors to be examined by the court when exercising their discretion, the recognition was growing and the change described by Bruce was beginning to emerge. It should also be noted that the particular issue in this case would have been largely diminished following the passing of the Divorce (Religious Marriages) Act 2002.<sup>276</sup>

### **The Tapering of Public Policy**

The way in which a pre-nuptial agreement could play a role in the division of property was demonstrated in *M v M (Prenuptial Agreement)*.<sup>277</sup> The Canadian couple had entered into a prenuptial contract very shortly prior to their marriage in Canada. The future wife was pregnant and was very anxious to get married, however the husband was not prepared to marry her without having a prenuptial agreement in place. An agreement was drafted stating that upon matrimonial breakdown the husband would pay the wife £275,000. The marriage lasted five years and upon the breakdown of the marriage the wife argued that she was vulnerable at the time of signing the pre-nuptial agreement and that she had felt under pressure to sign. Upon divorce the husband was worth £7.5 million, in contrast to the wife's assets of £300,000. Although the court was in no way bound by this agreement, a more modest award was certainly made because of its existence, with the wife being awarded £875,000. Connell J stated:

Given that a significant percentage of marriages these days end in divorce, it is understandable that mature adults, and in particular those who have been married before, might wish to agree what should happen in the event of a breakdown. The desire for certainty, or the wish to know where you stand, is not unusual. It is clear, of course, that the existence of such an agreement does not oust the jurisdiction of the court...The public policy objection to such agreements, namely that they tend to

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<sup>275</sup> S Bruce, 'SFLA News, Premarital agreements following *White v White*' [2001] Fam Law 304.

<sup>276</sup> Under s.1 of the Divorce (Religious Marriages) Act 2002 there is now the power to refuse the granting of a decree absolute if steps are not taken towards dissolving a religious marriage.

<sup>277</sup> [2002] 1 FLR 654.

diminish the importance of the marriage contract, seems to me to be of less importance now that divorce is so commonplace.<sup>278</sup>

This is hugely significant, although the judge was also guided by the short length of the marriage it does confirm that a pre-nuptial agreement can be looked at as part of the circumstances of the case. Moreover, Connell J actually questions the public policy argument stemming from the element of status categorising marriage as being a life-long relationship based on the amount of marriages which end in divorce. The dictum from *M v M* illustrates the discussion from the Introduction where it was suggested that in the vast majority of cases the aspiration of life-long marriage will be present,<sup>279</sup> yet the distance between this and social reality may prompt couples to attempt to create certainty through the creation of a contract. This statement from Connell J questions the influential status element of marriage being defined as a life-long union by contrasting it to social reality. He does not however cast any uncertainty over the public policy argument regarding the ousting of the court's jurisdiction.<sup>280</sup>

### **The Judicial Formulation of Relevant Factors**

*K v K (Ancillary Relief: Prenuptial Agreement)*<sup>281</sup> actually went further than the *M v M* decision:<sup>282</sup> the decision had almost the same effect as if the wife had actually been held to the agreement. The future wife in this case fell pregnant prior to the marriage; her mother was exerting pressure on the future husband to marry her daughter. The wife was worth approximately £1 million, with the husband being far wealthier with assets of approximately £25 million. A contract was drafted stating that if they were to split within five years of the contract then the wife would receive a lump sum of £100,000 which was to be increased by

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<sup>278</sup> (n 277) [21].

<sup>279</sup> In particular reference was made in the Introduction to the empirical research presented in L Barker and R Emery, 'When Every Relationship is Above Average.' *Law and Human Behaviour*, Vol.17, No. 4, 1993: '...the median response was an accurate estimate that 50% of U.S. couples who marry will divorce, the median response of the marriage licence applicants was 0% when assessing the likelihood that they personally would divorce.'

<sup>280</sup> Following this case, commentary can be found questioning this degree of evolution without any legislative reform occurring. J Posnansky 'Talking Shop: A Time for Change: a Personal View' [2007] *Fam Law* 442: 'But surely the governing Act should deal with and state clearly the approach to such agreements? In Australia, for example, the Family Law Amendment Act 2000 introduced into the Family Law Act 1975 new ss 90B–K, which not only make clear that parties entering into marriage may make 'binding financial agreements', but specify, for example, the circumstances in which the court may set aside a financial agreement. Even in China, the Marriage Law 2001 specifies, in art 19, that parties to a marriage may make binding agreements about the property regime of their marriage. Of course, for England and Wales all this could be left to the case-by-case, discretionary, 'bespoke', decision-making of the judges, but should it be?'

<sup>281</sup> [2003] 1 *FLR* 120.

<sup>282</sup> This has recently been described as a landmark case in Z Pabini 'In Practice: All you need is love: protecting clients' wealth.' [2010] *Fam Law* 1005.

10% per annum compound. The husband also agreed to make a reasonable financial provision for their child. The couple were married for fourteen months, after which the wife tried to claim £1.6 million from her husband. However, Rodger Hayward Smith QC, sitting as a Deputy High Court Judge, held that the wife should only receive £120,000 a figure which fell in line with the agreement as well as the husband's offer at the start of proceedings.

Although the husband did also have to provide £1.2 million for accommodation for the duration the child's dependency, this case indicates that a pre-nuptial agreement can carry significant weight. In addition, the judgment set out sixteen questions about the agreement and the circumstances surrounding this, the judge drew these questions from the cases discussed above.<sup>283</sup> With regard to the concern of this progression being made without legislative reform, Rodger Hayward Smith QC made it very clear that these questions have been derived from case law, 'I apply the law as it is now and not what it may or may not be after discussion and consultation elsewhere.'<sup>284</sup> The legal position of pre-nuptial agreements had been created purely by the common law. The standpoint and set of principles set out in *K v K* had been reached by the judiciary scrutinising the public policy argument regarding the undermining of marriage, allowing pre-nuptials to become one of the s.25 factors and then giving such significant weight to such agreements where the dynamics of the case allowed this.

The movement towards the contractual side of the continuum is however limited by this approach. The case law indicates movement away from the initial observations regarding agreements for future separation but there is still the upholding of the jurisdiction of the court in making the final decision and deciphering the weight to be attached to an agreement.

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<sup>283</sup> (n 281)131. The answers have not been included in the quotation, but the matters being assessed give a clear indication of the factors which were felt to be relevant to concluding whether this agreement could be given this amount of weight in the final decision: 'Did she understand the agreement? Was she properly advised as to its terms? Did the husband put her under any pressure to sign it? Was there full disclosure? Was the wife under any other pressure? Did she willingly sign the agreement? Did the husband exploit a dominant position, either financially or otherwise? Was the agreement entered into in the knowledge that there would be a child? Has any unforeseen circumstance arisen since the agreement was made that would make it unjust to hold the parties to it? What does the agreement mean? Does the agreement preclude an order for periodical payments for the wife? Are there any grounds for concluding that an injustice would be done by holding the parties to the terms of the agreement? Is the agreement one of the circumstances of the case to be considered under s 25? Does the entry into this agreement constitute conduct which it would be inequitable to disregard under s 25(2)(g)? Am I breaking new ground by holding the wife to the capital terms of the agreement? Insofar as maintenance for the wife is concerned, if I am wrong in my interpretation of the agreement as above, and if the agreement does preclude a maintenance claim, would it be unjust to hold the parties to that aspect of the agreement?'

<sup>284</sup> (n 281)132.

Despite this, the movement demonstrated is notable and significant in terms of the status-contract tension. Greater weight is being applied to the private wishes of couples expressed through contracts, but the overlap of status is still very much present through the role of the judge in the decision. This approach can be supported by the theoretical foundation of the status-contract continuum. The concerns held by commentators such as Posnansky are possibly more pronounced following this judgement in *K v K*, not only does this progress have no legislative guidance whatsoever but the proposals that could have aided the judiciary's approach does not appear to have had any significant influence in terms of developing a criterion for deciphering the influence the agreement may hold.

### **A Factor of Magnetic Importance**

*Crossley v Crossley*<sup>285</sup> offers further clarification on how pre-nuptial agreements were being given far more emphasis. The husband in this case had been married once before and had four children; the wife had been married three times previously and had three children. Both were wealthy, the husband had a fortune of £45 million and the wife declared £18 million. The couple received a great deal of media interest with the wife being branded a 'career divorcee.'<sup>286</sup> For simplicity Mrs Crossley is referred to by her first name.<sup>287</sup> Susan was a former model and had first married at the age of eighteen, this marriage ended after just 18 months. She married again when she was twenty-two, the couple had a daughter together. She married her third husband in 1985, they had two children together and divorced in 2000. Susan was awarded £16 million by the courts. She met Mr Crossley in June 2005, and they became engaged in the December. In November 2005 an agreement was created stating that upon marital breakdown each party should only take out of the marriage what they had brought into it. The couple married in January 2006, but by March 2007 they had split. The wife wished to ignore the pre-nuptial agreement and seek ancillary relief. Thorpe LJ gave this view:

All these cases are fact dependent and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the prenuptial

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<sup>285</sup> [2008] 1 FLR 1467.

<sup>286</sup> For one example of this see <[business.timesonline.co.uk/tol/business/law/article3359775.ece](http://business.timesonline.co.uk/tol/business/law/article3359775.ece)> last accessed 19 February 2011.

<sup>287</sup> In a similar way, Lord Denning commented on Janet Eves, 'I will call her Janet because she has had four surnames already.' *Eves v Eves* [1975] 3 All ER 768, 769.

agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case.<sup>288</sup>

This judgement gives confirmation that the weight being given by the judiciary to pre-nuptial agreements was growing much stronger than simply a factor to be considered under s.25.

## 2.5 CONCLUSION

The development shown in the overview of case law above indicates greater recognition being granted to private autonomy. Yet, there is no legislative intervention to confirm or disprove this approach. This outline of a selection of cases involving pre-nuptial agreements has brought the evolution through to 2008, in that year the case between Katrin Radmacher and Nicholas Granatino reached the High Court, being concluded in the Supreme Court in late 2010. This pre-nuptial case will be looked at in greater detail in Chapter Three. The decision in this case is extremely significant to demonstrate the current view being taken regarding the public policy issues surrounding pre-nuptial agreements. The Law Commission delayed the publication of their consultation paper until the decision was reached, and is referred to as the ‘culmination of this story of the evolution of judicial views’<sup>289</sup> in the consultation paper.

The examination of the evolution of private agreements has confirmed that the comment made by Bowen LJ in 1893 is correct, ‘Rules which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification.’<sup>290</sup> There have certainly been developments across all types of agreements, with any expansion or modification happening within the boundaries of what is perceived by the judiciary to be the current relevance of public policy, taking into account social reality. Pre-nuptial agreements have moved along the status-contract continuum, from being regarded as ‘null and void’<sup>291</sup> through to the potential for them to be regarded as a ‘factor of magnetic importance.’<sup>292</sup> The increasing regard towards autonomy has certainly weakened and even eradicated some of the earlier public policy arguments, in particular the weakening of the common law duty to cohabit has been observed with the passing of legislation governing separation agreements in the 1950s. There is evidence that the public

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<sup>288</sup> (n 285) [15].

<sup>289</sup> The Law Commission, *Marital Property Agreements* (n 24) para 3.37.

<sup>290</sup> Bowen, LJ, in *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* (n 1) 661.

<sup>291</sup> *Westmeath v Westmeath* (1830) 1 Dow & CI 519, 627.

<sup>292</sup> *Crossley v Crossley* [2008] 1 FLR 1467 [15].

policy argument regarding contracting out of any responsibility for a child has remained completely unchanged. The public policy rule based on the concept that pre and post-nuptial agreements may undermine the life-long nature of marriage remains somewhat unsettled, and very much dependant on the viewpoint of the judge.<sup>293</sup> The rule preventing the ousting of the court's jurisdiction remains a constant factor and is upheld throughout. The *Radmacher* decision will now be scrutinised to establish the most recent thinking from the judiciary on these two public policy issues, the Privy Council decision in *MacLeod* will also be examined in light of this evolution.

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<sup>293</sup> N Wilson (n 265): 'Some of us also feel that the institution of marriage is devalued if, while entering it, a couple can elect to sever some of its most important, if contingent, legal effects. Others of us consider, hesitantly, that marriage is made for mankind, not vice versa, and that, subject to obvious limits, adults should be allowed to cast their relationships in their own way. We are at one that this is profoundly difficult terrain.' *N v N (Jurisdiction: Pre-Nuptial Agreement)* [1999] 2 FLR 745 and *M v M (Prenuptial Agreement)* [2002] 1 FLR 654 were contrasted above at pp. 84 and 85.

## CHAPTER THREE

### RECENT DECISIONS: SUPPORTING CONTRACT BY EVADING STATUS?

The prevailing question of this Chapter is whether in order to reach the current position the historical development traced in Chapter Two has been evaded, and thus presents an issue which requires further scrutiny. This Chapter will outline the circumstances surrounding the pre-nuptial agreement in the dispute between Katrin Radmacher and Nicolas Granatino, and observe how this particular set of facts related to the financial awards granted at each stage of the judgment. The case reached the High Court in July 2008,<sup>1</sup> going to appeal in April 2009<sup>2</sup> and finally being decided in the Supreme Court in October 2010.<sup>3</sup> The judiciary in *Radmacher* examined the extent to which a pre-nuptial agreement should influence the division of assets upon divorce and it therefore contains very recent scrutiny of status and public policy. Subsequent cases are also examined in this Chapter. The post-nuptial agreement and the interpretation of public policy by the Privy Council in *MacLeod v MacLeod*<sup>4</sup> will be considered against the findings of Chapter Two. Analysis has been made as to the influence this judgment had on the decisions taken to promote the enforceability of pre-nuptial agreements in the Court of Appeal and the Supreme Court in *Radmacher*. This Chapter will assess what *Radmacher* and *MacLeod* have offered to this area of the law, and identify what factors influenced this movement along the status-contract continuum. This Chapter will demonstrate that these two cases have evaded the historical evolution of the treatment of private marital agreements and will conclude by exploring the practical benefit of a re-examination of these issues.

#### 3.1 RADMACHER: THE REASONING BEHIND THE FINANCIAL AWARDS

The case between Katrin Radmacher and Nicholas Granatino presented an agreement created by two wealthy individuals. There were however difficulties surrounding the details of the agreement which required further scrutiny in order for the judiciary to decide how much weight this agreement should be granted in English law. The vast amount of wealth in the case is of course important to the factual matrix, yet the application of the law regarding how

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<sup>1</sup> *NG v KR (Pre-nuptial contract)* [2008] EWHC 1532 (Fam).

<sup>2</sup> *Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 1 FLR 1478.

<sup>3</sup> *Radmacher (formally Granatino) (Respondent) v Granatino (Appellant)* [2010] UKSC 42.

<sup>4</sup> [2008] UKPC 64.

much weight should be given to this pre-nuptial agreement can still offer some general guidance.

The following section will analyse the financial awards made at each of the three stages of the case. In the High Court Baron J concluded:

As I find the PNC is defective under English law for the following reasons:(a) The husband received no independent legal advice.(b) It deprives the husband of all claims to the 'furthest permissible legal extent' even in a situation of want and that is manifestly unfair.(c) There was no disclosure by the wife. (d) There were no negotiations. (e) Two children have been born during the marriage.<sup>5</sup>

Consideration was then given to the factors in s.25 MCA, it was pointed out that the 'award should be circumscribed to a degree to reflect the fact that at the outset he has agreed to sign the PNC. Of course, from an English perspective the agreement was flawed...'<sup>6</sup> Given that Baron J considered this pre-nuptial agreement to be so fundamentally unsound using the factors developed by the judiciary in this jurisdiction, it is questionable as to why any weight should have been attached to the contract in the final award.

A more limited award was granted on the basis that Granatino had agreed to take nothing in the event of a divorce. The reduced award was based upon the husband's needs and broke down to: housing: £2,500,000, debts: £700,000, additional capital: £25,000, Duxbury fund £2,335,000; £504,000 for a house in Germany and periodical payments of £70,000 per year for their children.<sup>7</sup> The orders were made on a clean break basis. The only noticeably reduced award was from the husband's initial claim for capitalised funds, all of the other awards made here are fairly consistent with the husband's claim. The signing of the pre-nuptial contract had in effect cost him £2,314,432 between his claim and the award, around 25%. This decision shows a reluctance to give the pre-nuptial agreement very much weight, but some recognition had been accorded to the fact that such an agreement, although considered flawed, was in place. This reasoning has since been overturned.

Following the decision in the High Court Radmacher took the case to the Court of Appeal. She failed to pay the £5,560,000 lump sum to the husband; she had taken no action regarding

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<sup>5</sup> *NG v KR* (n 1) [137]. This list of reasons why the pre-nuptial contract was flawed can all be identified as factors recommended being determinative in the Government Green Paper from 1998. *Supporting Families* and the check list which has been developed by the judiciary from the previous cases, in particular *K v K (Ancillary Relief: Pre-Nuptial Agreement)*, [2003] 1 FLR 120 as discussed above in Chapter Two, p 86.

<sup>6</sup> *NG v KR* (n 1) [139].

<sup>7</sup> *NG v KR* (n 1) [141].

the £504,000 for the house in Germany and had not made any of the periodical payments. The appeal was granted, with the condition attached that all outstanding payments were to be brought to England and placed into a bank account.<sup>8</sup> The appeal was successful: the Court of Appeal stated that there had been ‘a sufficiently erroneous exercise of the judicial discretion.’<sup>9</sup> Thorpe LJ gave the leading judgment, stating that, ‘despite the appearance of the ante-nuptial agreement as a factor, the overall impression is of a negligible resulting discount.’<sup>10</sup> This decision was based on the analysis above, that the award almost matched the husband’s claim.

The Court of Appeal took a different stance to the factors in the formation of the contract which Baron J had deemed to make the pre-nuptial contract defective under English Law. Thorpe LJ summarised:

- i) The husband, at the threshold of the marriage, was of great ability and was already well established in the field of international banking.
- ii) In both France and Germany the execution of a contract providing for the property regime of the intended marriage is standard practice for the young engaged couple. Equally normal would be a considerable parental contribution to the process.
- iii) The husband clearly had the opportunity to seek independent advice during the development of the contract. The final draft may only have arrived a week before the trip to Dusseldorf to execute the contract but clearly the husband could have sought advice during the drafting process.
- iv) It is surely significant that no less than 4 months then elapsed from the execution of the contract without question or demur from the husband.
- v) Although the exclusion of an account of the wife's assets was the intention of the wife and her father, the husband well knew that she was a daughter of a significantly rich family. What was hers at the date of the marriage was likely to be of lesser significance than what was to come to her as her generation took control.
- vi) The absence of negotiations seems to me of little moment. It was the husband's choice not to initiate negotiations.
- vii) Finally, it is to be assumed that the young couple expected to start a family after marrying.<sup>11</sup>

Many of the factors which Baron J considered to render the contract as defective were thus dismissed at appeal.

The Court of Appeal set out to alter the award to be restricted to his role as a father, taking nothing as a result of being a former husband. The court did not wish to reduce the award of

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<sup>8</sup> This condition was attached to the appeal by virtue of the Civil Procedure Rules 1998, 52.3(7), meaning that an order giving permission may be made subject to conditions.

<sup>9</sup> *Radmacher v Granatino* (n 2) [44].

<sup>10</sup> *Radmacher v Granatino* (n 2) [36].

<sup>11</sup> *Radmacher v Granatino* (n 2) [33]. Greater analysis of the safeguards developed by the judiciary will be explored further in Part Three, Chapter Nine, see in particular p 279.

£2,500,000 for a home in England, but instead limited it to the period where Granatino could be considered to have ‘home making duties.’<sup>12</sup> The home was to be held on trust for Radmacher. The award for £700,000 in order to clear debts stood, it was considered that Granatino should not be encumbered by debts, again this element was viewed solely as his role as a home maker for their children. The £25,000 award made by Baron J remained, this was not challenged by Radmacher as this award was to buy a car, something which their two girls would benefit from. The £2,335,000 Duxbury fund was then scrutinised, Wilson LJ raised the question, ‘How much less does the husband need as a home-maker for the girls than he needs generally?’<sup>13</sup> He directed that the provision of any award should be given a time limit so as to be restricted to Granatino’s period as a home maker. The suggested period was until 2024, when their youngest daughter will turn twenty-two.<sup>14</sup> However, Wilson LJ required written submissions as to the appropriate figure as a home-maker, rather than the original figure which represented his needs generally.<sup>15</sup>

The Supreme Court upheld the award granted by the Court of Appeal. In her dissenting judgment Lady Hale felt it inappropriate that a distinction had not been drawn between a separating cohabiting couple and a couple who had been married,<sup>16</sup> she would have awarded the husband a home for life. When considering the change in career taken by the husband Lady Hale stated, ‘If the decision was taken for the good of the family as a whole, this would have been for the benefit of the children as well as their parents. Happy parents make for happy children.’<sup>17</sup> Lady Hale contemplated that this move had benefited the children and that this act should not lead to his future needs as a former husband being disregarded as a result of a nuptial agreement. Furthermore, she stated of the decision taken by Baron J in the High Court, ‘...while I am clear that she did not give enough weight to the agreement in this case, I

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<sup>12</sup> *Radmacher v Granatino* (n 2) [150].

<sup>13</sup> *Radmacher v Granatino* (n 2) [156].

<sup>14</sup> *Radmacher v Granatino* (n 2) [155].

<sup>15</sup> *Radmacher v Granatino* (n 2) [156].

<sup>16</sup> *Radmacher v Granatino* (n 3) [193]: ‘In my view the Court of Appeal erred in principle in treating a parent who has been married to the other parent in the same way as they would treat a parent who has not. If, for example, a parent has irredeemably compromised her position in the labour market as a result of her caring responsibilities, she is entitled to at least some provision for her future needs, even after the children have grown up. It would not be fair for an ante- or post-nuptial agreement to deprive her of that. Where parents are not married to one another, there is nothing the court can do to compensate her. But where they are, there is. A nuptial agreement should not stand in the way of producing a fair outcome.’

<sup>17</sup> *Radmacher v Granatino* (n 3) [194].

am equally clear that the Court of Appeal erred in equating married with unmarried parenthood.’<sup>18</sup> Barton comments on this reasoning:

One wonders whether it occurred to any of the usual suspects, who welcomed Lady Hale amongst them as a repentant sinner, that her point was not that cohabitation should be equal to marriage but that it should not be better. Of course, it is not for a commentator to point out that cohabitants have the advantage over the affianced in being able to make their deals stick.<sup>19</sup>

Following the decision of the Supreme Court, Nicolas Granatino only took a financial award on the basis of him being the father to their two children.<sup>20</sup>

The next section of this Chapter questions how the current position on the status–contract continuum has been reached. Analysis is made of the wider implications that this case has on the development of pre-nuptial agreements. Consideration is given to the public policy rules determined from the two facets of status and the evolution in the interpretation of these rules as traced from their source in Chapter Two.

### 3.2 AN INACCURATE DISTINCTION IDENTIFIED IN *MACLEOD*

An erroneous division was drawn between pre-nuptial agreements and post-nuptial agreements in terms of their enforceability in *MacLeod v MacLeod*.<sup>21</sup> The case was heard by the Privy Council, on appeal from the High Court of Justice of the Isle of Man, in December 2008. (Prior to the Court of Appeal’s decision in *Radmacher*). *MacLeod* involved an American couple who had married in Florida and had signed a pre-nuptial agreement on their wedding day. They agreed that each party would retain what they had brought into the marriage, with any jointly owned property accrued during their marriage to be divided equally. The husband had disclosed assets of over \$10 million, the wife had no significant assets; he had agreed to pay her \$25,000 for each full year of their marriage if they were to separate in the future. The couple moved to the Isle of Man and eight years into their marriage they created a post-nuptial agreement. This contract confirmed the original pre-nuptial agreements, but also made some further provisions for the wife. Thirteen months after they had created their post-nuptial agreement the MacLeods separated. The wife claimed that

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<sup>18</sup> *Radmacher v Granatino* (n 3) [194].

<sup>19</sup> C Barton, ‘In Stoke-on-Trent, My Lord, They Speak of Little Else’: *Radmacher v Granatino* [2011] Fam Law 67.

<sup>20</sup> Greater discussion on this point with regard to the proposed narrowing of the status-contract continuum is included in Part Two, Chapter Six.

<sup>21</sup> (n 4).

the court should ignore both agreements, and sought 30% of the husband's wealth upon marriage and 50% of the increased value during the course of the marriage. Baroness Hale, stated:

Post-nuptial agreements, however, are very different from pre-nuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry. There is nothing to stop a couple entering into contractual financial arrangements governing their life together, as this couple did as part of their 2002 agreement.<sup>22</sup>

The effect of this judgment would give encouragement to couples to draft a post-nuptial agreement following the guidance that could be gleaned from the earlier case *Brodie v Brodie*.<sup>23</sup> It does however fail to acknowledge that a post-nuptial may in fact be the price for the continuing of a marriage.<sup>24</sup> The Supreme Court in *Radmacher* commented, 'we do not see why different principles must apply to an agreement concluded in anticipation of the married state and one concluded after entry into the married state.'<sup>25</sup> The Board in *MacLeod* made some sweeping statements with regard to the differences that exist between pre-nuptial agreements and post-nuptial agreements. One of the issues raised by the Board was the timing of such agreements:

There is an enormous difference in principle and in practice between an agreement providing for a present state of affairs which has developed between a married couple and an agreement made before the parties have committed themselves to the rights and responsibilities of the married state purporting to govern what may happen in an uncertain and unhopd for future.<sup>26</sup>

The Supreme Court in *Radmacher* disagreed with this distinction. Post-nuptial agreements, by their very nature, are going to be closer in time to the point of separation than an agreement made prior to marriage. However, this description fails to take into account the

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<sup>22</sup> (n 4) 657.

<sup>23</sup> [1917] P.271.

<sup>24</sup> E Hitchings, 'From Pre-Nups to Post-Nups: Dealing with Marital Property Agreements' [2009] Fam Law 1056. Comment is also made by the Law Commission: 'We agree that before marriage there may be great pressure to sign an agreement rather than having a wedding cancelled. Equally, either party is still free to walk away. After the wedding the financially weaker party has ancillary relief rights and thereby considerable protection; but he or she may not know this; and the pressure to comply may be tremendous. He or she may be unwilling to displease a dearly-loved spouse. The parties may have now made the emotional as well as financial investment of buying a home together and having children. The agreement may be the price of the continuation of the marriage or civil partnership at a point when one party would otherwise be willing to contemplate divorce or dissolution. For these reasons, some jurisdictions regard post-nuptial agreements as far more risky, and far more in need of judicial control, than those made before marriage.' The Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) paras 3.79-80.

<sup>25</sup> *Radmacher v Granatino* (n 3) [60].

<sup>26</sup> *MacLeod v MacLeod* (n 4) [31].

possibility of a couple creating a post-nuptial agreement in the days following their wedding ceremony, nor does it allow for a pre-nuptial agreement made between a couple who have cohabited for a considerable time prior to marriage. The reason why this distinction was made was in order to promote the enforceability of post-nuptial agreements. In discussing the enforceability of pre-nuptial agreements the court considered, ‘The Board takes the view that it is not open to them to reverse the long standing rule that ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense.’<sup>27</sup> The Board were, however, of the view that they could reverse the public policy rules surrounding post-nuptial agreements.

### 3.3 THE *MACLEOD* DECISION: MISINTERPRETING HISTORY?

In order to support the notion that post-nuptial agreements were enforceable the Board misconstrued the purpose and reasoning behind sections 34, 35 and 36 of the Matrimonial Causes Act 1973. The provisions regulating Maintenance Agreements, and the rationale for them, was discussed in detail in the previous Chapter. In brief, these legislative provisions were originally included to provide a mechanism for a separated couple where a divorce may not have been wanted, or even possible.<sup>28</sup> The passing of the Maintenance Agreement Act 1957 was only possible due to the gradual erosion of the duty placed on a husband and wife to remain living together in the nineteenth century. Further to this, the matrimonial remedies of reasonable confinement and the restitution of conjugal rights had been abolished in 1891 and 1970 respectively; although it was noted that the Royal Commission in 1951-55 had identified only tenuous reasoning at this point in time in order to maintain the restitution of conjugal rights.<sup>29</sup> The Board commented upon these changes,<sup>30</sup> drawing to the conclusion that post-nuptial agreements are enforceable:

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<sup>27</sup> *MacLeod v MacLeod* (n 4) [31].

<sup>28</sup> Section 1 (1) of the Maintenance Act 1957 stated: ‘This section applies to any agreement in writing made, whether before or after the commencement of this Act, between the parties to a marriage for the purposes of their living separately.’ Furthermore, the report this Act was based on set out: ‘The essential feature of a separation agreement is that the parties agree thenceforth to live separate and apart.’ Royal Commission on Marriage and Divorce Report 1951 – 1955 Cmd. 9678 Presented to Parliament by Command of Her Majesty March 1956, at paragraph 192.

<sup>29</sup> See, ‘The Gradual Abandonment of Enforcing the Obligation: 1891 – 1970’ section in the previous chapter.

<sup>30</sup> J Miles comments on the current position of the common law duty to cohabit: ‘The duty to cohabit no longer exists, save in so far as desertion still provides a basis for divorce. The husband can no longer resort to the self-help remedy of reasonable confinement. The decree for restitution of conjugal rights has been statutorily abolished, as have actions for interference by third parties with the spousal relationship. And so, says Baroness Hale, the legal foundations for the public policy objection to post-nuptial agreements have disintegrated. Spouses are therefore free during marriage to make agreements for the eventuality of a future separation,

Hence the reasoning which led to the rule has now disappeared. It is now time for the rule itself to disappear. It has long been of uncertain scope, as some provisions which contemplate future marital separation have been upheld: see for example *Lily, Duchess of Marlborough v Duke of Marlborough* [1901] 1 Ch 165. This means that sections 49 to 51 of the 2003 Act (sections 34 to 36 of the 1973 Act) can apply to such agreements in just the same way as they do any other.<sup>31</sup>

The foundation for this statement is anomalous on a number of points. Firstly, the reasoning which led to the rule regarding the duty to cohabit and the surrounding remedies had disappeared altogether by 1970, so it is unclear as to why it is 'now time' for the rule to disappear. Furthermore, the Board is not precise as to which rule they are referring to: the previous Chapter established that the public policy surrounding separation agreements had disappeared, and hence their enforceability in the late nineteenth century, with the limitation of not being able to oust the jurisdiction of the court. Yet agreements which contemplated a future separation were still regarded as contrary to public policy: they are different in nature.

Writing in the late 1970s Cretney commented on the position:

After some conflict, it was settled in the nineteenth century that a separation agreement is not void as conflicting with public policy, providing that separation has actually occurred or is inevitable. But the law is still influenced by the old notions. The authorities (which may, however, need review in light of changed attitudes) establish the following: (i) Agreements or dispositions which tend to encourage the violation of the marriage tie are void (e.g. a provision increasing a legacy to a husband in the event of separation from his wife). (ii) Hence, an agreement in the event of a *future* separation is altogether void.<sup>32</sup>

If, the Board in *MacLeod* were attempting to bring the law up-to-date in light of changed attitudes it is notable that they did not expand on this point. Finally, citing *Lily, Duchess of Marlborough v Duke of Marlborough*<sup>33</sup> is curious given that this case affirmed the principle established in previous cases. This case was discussed in Chapter Two and the following quotation was discussed:<sup>34</sup> 'The parties to a marriage settlement, or what was equivalent to it, chose to bargain as to what should take place in the event of a future separation of the

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whether their agreement is made shortly before separation when the marriage is on the rocks or shortly after marriage; and that agreement will be legally binding and so may be sued on like any other contract.'

J Miles, '*Radmacher v Granatino*: Upping the ante-nuptial agreement.' (n 30).

<sup>31</sup> *MacLeod v MacLeod* (n 4) [39].

<sup>32</sup> S Cretney, *Principles of Family Law* (3<sup>rd</sup> edn, Sweet and Maxwell, 1979) 367. See also, Morrison: 'Agreements for future separation were not and are not generally recognised as they are too open an invitation to desert the duties of marriage. But even agreements to part which were followed by immediate separation have only clearly been recognised in the courts during the nineteenth century.' C A Morrison, 'The Family in Contract' in R H Graveson and F R Crane (eds), *A Century of Family Law* (Sweet and Maxwell Ltd, London, 1957) 136.

<sup>33</sup> [1901] 1 Ch 165.

<sup>34</sup> See above at p 67.

spouses. There can be no doubt that such a bargain is absolutely bad.’<sup>35</sup> The enforceability of separation agreements did not challenge the status of marriage, other than to confirm that the couple had the autonomy to live separately and put a legal mechanism in place for one spouse to maintain the other, or set out the terms of their separate living.<sup>36</sup> Following this rationale of the Board in *MacLeod* it is questionable as to why this extension towards post-nuptial agreements was not taken in the 1950s legislation instead of the very careful drafting of the provisions only to apply upon relationship breakdown. The findings of the previous Chapter established that the public policy rules surrounding agreements for future separation evolved independently from the public policy rule regarding the common law duty to cohabit, and the references made by the judiciary to public policy remained prevalent long after separation agreements were deemed to be enforceable.<sup>37</sup>

The couples in *Radmacher* and *MacLeod* were not contemplating a future in which they remained married but lived separately: the agreements were to come into effect upon divorce.<sup>38</sup> Although, living separately is of course inconsistent with a life-long marriage, the life-long status element of marriage is distinct to the couple living together, hence a further element as to why the *MacLeod* judgment was flawed in assimilating a post-nuptial agreement with a separation agreement. When considering *Radmacher* in the Court of Appeal, Wilson LJ commented:

The suggested introduction into the consideration of post-nuptial contracts in proceedings for ancillary relief following divorce of an analogy with the power to alter a maintenance agreement under s.35 is, if I may speak for myself, entirely unexpected; and it will need careful, albeit genuinely respectful, scrutiny in the cases in which it arises. Sections 34 and 35 have been dead letters for more than thirty years.<sup>39</sup>

The fact that s.34 and 35 have been ‘dead letters’ perhaps indicates a great deal about the current attitude to obtaining a divorce, as opposed to remaining married but living separately.

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<sup>35</sup> Rigby LJ in *Lily, Duchess of Marlborough v Duke of Marlborough*. [1901] 1 Ch. 165, 170.

<sup>36</sup> The Law Commission comment on this issue, ‘So there was originally no intention that the sections should apply to marital post-nuptial contracts in the modern sense. Their importance lay in the fact that in the days when divorce might be impossible, or distasteful to the parties, an enforceable separation agreement was vital, particularly for wives.’ The Law Commission, *Marital Property Agreements* (n 24) para 3.75.

<sup>37</sup> See in particular the case law discussed in Chapter Two, pp. 82 – 88.

<sup>38</sup> *NG v KR* (n 1) [2]: Baron J states, ‘That agreement...provides for a separation of assets upon marriage and makes no provision for either spouse upon divorce.’ *MacLeod v MacLeod* (n 4) [1]: Hale B states, ‘This case is about the validity and effect of a post-nuptial agreement made between a husband and wife while they were still living together. It dealt with their financial arrangements both while they stayed together and in the event of a divorce.’

<sup>39</sup> *Radmacher v Granatino* (n 2) [134].

In addition to the unlikely event of utilising s.35 as outlined above, Miles comments, ‘Divorce now being more readily available than when the progenitors of these sections were enacted in the 1950s and the stigma of divorce having substantially reduced fewer parties need to rely (certainly not for any length of time) on maintenance agreements.’<sup>40</sup> Given that these provisions were only to be applied to separation agreements, the Supreme Court considered that it was highly unlikely that Parliament had intended to extend the use of these provisions, even though the wording in this Act was not as explicitly clear as the wording used in 1957 to limit their use to only separation agreements. Indeed, the Law Commission comment:

We wonder how realistic it is today to suppose that spouses will litigate financial agreements while remaining married. A very few may find that preferable to divorce, but for them the section 25 jurisdiction ancillary to a decree of judicial separation will provide the necessary judicial control. So we are not convinced that the existence of sections 34 and 35 justifies giving post-nuptial agreements a status different to pre-nuptial ones.<sup>41</sup>

*MacLeod* did however aim to retain the position that pre-nuptial agreements would remain contrary to public policy, based on the reasoning that the variation power in s.35 MCA 1973 did not extend to couples who were not yet married, and so they would still potentially oust the jurisdiction of the court. *Radmacher* reached the High Court prior to the *MacLeod* decision and it is notable that counsel for Radmacher attempted to argue that the pre-nuptial agreement was valid as it fell into s.34 MCA,<sup>42</sup> but Baron J dismissed this position, ‘The strict reading of the statute demands that a maintenance agreement must be made during the continuance of the marriage and not before.’<sup>43</sup> *MacLeod* did not recognise that post-nuptial agreements made before relationship breakdown carry different public policy objections, and has given these agreements a ‘statutory legitimacy’<sup>44</sup> by utilising a piece of legislation which was never enacted to cover these agreements.

The use of the variation power under s.35 MCA 1973 is particularly bizarre when considered against the principles developed in *Edgar v Edgar*<sup>45</sup> for the treatment of separation agreements upon divorce as discussed in Chapter Two. If the couple remain married then they will only have the variation available under s.35. If however, a divorce or judicial

<sup>40</sup> J Miles, ‘*Radmacher v Granatino*: Upping the ante-nuptial agreement’ (n 30).

<sup>41</sup> The Law Commission, *Marital Property Agreements* (n 24) para 3.77.

<sup>42</sup> The argument is discussed at *NG v KR* (n 1) [128]-[132].

<sup>43</sup> *NG v KR* (n 1) [131].

<sup>44</sup> M Geffin, ‘Miller/McFarlane and MacLeod – The Duality of Law-Making’ [2009] Fam Law 412.

<sup>45</sup> (1981) 2 FLR 25.

separation were in question, and a spouse wished to challenge the agreement, then the route that should be advised would be to challenge the agreement by applying for a financial order and have the agreement looked at under s.25 of the MCA 1973, under the *Edgar* principle. Section 25 would offer a much greater scope of altering the agreement; in contrast s.35 is limited to give the court authority to vary the agreement only in very specific circumstances.<sup>46</sup>

When Baroness Hale discussed the application of the *Edgar* principles in *MacLeod* she showed preference to the ‘slightly softer’<sup>47</sup> or ‘woollier of the two oft-cited judgments.’<sup>48</sup> The judgment confirmed was that given by Ormrod J, who discussed the role of the judiciary still considering all the circumstances of the case:

To decide what weight should be given in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel, all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant.<sup>49</sup>

Yet, Oliver LJ went further, in that he indicated the weight that should be attached to these agreements:

...the court must, I think, start from the position that a solemn and freely negotiated bargain by which a party defines her own requirements ought to be adhered to unless some clear and compelling reason, such, for instance, as a drastic change of circumstances, is shown to the contrary.<sup>50</sup>

In making this distinction Baroness Hale was keen to avoid the idea that an agreement would be the starting point for the court, yet Wilson LJ stated in the Court of Appeal in *Radmacher*, ‘... it falls not far short of an informal presumption of dispositiveness. I wish to see statutory reform which introduces a formal presumption of dispositiveness and which expressly

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<sup>46</sup> Section 35 Matrimonial Causes Act 1973 (a) that by reason of a change in the circumstances in the light of which any financial arrangements contained in the agreement were made or, as the case may be, financial arrangements were omitted from it (including a change foreseen by the parties when making the agreement), the agreement should be altered so as to make different, or, as the case may be, so as to contain, financial arrangements, or (b) that the agreement does not contain proper financial arrangements with respect to any child of the family.

<sup>47</sup> J Miles, ‘*Radmacher v Granatino*: Upping the ante-nuptial agreement’ (n 30).

<sup>48</sup> J Warshaw and M Brunson-Tully ‘The Meaning of *MacLeod*’ [2009] Fam Law 305.

<sup>49</sup> [1981] 2 FLR 19,25.

<sup>50</sup> [1999] 2 All ER 386, 889.

extends to pre-nuptial as well as to post-nuptial contracts.’<sup>51</sup> This ‘pulling together’<sup>52</sup> of post-nuptial and maintenance agreements has disregarded the isolated issue of post-nuptial agreements being void for contemplating a future separation, and moreover in some cases, divorce.

These separate issues of public policy may need to be re-examined were legislative reform to occur. Marital property agreements presently have a fictitious basis and therefore clarification is required to determine where marriage really is on the continuum. When discussing the evolution of family law Freeman comments, ‘Family ‘law’ was a discrete entity, not part of a social continuum...The law was seen apart from the values it embodied...’<sup>53</sup> The law should however reflect public views so far as possible in order to best serve the society. If the position has been reached because marriage is no longer generally regarded as a sacrament and divorce is a statistical commonplace,<sup>54</sup> then this has implications for other areas of family law.

In conclusion, the Supreme Court agreed with the notion of removing the first rule of public policy, ‘MacLeod has done a valuable service in sweeping away the archaic notions of public policy which have tended to obfuscate the approach to nuptial agreements.’<sup>55</sup> However, due to the problems outlined above they did not follow the approach taken in *MacLeod* with regard to the interpretation of separation agreements and their assimilation with post-nuptial agreements, but stated that pre-nuptial agreements should also be regarded as enforceable.

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<sup>51</sup> *Radmacher v Granatino* (n 2) [128].

<sup>52</sup> A Meehan, ‘*Radmacher*: What Practitioners Need from the Supreme Court.’ [2010] Fam Law 253. Meehan comments on the separate developed rules being altered by *MacLeod*: ‘...the case law in relation to the status and effect of the different types of agreements was, at best, difficult to fathom and, at worst, impenetrable for clients. Each type of agreement...had, prior to that case, developed its own line of jurisprudence. Readers will recall that, whilst declining to develop the law concerning the enforceability of pre-nuptial agreements, Baroness Hale for the Board of the Privy Council in *MacLeod* did attempt to pull together the different strands of the latter three categories of agreement referred to above by uniting them under the banner of ‘maintenance agreements’, which had previously been tucked away, largely unused, at ss 34 and 35 of the Matrimonial Causes Act 1973... Indeed, Baroness Hale considered that litigants, lawyers and even the courts had all been barking up the wrong tree for nearly 35 years by failing to use these statutory provisions.’

<sup>53</sup> M Freeman, ‘Fifty Years of Family Law: an Opinionated Review’ in N Lowe and G Douglas (eds), *The Continuing Evolution of Family Law* (Published by Family Law, Bristol, 2009) 153.

<sup>54</sup> *Radmacher v Granatino* (n 2) [29].

<sup>55</sup> *Radmacher v Granatino* (n 3) [66].

### 3.4 PUBLIC POLICY: 'SWEPT AWAY' OR SWEEPED UNDER THE CARPET?

This move identified in *Radmacher* is significant and requires further analysis. The interpretation of the two public policy rules identified in the first Chapter will now be analysed further in order to determine and clarify the evasion of the historical evolution.

#### ***Radmacher*: Ousting the Jurisdiction of the Court**

The facet of public policy stating that a private agreement could not oust the jurisdiction of the court upon the financial division of assets arose in 1929 in *Hyman v Hyman*.<sup>56</sup> The evolution traced in Chapter Two demonstrated that this policy has seen little movement from the judiciary in applying this to all types of marital property agreements, this pattern was followed in all stages of the *Radmacher* case. Baron J argued in the High Court that this is an issue that is rooted to human nature and so remains unchanged. She stated that the court, 'should not be blind to human frailty and susceptibility when love and separation are involved. The need for careful safeguards to protect the weaker party and ensure fairness remains.'<sup>57</sup> The Court of Appeal retained and upheld the public policy argument regarding the role of the court:

(i) Any provision that seeks to oust the jurisdiction of the court will always be void but severable. (ii) Any contract will be voidable if breaching proper safeguards or vitiated under general principles of the law of contract. (iii) Any contract would be subject to the review of a judge exercising his duty under s 25 if asserted to be manifestly unfair to one of the contracting parties.<sup>58</sup>

This interpretation of public policy was supported by the Supreme Court, 'The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.'<sup>59</sup> This is concurrent with the evolution outlined in the previous Chapter.

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<sup>56</sup> [1929] AC 601.

<sup>57</sup> *NG v KR* (n 1) [130].

<sup>58</sup> *Radmacher v Granatino* (n 2) [1190].

<sup>59</sup> *Radmacher v Granatino* (n 3) [75].

## ***Radmacher*: Contemplating Future Separation and a Politically Dangerous View of Marriage and Divorce**

When *Radmacher* was in the High Court, Baron J stated, ‘I accept the submission by Mr Mostyn that pre-nuptial agreements are not enforceable, *per se*, in English law’<sup>60</sup> and used *X v X (Y intervening)*<sup>61</sup> to outline that position, ‘It remains the rule that any agreement or arrangement entered into by a husband and wife, whether before or during the marriage, which contemplates or provides for the separation of husband and wife at a future time is against public policy and void.’<sup>62</sup> In addition, specific reference was made to the statement by Wall J in *N v N (Jurisdiction: Pre-Nuptial Agreement)*,<sup>63</sup> ‘...an agreement made prior to marriage which contemplates the steps the parties will take in the event of divorce or separation is perceived as being contrary to public policy because it undermines the concept of marriage as a life-long union.’<sup>64</sup> When the case reached the Court of Appeal however Thorpe LJ stated:

i) In so far as the rule that such contracts are void survives, it seems to me to be increasingly unrealistic. It reflects the laws and morals of earlier generations. It does not sufficiently recognise the rights of autonomous adults to govern their future financial relationship by agreement in an age when marriage is not generally regarded as a sacrament and divorce is a statistical commonplace. ii) As a society we should be seeking to reduce and not to maintain rules of law that divide us from the majority of the member states of Europe. iii) Europe apart, we are in danger of isolation in the wider common law world if we do not give greater force and effect to ante-nuptial contracts.<sup>65</sup>

Clearly there is a great deal of emphasis here on bringing England and Wales in line with other European jurisdictions. The previous Chapter noted that this was not the first occasion where such concerns had been raised by Thorpe LJ.<sup>66</sup> This factor is discussed below,<sup>67</sup> with regard to its influence in the movement towards the contract side of the status-contract

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<sup>60</sup> *NG v KR* (n 1) [109].

<sup>61</sup> [2002] 1 FLR 508.

<sup>62</sup> [2002] 1 FLR 508, [79].

<sup>63</sup> [1999] 2 FLR 745.

<sup>64</sup> (n 63) [752].

<sup>65</sup> *Radmacher v Granatino* (n 2) [29].

<sup>66</sup> See above at pp. 88-89 *Crossley v Crossley* [2008] 1 FLR 1467, [18]. Thorpe LJ stated, ‘There is, in my judgment, an even stronger argument for legislative consideration, given the resolution of the European Union to formulate some regulation to tackle the difficulties that arise from different approaches in the member states. There is an obvious divide between the provisions of the civil law jurisdictions and the absence of any marital property tradition in the common law systems. Undoubtedly there would be some narrowing between this European divide if greater opportunity were given within our justice system for parties to contract in advance of marriage, to make provision for the possibility of dissolution.’

<sup>67</sup> This discussion begins at p 107.

continuum. Moreover, it is apparent that the sentiment in the first part of this examination of public policy mirrors those reservations posed by Connell J in 2002 in *M v M (Prenuptial Agreement)*,<sup>68</sup> as discussed in the previous Chapter.<sup>69</sup> This politically dangerous view of marriage and pre-nuptial agreements was abandoned in the Supreme Court, instead the view taken in *MacLeod* was supported by the majority.<sup>70</sup> The statement by Thorpe LJ, albeit politically explosive in the sense that it recognises a change in attitude towards marriage, is in line with previous judgments and reasoning as to why pre-nuptial agreements are considered to be void as against public policy.<sup>71</sup> This point was swiftly dropped in the Supreme Court, and replaced by upholding the somewhat confused reasoning presented by the Privy Council. The evolution has been evaded. The Supreme Court went on to state:

If parties who have made such an agreement, whether ante-nuptial or post-nuptial, then decide to live apart, we can see no reason why they should not be entitled to enforce their agreement. This right will, however, prove nugatory if one or other objects to the terms of the agreement, for this is likely to result in the party who objects initiating proceedings for divorce or judicial separation and, arguing in ancillary relief proceedings that he or she should not be held to the terms of the agreement.<sup>72</sup>

The upshot of this statement is that it would seem parties can create a binding agreement on the basis that they provide for future separation only, and not divorce. This can of course still be varied under s.35 MCA 1973. However, if the couple wish subsequently to divorce these provisions provide a springboard to accessing the principles developed in *Edgar* and so pre- and post-nuptial agreements have been given a higher status than merely one of the factors to be considered under s.25 MCA 1973. This progression has been made without any mention as to the public policy rule and element of status regarding pre- and post-nuptial agreements undermining marriage as a life-long institution by the majority of the Supreme Court.<sup>73</sup>

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<sup>68</sup> [2002] 1 FLR 654.

<sup>69</sup> Connell J stated, 'Given that a significant percentage of marriages these days end in divorce, it is understandable that mature adults, and in particular those who have been married before, might wish to agree what should happen in the event of a breakdown. The desire for certainty, or the wish to know where you stand, is not unusual. It is clear, of course, that the existence of such an agreement does not oust the jurisdiction of the court... The public policy objection to such agreements, namely that they tend to diminish the importance of the marriage contract, seems to me to be of less importance now that divorce is so commonplace' *M v M (Prenuptial Agreement)* [2002] 1 FLR 654, [21]. Quotation originally used in Chapter Two, p 85.

<sup>70</sup> *Radmacher v Granatino* (n 3) [52].

<sup>71</sup> N Wilson, 'Ancillary Relief Reform Response of the Judges of the Family Division to Government Proposals' [1999] 29 Fam Law 159: 'Some of us also feel that the institution of marriage is devalued if, while entering it, a couple can elect to sever some of its most important, if contingent, legal effects. Others of us consider, hesitantly, that marriage is made for mankind, not vice versa, and that, subject to obvious limits, adults should be allowed to cast their relationships in their own way. We are at one that this is profoundly difficult terrain.'

<sup>72</sup> *Radmacher v Granatino* (n 3) [52].

<sup>73</sup> Lady Hale's dissent is discussed below, beginning at p 106.

Therefore the promotion of the enforceability of these agreements has evaded the evolution of case law, and this element of the law's progression should be re-examined should legislative reform occur. As the law currently stands it is evident that history has been ignored. It is proposed that this deserves reassessment prior to a legislative reform on marital property agreements.

### 3.5 MARRIAGE STILL COUNTS FOR SOMETHING

Lady Hale dissented from the majority view taken in the Supreme Court, the basis for this can be viewed from the wider view of the status-contract tension, 'The issue may be simple, but underlying it are some profound questions about the nature of marriage in the modern law and the role of the courts in determining it.'<sup>74</sup> This quotation forms the structure of Parts Two and Three as it captures the basis of this thesis, setting out the two questions which legislative reform will raise. Lady Hale was very mindful of the wider implications in her judgment. She comments on the abandonment of the element of public policy concerning the lifelong nature of marriage, 'Even if the old rationale for public policy rule 1 has gone, I still believe that it is the public policy of this country to support marriage and to encourage married people to stay married rather than to encourage them to get divorced.'<sup>75</sup> This is the only judgment in the Supreme Court which recognises any influence on marriage, although a great deal of the confusion was indeed caused by Lady Hale initially through her input into the *MacLeod* judgment.<sup>76</sup>

Lady Hale proposed a different test, moving away from the notion of a presumption of enforceability proposed by the majority in the Supreme Court:

The test to be applied to such an agreement, it seems to me, should be this "Did each party freely enter into an agreement, intending it to have legal effect and with a full appreciation of its implications? If so, in the circumstances as they now are, would it be fair to hold them to their agreement?" That is very similar to the test proposed by the majority, but it seeks to avoid the "impermissible judicial gloss" of a presumption or starting point, while mitigating the rigours of the *MacLeod* test in an appropriate case.<sup>77</sup>

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<sup>74</sup> *Radmacher v Granatino* (n 3) [132].

<sup>75</sup> *Radmacher v Granatino* (n 3) [160].

<sup>76</sup> See Lady Hale's comment in *Radmacher v Granatino* (n 3) [139]: 'It may be helpful to give a brief account of how the law has got into its current mess (for which I must take some of the blame).' See also for example C Barton, 'In Stoke-on-Trent, My Lord, They Speak of Little Else' (n 19) where Lady Hale is described as a 'repentant sinner' due to her involvement in the *MacLeod* judgment, the full quotation is included above at p 95.

<sup>77</sup> *Radmacher v Granatino* (n 3) [169].

She also makes a comment on the status element of marriage, the aspiration of marriage being for life, and also the importance of amicable separations:

There may be people who enter marriage in the belief that it will not endure, but for most people the hope and the belief is that it will. There is also a public interest in the stability of marriage. Marriage and relationship breakdown can have many damaging effects for the parties, their children and other members of their families, and also for society as a whole. So there is also a public interest in encouraging the parties to make adjustments to their roles and life-styles for the sake of their relationship and the welfare of their families.<sup>78</sup>

This sentiment highlights the possible tension between contract and status: there is a public interest in the stability of marriage, and public interest in ensuring the private reordering of lives. It was also suggested that if an agreement sets an attractive division of assets that it may actually encourage a spouse to look towards the prospect of divorce favourably upon facing difficulties in the marriage.<sup>79</sup> Also, it raises the possibility that the hope of a life-long marriage held by the majority of couples would be undermined. The dissenting judgement of Lady Hale is firmly based on the principle outlined in her concluding sentence, ‘Marriage still counts for something in the law of this country and long may it continue to do so.’<sup>80</sup>

### 3.6 MOVEMENT TOWARDS CONTRACT: THE EUROPEAN PICTURE AND PRIVATE AUTONOMY

The treatment of Radmacher and Granatino’s agreement in their respective homelands demonstrates the stark difference in approach taken towards the enforceability of pre-nuptial agreements in England and Wales.<sup>81</sup> This element was drawn out in the Court of Appeal. The most glaringly obvious question is why this divorce took place in England: this was debated and answered in the High Court:

The wife has sought to suggest that it is merely fortuitous that this case is before the English court because this couple were international and might have lived anywhere. She points to the fact that they discussed living in Germany...If this argument is made to suggest that they only have a passing connection with England then I beg to differ. This marriage was very closely connected with this country. The parties were

<sup>78</sup> *Radmacher v Granatino* (n 3) [175].

<sup>79</sup> *Radmacher v Granatino* (n 3) [135].

<sup>80</sup> *Radmacher v Granatino* (n 3) [194].

<sup>81</sup> Thorpe LJ considers the acceptance of judicially imposed outcomes on parties who are mindful of the very different outcome which could have been reached in their homeland: ‘How could the respondent accept as fair a London order that her transfer or pay over a substantial proportion of his hard earned fortune knowing that in his homeland his liability would have been minimal?’ in K Boele-Woelki, J Miles and J Sherpe (eds), *The Future of Family Property Law in Europe* (Intertax, Cambridge, 2011) The Rt. Hon. Lord Justice Matthew Thorpe ‘Financial Consequences of Divorce: England Versus the Rest of Europe’ 15.

married here, lived here (save for about a year) for the bulk of their marriage and their two children were born here. This is the country with which the marriage is most closely and obviously connected.<sup>82</sup>

Yet, it is more surprising that it was actually Radmacher who engaged this jurisdiction. It was put forward that in order to have had the case heard in Germany she would have been required to live there for at least six months.<sup>83</sup> It is questionable, therefore, as to how much confidence Radmacher had really placed on the Clause 2 in the contract which supported the application of German law.<sup>84</sup> At the outset of the hearing Radmacher attempted to argue that the clause was a jurisdiction clause, meaning all decisions regarding maintenance should be taken by a German court. Radmacher argued that this clause in the agreement invoked Art 23 of Brussels 1, relating to ‘jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.’<sup>85</sup> Granatino instead stated that this clause was a mere choice of law rather than a jurisdiction clause. The Notary outlined that this term was to be interpreted as to mean as far as domestic law would permit the application of German law, and not that the case could only be heard in a German court. Based on the evidence from the Notary, Radmacher withdrew this claim from the case.

This argument would however have been irrelevant to the case; the English courts will apply English family law. Harding comments on this in the context of divorce cases and applications for a financial order.

While this approach can be criticised as being insular, it makes sense if the marriage is viewed as a public commitment rather than a private contract. The English courts are responsible for enforcing the public commitments of an English marriage, and thus when the court exercises jurisdiction to award financial relief, it is these English obligations that it enforces.<sup>86</sup>

The concept of marriage as having a legal status has been imposed on an international couple. England is a *lex fori* country in the field of family law, this has been described as a ‘central pillar of our system of private international law.’<sup>87</sup> There is some flexibility towards this, in that the court may take into account any relevant foreign factors involved in the case; for

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<sup>82</sup> *NG v KR* (n 1) [46].

<sup>83</sup> *Radmacher v Granatino* (n 2) [11].

<sup>84</sup> *NG v KR* (n 1) [40]: ‘We hereby agree, pursuant to art 14 and 15 of the German Act on the Reform of Private International Law, that the effects of our marriage in general terms, as well as in terms of the law of matrimonial property and the law of succession shall be subject to the Law of the Federal Republic of Germany.’

<sup>85</sup> Council Regulation (EC) 44/2001 (On jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

<sup>86</sup> M Harding, ‘The Harmonisation of Private International Law in Europe: Taking the Character Out of Family Law?’ *Journal of Private International Law*, April 2011, Vol. 7 No.1, 226.

<sup>87</sup> *NG v KR* (n 1) [87].

example Thorpe LJ's consideration to what he described as 'Nigerian factors'<sup>88</sup> in the forum conveniens case *Otobo v Otobo*;<sup>89</sup> the decision being that England would be the suitable jurisdiction for the divorce to take place.

Further European regulations can be considered at this stage. Brussels I contained provisions relating to maintenance. Brussels II was introduced in March 2003, and was enlarged to create Brussels II Revised in March 2005. Brussels II sets out rules regarding parental responsibility and divorce, these are jurisdictional rules. However, neither of these Regulations deals with the property consequences when a couple divorce. The European Commission had the desire to overcome the problems created by the varied national laws across the European Union with Brussels III. Thorpe LJ highlights the difficulties posed to such a Regulation:

In this uncharted territory, the search for harmonisation clearly poses great difficulty, given an enlarged Europe where 26 member states would be invited to the negotiating table. Whilst the civil law jurisdictions of Europe generally employ notarised marital property regimes to regulate both the property consequences of marriage and divorce, the common law jurisdictions attach no property consequences to marriage and rely on a very wide judicial discretion to fix the property consequences of divorce.<sup>90</sup>

This background undoubtedly has relevance to *Radmacher* as the factual matrix had firm roots in this European dimension.<sup>91</sup> In addition, there have been two recent regulations which are relevant to the analysis of *Radmacher* as they would have introduced an obligation to apply the foreign law applicable to that person applying for a divorce or maintenance. In 2005 the Commission of the European Communities introduced a proposal for a council regulation on jurisdiction, applicable law and enforcement of decisions and cooperation in

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<sup>88</sup> *Otobo v Otobo* [2003] 1 FLR 192, [57].

<sup>89</sup> (n 88).

<sup>90</sup> *Radmacher v Granatino* (n 2) [5].

<sup>91</sup> See for example the concluding remarks of J Scherpe and J Miles in K Boele-Woelki, J Miles and J Sherpe (eds), *The Future of Family Property Law in Europe* (Intersertia, Cambridge, 2011) 424: 'Our conference proceedings and book editing could not have been framed by a more apt case: *Radmacher v Granatino* is a microcosm of so many of the debates pertinent to the future of family property law in Europe: about the jurisdiction in which matrimonial disputes and associated property and maintenance proceedings should be heard; about the law which should be applied by whichever court decides the case; about the force which parties' own agreements – whether about the disposition of their property, or about choice of forum or law – should have; most basically, about how any domestic law ought to allocate property and award maintenance on divorce.'

matters relating to maintenance obligations.<sup>92</sup> This proposal set out the context of this regulation:

At its meeting in Tampere on 15 and 16 October 1999, the European Council asked in matters relating to maintenance obligations for the establishment of special common procedural rules to simplify and accelerate the settlement of cross-border disputes and for the removal of intermediate measures needed for the recognition and enforcement in one Member State of a judgment given in another Member State.<sup>93</sup>

In 2007 the Commission of the European Communities put forward the Proposed Regulation regarding jurisdiction and introducing rules concerning applicable law in matters of divorce and legal separation.<sup>94</sup> The information given in the general context of this proposal accurately describes the position which Katrin Radmacher and Nicolas Granatino found themselves to be in:

The growing mobility of citizens within the European Union has led to an increasing number of international couples, i.e. spouses of different nationalities, spouses who live in different Member States or who live in a Member State in which one or both of them are not nationals. In view of the high divorce rate in the European Union, applicable law and jurisdiction in matrimonial matters concern a significant number of citizens each year.... There are currently no Community rules in the field of applicable law in matrimonial matters.<sup>95</sup>

The couple involved in this case represent exactly the situation that this proposal was aiming to regulate: a German wife and a French husband living in England.<sup>96</sup>

The government rejected those proposals, with the result that regardless of the nationality of the parties involved or whatever their personal agreement may be as to jurisdiction, at present

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<sup>92</sup> COM (2005) 649 final 15 Dec 2005.

<sup>93</sup> Brussels, 15.12.2005 COM (2005) 649 final 2005/0259 (CNS). Quotation at p 2.

<sup>94</sup> (2006/0135 (CNS) 12 January 2007).

<sup>95</sup> Brussels, 17.7.2006 COM (2006) 399 final 2006/0135 (CNS). Quotation at 4.

<sup>96</sup> The proposal sets out what this regulation is aiming to improve for such a couple in terms of legal certainty and the problems that currently exist when this situation arises: 'The overall objective of this Proposal is to provide a clear and comprehensive legal framework in matrimonial matters in the European Union and ensure adequate solutions to the citizens in terms of legal certainty, predictability, flexibility and access to court. The current situation may give rise to a number of problems in matrimonial proceedings of an international nature. The fact that national laws are very different both with regard to the substantive law and the conflict-of-law rules leads to legal uncertainty. The great differences between and complexity of the national conflict-of-law rules make it very difficult for international couples to predict which law will apply to their matrimonial proceeding. The large majority of Member States do not provide any possibility for the spouses to choose applicable law in matrimonial proceedings. This may lead to the application of a law with which the spouses are only tenuously connected and to a result that does not correspond to the legitimate expectations of the citizens.' Brussels, 17.7.2006 COM (2006) 399 final 2006/0135 (CNS). Quotation at 5-6.

courts in England and Wales will apply English family law.<sup>97</sup> Accepting these proposed regulations would have resulted in the application of foreign law, and the pre-nuptial contract would have been valid under German law.<sup>98</sup> If the divorce had taken place in France then the position would have been exactly the same, applying German law.<sup>99</sup> Granatino would have received nothing.

In the High Court Baron J stated:

Given the factual matrix, whilst I do not regard the foreign elements as determinative or ultimately fully decisive, they are definitely relevant because they are essential features. In particular, they are discounting factors in the sense that the amount of the husband's claim (if not extinguished) should be reduced by pointing me towards the lower end of the bracket of any possible award.<sup>100</sup>

This reasoning was not obviously apparent in the financial award granted. This can be contrasted to the stance taken by the Court of Appeal. When considering the background to this case Thorpe LJ identified:

The present appeal is almost a paradigm example of the caprice of outcome dependent on which European jurisdiction is first seized. Here, for himself, the husband was awarded over £5 million. In France or Germany he would have been awarded nothing for himself. At least England was the jurisdiction with which the marriage had the closest connection.<sup>101</sup>

The decision in the Court of Appeal was certainly driven by consideration being given to the wider approach taken towards such contracts across Europe. If legislation is passed in the future then the regulation of private agreements in other jurisdictions, both European and beyond, could provide guidance for England and Wales.<sup>102</sup> Very little is said in the Supreme

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<sup>97</sup> The consultation paper, *Matrimonial Property Regimes and the property consequences of registered partnerships – How should the UK approach the Commission's proposals in these areas?* (CP 8/2011), responses and report are available at [https://consult.justice.gov.uk/digital-communications/matrimonial\\_property](https://consult.justice.gov.uk/digital-communications/matrimonial_property).

<sup>98</sup> *NG v KR* (n 1) [77].

<sup>99</sup> *NG v KR* (n 1) [78].

<sup>100</sup> *NG v KR* (n 1) [93]-[94].

<sup>101</sup> *Radmacher v Granatino* (n 2) [11].

<sup>102</sup> See for example the work already undertaken in this field: J M Scherpe (ed), *Marital Agreements and Private Autonomy in a Comparative Perspective* (Hart Publishing, Oxford 2012). In the foreword to this volume, Lord Wilson comments, 'But what about pre-nuptial and post-nuptial agreements, i.e. agreements reached significantly *in advance* not only of the divorce but also often of the separation and not infrequently of the marriage itself? Here, English law has much to learn from other jurisdictions ahead of it in this area.' p vii. The volume contains details on the regulation of marital agreements in: Australia; Austria; France and Belgium; England and Wales; Germany; Ireland; The Netherlands; New Zealand; Scotland; Singapore; Spain; Sweden and United States. See also, D Salter, C Butruille-Cardew and S Grant (eds), *International Pre-Nuptial and Post-Nuptial Agreements* (Jordan Publishing Limited, Bristol, 2011). Details of the requirements to create a

Court regarding the European dimension of the case, other than setting out, ‘The approach of English law to nuptial agreements differs significantly from the law of Scotland, and more significantly from the rest of Europe and most other jurisdictions.’<sup>103</sup> Instead the judgment focuses on the ‘surprise decision’<sup>104</sup> of *MacLeod* and the desire to give due respect for autonomy.<sup>105</sup>

The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties’ agreement addresses existing circumstances and not merely the contingencies of an uncertain future.<sup>106</sup>

Both the growing regard for autonomy and the desire to move this jurisdiction closer to other European jurisdictions in our treatment of pre- and post-nuptial agreements have to be considered to be influential factors in reaching the current position on the status-contract continuum. These elements do not, however, overshadow the evasion of the historical development which occurred recently.

### 3.7 THE CURRENT TEST AND SUBSEQUENT DECISIONS

Trim comments on the upshot of *Radmacher* and *MacLeod*, ‘Rightly or wrongly there is now a presumption that the court will give effect to a nuptial agreement (before or after marriage) freely entered and understood, provided it is not unfair in the prevailing circumstances. It is no longer just one of the circumstances of the case.’<sup>107</sup> The current test<sup>108</sup> has elevated pre

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marital contract are included on: Australia; Austria; Canada; France; Russia; Switzerland; Ukraine; England and Wales and United States of America.

<sup>103</sup> *Radmacher v Granatino* (n 3) [3].

<sup>104</sup> A Meehan, ‘Analyse this: *Radmacher v Granatino*’ [2009] Fam Law 816.

<sup>105</sup> A Meehan, ‘*Radmacher* in the Supreme Court: What does it all mean?’ [2010] Fam Law 1284: ‘Interestingly, little was said by the Supreme Court about what had been a key factor in the decision of the Court of Appeal, namely the desire to bring the English jurisdiction in line with those of Europe where, unlike here, there are property consequences attaching to marriage and divorce and also the inability of English courts to apply applicable law. Instead, the focus of the majority was very much on the need to grant autonomy to individuals to contract as they see fit, subject to some safeguards.’

<sup>106</sup> *Radmacher v Granatino* (n 3) [78].

<sup>107</sup> H Trim, ‘*Radmacher v Granatino*: The Wait is Over’ [2010] Fam Law 1185. This is discussed again below at p 223.

<sup>108</sup> The test is set out above at p 105, but repeated here for clarity: ‘If parties who have made such an agreement, whether ante-nuptial or post-nuptial, then decide to live apart, we can see no reason why they should not be entitled to enforce their agreement. This right will, however, prove nugatory if one or other objects to the terms of the agreement, for this is likely to result in the party who objects initiating proceedings for divorce or judicial separation and, arguing in ancillary relief proceedings that he or she should not be held to the terms of the agreement.’ *Radmacher v Granatino* (n 3) [52].

and post-nuptial agreements above the factors to be considered under s.25 MCA 1973, currently the courts have a duty to exercise this provision. Hodson comments, ‘The Supreme Court decision does not of course make marital agreements binding in law — only Parliament can do so and probably will in the next 4 years following the Law Commission proposals published in January. In the meantime, this is as close to binding as judge-made law could provide.’<sup>109</sup> The details of the proposals are considered in Part Three. The models for reform raise questions regarding the role of the court. The release of this consultation paper is recognised at this point as a step towards cementing the position of marital property agreements in the future. We now have two subsequent reported decisions. In *Z v Z (No 2) (Financial Remedies: Marriage Contract)*<sup>110</sup> Mr Justice Moor refers the ‘seismic shift’<sup>111</sup> in this area since the Supreme Court’s decision and in *V v V (Prenuptial Agreement)*<sup>112</sup> Mr Justice Charles acknowledges, ‘the need to recognise the weight that should now be given to autonomy...’<sup>113</sup> The movement along the continuum by avoiding part of the element of status has been secured.

### 3.8 CONCLUSION

In conclusion, the current position of pre-nuptial and post-nuptial agreements has been reached through the development of the public policy rule meaning a couple had a duty to cohabit. This issue was settled in the late nineteenth century. Rules have since been developed to set out how these agreements may be treated should the couple wish subsequently to divorce, the leading case being *Edgar v Edgar*.<sup>114</sup> In the current test the Supreme Court has repealed the rule of public policy, thus upon divorce, pre and post-nuptial agreements have fallen in line with the *Edgar* principles which were created to deal specifically with agreements made upon separation.

If legislative reform were to occur in the future then the position would have to be stripped back to examine the rule established in the nineteenth century concerning the contemplation of future separation and the life-long nature of marriage which meant that pre- and post-

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<sup>109</sup> D Hodson, ‘English Marital Agreements for International Families After *Radmacher*’ [2011] IFL 31.

<sup>110</sup> [2011] EWHC 2878 (Fam).

<sup>111</sup> *Z v Z (No 2) (Financial Remedies: Marriage Contract)* [2011] EWHC 2878 (Fam), [33].

<sup>112</sup> [2011] EWHC 3230 (Fam), [2012] 1 FLR (forthcoming).

<sup>113</sup> *V v V (Prenuptial Agreement)* [2011] EWHC 3230 (Fam), [36].

<sup>114</sup> (1981) 2 FLR 25.

nuptial agreements have been considered to be void.<sup>115</sup> It is perfectly possible that this rule is no longer appropriate, but this should be given further consideration on its own merits and not ‘swept away’ by upholding confused reasoning. There are glimmers of analysis on this point within *Radmacher*, the idea of reflecting social reality and the notion of European harmonisation in the Court of Appeal and the desire to uphold autonomy in the Supreme Court. These persuasive factors could be utilised to overturn this rule of public policy, but it is proposed that further analysis should be carried out prior to any legislative reform. Cretney comments on the prospect of reform in this area:

No party is likely to be enthusiastic about introducing (or facilitating the introduction) of legislation on this subject. Bills to deal with controversial issues where the differences do not reflect traditional ‘party’ loyalties present Governments (who are necessary mindful of the need to keep effective control of the legislative timetable) with very real difficulties. But the problem need not be insoluble. The baton has now passed to the Law Commission which has the task (difficult as it may be) of bringing forward detailed proposals which will hopefully achieve a degree of consensus sufficient to ensure that no responsible Government will be able to ignore them. Only in that way can the systematic development and reform of the law (which is the Law Commission’s statutory duty to promote) be achieved. As Baroness Hale remarked several times in her judgment, at the moment the law is ‘a mess.’<sup>116</sup>

Parts Two and Three explore what impact such reform may have on the regulation of family law.<sup>117</sup> Analysis is made on Lady Hale’s sentiment with regard to the ‘profound questions about the nature of marriage in the modern law and the role of the court.’<sup>118</sup> Attention will also be given to the Law Commission’s comment, ‘What is the place of autonomy in family law?’<sup>119</sup> The narrowing of the status-contract continuum will be explored in great depth.

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<sup>115</sup> In the previous Chapter at p 60 the distinction was traced to *Westmeath v Westmeath* (1830) 1 Dow & CI 519, 627: ‘This was the deed of 1817, and on the face of that deed it is contrary to the policy of the law and cannot be supported. About that part of the decree, therefore, which declares that deed to be null and void, there can, I think, be no question. Then came the other deed, dated the 30 May 1818, but which was executed in August of that year. The differences had still continued, and then this deed of separation was executed, and on the face of it the same objection as that to the deed in 1817 does not apply.’

<sup>116</sup> S Cretney’s Foreword to S Gilmore, J Herring and R Probert (eds), *Landmark Cases in Family Law* (Hart Publishing, Oxford, 2011) p vii.

<sup>117</sup> As stated in the Introduction at p 1, the Law Commission recognises the wider impact of this potential reform: ‘Our consultation asks whether there should be legislative reform to enable couples effectively to contract out of ancillary relief, and out of the court’s discretion, by entering into an agreement in a prescribed form and subject to appropriate safeguards. That is, at first sight, quite a narrow question. But it is a deep one and requires us to consider issues at the heart of family law, such as: ....What is the place of autonomy in family law?...’ The Law Commission, *Marital Property Agreements* (n 24) paras 1.11 and 1.12.

<sup>118</sup> *Radmacher v Granatino* (n 3) [132].

<sup>119</sup> The Law Commission, *Marital Property Agreements* (n 24) para 1.12.

## CHAPTER FOUR

### STATUS AND CONTRACT: A HUMAN RIGHTS ISSUE?

In light of the move to promote the enforceability of pre- and post-nuptial agreements demonstrated in the previous Chapter,<sup>1</sup> it is questionable as to whether this invokes any human rights based issues, or if future legislative reform could potentially touch upon human rights based issues. The aim of this Chapter is not to detract from or to weaken the arguments put forward previously with regard to the evasion of the evolution that has recently occurred. However, this Chapter will set out that there is scope for the Human Rights Act 1998<sup>2</sup> to play a part in the enforceability of marital property agreements in England and Wales. It is suggested in this Chapter that the use of Article One of the First Protocol<sup>3</sup> could provide protection for private agreements relating to property. The aim of this thesis is to examine and review the tension between status and contract in family law. This Chapter proposes that the use of A1P1 could make the link to the contractual side of the continuum stronger. A marital property agreement would still have to be recognised as a valid contract in this jurisdiction before A1P1 could be invoked. Thus, the discussion regarding the journey taken by these agreements from void as against public policy through to their current position is still very pertinent.

When *Radmacher v Granatino* was being heard in the High Court,<sup>4</sup> several human rights based arguments were presented, yet these arguments played no part in the judgment and were not pursued when the case went to appeal. This Chapter will explore the scope of these arguments and analyse why they were not pursued to their full potential. If the public policy arguments that are so tightly woven into this area of family law had been explored in more detail in the High Court, in conjunction with further analysis of these human rights based claims, then it is possible that additional guidance could have been provided for this uncertain area of law. This Chapter will conclude as to whether the chance to utilise the provisions of the HRA 1998 should be regarded as a missed opportunity.

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<sup>1</sup> See in particular p 105, the current test proposed by the Supreme Court suggested, 'If parties who have made such an agreement, whether ante-nuptial or post-nuptial, then decide to live apart, we can see no reason why they should not be entitled to enforce their agreement. This right will, however, prove nugatory if one or other objects to the terms of the agreement, for this is likely to result in the party who objects initiating proceedings for divorce or judicial separation and, arguing in ancillary relief proceedings that he or she should not be held to the terms of the agreement.' *Radmacher v Granatino* [2010] UKSC 42 [52].

<sup>2</sup> Will later be referred to as HRA 1998.

<sup>3</sup> Will later be referred to as A1P1.

<sup>4</sup> *NG v KR (Pre-nuptial contract)* [2008] EWHC 1532 (Fam), [2009] 1 FLR 1478.

#### 4.1 FAMILY LAW, *RADMACHER* AND HUMAN RIGHTS

It is now over a decade since the incorporation of the European Convention for the Protection of Human Rights into our domestic law, via the mechanism of the HRA 1998. The incorporation on 2 October 2000 has certainly had some impact on the area of family law.<sup>5</sup> It has been suggested however that the potential force of this Act has been inhibited due to an avoidance of the potential undermining of the family unit through an individualistic rights based approach and also the continual presence of public policy issues.<sup>6</sup> The individualistic rights potentially flowing from the presence of a marital property agreement against the surrounding public policy can be viewed in terms of the tension between status and contract.

In *NG v KR*<sup>7</sup> it was initially claimed that s.34 of the Matrimonial Causes Act 1973<sup>8</sup> was incompatible with the HRA 1998, claiming that this provision had the effect of limiting contractual freedom in only allowing for maintenance agreements to be valid.<sup>9</sup> This point was withdrawn before the case came to court. In addition, Katrin Radmacher claimed that the pre-nuptial contract had only been nullified due to their move from one EU jurisdiction to another. This would be considered vertical interference by the State, and it would be a restriction on their freedom to contract and therefore a contravention of Article 8.<sup>10</sup> Two further arguments were put forward in relation to AIP1. The first issue raised was that the removal of property would be contrary to the public and general interest and would fail to strike the fair balance required between the demands of the interest of the individual and the general interest.<sup>11</sup> Furthermore, it was suggested that the actual contract could be deemed to be property, and therefore failing to give force to this would also be an interference in

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<sup>5</sup> The change in approach towards the recognition of same sex couples between the cases *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 and *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557 provides a profound illustration of this. This is discussed further in Chapter Seven. For example, Millbank remarks, 'Greater scrutiny of discriminatory provisions and the ability to read legislation in a manner compliant with the human rights provision or declare them incompatible led to the extraordinary position that, just two years after the unanimous House of Lords decision held in *Fitzpatrick* that a same-sex couple could not live as spouses, a unanimous Court of Appeal held that a gay couple *were* indeed living as spouses under exactly the same statutory provisions.' J Millbank 'The role of 'functional family' in same-sex family recognition trends' [2008] CFLQ 155. These cases are discussed further below, see in particular p 201.

<sup>6</sup> See, S Harris-Short 'Family law and the Human Rights Act 1998: judicial restraint or revolution?' [2005] CFLQ 329.

<sup>7</sup> *NG v KR* (n 4).

<sup>8</sup> Will later be referred to as MCA 1973.

<sup>9</sup> *NG v KR* (n 4) [96].

<sup>10</sup> *NG v KR* (n 4) [96].

<sup>11</sup> *NG v KR* (n 4) [101]-[104].

property rights.<sup>12</sup> These human rights based arguments could certainly have been examined further in subsequent judgments.

When considering the human rights based arguments, Baron J comments:

I consider that there has been an unnecessary focus upon this aspect of the matter. Hours of time (and costs approaching £80,000) have been expended on the points in relation to the Human Rights Act (HRA). Whilst of course, I must give effect to the terms of the HRA in this and every case.<sup>13</sup>

Baron J agreed that the HRA 1998 was applicable to the case, as Article 6 is engaged in every case.<sup>14</sup> In addition she outlined that under s.3 there is the requirement to ensure that legislation is interpreted so that it is convention compatible,<sup>15</sup> and s.6(1) makes it unlawful for any public authority to act in a way that is incompatible with a convention right.<sup>16</sup> Therefore there is a requirement to interpret the MCA 1973 in such a way so as to be convention compatible. Further use of the HRA 1998 was not however pursued in the case, but it will now be discussed and evaluated in more detail.

#### 4.2 ARTICLE ONE OF THE FIRST PROTOCOL

A1P1 gives a person a right to the peaceful enjoyment of their possessions, but a person may be deprived of this right if this is in the public interest or by a condition of law:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The first human rights claim to be examined was the potential violation of Radmacher's A1P1 right through removing property from her. The application of A1P1 was discussed and clarified in the Grand Chamber in *Pye v The United Kingdom*.<sup>17</sup>

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<sup>12</sup> *NG v KR* (n 4) [105]-[128].

<sup>13</sup> *NG v KR* (n 4) [96].

<sup>14</sup> *NG v KR* (n 4) [98].

<sup>15</sup> *NG v KR* (n 4) [99].

<sup>16</sup> *NG v KR* (n 4) [100].

<sup>17</sup> [2007] All ER (D) 177 (Aug).

Article 1 of Protocol No. 1, which guarantees the right to the protection of property, contains three distinct rules: “the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest ... The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.<sup>18</sup>

In conclusion to the application of this right, Baron J stated that the making of a lump sum order or a transfer of property order would affect a person’s peaceful enjoyment of their possessions and therefore the protocol is engaged where this occurs.<sup>19</sup> Baron J then confirmed the position of the public policy argument in relation to this right, ‘It is also evident that no person should be deprived of their property unless it is in the public interest...’<sup>20</sup> Counsel for Granatino argued that A1P1 is not engaged when a person is deprived of income for the purpose of providing maintenance.<sup>21</sup> This argument was supported by citing *M v Secretary of State for Work and Pensions*,<sup>22</sup> where it was decided that the statutory deduction of income under the Child Support Act did not engage A1P1. This assertion was deemed as too simplistic given that he was claiming capital for housing and a distinction was drawn between the substantial capitalised maintenance that was being claimed in this case and the deductions being made in *M v SSWP*.<sup>23</sup> Therefore A1P1 was engaged in this case.

A further argument was made using A1P1, it was suggested that the actual contract was a valid contractual right and therefore amounted to property.<sup>24</sup> This is an argument that had previously been presented by Todd in a journal article in 2006: he acted for the Respondent in the High Court.

ANCs are binding legal contracts in every country in continental Europe, also the USA, Canada, South Africa, Australia and New Zealand. It is only by the vertical interference of the English/Welsh state that ANC rights are defeated. This is prima facie vertical interference with Art 1 (of Protocol 1) rights of the European Convention of the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention). These are supposed to protect private property

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<sup>18</sup> *Pye v The United Kingdom* (n 17) [52].

<sup>19</sup> *NG v KR* (n 4) [104].

<sup>20</sup> *NG v KR* (n 4) [103].

<sup>21</sup> *NG v KR* (n 4) [104].

<sup>22</sup> [2006] AC 91.

<sup>23</sup> *NG v KR* (n 4) [104].

<sup>24</sup> *NG v KR* (n 4) [105]-[128].

(including contracts). There is essentially a three-stage test: (1) Are contractual relations subject to a principle of peaceful enjoyment of possessions? Yes (see *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816). (2) What are the circumstances where one can be legitimately deprived of possessions? Essentially for ANCs, it is said this may be done because public policy demands this. (3) Property may be controlled in accord with the public interest provided it is proportionate. See *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816 at para [69]: 'The means chosen to cure the social mischief must be appropriate and not disproportionate in its adverse impact.'<sup>25</sup>

There was no mention in the case as to whether a contract could be classified as property so as to fall into the ambit of A1P1, as outlined above, this had previously been confirmed in *Wilson v First County Trust Ltd (No 2)*:<sup>26</sup>

Contractual rights can constitute possession. Provided the party shows that he has the right to enjoy a possession, article 1 to the First Protocol will be engaged. The Convention right protects that right to property against an interference, whether such interference amounts to control of the use of the property or deprivation of it.<sup>27</sup>

Counsel for Granatino did however argue that the pre-nuptial contract was not a valid contract under English law, and as it was made prior to the incorporation of the European Convention for the Protection of Human Rights into English law the contract would be immune from the Protocol, arguing that the statute cannot act retrospectively.<sup>28</sup> The case *Wilson* was cited in support of this argument.<sup>29</sup> When the case reached the Supreme Court, consideration was given as to whether a pre-nuptial agreement has contractual status, following the decision in *MacLeod* stating that a post-nuptial agreement would have contractual status, but a pre-nuptial agreement would not. The majority in the Supreme Court considered that this distinction was incorrect, but gave this point no further examination, 'Regardless of whether one or both are contracts, the ancillary relief courts should apply the same principles when considering ante-nuptial agreements.'<sup>30</sup> This is clearly an element that would need to be given a definitive answer in order to apply A1P1.

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<sup>25</sup> R Todd 'The Inevitable Triumph of the Ante-Nuptial Contract' [2006] Fam Law 539.

<sup>26</sup> [2003] UKHL 40, [2004] 1 AC 816.

<sup>27</sup> *Wilson* (n 26) 825.

<sup>28</sup> *NG v KR* (n 4) [106].

<sup>29</sup> The ability of the HRA to act retrospectively is discussed at [2003] UKHL 40, paragraphs [4]-[23].

<sup>30</sup> *Radmacher v Granatino* (n 1) [63]. C Barton comments on this part of the judgment, C Barton, 'In Stoke-on-Trent, My Lord, They Speak of Little Else': *Radmacher v Granatino* [2011] Fam Law 67, 68: '...perhaps less expectedly, it announced that nuptial agreements need not reach contract standard (although they would be negated by any of the standard vitiating factors given that in ancillary relief proceedings the court can overrule any agreement. Impliedly placing the burden of the presumption (a word generally shied away from in the judgments) on the promisor, the majority referred to: 'Factors detracting from the weight to be attached to the agreement'. Because such deals need not be contracts they do not require 'black and white rules': 'All that is important is that each party should have all the material that is material to his or her decision and that each party

The provisional proposals from the Law Commission flow from the view taken by the Supreme Court that such agreements are no longer considered to be void, or contrary to public policy.<sup>31</sup> They are cautious that these statements were *obiter dictum* and so do not bind a lower court, yet they consider that it is unlikely that they would be disregarded. Thus, an enforceable contract becomes a valid contract, but such contracts cannot oust the jurisdiction of the court.<sup>32</sup> Todd outlines above that public policy was the reason why a person could be deprived of their contractual right when this formula is applied to marital property agreements.

The case law regarding the binding nature of pre-nuptial agreements was explored in the High Court,<sup>33</sup> with Baron J reinforcing the public policy arguments that surround these. Firstly, that it is against public policy to consider what should happen upon divorce either before or during the marriage, 'It remains the rule that any agreement or arrangement entered into by a husband and wife, whether before or during the marriage, which contemplates or provides for the separation of husband and wife at a future time is against public policy and void.'<sup>34</sup> In addition the concept of it being contrary to public policy to oust the jurisdiction of the court was also considered:

A contract which purports to deprive the court of a jurisdiction which it would otherwise have is contrary to public policy. Thus, a spouse cannot validly agree, whether expressly or impliedly, not to apply to the court for maintenance or other forms of ancillary relief. Such a stipulation is contrary to public policy and unenforceable.<sup>35</sup>

Through examining case law<sup>36</sup> where pre-nuptial agreements have played a role in the case Baron J concluded that, 'This review shows that, over the years, Judges have become increasingly minded to look at the precise terms of the agreements and will seek to

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should intend that the agreement should govern the financial consequences of the marriage coming to an end'. So legal advice, although desirable, is not essential so we will just have to wait for that sizable minority who will try to renege.'

<sup>31</sup> The Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) paras 3.61-3.82.

<sup>32</sup> The separate rule of public policy established in *Hyman v Hyman* [1929] AC 601.

<sup>33</sup> *NG v KR* (n 4) [109]-[129].

<sup>34</sup> *NG v KR* (n 4) [79].

<sup>35</sup> *NG v KR* (n 4) [81].

<sup>36</sup> Cases looked at pp. 82 - 88: *F v F* (Ancillary Relief: Substantial Assets)[1995] 2 FLR 45, *S v S* (Divorce: Staying Proceedings)[1997] 2 FLR 100, *K v K* (Ancillary Relief: Prenuptial Agreement) [2003] 1 FLR 120, *M v M* (Pre-nuptial Agreement)[2002] 1 FLR 654, *Crossley v Crossley*[2007] EWCA Civ 1491, [2008] 1 FLR 1467.

implement their terms provided the circumstances reveal that the agreement is fair.’<sup>37</sup> Thus, maintaining the approach previously taken.

Using *Soulsbury v Soulsbury*<sup>38</sup> counsel for Radmacher challenged the stance that pre-nuptial agreements are not binding under the law of England and Wales. The case involved a couple who had divorced in 1986, and the court had made the order that the wife was to receive £12,000 per annum from the husband. A few years after this the husband sold his business and made gifts to both his former wife and their children. The wife agreed not to enforce maintenance, based on the provision that he would leave her £100,000 in his will, and he subsequently made a will to this effect. However, he then remarried and failed to make a new will. Upon his death the executors attempted to avoid the £100,000 in arguing that the agreement made was not enforceable. The Court of Appeal held that the agreement was binding, Cherie Booth QC therefore argued that this meant that this agreement should also be binding. Furthermore, it was suggested that the assumption can be made as to the intention to create legal relations as the contract was created between two competent adults and the marriage could be classified as consideration. Yet, Baron J highlighted that the *Soulsbury* case is not strictly a matrimonial case and therefore does not carry any of the inherent public policy issues.

The former wife in *Soulsbury* could have applied to the court to enforce the periodical payment order as the court’s jurisdiction had not been ousted in any way by the agreement. Consideration was also present, in the agreement not to sue the husband, and therefore Baron J concluded that this particular agreement was distinct from a matrimonial agreement and could be decided simply under the law of contract.<sup>39</sup> Interestingly Booth QC also argued that the pre-nuptial contract between Radmacher and Granatino was in fact a maintenance agreement and therefore falling under s.34 MCA 1973, this may offer some explanation as to why the original human rights based argument of claiming the incompatibility of this provision was withdrawn prior to the case coming to court. This argument was rejected, Baron J categorised this agreement as a pre-nuptial agreement and not a maintenance

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<sup>37</sup> *NG v KR* (n 4) [118].

<sup>38</sup> [2007] EWCA Civ 969.

<sup>39</sup> *NG v KR* (n 4) [120]-[127].

agreement, drawing a clear distinction between the two,<sup>40</sup> as discussed in the previous Chapter.<sup>41</sup>

### Conclusions from the High Court

It was concluded that the contract could not be considered to be property under A1P1, ‘As I find, prenuptial agreements remain unenforceable until adopted by the court and so in that sense the PNC is not a valid legal contract.’<sup>42</sup> The argument regarding the ability of the HRA 1998 to act retrospectively was not discussed any further, as it was thought that any analysis of this point would be unnecessary.<sup>43</sup> Although Baron J agreed that A1P1 would be engaged in this case, it was decided that the margin of appreciation granted to each contracting State would allow the state to make a decision based upon its own particular public policy;<sup>44</sup> the margin of appreciation in relation to A1P1 cases was defined in *Pye* as wide.<sup>45</sup> Guidance was also given to how the requirement for the proportionality outlined in the second paragraph of A1P1 can be achieved, again stating that the State enjoys a wide margin of appreciation.<sup>46</sup> Although counsel for Radmacher argued that s.25 MCA 1973 may result in ‘arbitrary results’,<sup>47</sup> it was decided that the application of s.25 MCA 1973 does not breach A1P1, and that both the public and general interest is fulfilled; highlighting that this process does not allow for one party to be left dependent on the State, whilst recognising the equality of the spouses. The human rights based arguments played no part in the final decision as to why the pre-nuptial contract was defective.<sup>48</sup>

### 4.3 ARTICLE 14

Given the current position of cohabitation contracts it is possible that the public policy argument that prevents a couple due to marry to assert their autonomy could in fact now be discouraging people to marry at all. Furthermore, this would give rise to a claim under Article 14 on the basis of discrimination based on status. The position of unmarried cohabitants on the proposed continuum model is discussed in Chapter Six, but an outline is included at this

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<sup>40</sup> *NG v KR* (n 4) [128]-[132].

<sup>41</sup> See p 100.

<sup>42</sup> *NG v KR* (n 4) [128].

<sup>43</sup> *NG v KR* (n 4) [133].

<sup>44</sup> *NG v KR* (n 4) [134].

<sup>45</sup> *Pye v The United Kingdom* (n 17) [71].

<sup>46</sup> *Pye v The United Kingdom* (n 17) [75].

<sup>47</sup> *NG v KR* (n 4) [135].

<sup>48</sup> *NG v KR* (n 4) [137].

point for clarity. In *Sutton v Mischon de Reya and Gawor & Co*<sup>49</sup> it was suggested by Hart J, 'I accept the submission that there is nothing contrary to public policy in a cohabitation agreement governing the property relationship between adults who intend to cohabit or who are cohabiting for the purposes of enjoying a sexual relationship.'<sup>50</sup> The current position of the law means that a cohabiting couple may enjoy far more control over their assets than a married couple, if the assertion of autonomy at the start or during the relationship is important to a couple then they may find cohabitation a more attractive prospect. However, it should be remembered that without binding contracts, cohabitants would currently have very few mechanisms available to regulate the division of property upon separation.

The current position of the law could lead to the conclusion that a more fundamental reform is needed, indeed it has been suggested that the desire for binding pre-nuptial agreements could be being driven by dissatisfaction with the current law regulating financial orders.<sup>51</sup> A challenge to this current position could potentially be made using the HRA 1998. In *NG v KR*<sup>52</sup> it was agreed that A1P1 would be engaged where a lump sum order was being made, or an order for the transfer of property. If this is so, then it could be considered that there is potential to make a claim for discrimination based on status under Article 14.<sup>53</sup>

#### **4.4 MARITAL PROPERTY AGREEMENTS AND A1P1: A MISSED OPPORTUNITY?**

If the public policy arguments that are intertwined with the application of the HRA 1998 in this area had been challenged in the High Court judgment then it is possible that the 1998 Act could have had a greater force in shaping the way pre-nuptial agreements could be treated in the future or have provided some interim clarity. This section will outline how the enforceability of marital property agreements could have been supported by making use of A1P1.

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<sup>49</sup> [2003] EWHC 3166 (Ch), [2004] 1 FLR 837.

<sup>50</sup> *Sutton v Mischon de Reya and Gawor & Co* (n 49) 847.

<sup>51</sup> Argument raised by R Probert at the conference 'Marital Agreements and Private Autonomy in a Comparative Perspective.' Cambridge University, 26<sup>th</sup>- 27<sup>th</sup> June 2009. For details of the conference see, <[http://www.cels.law.cam.ac.uk/marital\\_agreements/marital\\_agreements\\_and\\_private\\_autonomy\\_in\\_a\\_comparative\\_perspective\\_conference\\_2009.php](http://www.cels.law.cam.ac.uk/marital_agreements/marital_agreements_and_private_autonomy_in_a_comparative_perspective_conference_2009.php)> Last Accessed 15<sup>th</sup> August 2010. This issue is explored in the The Law Commission, *Marital Property Agreements* (n 31) paras 5.62 – 5.66.

<sup>52</sup> *NG v KR* (n 4) [135].

<sup>53</sup> See R Todd, 'The Inevitable Triumph of the Ante-Nuptial Agreement' (n 25).

The Supreme Court upheld the move in *MacLeod* to abandon the public policy issue surrounding the idea of agreements for future separation.<sup>54</sup> Much has been stated in the two previous Chapters regarding this progression from status towards contract in removing the public policy rule which once surrounded pre and post-nuptial agreements. The consequence is essentially that they are now as binding as judge-made law can determine, but cannot oust the jurisdiction of the court, or contract out of responsibility towards children.<sup>55</sup> The Court of Appeal retained and upheld the public policy argument regarding the role of the court, as outlined in the previous Chapter.<sup>56</sup> This interpretation of public policy was supported by the Supreme Court, ‘The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.’<sup>57</sup> As commented on in the previous Chapter, the decision of the Supreme Court in *Radmacher* set out the current legal position of pre-nuptial agreement and post-nuptial agreements is that if parties to the agreement decide to live apart then they would be able to enforce their agreement. However, the agreement would be ‘nugatory’ where one party objects to the outcome of this agreement and proceeds for divorce and financial relief.<sup>58</sup>

The current position could have been bolstered if it had been set against the framework of A1P1; the contract is considered as property under this right, but a person can be deprived of this right ‘if in the public interest and subject to the conditions provided for by law.’ The provision would allow for contractual freedom, but this would be balanced against the public nature of marriage. It would be the case, for instance, that to leave one spouse dependent upon the State would be deemed to be against the general interest, and therefore the person trying to enforce such a contract could justifiably be deprived of their property right. A similar framework could be set up regarding failing to make provision for children.<sup>59</sup>

If a more fundamental reform of marital property agreements were to succeed then this would provide a starting point. The position could be that such agreements are valid and have the protection of A1P1, unless there is something within the contract or the way in which it was

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<sup>54</sup> *Radmacher v Granatino* (n 1) [52]: ‘We whole heartedly endorse the conclusion...that the old rule that agreement providing for future separation are contrary to public policy is obsolete and should be swept away...’ See the analysis above at p 103.

<sup>55</sup> See The Law Commission, *Marital Property* (n 31) para 3.65.

<sup>56</sup> See p 103.

<sup>57</sup> *Radmacher v Granatino* (n 1) [75].

<sup>58</sup> *Radmacher v Granatino* (n 1) [52] See p 105.

<sup>59</sup> There are two areas have been described by the Law Commission as ‘inescapable provisos.’ The Law Commission, *Marital Property Agreements* (n 31) para 7.10. For more details see below at p 286.

formed which means that there can be a justifiable deprivation of the property. This may have given strength to this position should reform be unsuccessful. The current view taken by the judiciary over public policy is that such contracts are enforceable, an enforceable contract is property and therefore has the protection of A1P1, and it therefore bolsters the position of the presumption as set out in the Supreme Court. If reform were to grant a great deal of discretion to the judiciary to move away from an agreement then there may well be scope for a challenge to be made using A1P1. If a person was to be deprived of substantially more property than agreed to, then a claim could be made to question whether this was a violation of A1P1. The facts in *Radmacher* could provide an illustration of this: the agreement stated that the husband would receive nothing in the event of a divorce, due to his own personal wealth he would never have been left dependent upon the State and yet he was awarded a vast financial award by every court. This does not seem to sit entirely well with A1P1, potentially operating outside of the scope of the 'public interest.' A1P1 could be used as a safeguard between the tension of public status and a private contract.

The public policy argument regarding the supervisory role of the court has been retained. Baron J argued in the High Court that this is an issue that is rooted to human nature and so remains unchanged.<sup>60</sup> The supervision by the judiciary remains desirable as it is linked to the constant factor of human nature. Although the retention of this control does potentially limit the spouse's autonomy, it does provide an appropriate and desirable safeguard. The court can take into account any changes in circumstances that may have occurred since the contract was formed. In addition, it allows for an examination of any potential pressure exerted prior to the contract and removes the prospect of one spouse becoming economically reliant upon the State. A further argument in support of the court's role could be drawn from the application of the HRA 1998. If A1P1 is potentially engaged in the enforcement of such contracts then supervision by the court is required to ensure that the requirement for proportionality is discharged. Society may have now reached the position where the notion of contemplating divorce prior to marriage no longer seems unacceptable. This interpretation from the judiciary could have resulted in the stance taken towards pre-nuptial agreements in England and Wales falling more so in line with the rest of continental Europe, that is to say that they

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<sup>60</sup> *NG v KR* (n 4) [130].

are binding unless it is considered by the court that it would result in an inequitable result.<sup>61</sup> Of course, what constitutes ‘unjust’ would require far more regulation and guidance.<sup>62</sup>

#### 4.5 CONCLUSION

The opportunity to provide some further clarification to the uncertain nature of pre-nuptial agreements through the application of the HRA 1998 was missed in *NG v KR*.<sup>63</sup> The public policy issues surrounding pre-nuptial agreements are highly sensitive with regard to the upholding the concept of family in our society, which also gives rise to political and economic issues. It is possible that the potential force of the HRA 1998 on pre-nuptial agreements has been inhibited due to public policy issues and also the understandable reluctance of the judiciary to step outside of the constitutional role of the court. It may have been possible for Baron J to have made the leap to afford marital property agreements the status of property falling into the ambit of A1P1. It is possible that she held back in the belief that reform should be carried out by Parliament, acting upon the advice of the Law Commission. This was undoubtedly the view of Lady Hale in her dissenting judgement in the Supreme Court.<sup>64</sup>

The limitation of the Human Rights Act 1998 on family law can perhaps be summarised as, ‘The European Court of Human Rights accepts that the protection of the “traditional family” is in principle a legitimate aim...The traditional family is constituted by marriage.’<sup>65</sup> In English law, marriage traditionally gives rise to status, rather than a private contract between two individuals. The enforceability of marital property agreements does touch upon human rights issues, yet these have not been explored and utilised to their full extent due to a combination of factors. If reform is successful then these issues may well simply remain unanswered questions, if for some reason reform is halted then the use of the HRA 1998 may well be considered a missed opportunity to provide guidance on the balance between status and contract.

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<sup>61</sup> This description is put forward in J Scherpe ‘A Comparative View of Pre-Nuptial Agreements’ [2007] IFL 18.

<sup>62</sup> This issue is discussed further in Chapter Nine, see in particular p 284 and p 288.

<sup>63</sup> *NG v KR* (n 4).

<sup>64</sup> *Radmacher v Granatino* (n 1) [161].

<sup>65</sup> *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557, [563].

## PART TWO

### MARITAL PROPERTY AGREEMENTS AND THE NATURE OF MARRIAGE

#### INTRODUCTION

Part One of the thesis has analysed the increasing weight being attached to marital property agreements, suggesting that the approach being taken by the judiciary demonstrates a movement away from status and a move towards the contractual side of the proposed contract-status continuum. This movement has a profound effect upon the nature of marriage as it suggests the promotion of marriage as an increasingly private relationship, rather than a public union. The tension between contract and status and the elements of these antithetical terms was discussed in the Introduction. A useful summary of the movement from status to contract is provided by Regan:

Modern family law has steadily moved toward contract as its governing principle. I mean “contract” in both a literal and figurative sense: that the law is more willing to enforce agreements that tailor family life to individual preferences, and that the law is more solicitous in general of individual choice in family matters...changes in family law that reflect the increasing resonance of the two interrelated propositions: (1) that private ordering, rather than public regulation, is the preferable means of governing intimate relationships; and (2) that formal status is less important than the substance of intimate relationships.<sup>1</sup>

This quotation identifies and highlights the possible interpretations of both status and contract. The increasing weight being afforded to marital property agreements starts to look towards contract with regard to both of the interrelated propositions regarding status and contract. The focus of this Part of the thesis is the notion that a move towards the contractual side of the continuum suggests that there is greater freedom being granted with regard to individual choice. Furthermore, the narrowing of the continuum being brought about by the approach taken towards marital property agreements raises the question of the importance of formal status. The following three Chapters explore the workability of the continuum model by assessing the link between the area of law and the continuum, evaluating the extent the area has been influenced by upholding status and finally concluding whether the current provisions could be influenced by a more contractual approach being taken towards marriage.

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<sup>1</sup> M Regan Jr, *Family Law and the Pursuit of Intimacy* (New York University Press, 1993) 35.

## CHAPTER FIVE

### A DEPARTURE FROM STATUS AND THE RELEVANCE OF FAULT

This Chapter will measure what effect, if any, the movement towards a more private approach could have on the regulation of divorce. Three research questions will be applied to the regulation of divorce in order to assess this overall question. Firstly, the nature of the regulation of divorce will be evaluated against the status-contract continuum in order to ascertain the link between marital property agreements, divorce and the proposed continuum. The strength of public policy will then be examined in order to evaluate the extent to which the status of marriage has influenced this area of family law. Lastly, conclusions will be drawn as to whether there is the potential for a more contractual approach towards marriage to impact upon this area of law.

#### 5.1 THE REGULATION OF DIVORCE ON THE PROPOSED CONTINUUM

Llewellyn describes the link between marriage and divorce, 'Divorce presupposes marriage. Without marriage it lacks all meaning. From marriage it takes its origin, form, effect. Change the practices of marriage, and divorce, after due lag, will be found readjusting to it.'<sup>1</sup> If there is an optional private facet being introduced to marriage, it is therefore logical that this may have an impact upon the regulation of divorce. Swisher outlines the legal status of marriage in relation to the relevance of fault in divorce:

By the turn of the twentieth century, American and European legal systems had come to share a common set of assumptions regarding marriage and the traditional family unit as a basic social institution: (1) marriage was a primary support institution and a decisive determinant of the social, economic and legal status of the spouses and children; (2) marriage in principle was to last until the death of a spouse and would be terminated during the lives of the spouses only for serious cause; (3) the community aspect of marriage and the family was to be emphasized over the individualistic personalities of each member...<sup>2</sup>

Upholding marriage as a public union has meant that it could only be dissolved due to 'serious cause,' hence the inclusion of fault in the divorce system. The third aspect of the Swisher's description demonstrates the preservation of status over contract. A study of the interrelation between the introduction of no-fault divorce alongside the introduction of marital property agreements has been carried out by Franck. The study focussed on Germany and USA and concluded that the introduction of marital property agreements was in fact a

<sup>1</sup> K N Llewellyn, 'Behind the Law of Divorce' 32 Colum. L. Rev. 1281 (1932), 1286-7.

<sup>2</sup> P N Swisher, 'Reassessing Fault Factors in No Fault Divorce.' 31 Fam. L.Q. 269 (1997-1998), 276-7.

‘corrective measure’ to the introduction to no-fault divorce. This argument was supported by the idea that in having such an agreement in place may provide financial protection upon divorce. Franck comments on the strong link between these two areas of family law, ‘Conventional wisdom tells us that no-fault divorce and the enforceability of premarital contracts emerged together out of a spirit of liberalisation.’<sup>3</sup> Furthermore, he comments on the role of these reforms has had on the elevation of the contractual model:

In light of this philosophical debate over the relationship of marriage to contract, it comes as little surprise that the introduction of no-fault divorce – the option to dissolve a marriage at will – has been interpreted as a step towards reducing marriage to no more than a contractual relationship between two individuals... By allowing spouses to terminate their relationship without needing to show cause, the law would seem to have abandoned any attempt at protecting the ‘ethical’ spirit of marriage that...grows out of that union and supersedes the interests of the two contracting individuals. The related legalisation of premarital agreements on the financial consequences of divorce looked *prima facie* like a step further down this road. It is widely regarded simply as an additional feature that shows the triumph of the contractual model.<sup>4</sup>

It is viewed that enforceable marital property agreements are in fact ‘a step further down the road’ towards the triumph of the contractual model than no-fault divorce. Or, in terms of this thesis, legislation to create enforceable marital property agreements would be closer to the contract side of the status-contract continuum than a prospective reform to remove all fault from divorce. This Chapter will analyse whether a legislative reform to allow for enforceable marital property agreements would be a closer step towards the contractual side of the continuum than no-fault divorce in England and Wales.

The *obiter* from the recent marital property agreement cases shed light on this clear interrelation amongst marriage, divorce and such agreements; thus establishing the link to the continuum model. In 2009 the Court of Appeal examined the pre-nuptial agreement case *Radmacher*,<sup>5</sup> Thorpe LJ described divorce as being, ‘a statistical commonplace.’<sup>6</sup> Langdon-Down commented on Lord Justice Thorpe’s view on divorce reform,<sup>7</sup> ‘...the judge would like to see a divorce reform bill that required separating couples to sort out a parenting plan and a sensible division of assets before seeking a ‘no-fault’ divorce; and introduced a

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<sup>3</sup> J U Franck, ‘“So Hedge Therefore, Who Join Forever”; Understanding the Interrelation of No-Fault Divorce and Premarital Agreements.’ *IJLP&F* 2009 23 (235).

<sup>4</sup> J U Franck, ‘“So Hedge Therefore, Who Join Forever’ (n 3).

<sup>5</sup> See Chapter Three for full details of this decision, in particular see p 104.

<sup>6</sup> *Radmacher v Granatino* [2009] EWCA Civ 649 [29].

<sup>7</sup> This view is very similar to the attempts made in the Family Law Act 1996 Act, which is discussed in greater detail in this Chapter. This analysis starts at p 149.

presumption that mediation should be the first port of call before a solicitor.’<sup>8</sup> According to this account, enforceable marital property agreements and the option of a no-fault divorce system are areas supported by Thorpe LJ. The areas are undeniably linked from his comment in *Radmacher*. This position is similar to the linking of no-fault divorce and enforceable marital property agreements in the United States. The wording used in *Posner v Posner*<sup>9</sup> in 1970 can be compared to the words of Thorpe LJ in *Radmacher*. The Florida Supreme Court stated, ‘with divorce such a commonplace fact of life, it is fair to assume many prospective marriage partners... might want to consider, ...discuss... and agree upon... the disposition of their property and alimony rights... in the event their marriage... fails.’<sup>10</sup> Nasheri comments as follows on the link between these two areas of family law:

Although traditional states once were consistently unwilling to enforce pre-nuptial agreements that ‘encourage divorce,’ states’ adoption of... ‘no-fault divorce statutes, combined with decisions analogous to *Posner*...have influenced courts to enforce divorcing couples’ agreements.<sup>11</sup>

The Office for National Statistics reports that in 2008 there were 121,478 in that year, this figure fell in 2009 when there were 113,370 divorces: a fall of 6.7%. The Office for National Statistics states that this is in fact the fifth consecutive decrease in the number of divorces across the United Kingdom. The figure from 2009 represents the fewest number of divorces in one year since 1974, when there were 110,597. In contrast the peak in the number of divorces came in 1993 when there were 164,203: the 2009 figure is in fact 30.1% lower than this. The year 2010 saw a 5.1% increase in the number of divorces from 2009. The number of divorces under the Matrimonial Causes Act 1973 can be observed below.

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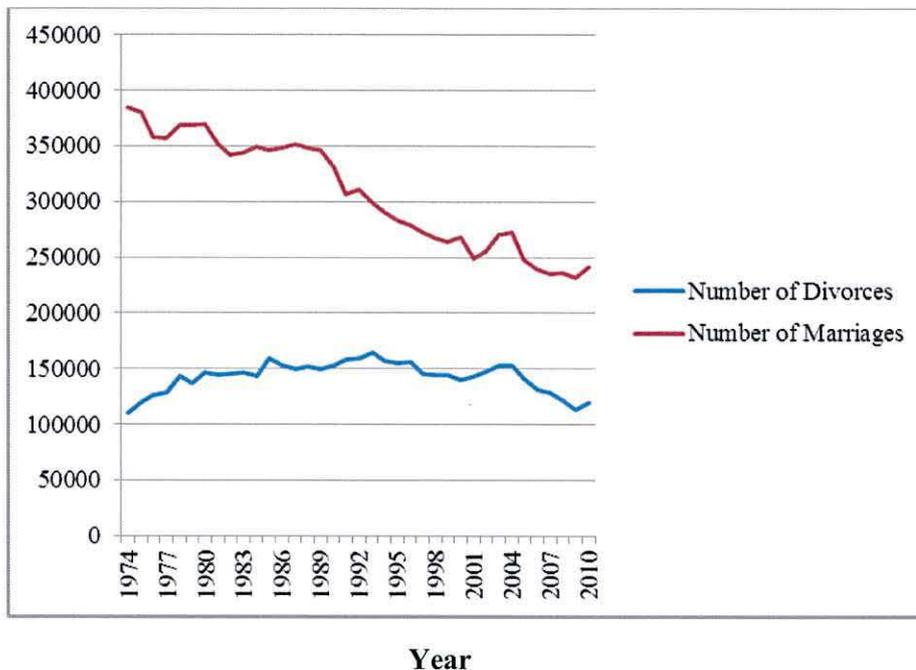
<sup>8</sup> G Langdon-Down, ‘Divorce Law Reform: Doing the Splits’ (2006) LS Gaz, 5 Oct 2006. The article also reports the view of Thorpe LJ on marital property agreements: ‘One of the results of high-profile divorce cases has been an increase in pre-nuptial agreements, something that he sees as no bad thing. Lord Justice Thorpe says: ‘There is a strong case for giving (pre-nups some statutory force to encourage adult autonomy. The more unpredictable the outcome of contested cases, the stronger becomes the case for allowing spouses to make their own arrangements.’ This quotation picks up on another Chapter in this thesis, Chapter Eight: ‘The Court’s Discretion: Propelling Movement towards Contract?’

<sup>9</sup> 233 So. 2nd 381, 384 (FL 1970).

<sup>10</sup> *Posner v Posner* (n 9).

<sup>11</sup> H Nasheri, ‘Prenuptial Agreements in the United States: A Need for Closer Control?’ 12 Int’l J.L. Pol. & Fam. 307 (1998) 315.

**A Graph to show the Number of Divorces under the Matrimonial Causes Act 1973<sup>12</sup> and the Number of Marriages per Annum 1974-2010<sup>13</sup>**



Despite the figures demonstrating fewer divorces in the last few years, the assertion that divorce is now commonplace in our society is an accurate one. In fact, it is now possible to buy an, ‘On Your Divorce’ greeting card. These cards may seem rather flippant, but may be truly indicative of society’s acceptance of divorce as being a routine part of life. Further to this, Debenhams launched a divorce gift list in 2010,<sup>14</sup> although this list has since been removed.<sup>15</sup> The marriage rate must be examined against these figures.<sup>16</sup> The 2009 figure represents the lowest number of marriages since 1895.<sup>17</sup> Thorpe LJ stated in *Radmacher*<sup>18</sup>

<sup>12</sup> The calculations for this graph have been made from the data from: ONS Statistics.

<<http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-238035>> Table 8.

<sup>13</sup> The data for this graph has been obtained from ONS Statistics: Figures for 2010 are provisional, last checked 17 June 2012 <<http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-249125>>

<sup>14</sup> L Bachelor, ‘Debenhams launches divorce gift list for separating couples: Essential household items feature on list for newly single people’ *The Guardian* (18 January 2010): ‘Peter Moore, head of retail services at Debenhams explained the rationale for the service: ‘With so many couples now living together before they marry, the wedding gift list concept is now regarded as more of an upgrade service, rather than stocking up the first home with the basics. However, a divorce means that one partner will be leaving their marital home and therefore be left without any essentials.’

Available electronically at <<http://www.guardian.co.uk/business/2010/jan/18/debenhams-divorce-gift-list>> Last accessed 14 June 2011.

<sup>15</sup> There is no sign of such a gift list service on the Debenhams website, <<http://www.debenhams.com/>> First accessed 1 December 2011, website searched again 14 November 2012.

<sup>16</sup> It is noted that these previous figures do not represent a ‘divorce rate’ but only the number of divorces in that particular year. It does not show the number of couples divorced against the year in which they were married.

<sup>17</sup> Office for National Statistics, data available at <<http://www.statistics.gov.uk/cci/nugget.asp?id=170>> Last accessed 14 June 2011.

that marriage was, 'not generally regarded as a sacrament.'<sup>19</sup> This statement is unquestionably telling about the nature of marriage; both on the direct religious connections to marriage and the 'ethical spirit' of marriage as outlined above by Franck.

In 1972, The Report of the Archbishop's Commission on the Christian Doctrine of Marriage considered the 'institution of marriage' in the pamphlet 'Marriage, Divorce and the Church':

People sometimes regard marriage as 'their own affair'; but in fact the whole community is involved, as is becoming increasingly evident with free education, national health, housing problems, and the need for stability in society as a whole....A strong social tradition is a great safeguard...<sup>20</sup>

If marriage is still considered to be an 'institution', on which many other factors that form a stable society depend, then the issue of the advancement towards the contractual, or private, side of the continuum becomes apparent. The 'strong social tradition' referred to perhaps alludes partly to the concept of entering into marriage with the belief that it will be for life; in addition to the expectation that in order to have a family one must first marry. Indeed, the belief in marriage for life affected the possibility of obtaining a divorce.<sup>21</sup> The fact that legislative divorce is available does show an acceptance that marriage may not be lifelong, but the way in which divorce has been regulated demonstrates the clear desire to raise marriage above being simply a private contract. It is therefore possible to examine how the institution of marriage has been upheld throughout history by examining the regulation of divorce.

## 5.2 THE INFLUENCE OF STATUS ON THE REGULATION OF DIVORCE

The first Act of Parliament relating to judicial divorce came into force 1 January 1858, the Matrimonial Causes Act 1857. As noted in Chapter Two, alternative methods to end a marriage were available prior to this Act. For example, an order could be acquired from the ecclesiastical court to allow the couple to cease cohabitation, a divorce *a mensa et thoro*; although the spouses could not remarry. It would be possible to obtain a common law

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<sup>18</sup> *Radmacher v Granatino* (n 6).

<sup>19</sup> *Radmacher v Granatino* (n 6) [29].

<sup>20</sup> *The Report of the Archbishop's Commission on the Christian Doctrine of Marriage* 1972.

<sup>21</sup> For example, Vickery explains, 'In every century before the twentieth, people expected every marriage to be for life. Divorce by Act of Parliament was prohibitively expensive and exceptionally rare.' A Vickery 'Love and marriage, English-style' *The Times Literary Supplement* (13 January 2010) Available electronically at <[http://entertainment.timesonline.co.uk/tol/arts\\_and\\_entertainment/the\\_tls/article6986146.ece](http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/the_tls/article6986146.ece)> Last accessed 24 June 2011.

judgement stating that adultery had occurred, and a divorce could then be obtained through the granting of a Private Act of Parliament,<sup>22</sup> this was however very costly:

Acts were passed in favour of professional men (including seventeen clergymen) and people engaged in business; indeed such folk accounted for half the Acts passed between the middle of the eighteenth century and 1857, Nevertheless all the promoters had one characteristic in common: they were very wealthy. They had to be, for the cost of a private Act and the related proceedings was formidable.<sup>23</sup>

The Matrimonial Causes Act 1857 simplified the procedure of divorce and began to make divorce more accessible.<sup>24</sup> Stone comments on the deliberations taken by the legislators over the issue of making divorce easier to obtain and the effect this may have on the family unit:

...these upper-class male Victorian legislators had grave doubts whether their own sex could be trusted to make responsible use of any relaxation of the strict laws of divorce. In the 1850s, the dangerous sex was not female but male. The Report of the Royal Commission on Divorce of 1853 argued that the laws against divorce were deigned 'chiefly to protect children from the inconstancy of parents, and next to guard women from the inconstancy of husbands' who if free to do so would obtain a divorce 'as soon as they were tired of their wives.' Thus it was widely believed that many husbands were only tied to their families by legal constraints.<sup>25</sup>

The promotion of marriage as a public union is evident. In order for the husband to be granted a divorce under the new law he would need to prove that his wife had committed adultery. There was to be no collusion between them.<sup>26</sup> The basis for this can perhaps be located in *The Gospel According to Matthew*, where Jesus taught, 'I tell you, then, any man who divorces his wife for any cause other than her unfaithfulness commits adultery if he marries another woman.'<sup>27</sup> Yet the fault basis available to the wife under this Act was evidently the creation of a patriarchal society. In order to be granted a divorce the wife would have been required to prove that either her husband's adultery was incestuous, or that he had committed bigamy, that he had been cruel to her, or through two years desertion. Acts of

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<sup>22</sup> See, R Probert, 'The *Roos* Case and Modern Family Law' in S Gilmore, J Herring and R Probert (eds), *Landmark Cases in Family Law* (Hart Publishing, Oxford, 2011) pp. 13-26. Probert comments on the case which saw John Manners, Lord Roos, obtain a private Act of Parliament to enable him to remarry: 'Given the centrality of divorce to modern family law, it could be claimed as the single most important development in the history of family law.' p 26.

<sup>23</sup> B Hale, D Pearl, E Cooke, P Bates, *The Family, Law and Society: Cases and Materials* (Butterworths, London, 2002) 213 – 214.

<sup>24</sup> C Barton and R Probert comment on the often overstated role played by women towards reform and the purpose of the reform in, 'Family Law: Its History and its 'Historians'' February [2011] *Fam Law*: '...more an Establishment driven matter, preceded by a Royal Commission and driven at least in part by the desire to avoid Parliamentary time being spent on individual divorce cases.'

<sup>25</sup> L Stone *Road to Divorce, England 1540 – 1987* (Oxford University Press, 1992) 384.

<sup>26</sup> Collusion is discussed further in this Chapter, starting at p 139.

<sup>27</sup> Matthew 19:3 -9.

rape,<sup>28</sup> sodomy or bestiality would have also been sufficient grounds.<sup>29</sup> At first glance it is surprising that an average of 40% of the petitions filed between 1858 and the end of the century were filed by women.<sup>30</sup> The great imbalance in the system had not deterred women from trying to obtain a divorce. Horstman offers a possible explanation for this:

Advocates for reform had long operated on the premise that divorce would be for husbands...If the grounds for wives had remained what they were before 1857 – bigamy and incest – the predictions would have come true. The addition, however, of cruelty and desertion when coupled with adultery gave wives more opportunity. And they took it. In the first year of the new court wives filed 97 of the 253 petitions....Either wives feared the stigma of divorce court less than the cruelty of their husbands or there was more cruelty than expected. In any case, reformers had badly misjudged the women of England.<sup>31</sup>

There was a contemporary reaction to the fact that wives were frequently adding the ground of cruelty to a claim for divorce, and thus creating reports of domestic violence within family life.<sup>32</sup>

As feared, the passage of the 1857 Act did result in an increase in the amount of divorces being granted: within the first three years the number of divorces rose from four per year to approximately one hundred and fifty.<sup>33</sup> Stone argues that rather than actually encouraging more people to divorce, this Act allowed people to divorce as opposed to being classified as

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<sup>28</sup> Notably the exemption to marital rape was not abolished until 1991, in *R v R (Rape: Marital Exemption)* [1991] 4 All ER 481. The case law relating to this exemption from this period reveals that Sir Matthew Hale's statement in *History of the Pleas of the Crown* (1 Hale PC (1736) 629) was upheld: 'But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.' The decision in *R v Clarence* (1888) 22 QBD 23 is notable. The case involved a husband suffering from a venereal disease; he was aware of this and communicated it to his wife through sexual intercourse. Initially the husband was convicted on charges of unlawfully inflicting grievous bodily harm and of assault occasioning actual bodily harm; based on the exemption to marital rape the convictions were subsequently quashed. It is particularly noticeable however that Wills J took steps to state that rape between married persons was not impossible.

<sup>29</sup> It is also of paramount importance to bear in mind that the earning potential of a working class Victorian woman would have been below the subsistence level, making marriage an 'economic necessity.' M Lyndon Shanley, *Feminism, Marriage and the Law in Victorian England* (Princeton University Press, 1999) 10.

<sup>30</sup> See S Cretney, *Family Law in the Twentieth Century, A History* (Oxford University Press, 2003) 169 and L Stone, *Road to Divorce* (n 25) Table 13.2, p 437.

<sup>31</sup> A Horstman, *Victorian Divorce* (Biddles Ltd, Guildford and Kings Lynn, 1985) 85-86.

<sup>32</sup> Lord Campbell felt that Parliament should restrict the publication of reports of domestic violence, stating that this was a 'most disastrous consequence.' See M Tromp, *The Private Rod: Marital Violence, Sensation and the Law in Victorian Britain*, 190: 'This great social danger was the mere representation of violence in the sanctified middle- and upper-class domestic scene. This danger was so pressing and so severe that Lord Campbell felt Parliament should suppress the publication of this information, preventing the questioning of the terms of realism and violence, preventing the spread of this potential contaminant, and denying public access to any images of women responding to cruelty or brutality with demands of protection or a wilful desire to escape.' See also A Horstman, *Victorian Divorce* (Biddles Ltd, Guildford and Kings Lynn, 1985) 86: 'Lord Campbell discovered that wives, rather than suing for a judicial separation after the husbands' adulteries, 'merely' added a charge of cruelty and sought a divorce instead – 'a most disastrous consequence' he wrote.'

<sup>33</sup> L Stone, *Road to Divorce* (n 25) 387.

‘eloped, the deserted, the privately separated, or the judicially separated.’<sup>34</sup> The legislation passed in 1858 signifies the first date that divorce had become an option for a greater section of society. It is from this point therefore that it is possible to trace the rejection of various suggested proposals to reform the system, on the basis that they would undermine the status of marriage. It is crucial at this point to make reference to 1866 case *Hyde v Hyde and Woodmensee*.<sup>35</sup> This case has been referred to earlier in the thesis but it is crucial to place it into the context of divorce reform. In a period where divorce had become an option to a greater number of people, the Victorian judge stated ‘Marriage as understood in Christendom, may...be defined as the voluntary union for life of one man and one woman to the exclusion of all others.’<sup>36</sup> This quotation adds to the overall picture of a legal system desperate to maintain marriage as something more than simply a contract.

In 1892 Dr William Hunter raised the argument that Scottish law had permitted a divorce to be granted to either spouse for desertion or simple adultery. This had been the law for 300 years, with no evidence of an increasing the divorce rate.<sup>37</sup> Hunter’s Parliamentary attempt to change the grounds for divorce was motivated by the numerous marriages in which one spouse was Scottish and the other English,<sup>38</sup> and so it would be rational for the two systems to be consistent. Yet the mere fact that this reformation would open up the possibility of divorce on demand in England and Wales meant that the Divorce Bill was not passed. On the second reading of the Bill it was described as an ‘audacious proposal’<sup>39</sup> and the Attorney-

<sup>34</sup> L Stone, *Road to Divorce* (n 25)387.

<sup>35</sup> (1866) LR 1 P&D 130.

<sup>36</sup> (1866) LR 1 P&D 130.

<sup>37</sup> S Cretney, *Family Law in the Twentieth Century* (n 30) 202, footnote 41. Cretney explains the underlying principle for this system, ‘The Westminster Confession of 1643 accepted by the Church of Scotland recognised adultery and ‘such wilful desertion as can no way be remedied by the church or civil magistrate’ as sufficient cause for dissolving the bond of marriage; and Scots law thereafter allowed divorce after desertion for four years.’

<sup>38</sup> L Bland, *Banishing the Beast: Feminism, Sex and Morality* (Tauris Parke, London 2001) 138. Bland however argues that the impetus for reform came from an Elizabeth Wolstenholme Elmy, commenting: ‘Concerned to abolish the marital rape exemption, Elizabeth was also determined to reform the law on divorce. In 1889 Elizabeth at last succeeded in inducing a Dr Hunter to bring in a bill which equalised divorce between the sexes and proposed desertion as an alternative to adultery as grounds for divorce. But Dr Hunter seemed uncommitted to the project. She bitterly reflected: ‘For four years he merely played with it, never bringing it in...during which time I had circulated some 200,000 leaflets and worked hard to develop opinion. In 1892 the bill was before Parliament but Dr Hunter only told her at the last minute and it fell.’

<sup>39</sup> *Manchester Courier and Lancashire General Advertiser*, 27.04.1892: ‘This very practical subject was followed by one of abstract value. Dr Hunter, one of the large body of men who saw the beauties of Scotland at a distance – is anxious that all the good things of life should not be reserved for people beyond the border. He desires to assimilate the law on divorce in England to that in Scotland, enabling a wife to secure a dissolution of marriage on the ground of desertion or of adultery alone. This ‘most audacious proposal’ has Sir J M Kenna described it with almost inarticulate indignation gave the Attorney-General a theme of distinctions that will attract the novelist, the philosopher, the lawyer, and the man of the world.’ The previous business, described as practical by the reporter, was that of the President of the Board of Agriculture.

General advised the House to be, 'very slow on increasing the facilities for divorce.'<sup>40</sup> It was thought that in maintaining the element of fault in the divorce process was indeed bolstering the strength of the institution of marriage,<sup>41</sup> thus disregarding the logic and justification demonstrated by Scots law for allowing divorce through desertion.

In 1902 the Second Earl Russell made an even bolder suggestion for reform, with the inclusion of non-fault based grounds.<sup>42</sup> This Bill proposed that divorce should be available upon three years separation, one year's separation with consent, cruelty, incurable insanity, adultery and in the circumstance that one spouse was serving three years penal servitude.<sup>43</sup> It is certainly possible that the inclusion of penal servitude is a reflection of the stigma that would have been attached to someone serving this punishment. It is easily possible that a divorce could have been granted because the spouse was guilty of a criminal offence, but not necessarily being guilty of a matrimonial fault. However, the inclusion of non-fault grounds in this Bill did not have a good reception. The Lord Chancellor, Lord Halsbury, stated, 'I say that the introduction of such a provision as that is an outrage upon your Lordships' House, something in the nature of an insult to your Lordships, and it is a thing which I, for one, deprecate most strongly.'<sup>44</sup> After denouncing the Bill as to be the 'abolition of the institute of marriage' and 'that in itself was enough to prevent the discussion of the measure,'<sup>45</sup> it is reported that, 'Lord Halsbury took the almost unprecedented step of moving the rejection of the Bill. This was agreed to amid cheers, and Lord Russell's attempt to amend the law relating to marriage was thus contemptuously thrust aside.'<sup>46</sup> Again, this demonstrates the

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<sup>40</sup> *Lancaster Gazette*, 30.04.1892: 'The Attorney-General advised the House to be very slow in increasing the facilities for divorce, and specially objected to the proposal for making four years desertion a ground for it. With regard to the other points, there was much to be said from a moral point of view for the suggestion, but practically he thought it undesirable.'

<sup>41</sup> *Pall Mall Gazette*, 27.04.1892. It was noted that: 'The Queens Proctor was not omniscient – he said – and could not even now hold together every couple that wished to be untied, therefore he appealed to hon. members not to make divorce any easier.'

<sup>42</sup> G Savage, 'Equality from the Masculine Point of View: The 2<sup>nd</sup> Earl Russell and Divorce Law in England' Savage describes the personal background of the Second Earl Russell, which provides an explanation for his bringing of this Bill: '...Frank Russell's vulnerability to the charms of a pretty widow and her pretty daughter had devastating consequences for his personal life. But the trajectory of Frank Russell's personal misfortunes and the impetus of his personality intersected a larger-scale social and cultural dynamic that involved a refiguring of the ways in which we understand gender relations and marriage.' Article available electronically at <digitalcommons.mcmaster.ca/cgi/viewcontent.cgi?...russelljournal> Last accessed 14 June 2011.

<sup>43</sup> Penal servitude was introduced in the Penal Servitude Act 1853 and was a substitute for transportation. It was abolished in 1948.

<sup>44</sup> *Hansard*, HL Deb 01 May 1902 vol 107 cc389-409, 408-409.

<sup>45</sup> *Gloucester Citizen*, 02.03.1902.

<sup>46</sup> *Portsmouth Evening News*, 02.05.1902: 'After Earl Russell had spoken for an hour and a quarter, the Lord Chancellor rose and denounced the measure as 'a Bill for the abolition of the institution of marriage.'...and therefore, after the second reading had been negatived without a division, Lord Halsbury took the almost

endeavour to uphold the institution of marriage by maintaining fault in divorce, a clear triumph of status over contract. It should be noted that this vehement rejection of his proposals did not deter Earl Russell, and later he published further material which promoted marriage as a civil contract.<sup>47</sup>

The Report of the Royal Commission on Divorce and Matrimonial Causes, The Gorell Report,<sup>48</sup> was constructed between 1909 and 1912. The emphasis was placed on the position of the poorer in society in obtaining a divorce, 'We have deemed it expedient that a Commission should forthwith issue to inquire into the present state of the law and administration thereof in divorce and matrimonial causes and applications for separation orders, especially with regard to the position of the poorer classes...'<sup>49</sup> The writers of this report were divided in their opinions of reform. The split in the opinions held by the writers demonstrates just how problematic this area is, evoking strong views and attitudes with regard to the nature of marriage. The majority of the writers<sup>50</sup> proposed that the law should be amended to allow a divorce to be obtained based on the following grounds: adultery; desertion for three years upwards; cruelty; incurable insanity after five years' confinement; habitual drunkenness found incurable after three years from first order of separation; or imprisonment under commuted death sentence.<sup>51</sup> When advocating this extension the majority were cautious to note that this would not render marriage to be a purely private union, 'We do not recommend the Legislature to permit of the dissolution of marriage for other than very grave causes. If once an attempt be made to proceed beyond this principle, marriage would practically become a union which would be merely continued at will.'<sup>52</sup> The minority involved with this report<sup>53</sup> held the view that these grounds were moving in the direction of making divorce too easy to obtain, and therefore placing less value on marriage.

The status-contract tension is highlighted in their considerations of the grounds for divorce:

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unprecedented step of moving the rejection of the Bill. This was agreed to amid cheers, and Lord Russell's attempt to amend the law relating to marriage was this contemptuously thrust aside.'

<sup>47</sup> See for example *The Observer* 28.04.1912, 'Earl Russell on Divorce': 'The keynote of the book is as follows:- 'Once the Legislature has admitted the principle that marriage is a civil contract which can be validly performed by a layman without religious rights, and dissolved by a judge without ecclesiastical sanction...the authority of the Church to intervene or to enforce its views on religious grounds is already gone.'

<sup>48</sup> The Chairman of the Commission was Baron Gorell.

<sup>49</sup> *Report of the Royal Commission on Divorce and Matrimonial Causes* 1912. Description contained in Royal Warrants at p 2.

<sup>50</sup> The majority was made up of: Baron Gorell, Frances Balfour, Thomas Burt, Charles J. Guthrie, Frederick Treves, A Tindal-Atkinson, May Tennant, Edgar Brierley and J A Spender.

<sup>51</sup> *Report of the Royal Commission* (n 49) 163.

<sup>52</sup> *Report of the Royal Commission* (n 49) 96.

<sup>53</sup> The minority was made up of: Cosmo Ebor, William R Anson and Lewis T Dibdin.

The State is sometimes called the third party to the marriage contract because it not only lays down the conditions which must be satisfied both as to personal qualifications, and as to the incidents of the contract, but also gives to the union of those who have been legally married special and definite recognition...it has a concern of its own in the peace of the community, the welfare of the family, the rearing of healthy children, and the training of good citizens, which renders it imperative that the making and breaking of marriage contracts should be treated as matters of public importance touching the commonwealth itself, and not as merely private transactions only affecting the parties.<sup>54</sup>

It is evident that throughout deliberations to reform divorce law, great concern is regularly voiced as to the potential effect on marriage, and moreover the status of marriage.

Equality of the sexes in divorce law was not achieved until Lord Buckmaster's Act in 1923. The passing of the Matrimonial Causes Act 1923 meant that either spouse could now be granted a divorce based on simple adultery. Speaking in the House of Lords, Lord Buckmaster described the Matrimonial Causes Bill:

The terms of the Bill are brief; its scope is strictly limited; and its aims are confined within narrow limits. It is not designed in any way to alter the existing grounds upon which divorce can be obtained.... It has this purpose and this purpose alone: to secure that whatever may be the grounds of divorce they shall be the same for both women and men.<sup>55</sup>

This reform of divorce law was set against a backdrop of circumstances that were changing the view of women within society. During the First World War women were required to take up roles in employment that needed to be filled and so many women became financially independent. There were many protests carried out by female campaigners prior to the breakout of the First World War, highlighting the inequality of the sexes. In 1914 however both the Women's Social and Political Union and the National Union took the decision to concentrate their work onto the war effort.<sup>56</sup> The liberation of women certainly had an effect on divorce rates.

In 1920 the proposals of the Gorell Report were reconsidered, yet it was not implemented due to opposition from the Church of England and also the issue that the writers of the report were not unanimous in their approach. It is possible that the delay was also caused through the reluctance of the politicians, not wishing to take this step prior to the General Election in

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<sup>54</sup> *Report of the Royal Commission* (n 49) 172.

<sup>55</sup> *Hansard*, HL Deb 26 June 1923 vol 54 cc573-610.

<sup>56</sup> G Davis and M Murch, *Ground for Divorce* (Clarendon Press Oxford 1988) 32: 'The emancipation of women has therefore had an impact on divorce rates in two ways, firstly, in provoking more women to question the terms of the bargaining which they appear to have struck, and secondly, in giving them freedom to leave.'

1929, interestingly the first election in which all women over the age of twenty one could now vote. Stone comments on the situation between 1923 and the passing of the Matrimonial Causes Act 1937:

...there lay a story of collusion and duplicity even more scandalous than that which had prevailed up to 1923. By allowing a wife to divorce a husband because of a single act of adultery, Parliament had in practice made it easy for the rich to divorce by mutual consent. The way it was done was for the husband to provide his wife with the evidence of his adultery by a procedure known as a 'hotel bill case.'<sup>57</sup>

In 1934 two novels were written highlighting to society the preposterous lengths that a couple were forced to go to in order to be granted a divorce. Both A. P. Herbert's *Holy Deadlock*<sup>58</sup> and Evelyn Waugh's *A Handful of Dust*<sup>59</sup> show the story of a couple who have fallen out of love. The husband in each novel is forced into having to hire a woman to take away for the weekend, in each case this was a platonic relationship and was purely so the chambermaid could later provide evidence that she had found them in bed together the following morning. A.P Herbert highlighted the accepted way in which people were moving around this illogical law and it was his Private Member's Bill which led to a change in the law.<sup>60</sup> His novel described the chambermaid when being tipped by the husband in question in the hope that she would later remember the sham couple:

Rose Parkins was not secretive. She looked at the thing in her hand, openly, and was amazed and overjoyed. Although she had served three years in the celebrated hotel it happened that she had never had any divorce business. No one before had given her a pound for bringing up a cup of tea on the first morning, and it delighted her.<sup>61</sup>

Providing a wider audience with details of such nonsensical acts that people were carrying out may have made the divorce law seem almost foolish and provided some impetus for reform. Furthermore, Herbert shed light on collusion when the husband in his story contacted his wife in order to seek advice on where he might find this service.<sup>62</sup> The Matrimonial

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<sup>57</sup> L Stone *Road to Divorce* (n 25) 397.

<sup>58</sup> A. P Herbert *Holy Deadlock* (Penguin Books Ltd, Middlesex. First Published 1934, Published in Penguin Books 1955).

<sup>59</sup> E Waugh *A Handful of Dust* (First Published by Chapman & Hall 1934, Published in Penguin Books 1951 London).

<sup>60</sup> Sir Alan Herbert comments, 'In July 1937, very surprisingly, after a long, severe, Parliamentary struggle, this received the Royal Assent as the Matrimonial Causes Act 1937. I do not claim that the Walls of Jericho fell down because of the book; I cannot remember that it was ever mentioned in the debates: but I think it had softened the climate of public opinion in which Members of Parliament have their being, and so made it easier for many to support, or accept, a reform which had always been considered politically perilous.' A. P Herbert *Holy Deadlock* (n 58).

<sup>61</sup> A. P Herbert *Holy Deadlock* (n 58) 77.

<sup>62</sup> A. P Herbert *Holy Deadlock* (n 58) 50-51: 'One day at the office he thought suddenly, 'one of Mary's stage friends will surely know.' But then, to write to her for advice in the matter would be collusion, or was it

Causes Act 1937 allowed divorce to be granted for adultery, desertion of three years, and incurable insanity with a minimum of five years confinement. The inclusion of incurable insanity may have been introduced under the influence of the creating a 'virile population'<sup>63</sup> and recognising 'human frailty.'<sup>64</sup> The provisions caused the medical profession to question their ethical role in declaring the certification of patients who may later recover, and demanded legal protection on this basis.<sup>65</sup> This ground does not sit well with the wedding vow 'in sickness or in health,' and does allow a spouse to end an unhappy marriage without alleging matrimonial fault.<sup>66</sup>

Herbert's Act made changes to collusion. Section 4 of the Matrimonial Causes Act 1937 reversed the burden of proof, so that it was for the petitioner to assure the court that there was no collusion between the parties. In a preceding debate on the Act, Viscount Fitzalan commented, 'Now about collusion. If I understand the matter aright, collusion connected with divorce is one of the gravest scandals of the day, and there is no excuse for not dealing with it.'<sup>67</sup> Further change was made on the passing of the Divorce Reform Act 1969, s.1 (2)(d), which introduced irretrievable breakdown demonstrated by two years separation with consent. It is notable that the stance taken by English law towards private arrangements and divorce by mutual consent has changed so dramatically over a small period of time,<sup>68</sup>

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recrimination? Still, if the letter were destroyed no harm could be done: and he could disguise the subject-matter. He would risk it. He wrote that evening:

Dear Mary, A friend of mine is very anxious to behave like a gentleman, but so far has been unable to find a suitable companion. He understands that there are agencies for this purpose, and I thought perhaps that one of your stage friends might know of one. Yours affectionately, John. He added: PS.- Burn this, and for God's sake don't telegraph. He received a telegram the following morning: Adam Heddle and Feather Sussex Street Strand darling too sweet of you but why the mystery and bugaboo of course go at once to Mortimer's Secretarial and Typing Bureau Holiday Street and hurry dear because want settle down present life so very unsatisfactory thanks kisses Mary. Collusion certainly. Condonation probably. John Adam concluded that his wife had not yet consulted a solicitor.' 50-51.

<sup>63</sup> Lord Birkenhead stated during the debates on Lord Buckmaster's Bill in 1920: , '...the future of the Empire may depend upon the sufficiency of a virile population.' Official Report (HL) 10 March 1920, vol. 39, col, 672.

<sup>64</sup> See for example, *Hull Daily Mail*, 30.12.1937: 'The necessity for these new regulations is a sad proof of our human frailty. That mental and physical ailments cannot be foreseen when all the world is bright during the days of courtship is admitted, but would there be any need for the appointment of new judges if the elementary vows made before and at the marriage ceremony were honoured through life.'

<sup>65</sup> See for example, *The Manchester Guardian*, 19.07.1938, 'Insanity and Divorce, Doctors and Certified Patients who may recover: Legal Protection Demanded.': The council of the B.M.A., however, has been advised that the Mental Treatment Act gives no protection to the practitioner giving an opinion as to the mental condition of a party in a divorce action.'

<sup>66</sup> Debate on the inclusion of incurable insanity can be found into the late 1950s. See for example: *Hansard*, HL Deb 20 May 1958 vol 209 cc455-70 and *Hansard*, HC Deb 06 December 1957 vol 579 cc807-26.1.

<sup>67</sup> *Hansard*, HL Deb 24 June 1937 vol 105 cc730-86, 741.

<sup>68</sup> The Rt Hon Lord Wilson of Culworth, Justice of the Supreme Court of the United Kingdom, comments in his foreword to J M Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing, Oxford 2012) p vii: 'One of my worst moments as a young advocate was in 1969 when a judge refused to grant my client a divorce in the light of her 'collusion' with her husband: for they had reached an agreement which not only resolved their financial issues but provided that he would not oppose the divorce.'

especially if the current interpretation of pre- and post-nuptial agreements is considered. The position has shifted from a couple being actively discouraged from discussing their future financial arrangements for fear that this may be interpreted as collusion, through to separation agreements being considered to be advantageous.<sup>69</sup> Legislation to allow enforceable pre- and post-nuptial agreements would be a further step away from this earlier position.

Mrs Eirene White's Private Member's Bill in 1951 proposed divorce through seven years separation. Perhaps unsurprisingly it received much opposition. During the second reading of the Matrimonial Causes Bill, Mr Black stated, 'An effort has been made to deny what we who oppose the Bill suggest, that the Bill makes divorce easier. I cannot seriously believe that hon. Members can be in doubt that divorce would be made easier if the Bill became an Act and that a larger number of cases of divorce would occur.'<sup>70</sup> A few months later, the Prime Minister, Mr Clement Attlee, announced, 'I have decided to recommend to His Majesty the appointment of a Royal Commission to review the law relating to divorce.'<sup>71</sup> In reply, White requested that this should happen as soon as possible.<sup>72</sup> Her 1951 proposals were however later rejected by The Royal Commission on Marriage and Divorce 1951-1956:

We have rejected the introduction into the law of the principle that marriage should be ended if it has irretrievably broken down, because...in whatever form that principle is introduced it would entail the recognition of divorce by consent. In its more fully developed forms it would also entail the recognition of divorce against the will of a spouse who had committed no recognised matrimonial offence. It is the introduction of either of these elements that we regard as fundamentally

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Unlike the type of agreements which are the main subject of this book, theirs was simply an agreement reached following their separation and a mutual disclosure of their resources and as a prelude to immediate proceedings. It is hard to believe, but English law was then hostile to any agreement between separated spouses, particularly if it is identified a non-contentious route to their divorce. Slowly-too-slowly English law has turned almost 180 degrees. Agreements of the type which, in my inexperienced forensic hands, absurdly resulted in my client's continued marriage to her husband are now encouraged at every turn.'

<sup>69</sup> As mentioned above at p 104 in Chapter Two, Munby J stated in *X v X (Y and Z intervening)* [2002] 1 FLR 508, [530]: 'The starting point, and this is common ground, is that there is no public policy objection to the agreement at which the parties have arrived, notwithstanding that it provides amongst other things for the parties to divorce on agreed terms. Indeed, I would say, if anything quite the contrary.'

<sup>70</sup> *Hansard*, HC Deb 09 March 1951 vol 485 cc926-1021, 956.

<sup>71</sup> *Hansard*, HC Deb 14 March 1951 vol 485 cc1535-7, 1536.

<sup>72</sup> *Hansard* (n 71) 1536: 'While thanking my right hon. Friend for his reply, may I ask him to assure the House that the terms of reference will be sufficiently wide to cover not only the law directly relating to marriage, separation and divorce, but also such cognate matters as pensions, insurance and marriage guidance and advice, so that people may be helped to avoid broken marriages? May I also ask my right hon. Friend whether the Government, who have shown some hesitation in reaching a further decision on this matter, recognise that it is very undesirable for the public to be kept for so long in uncertainty on questions which affect the lives and futures of so many thousands of men and women? May we have an answer to these points as soon as possible?'

objectionable and as containing the seeds of grave damage to marriage as an institution.<sup>73</sup>

Again, there is evidence of upholding the public status associated with marriage. The Royal Commission's Report then goes on to explain the view taken on the increased divorce rate created by marriages which would otherwise have held together:

People would then come to look upon marriage less and less as a life-long union and more and more as one to be ended if things begin to go wrong, and there would be a very real risk that in the end widespread divorce would come to be an accepted feature of our society. As those attitudes spread they would undermine, and ultimately destroy, the concept of life-long marriage. The evils which would result if the community were to come to accept divorce as the obvious way out of all marriage difficulties need no elaboration.<sup>74</sup>

Lord Walker did not agree with the majority working on the report. His view echoes the justifications put forward under Scottish law for allowing divorce due to desertion as discussed earlier. In addition he put forward the argument that if people are to be held in a marriage which has lost its true meaning, then this is also harmful to the value that society places on marriage:

The true significance of marriage as I see it is life-long cohabitation in the home for the family. But when the prospect of continuing cohabitation has ceased the true view as to the significance of marriage seems to require that the legal tie should be dissolved. Each empty tie - as empty ties accumulate - adds increasing harm to the community and injury to the ideal of marriage.<sup>75</sup>

The pressure for divorce reform was increased during this period due to the social changes that had occurred during the Second World War; again many women had grown independent from their husbands and they found it extremely hard to revert back to their previous roles, leading to marital conflict.<sup>76</sup> In addition many couples may have rushed into marriage during the war, where they would not have done so ordinarily.<sup>77</sup> However, it would seem that some parts of society, specifically policy makers, thought that retaining the matrimonial fault within the divorce legislation upheld the notion that marriage was a life-long commitment,

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<sup>73</sup> *Royal Commission on Marriage and Divorce Report 1951 – 1956* (Presented to Parliament by Command of Her Majesty, March 1956. London. Her Majesty's Stationary Office Reprinted 1966. Cmd 9678) 14.

<sup>74</sup> *Royal Commission on Marriage and Divorce Report 1951 – 1956* (n 73) 14.

<sup>75</sup> *Royal Commission on Marriage and Divorce Report 1951 – 1956* (n 73) 341.

<sup>76</sup> A similar effect on women can be seen following the First World War. See for example, P Rooke *Women's Rights* (Wayland Publishers, 1972) 110.

<sup>77</sup> A peak in the number of divorces can be traced to 1947. See, Office of National Statistics, J Beaumont, *Households and Families Social Trends 41*: 'Following the Act of Parliament in 1938 that extended the ground on which divorce was allowed, numbers increased considerably throughout the 1940s, to a peak of around 60,300 in 1947. ' p 12. Available electronically at <[www.ons.gov.uk/...social-trends-41---household-and-families.pdf](http://www.ons.gov.uk/...social-trends-41---household-and-families.pdf)> Last accessed 1 June 2012.

therefore to end this would need one party to be guilty. The Church of England supported this view, 'the doctrine of the matrimonial offence was 'entirely in accord with the New Testament', and that divorce was a 'very dangerous threat to the family and the conception of marriage as a lifelong obligation.'<sup>78</sup> Brooks offers an explanation as to why the upholding of matrimonial fault in divorce may have been so paramount to the Christian faith:

The church, in bringing people to a realisation of their failure, offers the hope of new beginnings in Christ. A view of divorce which takes no account of human failure is flawed, as is one where there is only one guilty party. Both deny the hope of redemption from failure. The message of universal failure confronted by the opportunity of universal forgiveness is at the heart of the gospel.<sup>79</sup>

Given this view stated by Brooks it seems inconsistent that the Archbishop's Group proposed to reform divorce law so that the sole ground for divorce would be irretrievable breakdown. The Group's first meeting was in 1964. The report *Putting Asunder: A Divorce Law for Contemporary Society* required that irretrievable breakdown of the marriage had to be determined by an inquest: the court's role was to examine the evidence in order to establish irretrievable breakdown.<sup>80</sup> Cretney comments that this report provided the 'catalysis for divorce reform.'<sup>81</sup> The Divorce Reform Act 1969, which came into force in 1971, made irretrievable breakdown the sole ground for divorce. The concept of the inquiry however was possibly considered too adversarial. In examining the various proposals and reforms occurring since 1 January 1858 has demonstrated that the influence of maintaining the public nature of marriage has resulted in the retention of fault in divorce law.

### 5.3 THE POTENTIAL INFLUENCE OF CONTRACT ON THE REGULATION OF DIVORCE

The current divorce law must now be examined. The reforms which led to the Matrimonial Causes Act 1973 had left a law which has been critically described as, 'a mixed bag of separation and fault-based facts...at best illogical and at worst destructive.'<sup>82</sup> This piece of

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<sup>78</sup> B Hale, D Pearl, E Cooke, P Bates *The Family, Law and Society* (n 23) 213 – 214.

<sup>79</sup> J Brooks *Whose Fault Is It Anyway? Divorce and the Family Law Act 1996* (Grove Ethical Studies, Grove Boos Limited, Cambridge E116. Printed by the Christian Publicity Organisation).

<sup>80</sup> The *Putting Asunder: A Divorce Law for Contemporary Society* report stated, 'It would have to be made possible for the court...to inquire effectively into what attempts at reconciliation had been made, into the feasibility of further attempts, into the acts, events and circumstances, alleged to have destroyed the marriage, into the truth of statements made (especially in uncontested cases), and into all matters bearing upon the determination of public interest.' Quotation obtained from *Putting Asunder* paragraph 84. See also, S Cretney, *Family Law in the Twentieth Century* (n 30) 357, footnote 241.

<sup>81</sup> S Cretney *Family Law in the Twentieth Century* (n 30) 360.

<sup>82</sup> N Shephard 'Don't Divorce the Lawyer' *The Times* (25 April 1995).

legislation has only one ground for divorce, the irretrievable breakdown of a marriage.<sup>83</sup> This then has to be supported by one of the following five facts:<sup>84</sup> adultery and the fact that the petitioner finds it intolerable to live with the respondent;<sup>85</sup> the petitioner cannot be expected to live with the respondent due to their behaviour;<sup>86</sup> desertion for at least two years;<sup>87</sup> two years separation with the respondent's consent<sup>88</sup> or five years separation.<sup>89</sup> In examining the facts available it is clear that this is a hybrid Act, allowing for divorce based both on fault-based facts and non-fault based facts. The Law Society have criticised the division between the ground for divorce and a supporting fact, deeming this division to be misleading.<sup>90</sup> *Buffery v Buffery*<sup>91</sup> demonstrates that the legislation will not allow for a couple to obtain a divorce simply because they have fallen out of love, there has to be a clear link between the fact used and the irretrievable breakdown of the marriage.<sup>92</sup> Yet, if people are determined to obtain a divorce it may be tempting to exaggerate their claims so as to ensure that the petition is successful, an element that may be detrimental to their future relationship.<sup>93</sup>

The fact of behaviour under s.1(2)(b) Matrimonial Causes Act 1973 is a hybrid fact, as it has encapsulated the previous grounds of incurable insanity and cruelty. George Baker P provided a definition of the use of behaviour as a fact, 'Behaviour in this context is action or conduct by the one which affects the other.'<sup>94</sup> In *Katz v Katz*,<sup>95</sup> where this definition was stated, the wife was able to divorce her husband due to his poor mental health, which led to vicarious harm to the wife's own health. In *Hadjimilitis v Tsavliris*<sup>96</sup> the wife was able to divorce her husband due to his controlling nature and the public humiliation that she had suffered due to him. This fact has to pass both the objective test provided by the court, and

<sup>83</sup> s.1(1) Matrimonial Causes Act 1973, 'Subject to section 3 below, a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably.'

<sup>84</sup> s.1(2) Matrimonial Causes Act 1973, The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts.

<sup>85</sup> s.1 (2)(a) Matrimonial Causes Act 1973.

<sup>86</sup> s.1(2)(b) Matrimonial Causes Act 1973.

<sup>87</sup> s.1(2)(c) Matrimonial Causes Act 1973.

<sup>88</sup> s.1(2)(d) Matrimonial Causes Act 1973.

<sup>89</sup> s.1(2)(e) Matrimonial Causes Act 1973.

<sup>90</sup> The Law Commission *Family Law: The Ground for Divorce* (Law Com No.192, 1990) para 2.8.

<sup>91</sup> [1988] FCR 465.

<sup>92</sup> Lord Justice May concluded in *Buffery v Buffery*: 'In truth what has happened in this marriage is the fault of neither party; they have just grown apart. They cannot communicate. They have nothing in common and there lies, as the recorder said, the crux of the matter...In those circumstances, in my judgment, clearly the petitioner wife failed to make out her case under s 1(2)(b).' [1988] FCR 465, [469].

<sup>93</sup> See for example, N Rose, 'No-Fault Call' (2002) LS Gaz, 4 Jan, 5 (6): 'It is really ridiculous that when neither person has committed adultery, the law forces people into making unpleasant allegations about the behaviour of their spouse in order to obtain a divorce right away.'

<sup>94</sup> *Katz v Katz* [1972] 1 W.L.R 955, 960.

<sup>95</sup> [1972] 1 W.L.R 955.

<sup>96</sup> [2003] 1 F.L.R. 81.

more importantly the subjective test of the petitioners view. It would seem that the objective test is kept in place to remove the possibility of an 'easy' divorce, yet there would seem very little point in keeping a couple in a marriage because the behaviour alleged does not pass the objective test.

The special procedure was introduced between 1973 and 1977, and applied to undefended divorce petitions. Hasson comments on the current system, '...by virtue of the 'special procedure' that has applied to all undefended divorce petitions since 1977, it has become largely a matter of correctly filling out the requisite forms. The result is effectively divorce on demand.'<sup>97</sup> Waite LJ commented:

In outward form English divorce law still does its best to emphasise the institutional solemnity of marriage by insisting that it can be ended only by a judicial pronouncement, and that the terms of any financial compromise accompanying or following divorce are judicially approved. In practice, procedural corners have had to be cut in the interests of saving time, expense and heartache within a system that has to accommodate more than 150,000 unopposed divorce petitions annually. One such development has been the enlargement of what began as a "special procedure" until it became the norm for most unopposed divorces. It still bears the superficial hallmarks of a full-scale judicial process, in that the proceedings are spoken of as a "cause" and there is reference in the rules to their outcome as a "trial." Closer inspection reveals that such descriptions have more pageantry than substance.<sup>98</sup>

This procedure has simplified the process of obtaining a divorce for the vast majority.<sup>99</sup>

### **Are the Fault Based Facts Fulfilling a Role?**

The most recent data available from the Office for National Statistics records that behaviour was the most popular fact used in divorce in 2010. Of the 119,425 divorces granted in 2010 in England and Wales, 48.3% were obtained through the fact of behaviour. Adultery was used in 15.7% of cases.<sup>100</sup> Desertion was used by only 0.4% of those divorcing. Two years separation with consent was used by 25% of all divorcing couples and 10.4% were granted a

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<sup>97</sup> E Hasson "Wedded to Fault": The legal regulation of divorce and relationship breakdown.' (2006) *Legal Studies* Vol 26 No. 6, 267 – 290, 277.

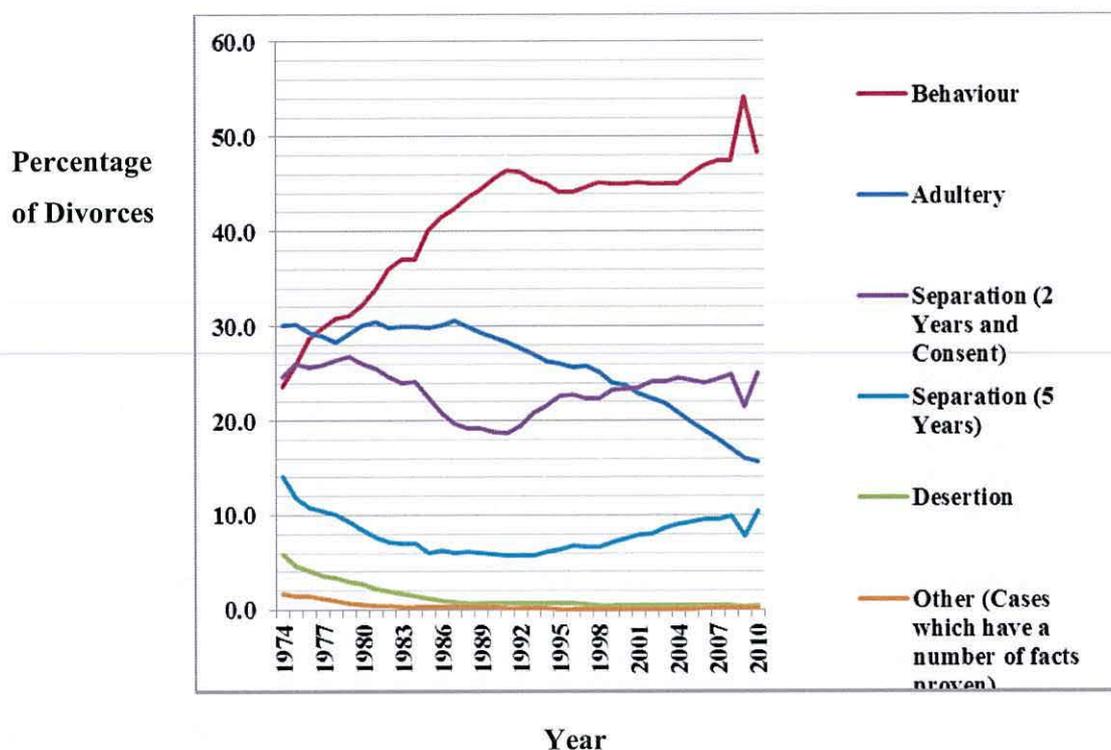
<sup>98</sup> *Pounds v Pounds* [1994] 1 W.L.R. 1535, 1539.

<sup>99</sup> See, E Elston, J Fuller and M Murch, 'Judicial Hearings of Undisclosed Divorce Petitions' *The Modern Law Review*, Volume 38, Issue 6, 609–640, November 1975. This research highlighted the problems associated with undefended divorces which led to the special procedure.

<sup>100</sup> ONS Statistics available at <<http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-238035>> Table 8. See also, G Davis and M Murch, *Ground for Divorce* (n 56) 141. G Davis and M Murch commented on the advantage of utilising behaviour or adultery: ...couples with children are over-represented among those employing the fault-based 'facts.' It is not that they are in such a hurry to remarry – they are rather in less of a hurry than their 'childless' counterparts, statistically speaking – but rather that the so-called 'ancillary matters' assume far greater urgency.

divorce by showing five years separation. Cases where there were a combination of facts proven was listed as 0.2%.<sup>101</sup> The figures from 1974 through to 2010 can be examined in order to establish if divorcing couples are using the fault based facts more frequently than the facts which do not require an allegation of fault.

**A Graph to Show the Fact used to Support the Ground of Irretrievable Breakdown of Marriage against Year: 1974-2010<sup>102</sup>**

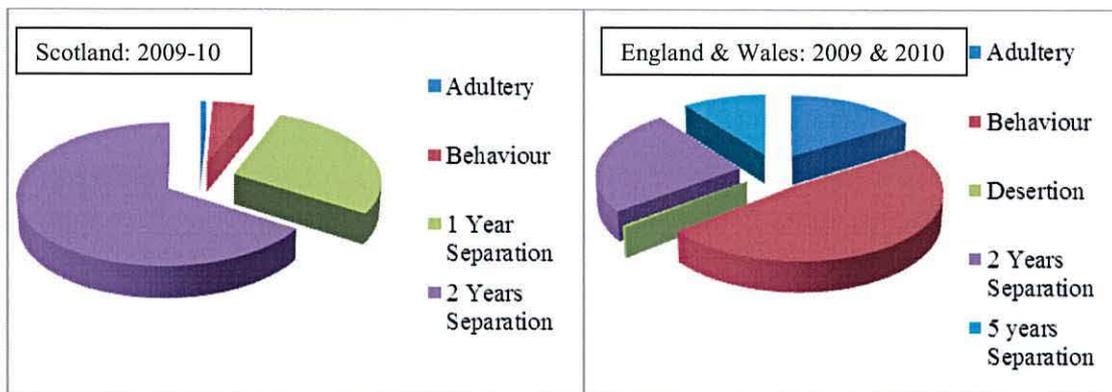


The graph shows a steady decline of the use of adultery in divorce, and a steady increase of couples divorcing after two years separation with consent following a dip in the mid 1980s and early 1990s. The use of behaviour has been the most frequently used fact since 1977. It does raise the question as to whether two years separation would be used more regularly if a shorter period of time was required. This question can partly be answered by considering the changes implemented just across the border in May 2006, with the passing of the Family Law (Scotland) Act 2006. This Act reduced the separation periods required in order to be granted

<sup>101</sup> Statistics obtained from <<http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-238035>> Table 8.

<sup>102</sup> The calculations for this graph have been made from the data from: ONS Statistics. <<http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-238035>> Table 8.

a divorce in Scotland. Two years separation with consent was reduced to one year<sup>103</sup> and five years separation without consent was reduced to two years.<sup>104</sup> The legislation removed the fact of desertion in Scotland.<sup>105</sup> Initially the number of divorces rose in Scotland, this rise was thought to be caused by some divorces taking place earlier than they would have done so.<sup>106</sup> The statistics available for Scotland show that in 2009-10 the number of divorces were the lowest in a decade.<sup>107</sup> The use of the revised facts in 2009-10 in Scotland<sup>108</sup> in comparison to those used in England and Wales in 2009 and 2010<sup>109</sup> is key to this analysis. It should be noted that these figures are not directly comparable as they are taken over a different time-scale.



<sup>103</sup> Family Law (Scotland) Act, s.11 (a).

<sup>104</sup> Family Law (Scotland) Act, s.11 (b).

<sup>105</sup> Family Law (Scotland) Act, s.12.

<sup>106</sup> Scottish Executive *Statistical Bulletin* p 1: 'The Family Law (Scotland) Act 2006 reduced the non-cohabitation periods required to establish the irretrievable breakdown of a marriage. This led to some divorces taking place earlier than if these changes had not taken place, and is the main reason for the increase in divorces in 2006-07 and the subsequent decline, although the effect of these changes has now expired.' This report is available electronically at <<http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/DivDiss/>>

<sup>107</sup> Scottish Executive *Statistical Bulletin* p 1: 'The number of divorces granted in Scotland in 2009-10 was 10,173, 10 per cent fewer than in 2008-09 and the lowest number in the last 10 years.' See also <<http://www.gro-scotland.gov.uk/press/news2009/more-divorces-in-2008-than-previously-thought.html>> for comment on the 2008 figures: 'We had expected a fall in the number of divorces in 2008, because the Family Law (Scotland) Act 2006 reduced separation periods before divorce, causing an increase in divorces in 2006 followed by reductions in 2007 and 2008. The corrected figure shows that there was indeed a reduction in 2008, although the fall was smaller than the provisional figure had suggested. The average annual number of divorces in the three years after the law was changed was 12,442, which is more than 10% up on the average level of just over 11,000 divorces per year during the 3 years before the change.'

<sup>108</sup> Scottish Executive *Statistical Bulletin* (n 107) Data available at 9.

<sup>109</sup> The calculations for this graph have been made from the data from: ONS Statistics.

<<http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcM%3A77-238035>> Table 8.

Although the legislation in England and Wales does provide the option of divorce without alleging fault, the vast majority of couples who have used this legislative provision have used a fault based fact in order to demonstrate the irretrievable breakdown of their marriage. The figures from 2009 and 2010 are not exceptional for England and Wales. A similar breakdown can be observed if the figures from 1974 through to 2010 are considered.<sup>110</sup> It would seem that some couples may allege an element of fault in order to be granted a Decree Nisi in a shorter period of time<sup>111</sup> in order to gain access to the financial orders made by the court.<sup>112</sup> It is possible to speculate that if England and Wales followed the Scottish approach in lowering the separation periods that the fault based facts would be used by fewer couples.

It must be considered that a great proportion of those divorces using the ‘fault’ facts may indeed be representative of the irretrievable breakdown of their marriage. Some may even argue that the law should provide this mechanism for blame, for example Rowthorn comments:

...the idea of fault is central to the notion of marriage as a commitment. By restricting unilateral exit from marriage without just cause, or by making the terms of dissolution depend on marital conduct, fault-based divorce penalizes those who break their marital vows and helps protect those who fulfil their obligations.<sup>113</sup>

This is an idea explored by Sclater, ‘Conflict can be seen as an integral part of the psychology of divorce, and not just an artefact of the adversarial process. Negative and destructive emotions may need to be expressed during dispute resolution.’<sup>114</sup> This view would certainly support the idea of retaining matrimonial fault within the divorce process, Bainham comments, ‘...one of the primary reasons why a return to fault-based divorce has been advocated...has been an attempt to underscore marital obligations and deter marital misconduct. Marriage is a legal status which imposes reciprocal duties on the spouses.’<sup>115</sup> In his support for a return to fault in divorce Regan comments, ‘We should leave available...a

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<sup>110</sup> The calculations for this graph have been made from the data from: ONS Statistics.

<<http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-238035>> Table 8.

<sup>111</sup> See for example A Greensmith, ‘Nobody’s Fault’ 157 NLJ 377: ‘Isn’t it incongruous that to get divorce in a matter of weeks from separation one party must blame the other for the marriage breakdown, yet if they are happy not to apportion blame, they have to wait two years before a petition can be issued? This is a wholly illogical state of affairs which does not stand up to scrutiny.’

<sup>112</sup> See for example N Shepherd, ‘Ending the Blame Game: Getting No Fault Back on the Agenda’ [2009] Fam Law 122, Shepherd argues that the finding of fault has simply become ‘a paper exercise.’

<sup>113</sup> R Rowthorn, ‘Marriage and Trust: Some Lessons from Economics’ (1999) 23 Cambridge Journal of Economic 661-691, 686.

<sup>114</sup> S Day Sclater, *The Psychology of Divorce Dispute Resolution, A Research Report*. (March 1998).

<sup>115</sup> A Bainham, ‘Men and Women Behaving Badly: Is Fault Dead in English Family Law? Oxford J Legal Studies (2001) 21 (2): 219, 235.

divorce based action based on fault when a spouse desires legal recognition that a genuine abuse of trust has occurred.’<sup>116</sup>

The current law could be criticised as an over-simplification of the vast amount of reasons why a couple may divorce. Yet in providing these distinct categories within the process perhaps provides a label for individual divorce cases, providing a clear explanation for both society and the couple involved why that marriage has broken down or failed. The Law Commission comment:

The law is, of course, used to deciding whether or not a crime has been committed. It is much less well-suited to engaging in the complex and sensitive factual and moral judgments which would be necessary to accurately reflect the relative blameworthiness of the parties to the marriage.<sup>117</sup>

However, this law is far removed from the suggestion by the Archbishop’s Group, *Putting Asunder*. There is no way of being totally certain if the fact used to obtain the divorce is truly the reason for the irretrievable breakdown. Perhaps then it is crucial to bear in mind that people will assert their autonomy, and use the system in place so that it will achieve the outcome most suitable for their situation. Eekelaar comments, ‘To require reasons is to cling to the notion that the parties must publicly justify their conduct, which is an invitation to deception and manipulation.’<sup>118</sup> This certainly challenges whether retaining matrimonial fault in divorce is in fact upholding the institution of marriage. A divorcing couple may include matrimonial fault in their divorce simply to achieve the wanted result more quickly. It is possible that the issues surrounding matrimonial fault and upholding the value of marriage may one day diminish. Yet in the 154 years in which legislative divorce has existed the law has not yet evolved to remove fault altogether, the public policy argument is still very much alive. It is possible that the element of ‘conflict’ inherent in the fault based facts could be considered to be fulfilling a necessary role in the divorce process, and so this would have to be considered were reform to occur in this area.

### **A Failed Attempt to Remove Fault: The Influence of Status?**

The Family Law Act 1996 Part II was intended to reform divorce law, leaving simply the ground of irretrievable breakdown. This no-fault divorce process was to be carried out using a period of reflection. For a childless couple the process would have taken a minimum of

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<sup>116</sup> M Regan Jr, *Family Law and the Pursuit of Intimacy* (New York University Press, 1993) 141.

<sup>117</sup> The Law Commission *Family Law: The Ground for Divorce*. (Law Com No 192, 1990) para 3.6.

<sup>118</sup> J Eekelaar ‘The Family Law Bill – The Politics of Family Law’ January [1996] *Family Law*.

twelve months and fourteen days. For a couple with children the process would have been longer, taking a minimum of eighteen months and fourteen days.<sup>119</sup> The reasoning behind the period of reflection was the hope of reconciliation in this space of time. Part I and Part IV of the Family Law Act 1996 were implemented. The principles that were to be upheld by the Act are contained in Part I, the first being, 'that the institution of marriage is to be supported.'<sup>120</sup> The four requirements needed to obtain a divorce were held in Part II s.3. In brief these elements were; irretrievable breakdown of the marriage,<sup>121</sup> attending an information meeting before being able to file a statement of irretrievable breakdown,<sup>122</sup> an agreement for future arrangements decided<sup>123</sup> and that the application had not been withdrawn in the period of reflection.<sup>124</sup> To remove all fault from the divorce process was certainly a bold move, and Eekelaar discusses the 'vulnerability' of the Act because of this:

The virtue of the Bill's scheme is its honesty in recognising limits of legal regulation of moral matters and the inherent logic in no-fault divorce, although, unfortunately, that this is also the reason for its vulnerability at the hands of those who would use the law to make moral judgments on marital behaviour.<sup>125</sup>

Again, the desire to uphold the status of marriage through the use of matrimonial fault played a strong part in the reform of divorce law. It must also be recognised that this Act failed due to its own intrinsic problems,<sup>126</sup> and has been described as 'curiously naïve.'<sup>127</sup> The

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<sup>119</sup> Further details of how the Part II of the Family Law Act 1996 would have worked: Once a statement of irretrievable breakdown had been filed, the period of reflection and consideration began fourteen days after the day on which the statement had been received by the court (s.7(3)). This took a couple to three months and fourteen days since the information meeting was attended. During this period of reflection and consideration the couple had to decide whether they could possibly save their marriage, and if so, begin reconciliation. (s.7 (1)(a) and (b)). This period of six months could have been extended (s.7 (13)). There are two facts which could have triggered this subsection. The first fact would have been if the party who had not applied to the court wished to have had a further period to reflect upon the situation. The other factor that would have extended the period by a further six months was if there was a child in the family under 16 years of age at the point the application was made. However under s.12 there were two situation where s.7(13) could not be utilised to give this extension: where the applicant or child of the family had an occupation order or a non-molestation order against the other party (s.12(a)); or where the court felt that an extension was detrimental to the child's welfare (s.12(b)). A further possibility to have extended the nine months was under s. 7(7), this was when both parties informed the court that they were attempting to reconcile their marriage, upon receiving this information the court effectively stopped the clock running on the period for reflection. This could have been resumed again if either party informed the court that their attempts to save the marriage were unsuccessful. Yet, if this period was interrupted the period of reflection by more than 18 months, a couple would have had to start the process again by filling in a new statement to the court.

<sup>120</sup> Family Law Act 1996 Part II s.1(a).

<sup>121</sup> Family Law Act 1996 Part II s.3(a).

<sup>122</sup> Family Law Act 1996 Part II s.3(b).

<sup>123</sup> Family Law Act 1996 Part II s.3(c).

<sup>124</sup> Family Law Act 1996 Part II s.3(a).

<sup>125</sup> J Eekelaar 'The Family Law Bill (n 118).

<sup>126</sup> See for example P Booth, 'Picking Faults in Divorce Law' August [2004] Fam Law, p 566: 'When, exactly, did we ever imagine that warring couples considering divorce would sit nicely around the kitchen table and discuss their problems – they never did before, did they?'

information meetings were considered too general, or even patronising, and reinforced the desire for legal advice for many participants.<sup>128</sup> People may have needed specific advice and possibly felt too embarrassed to ask for this.<sup>129</sup> Also, the simple fact that at the point a couple had filed a statement of irretrievable breakdown the majority had already completed their own private period of reflection,<sup>130</sup> to then have a further unwanted period of time imposed on them by the legislation.<sup>131</sup> They may well have been entering the system at the wrong time; the chance of successful reconciliation may have passed.<sup>132</sup> Although, the provisions did recognise that divorce is not a single event.<sup>133</sup> In March 1994 *The Times* reported, ‘Ministers are preparing to shelve plans to make divorce easier in the face of opposition from senior Conservatives who fear the reforms would make a mockery of its back to basics and family value policies.’<sup>134</sup> The issue of public policy may well have overridden any reform of this nature. The Institute of Economic Affairs, Health and Welfare Unit<sup>135</sup> released a report on the Act, *Just a Piece of Paper, Divorce Reform and the Undermining of Marriage*.<sup>136</sup> Their view of the 1996 Act was clear:

For years opponents of marriage have dismissed it as ‘just a piece of paper.’ Despite this hostility, the majority of families have continued to regard marriage as a lifelong commitment, and not a mere agreement for the time being. The Government’s

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<sup>127</sup> S Cretney, ‘The Divorce White Paper – Some Reflections’ June [1995] *Fam Law*.

<sup>128</sup> See for example G Morris, ‘Family: Times they are a-changin’ 159 *NLJ* 494: ‘The apparent aim of the information meetings was to move away from parties seeking legal advice but this appeared to backfire when research revealed that the information meetings only seemed to reinforce in people’s minds the need for legal advice.’

<sup>129</sup> See for example S Cretney, ‘The Divorce White Paper’ (n 127) 303. Cretney describes the potential for the meetings to be a, ‘patronising and humiliating lecture about, for example their continuing parental responsibility, both embarrassing and stigmatic.’

<sup>130</sup> This point was raised by G Davies, ‘Divorce Reform – Peering Anxiously into the Future’ October [1995] *Fam Law* 564.

<sup>131</sup> See J Eekelaar ‘The Family Law Bill (n 125) This period was considered to be an, ‘unnecessary hardship for no gain’ p 46. The benefits of having this period of reflection in place is stated in G Langdon – Down, ‘Doing the Splits’ (n 8) 21: ‘It is wise to have a period of reflection so people don’t rush off in a fit of pique and get divorced.’

<sup>132</sup> G Davis, ‘Divorce Reform – Peering Anxiously into the Future’ October [1995] *Fam Law* 565: ‘It has to be understood that the notice will be a highly visible marker upon a failing marriage; it is likely to be experienced, in the great majority of cases, as consigning the marriage to the dustbin – in other words, not the beginning of a process of reflection but the marriage’s effective end.’

<sup>133</sup> This point is raised by J Brown and C Lyndon, ‘Time to consider and Reflect’ December [1990] *Fam Law* 463: ‘The model recognises that divorce is not a single legal event but it is principally and emotional social and psychological one which takes place over a period of time, during which people need to adapt in several ways to their new circumstances.’

<sup>134</sup> L Lightfoot “Easy Divorce Plans Shelved amid Fears for Family Values” *The Sunday Times* (13 March 1994).

<sup>135</sup> Now known as ‘Civitas.’ See generally <<http://www.civitas.org.uk/books/about.php>> Last accessed 06 August 2012.

<sup>136</sup> IEA Health and Welfare Unit, *Just a Piece of Paper, Divorce Reform and the Undermining of Marriage* (First published July 1995).

misguided divorce reforms, however, will succeed in finally reducing marriage to little more than the proverbial 'scrap of paper.'<sup>137</sup>

This is the most recent holistic attempt at reforming divorce legislation, and its failure has left a law that was written for a society with slightly different views and attitudes to those held today.

#### 5.4 CONCLUSION

Franck stated that marital agreements appear to be a step further down the road towards the triumph of the contractual model than no-fault divorce.<sup>138</sup> The Chapter has demonstrated the strength of public policy surrounding divorce law in this jurisdiction and it is therefore suggested that Franck's reasoning can be applied to the system in place in England and Wales. The current law does offer couples the option of a no-fault divorce, although they cannot currently create a binding marital property agreement. The introduction of binding private agreements would potentially be a step further towards the contractual model of marriage than no-fault divorce. The reason as to why this is deemed to be a 'potential' is outlined by Dewar:

When no-fault divorce was introduced, one source of family law had primacy: namely, the legislation itself, coupled with judicial interpretation of that legislation, and professional understandings or conventions about what judges would be likely to do in any given case. In other words, it was easy to assume a top-down model of legal authority, in which legislation and judicial glossing of that legislation were centre-pieces.<sup>139</sup>

This view allows a more accurate placing of no-fault divorce on the proposed status-contract continuum in this jurisdiction. Although a no-fault divorce system moves away from the notion that in order to obtain a divorce a couple must first demonstrate serious cause,<sup>140</sup> the scope of this autonomy is still governed by legislation and, moreover, judicial interpretation of these provisions. Any reform to provide no-fault divorce would be pilloried due to the notion that it made divorce 'easier.' If such a reform were to occur it would seem extremely likely that a couple would be required to demonstrate something in order to be granted a

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<sup>137</sup> IEA Health and Welfare Unit, *Just a Piece of Paper* (n 136) iv.

<sup>138</sup> J U Franck, "So Hedge Therefore, Who Join Forever" (n 3). Quotation repeated here for clarity: 'The related legalisation of premarital agreements on the financial consequences of divorce looked prima facie like a step further down this road. It is widely regarded simply as an additional feature that shows the triumph of the contractual model.'

<sup>139</sup> J Dewar, 'Family Law and its Discontents' 14 Int'l J.L. Pol. & Fam. 59 (2000) 70.

<sup>140</sup> See P N Swisher, 'Reassessing Fault Factors in No Fault Divorce' (n 2).

divorce. For example, the 1996 Act went about securing this position by requiring the period of reflection, and the current law requires a period of separation.

Dewar comments that if marital agreements were capable of ousting the jurisdiction of the court then this would displace this source of applicable family law in the creation of ‘many autonomies.’<sup>141</sup> Further to this argument, Sanders comments on the link between fault-based divorce and marital property agreements:

If the legislator wants to impede divorces, another divorce system should be introduced, one which does not allow divorce at all or allows it in very limited circumstances... This however, is certainly not what the law over recent years has done. It seems that judges are happy to make consent orders to speed up proceedings and to save time and money for the parties. So if it is public policy that divorce should be available to the parties without unnecessary hazard for them and their children, it cannot contradict public policy when they conclude marital property agreements to make divorce even easier.<sup>142</sup>

This view supports the notion that no-fault divorce and enforceable marital property agreements appear together in the ‘spirit of liberalisation.’<sup>143</sup> They are inextricably linked on the proposed status-contract continuum. Whether England and Wales introduce legislative provisions which would allow for ‘judge-proof certainty’<sup>144</sup> remains to be seen and this question is discussed further in Chapter Nine. It is however possible to suggest that it would be binding marital property agreements, that is to say agreements capable of ousting the court’s jurisdiction, which would place marital property agreements ‘further down the road’ towards contract than no-fault divorce. Moreover, it is possible to submit that the introduction of marital property agreements, which still rely on judicial interpretation, would be in line with the introduction of no-fault divorce on the proposed status-contract continuum. Thus, if reform were to occur, regardless of the nature of the reform, there is still the potential for the law of divorce to be influenced by contract.

Stone’s conclusions are a reminder of the overall changes that have occurred in relation to divorce:

All the historian can say with confidence is that the metamorphosis of a largely non-separating and non-divorcing society, such as England from the Middle Ages to the mid-nineteenth century, into a separating and divorcing one in the twentieth, is

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<sup>141</sup> J Dewar, ‘Family Law and its Discontents’ (n 139) 72.

<sup>142</sup> A Sanders, ‘Private autonomy and marital property agreements.’ *International and Comparative Law Quarterly* (2010), 59, pp. 571-603.

<sup>143</sup> J U Franck, ‘So Hedge Therefore, Who Join Forever’ (n 3).

<sup>144</sup> C Barton, ‘The Lords and Pre-Nups’ [2009] *Fam Law* 265.

perhaps the most profound and far-reaching social change to have occurred in the last five hundred years. A gigantic moral, religious, and legal revolution has accompanied and made possible the shift from a system of marriage prematurely terminated by death to a system of marriage prematurely terminated by choice.<sup>145</sup>

Through examining the various reforms and proposals to reform divorce law which have occurred since 1857 it is apparent that policy makers have maintained the stance that the tight regulation of divorce will in fact uphold and protect the institution of marriage above the idea of it being 'just a piece of paper.' Progress has certainly been made away from this narrow view with the introduction of the possibility of a no-fault divorce under the current law, but the fact that a couple is still required to demonstrate something more than simply announcing irretrievable breakdown is inescapable. Public policy arguments are still very visible when divorce reform is debated. Regan comments, 'Deference to marital contract sends the message the divorce is a "private" matter solely of interest to the immediate parties.'<sup>146</sup> Thus, if reform to create enforceable marital property agreements is successful there would certainly be a compelling argument for further movement towards removing fault from divorce alongside this change.

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<sup>145</sup> L Stone *Road to Divorce* (n 25) 422.

<sup>146</sup> M Regan Jr, *Family Law and the Pursuit of Intimacy* (n 116) 151.

## CHAPTER SIX

### UNMARRIED COHABITANTS ON A NARROWING CONTINUUM

The enforceability of marital property agreements moves marriage along the proposed status-contract continuum towards the possibility for greater autonomy within the legal regulation of marriage. Nasheri provides an example of the interpretation of marriage as a contract, 'Marriage can be analogized to a contract, a partnership or perhaps even a type of close corporation. The idea that two parties betrothed to each other can make a pre-nuptial agreement is consistent with the contract idea.'<sup>1</sup> The issue of cohabitation is inextricably linked to this narrowing of the continuum. A cohabiting couple may wish to create an enforceable agreement. If they are looking to marry then the option to create an enforceable marital property agreement may be a relevant element of this decision. The accessibility of such an agreement may even encourage people to marry.<sup>2</sup> The scope for legislation dealing with these two types of agreements is considered. Furthermore, the discretion held by the court in the distribution of assets upon divorce may influence the decision as to whether a couple wishes to opt away from this through contract. The provisions available to cohabitants in other jurisdictions have been analysed, and the influence of averting same-sex marriage has been examined.

The aim of this Chapter is to examine the choices available to unmarried couples in England and Wales and it therefore brings together many of the areas discussed in this thesis. Firstly, the position of cohabitants on the continuum will be analysed, taking into account the scale of the issue, provisions available upon relationship breakdown and the availability of private agreements. Secondly, the influence of status will be examined by scrutinising the possible models for reform and the current position. Lastly, the possible influence of contract will be explored. At first glance it may seem that the potential introduction of enforceable marital property agreements, or contractual option, into family law may suggest that a solely contractual solution could be the most appropriate way forward in this jurisdiction. The provisions in Scotland, Australia and France are analysed in terms of status and contract in order to demonstrate that pursuing a model which confers status would be the most advantageous system to implement in England and Wales. This Chapter questions the possibility of contract influencing legislative reform to provide legislative protection for

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<sup>1</sup> H Nasheri, 'Prenuptial Agreements in the United States: A Need for Closer Control?' 12 Int'l J.L. Pol. & Fam. 307 (1998) 309.

<sup>2</sup> This point is made by The Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) para 5.20. More analysis is included below at p 156.

separating cohabitants within the ambit of family law; thus further pinpointing unmarried couples on the status-contract continuum.

### 6.1 UNMARRIED COHABITANTS ON THE PROPOSED CONTINUUM

Prior to considering whether the movement towards contract could influence the provisions available to unmarried cohabitants upon separation, it is crucial first to assess where this group presently feature on the proposed model. Montague comments, 'In the absence of a change in the law on either the rights of cohabitants or the validity of prenuptial agreements...couples contemplating living together or marriage/civil partnership should be aware of the legal consequences of their life style choice.'<sup>3</sup> Provisions for cohabitants may have partly been restricted with the aim of preserving marriage as the only legal institution in which a couple can gain this protection or safety net of accessing legislative provisions upon relationship breakdown.<sup>4</sup> There is undoubtedly an argument that a certain proportion of the cohabiting population may take the step to marry if they could be guaranteed the certainty of a binding contract setting out how their assets should be divided should they later separate. This is an argument raised in the Law Commission's consultation paper on marital property agreements:

Indeed, we have heard from a number of solicitors who have been obliged to point out to their clients that the only way to achieve their objective of preserving certain assets is to cohabit rather than to marry. Some have told us of clients who, as a result, did not marry. The availability of qualifying nuptial agreements could encourage marriage in such cases.<sup>5</sup>

Under the current law, the option to remain cohabiting offers far more autonomy to a couple. The public policy argument can be turned on its head at this point. It could be seen that the present law is undermining marriage in the sense that the way in which it is regulated is deterring people from marrying.

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<sup>3</sup> J Montague, 'To say "I do" or not.... the legal implications of life style choices' Coventry Law Journal 2011. One of the Law Commission's two references to unmarried cohabitants in The Law Commission, *Marital Property Agreements* (n 2) is with regard to the content of legal advice, to advise couples on this gulf in provisions, stating: 'The lawyer might well make reference, by way of contrast, to the alternative of cohabitation rather than marriage and the financial consequences of that choice' para 6.91. The only other reference to cohabitants within the Consultation Paper is the with regard to the Inheritance (Provisions for the Family and Dependents Act) 1975.

<sup>4</sup> This point is considered by The Law Commission when considering extending the Matrimonial Causes Act 1973 to cover separating cohabitants in *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307 Cm 7182, 2007) para 4.8. This argument is explored in further detail at p 172.

<sup>5</sup> The Law Commission, *Marital Property Agreements* (n 2) para 5.20.

There has been a reluctance to confer status upon unmarried cohabitants by providing a mechanism for financial orders upon relationship breakdown within family law. Yet there is now the potential that a married couple could be provided with the option of contract to opt out of the default position; thus narrowing the status-contract continuum that presently exists. Significantly the Supreme Court decision in *Radmacher* provides an example of this. The weight attached to the pre-nuptial agreement meant that Granatino could take no more from the marriage than an unmarried cohabitant would have done. As stated in Chapter Two, Lady Hale's comment on the Court of Appeal decision, which was upheld by the Supreme Court, indicates the view held by some on this area, '...the Court of Appeal erred in equating married with unmarried parenthood. Marriage still counts for something in the law of this country and long may it continue to do so.'<sup>6</sup>

### **The Scale of the Issue**

It is evident that family form is evolving, the Office for National Statistics reported on the rising number of couples choosing to cohabit, 'The proportion of married couple families has decreased over the last ten years, (accounting for 71 per cent of families in 2006, compared with 76 per cent in 1996). Over the same period the proportion of cohabiting couple families increased to 14 per cent from 9 per cent.'<sup>7</sup> Allison reports on what the future may hold with regard to this increase, predicting that there will be 3.8 million cohabiting couples and 10 million married couples in England and Wales.<sup>8</sup> The ONS has estimated figures for the number of people cohabiting in England and Wales in 2003, 2007 and 2008.<sup>9</sup> The estimates show only adults over the age of 16, who are in an opposite-sex, co-residential cohabiting partnership; same-sex cohabiting couples are not accounted for in these figures. The available data can be compared against population estimates for the same years.<sup>10</sup>

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<sup>6</sup> *Radmacher v Granatino* [2010] UKSC 42 [194].

<sup>7</sup> Office for National Statistics, National Statistics Online <<http://www.statistics.gov.uk/cci/nugget.asp?id=1865>> accessed 12<sup>th</sup> April 2010.

<sup>8</sup> D Allison 'Cohabitants have waited too long for justice' 157 NLJ 386 16<sup>th</sup> March 2007.

<sup>9</sup> Office for National Statistics, National Statistics Online <<http://www.ons.gov.uk/ons/rel/family-demography/cohabitation-estimates--england-and-wales/cohabitation-estimates/index.html>>

<sup>10</sup> Office for National Statistics, National Statistics Online <<http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/index.html>> Last accessed 18 June 2012.

	Number Unmarried Cohabitants	Population of England and Wales	Percentage of People Cohabiting in the Population of England and Wales (%)
Mid 2003 Estimate	4,000,000	52,792,200	7.6
Mid 2007 Estimate	4,500,000	54,082,300	8.3
Mid 2008 Estimate	4,680,000	54,454,700	8.6

Barlow summarises the various factors that add pressure to the concept of reforming this area of the law:

...the social acceptance of cohabitation by all strata of society as on par with marriage, the woeful ignorance of people in general and cohabitants in particular about the different legal treatment of cohabitation as compared with marriage...their preference for inaction even when they are aware and do intend to take action...<sup>11</sup>

The combination of these two elements leaves a legal system which is not well equipped to deal with the possible problems encountered by a growing proportion of the population.

The scale of change in society has been outlined by Walsh, reporting that in 2008 three in ten of all births in England and Wales were to unmarried cohabiting parents.<sup>12</sup> Goodman and Greaves have carried out research for the Institute for Fiscal Studies; *Cohabitation, Marriage and Child Outcomes* which was published in April 2010. The study reveals some noteworthy conclusions, 'it is debatable whether relationship quality is what causes marriage or whether, even early on, being married itself improves relationship quality.'<sup>13</sup> Such research adds weight to the idea that protection should be afforded to all couples with children, and not to

<sup>11</sup> A Barlow 'Cohabitation Law Reform – Messages From Research' *Feminist Legal Studies* (2006) 14:167-180, 173.

<sup>12</sup> E Walsh, 'Newline Extra: Marriage v Cohabitation' [2010] *Fam Law* 670: 'There has been a large increase in the number of births outside of formal marriage in the last 25 years — almost all of this increase is due to a growing number of cohabiting couples who decide to have children outside of marriage. Three in 10 of all births in England and Wales in 2008 were to unmarried parents living at the same address.'

<sup>13</sup> A Goodman and E Greaves, *Cohabitation, Marriage and Child Outcomes* (Published by the Institute for Fiscal Studies, London, 2010) 45. Factors taken into consideration: 'There is a vigorous debate about the benefits of marriage that has focussed on whether formal marriage is a better environment for children than parental cohabitation. We have shown that the children of married parents do better than the children of cohabitating couples in a number of dimensions, particularly on measures of social and emotional development at the ages of 3 and 5. But we have also shown that parents who are married differ from those who are cohabitating in very substantial ways, particularly relating to their ethnicity, education and socio-economic status, and their history of relationship stability and the quality of their relationship even when the child is at a very young age. Once we take these factors into account, there are no longer any statistically significant differences in these child outcomes between children of married and cohabitating parents...'

make a distinction based on marital status. Marriage is no longer expected prior to starting a family. This debate certainly produces some political dispute, Beckford outlines the position:

The Conservatives have pledged to recognise marriage in the tax system, ensuring that spouses would not lose out if one wanted to stay at home to raise their children, on the grounds that stable families are good for society. But Labour ministers, who abolished tax breaks for married couples, say that families now come in “all shapes and sizes” and so it would be wrong to disadvantage single parents or widows.<sup>14</sup>

It is clear that there is no definitive answer to this debate. No two families are the same. What is clear though is that the shape of the family unit is evolving.

### **The Legal Provisions Available to Cohabitants upon Relationship Breakdown**

The legal mechanism for property disputes between unmarried cohabitants upon separation does not come from family law but from trust law, hence the argument that cohabitants do not feature on the continuum model in terms of financial relief upon relationship breakdown. Bottomley discusses the inadequacies that the current law governing cohabitants holds in comparison to divorce law by describing the scope of the court’s jurisdiction for a separating married couple:

...family (divorce) law allows the court to redistribute property between the parties, taking into account factors which are not (overtly at least) recognised in property law, notably the age of the parties and length of the relationship, the circumstances which brought the relationship to an end, contributions made to the welfare of the family (caring) and future needs.<sup>15</sup>

By contrast, Carnwath LJ provides a rather vivid description of the uncertain legal provisions currently available to cohabitants in *Stack v Dowden*:<sup>16</sup>

To the detached observer, the result may seem like a witch's brew, into which various esoteric ingredients have been stirred over the years, and in which different ideas bubble to the surface at different times. They include implied trust, constructive trust, resulting trust, presumption of advancement, proprietary estoppel, unjust enrichment, and so on. These ideas are likely to mean nothing to laymen, and often little more to the lawyers who use them.<sup>17</sup>

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<sup>14</sup> M Beckford, ‘Marriage more stable than living together’ *The Telegraph* (26 March 2010).

<sup>15</sup> A Bottomley ‘From Mrs. Burns to Mrs. Oxley: Do Co-habiting Women (Still) Need Marriage Law?’ *Feminist Legal Studies* (2006) 14:181-211, 182.

<sup>16</sup> [2005] EWCA Civ 857.

<sup>17</sup> *Stack v Dowden* (n 16) [75].

The Law Commission were evidently keen to move away from this ‘witch’s brew,’ recommending in 2007 that, ‘Results must be predictable, not with mathematical precision but with some degree of confidence.’<sup>18</sup> The test for establishing a common intention constructive trust was set out in *Lloyds Bank v Rosset*;<sup>19</sup> the test requires either evidence of an express discussion leading to some form of detrimental reliance, or a direct contribution to the purchase price.<sup>20</sup> This position has been criticised by many<sup>21</sup> including the Law Commission:

In many cases, a couple will not engage in discussion, but agree to an ordering of the household finance such that one pays off the mortgage while the other pays the household bills...In our view, an indirect contribution to the mortgage if this kind should be sufficient to enable the courts to infer that the parties had a common intention that the beneficial entitlement to the home to be shared.<sup>22</sup>

Research suggests that men’s wages are usually spent on paying the mortgage, or ‘essentials’, and women’s earnings are instead used to buy ‘luxuries.’<sup>23</sup> It would seem therefore that such injustice may apply more frequently to women, with *Burns v Burns*<sup>24</sup> perhaps providing a stark illustration of how a woman may fare in such circumstances where there is no financial contribution towards the home.<sup>25</sup> Although this is a bleak illustration of such a result, the changing position of women in society may alter this position with more women making

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<sup>18</sup> The Law Commission, *Cohabitation* (n 4) para 4.3.

<sup>19</sup> [1991] 1 A.C. 107.

<sup>20</sup> *Lloyds Bank v Rosset* [1991] 1 A.C. 107, [132]-[133].

<sup>21</sup> For example see Lord Walker in *Stack v Dowden* [2007] UKHL 17, [26]: ‘Lord Bridge’s extreme doubt “whether anything less will do” was certainly consistent with many first-instance and Court of Appeal decisions, but I respectfully doubt whether it took full account of the views (conflicting though they were) expressed in *Gissing v Gissing* [1971] AC 886 (see especially Lord Reid, at pp 896g—897b, and Lord Diplock, at p 909d—h). It has attracted some trenchant criticism from scholars as potentially productive of injustice: see Gray & Gray, *Elements of Land Law*, 4th ed, paras 10.132—10.137, the last paragraph being headed ‘A More Optimistic Future’. Whether or not Lord Bridge’s observation was justified in 1990, in my opinion the law has moved on, and your Lordships should move it a little more in the same direction, while bearing in mind that the Law Commission may soon come forward with proposals which, if enacted by Parliament, may recast the law in this area.’

<sup>22</sup> The Law Commission *Sharing Homes: A Discussion Paper* (Law Com No 278, 2002) para 4.26.

<sup>23</sup> C Rotherham ‘The Property Rights of Unmarried Cohabitees: The Case for Reform.’ *Conv.* 2004, July/Aug, 272.

<sup>24</sup> [1984] 1 All ER 244.

<sup>25</sup> Fox LJ contemplated the lack of provisions available to an unmarried cohabitant: ‘...one asks, can the fact that the plaintiff performed domestic duties in the house and looked after the children be taken into account? I think it is necessary to keep in mind the nature of the right which is being asserted. The court has no jurisdiction to make such order as it might think fair; the powers conferred by the Matrimonial Causes Act 1973 in relation to the property of married persons do not apply to unmarried couples. The house was bought by the defendant in his own name and, prima facie, he is the absolute beneficial owner. If the plaintiff, or anybody else, claims to take it from him, it must be proved the claimant has, by some process of law, acquired an interest in the house.’ *Burns v Burns* [1984] Ch. 317, 330.

financial contributions.<sup>26</sup> If a claimant does fall into one of the categories to establish a common intention constructive trust then there is the further difficulty of quantifying their share;<sup>27</sup> the cases of *Oxley v Hiscock*,<sup>28</sup> *Stack v Dowden*,<sup>29</sup> and most recently *Jones v Kernott*<sup>30</sup> have required the judiciary to address this difficulty.<sup>31</sup>

## Private Agreements

There are very few public policy issues surrounding cohabitation agreements presently. It may currently be possible for an unmarried couple to attempt to place themselves in a similar financial position to a married couple upon separation through private ordering.<sup>32</sup> There is no quandary with the idea of the court's jurisdiction being ousted as currently the judiciary hold no jurisdiction over the redistribution of assets between separating cohabiting couples. Much could be said at this point with regard to the contractual considerations that would need to be overcome to create an enforceable cohabitation agreement; contractual considerations are discussed in Chapter Nine.

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<sup>26</sup> R Probert challenges this position in 'Cohabitants and The Family Home' [2000] Fam Law 925: 'It is somewhat telling that *Burns v Burns* remains the classic example of the unfairness of the law: the average cohabiting relationship is shorter, more likely to end in marriage, more likely to involve financial contributions from the female partner and less likely to involve children. The idea that the law of trusts inevitably discriminates against women is based in the assumptions about the position of women in society and their contributions within relationships that do not necessarily reflect the true position of cohabiting women.'

<sup>27</sup> R Probert outlines the factors taken into consideration where there is joint ownership in 'Cohabitation and Joint Ownership: The Implications of *Stack v Dowden*' October [2007] Fam Law: 'unequal contributions', 'money-management patterns' and 'duration of the relationship.'

<sup>28</sup> [2004] EWCA Civ 546. The court commented on the approach to be taken, 'It must now be accepted that (at least in this Court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property.' *Oxley v Hiscock* [2004] EWCA Civ 546, [69].

<sup>29</sup> [2005] EWCA Civ 857. Lady Hale in *Stack v Dowden* [2007] UKHL 17, [58]: 'The issue as it has been framed before us is whether a conveyance into joint names indicates only that each party is intended to have some beneficial interest but says nothing about the nature and extent of that beneficial interest, or whether a conveyance into joint names establishes a prime facie case of joint and equal beneficial interests until the contrary is shown. For the reasons already stated, at least in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved.' The decision was a 65%/35% split in Ms Dowden's favour.

<sup>30</sup> [2010] UKSC 53. Lord Walker and Lady Hale in *Jones v Kernott* [2010] UKSC 53, [2]: 'But counsel have not argued that *Stack v Dowden* was wrongly decided or that this court should now depart from the principles which it laid down. This appeal provides an opportunity for some clarification.' Held: 90% to Ms Jones and 10% to Mr Kernott.

<sup>31</sup> M Stowe describes the problem facing the Supreme Court, '*Kernott v Jones* will see the most agile and brilliant legal brains in the country occupied for months, considering firstly whether a peg is round or square – and secondly deciding in which round or square hole the round or square peg should somehow be fitted.' Comment available electronically at <<http://www.marilynstowe.co.uk/2011/05/kernott-v-jones-supreme-court/>> See also: R Bailey-Harris and J Wilson, '*Jones v Kernott* – Another helping of the witches' brew?' <<http://www.familylawweek.co.uk/site.aspx?i=ed89478>> Last Accessed 1 December 2011.

<sup>32</sup> See for example, A Barlow, *Cohabitation and the Law* (3<sup>rd</sup> edn, Butterworths, London, 2001) para 1.67: '...a cohabitation contract could attempt to opt in to matrimonial legislation by virtue of a term stating the parties agree to make such financial provision for the other as they would be required to do by the court had they married each other on the date cohabitation commenced.'

Previous public policy rules surrounding cohabitation contracts from the law of contract are noteworthy. A contract is deemed to be illegal where there is the presence of sexual immorality, a concept which has certainly evolved and developed in the context of cohabitation. Barton contrasts the attitude change towards cohabitation between the 1884 case *Re Vallance, Vallance v Blagden*<sup>33</sup> with *The Lady Cox* case<sup>34</sup> one hundred and fifty years previously. In *The Lady Cox* case a sum of money was to be given to the female following the male partner's death. However the fact that they continued to live together following this agreement was seen as 'wicked consideration.' Yet later in *Vallance* the court allowed the agreement to stand on the basis that their prior cohabitation was past consideration, and further to this; simply because they had continued to live together after the agreement does not automatically raise the presumption that this was in fact consideration for the contract. These old authorities indicate that this element of illegality is very much dependant on the perceptions at the time. Many other distinctions were drawn when discussing the enforceability of cohabitation contracts, for example if the female was aware that the male partner was already married then the contract could still be enforced. Yet if the female party was married, or was separated from her husband, then the contract would remain unenforceable. Recent cases show movement away from these early attempts to distinguish illegality of contract.<sup>35</sup>

With regard to the position of cohabitation agreements on the proposed continuum model Barton comments, 'It seems that agreements between cohabitees are currently governed by general contractual (private) rules and not by family law (status).'<sup>36</sup> Thus, it is evident that the public policy rules which have been derived from status surrounding marital property agreements are not going to apply to cohabitation agreements.<sup>37</sup> During a 1938 case involving a cohabiting couple, where there was no suggestion of an immoral promise, a public policy argument was put forward:

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<sup>33</sup> (1886) 26 Ch.D. 353.

<sup>34</sup> Case found in C Barton *Cohabitation Contracts* (Gower Publishing Company, 1985 Aldershot) 39.

<sup>35</sup> C Barton *Cohabitation Contracts* (n 34) 41. Barton commented in 1985: 'In the last decade, judicial developments with regard to the home shared by cohabitees have been progressively so encouraging of their fixing their respective entitlements by private arrangement, that they must be treated as having diminished the force of the old cases analysed above.'

<sup>36</sup> C Barton *Cohabitation Contracts* (n 34) 37.

<sup>37</sup> This is confirmed in A Barlow, *Cohabitation and the Law* (n 32) para 1.38: 'Couples are likely to want a cohabitation contract to cover their rights and obligations both during cohabitation and on breakdown of the relationship. Unlike their married counterparts who are thought to be prevented by public policy considerations from preparing for the contingency of breakdown, a cohabitation contract would not be void by reason of providing such an eventuality.'

The only public policy which can be involved in this case must be that of promoting and safeguarding as far as may be the relationship of marriage, the maintenance of which must always be regarded as of primary moment in any civilised State and not least in a country like ours, which is essentially monogamous. The marriage relationship is certainly a matter of public interest; it involves a status of public character, indissoluble by the consent of the parties...<sup>38</sup>

This quotation indicates the link between unmarried cohabitants, marriage and the proposed continuum in family law. Cohabitants do not currently appear on the status-contract continuum in order to maintain and uphold marriage.

The most recent guidance on this position is from *Sutton v Mishcon de Reya and Gawor & Co.*<sup>39</sup> The master-slave relationship in this case is certainly exceptional,<sup>40</sup> yet *Sutton* does give more general insight into the development of public policy and cohabitation contracts. The legal question was whether two agreements had been negligently drafted.<sup>41</sup> The negligence cases against both firms of solicitors did not succeed. The most crucial part of this case with regard to the enforceability of cohabitation agreements is the acknowledgement made by Hart J, 'I accept the submission that there is nothing contrary to public policy in a cohabitation agreement governing the property relationship between adults who intend to cohabit or who are cohabiting for the purposes of enjoying a sexual relationship.'<sup>42</sup>

The requirement of legal advice was discussed in *Sutton*. The first solicitor advised them that the cohabitation agreement may not be binding, and also advised Staal, who was to be the 'slave', to obtain independent legal advice. Staal agreed that he would do so in Sweden, however he assured Sutton that, 'I will not change my mind whatever [the lawyer] will tell me,'<sup>43</sup> this sentiment perhaps indicates the limitation in the stipulation of taking independent legal advice. The cohabitation agreement was signed by Sutton and Staal, although the two men never cohabited. The claim regarding the solicitor not giving stringent guidance over the

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<sup>38</sup> *Fender v St. John-Mildmay* [1938] A.C. 1, p 42 and 43.

<sup>39</sup> [2004] 1 FLR 837.

<sup>40</sup> The agreements were made between Geurt Staal, a Swedish business man and Mark Sutton, an air steward, who also worked as a part-time male escort and male prostitute. The cohabitation agreement made reference to a further document, a 'statement of trust', which had been written by Sutton. It was within this document where they had described the 'master-slave' relationship. The 'Statement of Trust' finely detailed how the relationship would be run, clauses such as 'In effect you are my property – I will essentially own you and will have ultimate power over what you and all that you do' and 'Each day you will have your duties, normally starting with bringing my breakfast and then continuing to serve throughout the day,' clearly demonstrate the nature of the proposed relationship and was signed by both men.

<sup>41</sup> Two different forms of agreements had been drafted by the firms in question, the first firm created a deed of cohabitation, and the second firm had drafted a deed of separation.

<sup>42</sup> (n 39) [22].

<sup>43</sup> (n 39) [8].

legal advice to be taken by Staal was dismissed, due to the domination in the relationship, 'it is difficult to see how the court could ever enforce such a contract against Staal, however much independent legal advice he might have had.'<sup>44</sup> As this case involved a master slave relationship it is perhaps the most extreme case of control being asserted by one person over another, yet this principle could be applied to contracts being made between people in intimate relationships. In some cases there will be one party who possesses a more marked or forceful personality. This part of the judgment highlights that the mere presence of independent legal advice guarantees absolutely nothing.<sup>45</sup>

Barton summarises the general meaning of the *Sutton* case in relation to future of cohabitation agreements:

Stripped of its distracting 'gay master and slave' element, the upshot is that a contract between parties to an informal sexual relationship, as opposed to one for such a relationship, will hold if it is OK by the general law of contract with particular reference to intent to create legal relations, payment for sexual services, and other vitiating factors such as duress, undue influence, misrepresentation or mistake.<sup>46</sup>

Although, there has not yet been a case where a cohabitation contract has been upheld, this case does examine the possible public policy arguments and contractual requirements in great detail.<sup>47</sup> As Probert notes, 'Commentators have welcomed Sutton as finally establishing that a cohabitation contract will be valid.'<sup>48</sup> The current position therefore seems to be that it would be possible for a cohabitation contract to be binding upon the couple. It is crucial to remember however the extent to which a cohabiting couple may rely upon a private agreement and the potential for these to be developed within family law. This is discussed further below.<sup>49</sup>

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<sup>44</sup> (n 39) [25].

<sup>45</sup> This will be given further consideration in Chapter Nine, see in particular pp. 281-282.

<sup>46</sup> C Barton 'Domestic Partnership Contracts: Sliced Bread or a Slice of the Bread?' [2008] Fam Law 900.

<sup>47</sup> A Barlow provides a useful summary of these requirements: 'The issues are raised by the law of contract, and are matters which courts must consider in relation to any contract the validity of which is challenged. There are as many as five hurdles at which a cohabitation agreement may fall: (i) it may be found illegal or void on grounds of public policy; (ii) an intention to create legal relations may be absent; (iii) it may be found void for uncertainty; (iv) consideration may be absent; or (v) it may be found voidable where there is undue influence.' A Barlow, *Cohabitation and the Law* (n 32) para 1.44.

<sup>48</sup> R Probert 'Case Commentary: Cohabitation contracts and Swedish sex slaves' [2004] CFLQ 453.

<sup>49</sup> See below, in particular p 176.

## 6.2 THE INFLUENCE OF STATUS ON THE PROVISIONS FOR UNMARRIED COHABITANTS UPON SEPARATION

This section will analyse how potential reforms to provide separating cohabiting couples with a financial remedy has been influenced by the notion of preserving the status of marriage. In considering the changes which have occurred in the twentieth century Probert comments:

There has until relatively recently been a degree of official confidence that those who can marry will do so and that reforms to marriage and divorce will enable stable unions to be regularized. The increase in cohabitation in the past thirty years, and in particular the prevalence of post divorce cohabitation, has dispelled this confidence. Attempts to make marriage more attractive have continued, but at the same time it is recognized that cohabitants may need the protection of the law.<sup>50</sup>

This provides the starting point for the analysis in this section of the Chapter.

The Law Commission published the report *Cohabitation: The Financial Consequences of Relationship Breakdown*<sup>51</sup> on 31 July 2007. This report proposed how the law could be reformed to provide legal provisions for couples living in intimate relationships upon the breakdown of their relationship.<sup>52</sup> The scope of the 2007 report was far narrower than the 2002 Law Commission Discussion Paper *Sharing Homes*.<sup>53</sup> The 2002 discussion paper set out, 'It covers a broad range of people – not only "couples," married or unmarried, but also friends, relatives and others who may be living together for reasons of companionship or care and support.'<sup>54</sup> The failure of *Sharing Homes* caused some commentators to speculate as to whether the 2007 report would have any effect.<sup>55</sup> The change in approach in 2007 to only including couples living in an intimate relationship<sup>56</sup> perhaps leaves any suggestions open to much greater scrutiny through the comparison with the current legal provisions available to a

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<sup>50</sup> R Probert, 'Cohabitation in Twentieth Century England and Wales: Law and Policy' *Law & Policy*, Vol.26 (No.1) 27.

<sup>51</sup> The Law Commission *Cohabitation* (n 4).

<sup>52</sup> As the report was specifically focussed on financial issues upon relationship breakdown, areas such as an unmarried father having no automatic right of parental responsibility and the duty of cohabitants to support each other financially during the relationship were not considered.

<sup>53</sup> The Law Commission *Sharing Homes* (n 22).

<sup>54</sup> The Law Commission *Sharing Homes* (n 22).

<sup>55</sup> For example, Harper commented, 'A report by the commission is promised by June 2007, but given that its paper on sharing homes published in July 2002 had taken seven years to be published and made no specific recommendations, many fear that this cohabitation project will not be given any priority.' M Harper 'Scotland makes breaking up less hard to do.' *The Times* (London 10<sup>th</sup> May 2005).

<[business.timesonline.co.uk/tol/business/law/article519743.ece](http://business.timesonline.co.uk/tol/business/law/article519743.ece)> accessed 15<sup>th</sup> April 2010.

<sup>56</sup> The 2007 report specifically states that blood relatives, or people living together where the nature of the relationship is purely to care for that person, and also commercial relationships would not be covered by the proposals. The Law Commission *Cohabitation* (n 4) para 1.19. Yet, with the exception of those related by blood, it is possible that one cohabitant may allege that they had indeed been living in an intimate relationship so that their case would be covered by the proposals, thus raising a potential area for litigation.

married couple or civil partners.<sup>57</sup> It is therefore possible to examine the proposals set out in this report to establish what lengths the Law Commission went to in order to reduce the potential for this reform to be deemed capable of undermining the institution of marriage by conferring status to unmarried cohabitants.<sup>58</sup> Previous attempted reforms in the area of cohabitation indicate the strong feelings on maintaining a difference between the legal protection of a married couple and a cohabitating couple.<sup>59</sup>

The proposals set out a minimum time period to be proven by the couple in order to access the proposed legislation, the suggested time period was a relationship between two and five years in length.<sup>60</sup> This suggestion is very similar to the findings of research carried out on the views of cohabitants, who suggested that the proposals should apply to a relationship of a

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<sup>57</sup> S Wong comments on the Law Societies definition of cohabitants, which is comparable with the more recent narrower scope of cohabitants the Law Commission concentrated on in, 'Cohabitation and the Law Commission's Project' *Feminist Legal Studies* (2006) 14: 145-166: 'The marriage-like approach taken in Law Society model is further reinforced by the recommendation of a non-exhaustive list of factors to guide the courts in determining whether a cohabiting relationship qualifies... The very first factor on the list is whether or not the parties have a sexual relationship... What we see is a stretching of the marriage model to accommodate the inclusion of other close personal relationships.'

<sup>58</sup> Possibly in a bid to avoid creating newspaper headlines such, J Macintyre 'Cohabitants set for same rights as married couples' *The Independent* (31 July 2007) Available electronically at <<http://www.independent.co.uk/news/uk/this-britain/cohabitants-set-for-same-rights-as-married-couples-459694.html>> Last accessed 15 April 2010.

<sup>59</sup> For example the Family Homes and Domestic Violence Bill was withdrawn because it did not draw a distinction between a cohabiting couple and a married couple with regard to what protection they could be granted. It was reintroduced as in the Family Law Bill, now Part IV of the Family Law Act 1996. Section 41(2) was added to the legislation, meaning the court would have to give consideration to the fact that a cohabitating couple 'have not given each other the commitment involved in marriage.' Lord Irvine of Lairg commented, 'The minority obviously thought....that the Bill for the first time would afford legal protection to mistresses and somehow, as a result, undermine the institution of marriage.' (*Hansard*, HL Deb 30 January 1996 vol 568 cc1382-426, 1398.) The mere suggestion of undermining the institution of marriage caused a piece of legislation to be withdrawn; showing the strength that remains behind this opposition. See also C Lind and A Barlow, 'Family Redefinition under Family Law Bill 1996' (1996) *Web Journal of Current Legal Issues*. Available electronically at <<http://webjcli.ncl.ac.uk/1996/issue2/lind2.html>> Last accessed 18 June 2012.

<sup>60</sup> It would be logical for the proposals to mirror the existing legislation available to a cohabitant upon the death of their partner with regard to the time period of living together in order to access the provisions. s.1(1A) of the Inheritance (Provision for Family and Dependents) Act 1975 states, 'This subsection applies to a person if the deceased died on or after 1st January 1996 and, during the whole of the period of two years ending immediately before the date when the deceased died, the person was living (a) in the same household as the deceased, and (b) as the husband or wife of the deceased.' In October 2009 the Law Commission published the consultation paper *Intestacy and Family Provision Claims on Death* (Consultation Paper No 191, 2009). In creating an automatic position that can only be altered through the making of a will would create a situation where in order to assert autonomy a cohabitant would actually be forced to create a will. The consultation paper concluded that this would be a preferable position to the current law. The final report was released 14 December 2011 and two draft Bills have been created to implement reform; the draft Inheritance (Cohabitants) Bill and the draft Inheritance and Trustees' Powers Bill. With regard to the reform under discussion here the provisions set out in the Inheritance (Cohabitants) Bill could influence reform. This Bill contains provisions that would give some unmarried partners who have lived together for five years the right to inherit on each other's death. This period would be reduced to two years where; the couple have a child together and the child was still living with the couple.

minimum of three to five years in length, or more.<sup>61</sup> Unlike marriage or civil partnership however there is no universally recognisable point to mark the start of cohabitation, therefore leaving this point open to potential litigation. Under the proposals a cohabiting couple would potentially have to prove a relationship twice the length of some married couples or civil partners who can access financial provisions upon divorce or dissolution, perhaps maintaining the perception that cohabiting couples are less committed,<sup>62</sup> despite the research available in this area.<sup>63</sup>

The proposals also suggested that all cohabiting couples who have children would be covered by the scheme, so again there would be no minimum duration to prove.<sup>64</sup> Cynically, it may be suggested that cohabitants who have children, regardless of the length of their relationship, have been included into the scheme so that one partner may access some form of financial award and be less likely to become dependent upon the state. Currently provision is made only for the child.<sup>65</sup> Schedule 1 of the Children Act 1989 is usually used to deal with the financial provision to be made for a child when the parents are unmarried. In this situation the parents have no obligations to one another yet the parent will still have a duty to maintain the child. Several orders can be made to reflect this obligation: the court has the power to order for a lump sum; periodical payments and provide housing in favour of the child. These orders carry a limited time span, this being until the child turns eighteen or completes full-time

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<sup>61</sup> A Barlow, C Burgoyne and J Smitherson 'Living Together Campaign – the Impact on Cohabitants' Family Law Volume 37 February, 166.

<sup>62</sup> For example, G Jenkins *Cohabitation: A Biblical Perspective*, Grove Ethics Series (Grove Books Limited, Cambridge 2002) 12: 'Permanence is not just a chronological term that describes the length of a relationship; it also describes the quality of the relationship....One of the most obvious characteristics of cohabitation is its lack of permanence.'

<sup>63</sup> See for example, S Duncan, A Barlow and G James, 'Why don't they marry? Cohabitation, commitment and DIY marriage.' CFLQ, Vol 17, No 3, 2005: 'Cohabitants seem to show as much commitment to their partnerships, when we compare them like with like, as married people do. Some cohabitants are less committed than others, but the same goes for married people. A dramatic spread in lack of commitment, therefore, cannot explain the increasing levels of cohabitation in Britain.'

<sup>64</sup> Baroness Deech comments: Fourteen per cent of British couples are cohabitants (with 1,250,000 children). The median duration of the cohabiting relationship is two years, after which they marry or separate. Cohabitation is made less stable by childbearing, according to the statistics, as more of the couples without children stay together. Baroness Deech 'Couples don't need the law to tell them how to live together.' *The Observer* (22 November 2009) Available electronically <<http://www.guardian.co.uk/commentisfree/2009/nov/22/ruth-deech-marriage-cohabitation-children>> accessed 18th April 2010.

<sup>65</sup> The duty to maintain a child for separating unmarried couples was set out in Chapter Two, see p 42. It is repeated here for clarity.

education. The proposals would shift the emphasis onto the couple, and not whether they are married.<sup>66</sup> Regan comments on this position:

If the law ignored the reliance and vulnerability that arises in these relationships, it would be party to considerable hardship. Non enforcement would undermine the cultivation of relational identity by reinforcing the idea that by refusing to marry one can escape the responsibilities that flow from that intimate relationship. The message would be that these relationships of interdependence are purely “private” matters of no social concern.<sup>67</sup>

This viewpoint is presented from the desire to support intimacy within family law, as discussed in the Introduction. Perhaps therefore it is a positive move that reform should concentrate on the existence of children rather than the relationship of the couple, with more emphasis placed on the existence of a ‘family’ rather than the legal status of a relationship.

### **Models for Reform: Attention to Status and Contract**

Extending the Matrimonial Causes Act 1973<sup>68</sup> was rejected on several grounds. The Law Commission took into account that many are dissatisfied with the MCA 1973:

Several of our consultees expressed dissatisfaction with the MCA. They pointed in particular to the lack of a statutory objective underpinning the exercise of discretion, the theoretical and practical difficulties in applying its principles to so called “big money” cases, and the lack of predictability of outcome.<sup>69</sup>

It is understandable to disregard the option of replicating a system which is already considered flawed; this is an element of the continuum discussed in Chapter Eight.<sup>70</sup> Concerns were also raised that cohabitants would object to being treated as if they had actually married. Baroness Hale categorises the groups of people who cohabit as, ‘the informed cohabitants’, ‘the uninformed cohabitants’, ‘the reluctant cohabitants’ and ‘the no-

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<sup>66</sup> This can be compared to the views put forward by Clive as set out in the Introduction. See, E M Clive, ‘Marriage: An Unnecessary Legal Concept?’ in J Eekelaar and S Katz (eds) *Marriage and Cohabitation in Contemporary Societies* (Butterworths, London, 1980).

<sup>67</sup> M Regan Jr, *Family Law and the Pursuit of Intimacy* (New York University Press, 1993) 124.

<sup>68</sup> Will later be referred to as MCA 1973.

<sup>69</sup> The Law Commission *Cohabitation* (n 4) para 4.6.

<sup>70</sup> Chapter Eight raises the possibility of reforming financial relief with the inclusion of certain cohabiting couples. Reference is made to E Cooke, A Barlow, T Callus ‘Community of Property, A regime for England and Wales?’ (The Policy Press, Bristol 2006) 41: ‘We certainly think that if we are moving towards a community of property system – and even if we are not already, in the longer term there may well be European pressure to go down that route – this should not be done only in the married context. There is scope for the scheme to include only ‘committed’ cohabitants and also to provide the perceived inequities arising from asset transfer after short childless relationships.’

choice cohabitants.<sup>71</sup> People may choose not to marry for a range of reasons and so this must be respected. Moreover, it is extremely unlikely that the proposals would have been considered for implementation if they had extended the MCA 1973. Indeed the Law Commission state:

Applying the MCA would impose an equivalence with marriage which many people would find inappropriate, and some consultees suggested that it is unlikely that a scheme which equated cohabitation with marriage in this way would be politically attainable.<sup>72</sup>

The Law Commission's rejection of the MCA 1973 indicates how strong the feelings are about precluding equivalence to marriage in allowing an unmarried couple to access these provisions; this was thought of as politically unattainable.<sup>73</sup> Yet the proposals take into account that cohabiting couples may not want to be treated as if they had married, so this autonomy is also being respected. Arguably this would have been the simplest way to achieve reform, and would have had the advantage of instant familiarity. Yet a different route was chosen; steering the proposals away from extending the legal provisions already in place, minimising the chance of being deemed as undermining the institution of marriage and maximising the chance of actually being implemented into law.

### **Community of Property Model**

The Law Commission rejected the idea of a rule-based approach, similar to community of property regimes used in many other European jurisdictions. This rejection was based on the system being too rigid: 'Cohabitation arrangements vary widely and one size cannot fit all.'<sup>74</sup> This regime would however have the advantage of simplicity. The system currently utilised in Sweden is notable as the value of a joint house and household items is simply divided equally upon relationship breakdown.<sup>75</sup> The provisions are contained in the Swedish Code of Statutes (SFS 2003:376).<sup>76</sup> The Cohabitees Act 2003 defines a cohabitant as, 'two persons permanently living together in a relationship and have a joint household.'<sup>77</sup> The provisions contain details of how a person's interest in a property is calculated by firstly taking into

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<sup>71</sup> Baroness Hale 'Unmarried Couples in Family Law' June [2004] Fam Law.

<sup>72</sup> The Law Commission *Cohabitation* (n 4) para 4.8.

<sup>73</sup> K Kieran, A Barlow and R Merlo comment on this position in 'Cohabitation Law Reform and its Impact on Marriage' December [2006] Fam Law.

<sup>74</sup> The Law Commission *Cohabitation* (n 4) para 4.13.

<sup>75</sup> The Law Commission *Cohabitation* (n 4) para 4.11.

<sup>76</sup> For more details see < <http://www.sweden.gov.se/sb/d/12680/a/155258>>

<sup>77</sup> Sambolag (2003:376), s.1.

account any debts under s.12. Once debts have been accounted for, then the remaining value is divided equally between cohabitants under s. 13.<sup>78</sup> Scherpe describes that Sweden took a 'pioneering role in the development of rules for cohabitation'<sup>79</sup> and that 'the Swedish legislation has proved to be a point of reference, if not a yardstick in academic debates and law reform in Europe.'<sup>80</sup> The proposals put forward for this jurisdiction however favoured a system based on discretion. Again, the Law Commission distinguish how this system would be different to the discretion available in MCA 1973:

The MCA discretion is "strong" because the statute does not say what is to be achieved. Discretion in our recommended scheme would be weaker because the statute would determine the pre-conditions for relief and its objectives....the court should not be presented with a "menu" that simply invites the judge to "have regard to" a wide range of considerations without any prioritisation in deciding what relief is appropriate to the circumstances of the case.<sup>81</sup>

The report rejected the concept that this discretion should be based on the principle of meeting the 'needs' of the parties, thus drawing a further distinction between cohabitants, married couples and civil partners. This rejection was based on the fact that a cohabiting couple have absolutely no obligation to maintain each other during the relationship and so it would seem illogical that they should have to meet the others needs upon separation. The principle of 'global accounting'<sup>82</sup> would have involved placing an economic value on all advantages and disadvantages accumulated in the duration of the relationship. The Law Commission noted that it would have been particularly complex where the contribution was not purely financial.<sup>83</sup>

### **Contributions**

The proposal set out a scheme which would aim to achieve equality between the separating cohabitants. Disadvantages accrued during the course of the relationship would be shared by the applicant and respondent. If the respondent had benefited from an advantage that had

<sup>78</sup> Available electronically at <<https://lagen.nu/2003:376>>

<sup>79</sup> J M Scherpe, 'The Nordic Countries in the Vanguard of European Family Law' 277. Available electronically from the Stockholm Institute for Scandinavian Law: <<http://www.scandinavianlaw.se-pdf-50-17.url>>

<sup>80</sup> J M Scherpe, 'The Nordic Countries in the Vanguard of European Family Law' (n 79) 279.

<sup>81</sup> The Law Commission *Cohabitation* (n 4) para 4.16.

<sup>82</sup> The Law Commission *Cohabitation* (n 4) para 4.28.

<sup>83</sup> The Law Commission *Cohabitation* (n 4) para 4.28: 'We called that sort of exercise "global accounting" in the CP and we rejected it because of its evidential complexity and the impossibility of attributing a value to many contributions, in particular those that are not financial. This is why it would not be practicable to recommend a scheme whose single guiding principle was, simply, "contributions."'

occurred because of a contribution by the applicant this would also be redressed. The proposals throw the definition of 'contribution' very wide:

A qualifying contribution is any contribution arising from the cohabiting relationship which is made to the parties' shared lives or to the welfare of members of their families. Contributions are not limited to financial contributions, and include future contributions, in particular to the care of the parties' children following separation.<sup>84</sup>

In the case of a disadvantage the applicant must be able to prove a direct causal link between the disadvantage and their contribution. The Law Commission define what may constitute as a disadvantage, 'An economic disadvantage is a present or future loss. It may include a diminution in current savings as a result of expenditure or of earnings lost during the relationship, lost future earnings, or the future cost of paid child-care.'<sup>85</sup> In the same way, the applicant must be able to demonstrate a direct causal link between the benefit enjoyed by the respondent and their contribution to the relationship. The report outlines what may be regarded as an advantage, 'A retained benefit may take the form of capital, income or earning capacity that has been acquired, retained or enhanced.'<sup>86</sup> The Law Commissioner at the time of the report, Bridge, also outlined the inclusion of an 'economic equality ceiling'<sup>87</sup> so that if the couple were in an equivalent financial situation following the relationship breakdown then neither would be able to claim. Yet if they were not in an equivalent financial situation then the person in the stronger financial situation after the breakdown would be unable to claim for any form of disadvantage. It is evident that the aim of the scheme proposed would be very different from the wide discretion available to the judiciary under MCA 1973. This may have the benefit that it may be easier for a cohabiting couple to make a financial settlement out of court.

Baroness Hale summarised the 'rationale for distribution'<sup>88</sup> upon the separation of a married couple in *Miller v Miller; McFarlane v McFarlane*.<sup>89</sup> It was stated that 'the relationship has generated needs,'<sup>90</sup> that redistribution is 'the sharing of the fruits of the matrimonial

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<sup>84</sup> The Law Commission *Cohabitation* (n 4) para 8.11.

<sup>85</sup> The Law Commission *Cohabitation* (n 4) para 8.13.

<sup>86</sup> The Law Commission *Cohabitation* (n 4) para 8.12.

<sup>87</sup> S Bridge 'Financial Relief For Cohabitants: How the Law Commission's Scheme Would Work' *Family Law* Volume 37 November 2007, 999.

<sup>88</sup> *Miller v Miller; McFarlane v McFarlane* [2006] A.C. 618, 659.

<sup>89</sup> *Miller; McFarlane* (n 88)

<sup>90</sup> *Miller; McFarlane* (n 88) 659.

partnership'<sup>91</sup> and it allows for 'compensation for relationship generated disadvantage.'<sup>92</sup> Although the redressing of the disadvantage has been carried across as a rationale for the division of assets of separating cohabiting couples,<sup>93</sup> the other two considerations have been disregarded by the Law Commission. It is perhaps surprising therefore that the discretionary factors available upon the breakdown of a cohabiting relationship appear strikingly similar to the factors listed in s.25 MCA 1973.<sup>94</sup>

### **Further Comparisons to the Matrimonial Causes Act 1973**

Both the proposals for cohabitants and s.25 MCA 1973 are concerned with the welfare of children. Under s.25 (1) MCA 1973 consideration must be given to the welfare of '...any child of the family...' Yet in the proposals this principle is split into two considerations, the first being narrower covering only 'any child of both parties,'<sup>95</sup> but further down in the list of factors there is a wider definition covering 'the welfare of any children who live with, or might reasonably be expected to live with, either party.'<sup>96</sup> Section 25 (2)(a) is mirrored in the proposals, the court will be able to take into account the resources the parties are likely to have both in the near future and at present. Also, s.25 (2)(b) has also been carried across, so that the court can pay some regard to the 'financial needs, obligations and responsibilities.' Although the concept of meeting 'needs' is not being promoted as a rationale for the division of assets, it is still a factor that can be given consideration. It is arguable that this is perhaps how the division of assets is carried out in reality for most divorcing couples, it is rare that assets can be split to meet the needs of both parties but the idea is given some consideration.

The final factor that remains the same in both s.25 and the proposals is the concept of conduct. In the case of divorce the factor of conduct has evolved. Herring acknowledges that the 1973 case *Wachtel v Wachtel*<sup>97</sup> demonstrates the change in attitude towards the link between conduct and the financial award given; in this case it was held that, '...there should

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<sup>91</sup> *Miller; McFarlane* (n 88) 660.

<sup>92</sup> *Miller; McFarlane* (n 88) 660.

<sup>93</sup> M Humpheris describes this similarity in 'The Law Commission Consultation on Cohabitation' October [2006] Fam Law: 'Economic disadvantage is defined as a principle addressing the economic sacrifices (in terms of capital, income and earning capacity) incurred by the applicant as a result of his or her contributions...in other words, the Mrs McFarlane compensation argument.'

<sup>94</sup> S Bridge describes this similarity in 'Money, Marriage and Cohabitation' August [2006] Fam Law: 'The proposed scheme of financial relief, while superficially similar to the current ancillary relief scheme, is entirely self-standing, based on distinct principles of its own.'

<sup>95</sup> The Law Commission *Cohabitation* (n 4) para 8.15, factor (1).

<sup>96</sup> The Law Commission *Cohabitation* (n 4) para 8.15, factor (4).

<sup>97</sup> [1973] Fam 72.

be no reduction in what the wife was to receive because of her share of responsibility for the breakdown of the marriage.’<sup>98</sup> Later cases illustrate that the conduct must be rather more extreme,<sup>99</sup> such as assisting a suicide attempt<sup>100</sup> or where one spouse attacks the other with a knife.<sup>101</sup> Yet in the proposals for cohabitants, conduct is defined as, ‘to include cases where a qualifying contribution can be shown to have been made despite the express disagreement of the other party.’<sup>102</sup> Although the examples outlined above may not be analogous to those anticipated by the Law Commission, it is evident that the definition of conduct is much wider.

In terms of the orders that can be made by the court the only dissimilarity is that periodical payments ‘should not generally be available.’<sup>103</sup> The report explains the emphasis being placed on achieving a ‘clean break’ by contrast to the MCA 1973: ‘The arguments in favour of a clean break which apply to divorcing couples are even stronger for separating cohabitants, who have not entered into any legal commitment to support each other financially.’<sup>104</sup> Yet, there would be an exception to this rule; ‘...the court should not be entitled to make orders for periodical payments under our recommended scheme, save in the case of childcare costs...’<sup>105</sup> All other orders available upon divorce would be carried across into the proposals.

The discretionary factors not included in the proposals are those that would be inconsistent with achieving a clean break or those that have been addressed elsewhere; there are a total of five factors that have not been carried across. Future contributions under s.25 (2)(f) MCA 1973 is not mirrored in the proposals, as this would run contrary to the clean break principle.

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<sup>98</sup> *Wachtel* (n 97) 74.

<sup>99</sup> In *K v L* [2010] EWCA Civ 125, [2010] 2 FLR. Wilson LJ comments on the calls for further guidance on conduct: ‘In this regard Miss Ball’s industry has unearthed a call for general guidance on the proper treatment of misconduct in awards for ancillary relief made by Burton J during his too fleeting visit to the Family Division in *S v S* (Non Matrimonial Property: Conduct) [2006] EWHC 2793, [2007] 1 FLR 1496, at [41]. I cannot think, however, that, even if this court had before it a full appeal on that point, it would feel able or willing to give the sort of general guidance for which Burton J there called and for which Miss Ball now asks. In relation to each set of facts the court has to exercise its discretion and in my view this court would be most unwise to be drawn into making a statement of principle about the sort of case in which, for example, conduct would override all other factors, including that of need, even if (which I doubt) it was possible for the court to formulate such a statement with any confidence.’ [2010] EWCA Civ 125 [12]. See also, A Commins, ‘Ancillary Relief and Sexual (Mis) Conduct: Negating Need: *K v L*’ June [2010] Fam Law: ‘*K v L* does provide an interesting example of such [sexual] conduct which – when balanced against other factors – can negate needs even if the direct effect of the conduct is not financially quantifiable nor the pot to limited to provide.’

<sup>100</sup> *K v K* (*Financial Provision: Conduct*) [1990] 2 FLR 225, [1990] FCR 372.

<sup>101</sup> *H v H* (*Financial Relief: Attempted Murder as Conduct*) [1990] 2 FLR, [1990] FCR 372.

<sup>102</sup> The Law Commission *Cohabitation* (n 4) para 8.15, factor (4).

<sup>103</sup> The Law Commission *Cohabitation* (n 4) para 8.17.

<sup>104</sup> The Law Commission *Cohabitation* (n 4) paras 4.97- 4.98.

<sup>105</sup> The Law Commission *Cohabitation* (n 4) para 4.99.

Cohabitants have not made the vow to support each other in 'sickness and in health' and so it would have perhaps been inappropriate to reproduce s.25 (2)(e) in the proposals, which allows the court to pay regard to any physical or mental disability of the parties of divorcing couples.<sup>106</sup> The age of the parties and the duration of the relationship under s. 25 (2)(d) MCA 1973 is perhaps an unnecessary factor as this would be redressed through being able to demonstrate a greater amount of disadvantages and advantages accrued over the period. Interestingly the standard of living under s.25 (2)(b) MCA 1973 has not been replicated, yet this may be a move to disregard a factor that can rarely be given much scope in divorce cases.

In analysing the similarities and differences that lie between the proposals and current law it is evident that if the proposals set out in the Law Commission's report *Cohabitation: The Financial Consequences of Relationship Breakdown* were to become law, then the two pieces of legislation would look very alike. It must be also remembered that the rationale or objective used by the judiciary when applying s.25 MCA 1973 is something that will evolve and develop, indeed there is disagreement between judges as to what should be the overriding principle or aim. Baroness Hale discusses this concept further in *Miller v Miller; McFarlane v McFarlane*:<sup>107</sup>

I agree that there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance. Much will depend upon how far future income is to be shared as well as current assets....The ultimate objective is to give each party an equal start on the road to independent living.<sup>108</sup>

If the concluding sentence is scrutinised here, then it would appear that the rationale for the division of assets in the case of dissolution, divorce or a separating cohabiting couple could become gradually similar; with equality being the overarching principle.

It would have been possible for the Law Commission to recommend that the MCA 1973 should simply be extended to cover cohabiting couples, whilst setting out the differences in approach that must be kept in mind by the judiciary. The MCA 1973 could be applied to a

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<sup>106</sup> It should be noted that the Law Commission did contemplate the future disability of a child and the crossover with Schedule 1 of the Children Act 1989. The Law Commission *Cohabitation* (n 4) para 4.154(2): 'Where neither party thought it worth making a claim initially, but circumstances significantly changed after the expiry of the limitation period. The case which concerns us most is where a child develops a serious disability. Schedule 1 to the Children Act 1989 will respond to the child's needs, but not to the consequent economic disadvantage of the former cohabitant with whom the child lives (who might have to give up work to care for the child, and therefore be out of the labour market for much longer than had previously been anticipated).'

<sup>107</sup> *Miller; McFarlane* (n 88)

<sup>108</sup> *Miller; McFarlane* (n 88) 144.

separating cohabiting couple, with the discretionary factors contained in s.25 MCA 1973 that do look to the future disregarded as inappropriate to the case. Barlow, Kiernan and Merlo suggest why this extension has been avoided by the Law Commission:

The argument runs that if you can get all the benefits of marriage without actually formally marrying, then it logically follows that fewer people will marry and marriage (and family stability) will be undermined. This is clearly not something any policy-maker or government would want to be responsible for, and in England and Wales perhaps accounts for the Law Commission's avoidance of marriage equivalence....<sup>109</sup>

The research carried out by Barlow *et al* concluded that where countries had extended their matrimonial law to cover separating cohabitants, there were no indications that their marriage rates had fallen as a consequence.<sup>110</sup> Perhaps this indicates just how strong the feelings are to the mere possibility of undermining marriage. This point is further scrutinised in this Chapter when considering the third research question.

On 6 March 2008 the Parliamentary Under-Secretary of State, Bridget Prentice stated, 'The report has been carefully considered and the Government have decided that they wish to seek research findings on the Family Law (Scotland) Act 2006...'<sup>111</sup> In January 2011 the Ministry of Justice presented the *Report on the Implementation of Law Commission's Proposals*<sup>112</sup> to Parliament.<sup>113</sup> The Law Commission's report, *Cohabitation: The Financial Consequences of Relationship Breakdown* is featured in the section of the report dedicated to proposals which have not been implemented, it is stated, 'The Government is considering the research on the impact of the Family Law (Scotland) Act 2006 along with the proposals set out in the Law Commission's report and aims to make an announcement on our position early this year.'<sup>114</sup> On 11 September 2011 a further Ministerial Statement was made by Parliamentary Under-Secretary of State, Ministry of Justice, Jonathan Djanogly, stating that there will not be a reform during this Parliament.<sup>115</sup> The current Law Commissioner, Elizabeth Cooke,

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<sup>109</sup> K Kiernan, A Barlow and R Merlo 'Cohabitation Law Reform and its Impact on Marriage: Evidence from Australia and Europe' IFLJ 2007 (71).

<sup>110</sup> K Kiernan, A Barlow and R Merlo 'Cohabitation Law Reform' (n 109).

<sup>111</sup> B Prentice, Parliamentary Under-Secretary of State. Written ministerial statement, *Daily Hansard*, column WS111 <[www.parliament.uk/commons/lib/research/briefings/snha-03372.pdf](http://www.parliament.uk/commons/lib/research/briefings/snha-03372.pdf)> Last accessed 26<sup>th</sup> April 2010.

<sup>112</sup> Report available electronically <[www.justice.gov.uk/.../report-implementation-law-commission-proposals.pdf](http://www.justice.gov.uk/.../report-implementation-law-commission-proposals.pdf)> Last Accessed 30 June 2011.

<sup>113</sup> In accordance with s.1 of the Law Commission Act 2009.

<sup>114</sup> *Report on the Implementation of Law Commissions Proposals*, quotation at p 9, paragraph 29.

<sup>115</sup> *Hansard* 6 Sep 2011: Column WS17, WS18-9: The Minister of State, Ministry of Justice (Lord McNally): 'The findings of the research into the Scottish legislation do not provide us with a sufficient basis for a change in the law. Furthermore, the family justice system is in a transitional period, with major reforms already on the

comments, 'We hope that implementation will not be delayed beyond the early days of the next Parliament, in view of the hardship and injustice caused by the current law.'<sup>116</sup> The possibility of reform has been postponed.

### 6.3 THE POTENTIAL INFLUENCE OF CONTRACT ON THE LEGAL PROVISIONS FOR UNMARRIED COHABITANTS UPON SEPARATION

The final section of this Chapter will conclude as to whether the narrowing of the continuum potentially demonstrated by enforceable marital property agreements could influence a reform to afford protection to unmarried cohabitants upon relationship breakdown. Recent reforms from other jurisdictions are considered in order to analyse how a reform may come about to confer status, or alternately, cement the position of contract in the family sphere.

#### **Status or Contract? Rights or Safeguards? Enforceable Agreements?**

Barton commented that cohabitation contracts are governed by the general rule of contract and not status.<sup>117</sup> The *obiter* from *Sutton* went some way to setting cohabitants firmly at the contract end of the continuum. This section will examine recent reforms in other jurisdictions in order to analyse the potential future position of cohabitants on the continuum. Festy comments on the reforms which have occurred across Europe: 'Never has Napoleon's remark that "common law spouses ignore the law, the law ignores common law spouses" been more untrue.'<sup>118</sup> In addition to pinpointing these reforms in terms of status or contract, it is important to also note whether these reforms have granted the equivalent rights to cohabiting couples as married couples, or whether the legislation simply provides a legal safeguard. As noted above, the final financial result may be very similar, but this distinction remains important in terms of policy.<sup>119</sup> The enforceability of private agreements is examined in each jurisdiction in order to analyse the link between marital agreements, cohabitation agreements and the position on the continuum occupied by unmarried cohabitants. Through undertaking

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horizon. We do not therefore intend to take forward the Law Commission's recommendations for reform of cohabitation law in this parliamentary term.'

<sup>116</sup> E Cooke, Law Commissioner, Statement on Government's response, 'We note the Government's cautious response to our recommendations, and that reform will not be implemented during the current Parliament. We hope that implementation will not be delayed beyond the early days of the next Parliament, in view of the hardship and injustice caused by the current law. The prevalence of cohabitation, and of the birth of children to couples who live together, means that the need for reform of the law can only become more pressing over time.' Available electronically <

[http://lawcommission.justice.gov.uk/docs/20110906\\_Statement\\_on\\_Govt\\_response.pdf](http://lawcommission.justice.gov.uk/docs/20110906_Statement_on_Govt_response.pdf)>

<sup>117</sup> C Barton *Cohabitation Contracts* (n 34) 37.

<sup>118</sup> P Festy 'Legal Recognition of same-sex couples in Europe' I.N.E.D *Population* 2006/4 - Vol. 61, 417- 453, 418.

<sup>119</sup> See in particular p 174.

this comparative analysis it is possible to suggest which package of status, contract, rights, safeguards and the enforceability of private agreements which would be the most appropriate reform for England and Wales.

It is possible to scrutinise reforms which, if implemented in England and Wales, would move cohabitants to the status end of the continuum. That is to say, a reform in which financial relief is provided without the couple registering their relationship or creating a private agreement, which suggests a more contractual approach.<sup>120</sup> The recent reforms in Scotland and Australia are analysed in order to suggest how status could be achieved for unmarried cohabitants. Lastly, the contractual approach taken in France is scrutinised.

### **Scotland: Status and Safeguards**

The Family Law (Scotland) Act 2006<sup>121</sup> gives financial relief to unmarried cohabitants upon separation and death.<sup>122</sup> The Scottish Executive comment on the reasoning behind this Act: ‘Three core principles guided these reforms: safeguarding the best interests of children; promoting and supporting stable families; updating the law to reflect the reality of family life in Scotland today.’<sup>123</sup> This legislation places the emphasis on the family unit rather than being limited to marriage. Wasoff, Miles and Mordaunt comment, ‘The Scottish Ministers do not intend to create a new legal status for cohabitants. It is not the intention that marriage-equivalent legal rights should accrue to cohabiting couples...’<sup>124</sup> The reform allows the family unit to be given protection when required, without disturbing the position of marriage.

### **Cohabitation Provisions and Marriage in Scotland**

The responses to the Scottish Consultation Paper in 2004<sup>125</sup> depict recent views and opinions on providing a legal remedy to separating cohabitants. There was not an overwhelming response in favour of the proposals, with a small majority of 52% of all respondents being in

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<sup>120</sup> For example see, R Probert, ‘From lack of status to contract: assessing the French *Pacte Civil de Solidarité*’ *Journal of Social Welfare and Family Law* 23(3) 2011: 257-269.

<sup>121</sup> The Act was passed by the Parliament on 15 December 2005 and received Royal Assent on 20 January 2006.

<sup>122</sup> The current provisions upon death for unmarried cohabitants are currently under review in England and Wales as outlined above.

<sup>123</sup> Scottish Executive *Family Matter: Living Together in Scotland* p 1. Available electronically at <<http://www.scotland.gov.uk/Publications/2006/04/27135238/3>> Last accessed 12 August 2012.

<sup>124</sup> F Wasoff, J Miles and E Mordaunt, *Legal Practitioner's Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (Project funded by the Nuffield Foundation, October 2010) p 1.

<sup>125</sup> *Improving Family Law in Scotland: Analysis of Written Consultation Responses* October 2004. Available at <<http://www.scotland.gov.uk/Publications/2004/10/20057/44659>>

favour of providing a legal safeguard to separating cohabitants.<sup>126</sup> The reasoning behind the support for the proposals is worthy of note:

One respondent summed this up as supporting the proposal in order to protect the vulnerable rather than for any good social reason...Others perceived the need to introduce legal protection for cohabiting couples but to ensure that the distinction between the status of marriage and cohabiting remained preserved.<sup>127</sup>

The impetus was to provide a legal safeguard to vulnerable people, and not to produce an alternative to marriage. Respondents who opposed the proposals stated that such a reform would undermine marriage and that having this safeguard in place would discourage people from marrying.<sup>128</sup> There has been no significant decline in the uptake in marriage in Scotland since the implementation of the 2006 Act.<sup>129</sup>

It should also be noted that the legal recognition of same-sex couples has had no bearing on these provisions. Such influence is however apparent in the other two jurisdictions considered below. Presently, same-sex couples have the option to form a civil partnership in Scotland and furthermore, the Scottish Government is committed to legalise same-sex marriage.<sup>130</sup>

### **The Scottish Provisions for Separating Cohabitants**

In October 2010 Wasoff, Miles and Mordaunt published their research report,<sup>131</sup> *Legal Practitioner's Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act*

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<sup>126</sup> This percentage represents the combined total of individuals and organisations: 61% of individuals were in opposition, but only 24% of organisations opposed the proposals. The overall combination of these two groups of respondents presented 52% majority in opposition to the proposals. *Improving Family Law in Scotland* (n 125) [5.1] Table 3.

<sup>127</sup> *Improving Family Law in Scotland* (n 125) [5.1].

<sup>128</sup> Comments included: "it's like saying you must have a driving license to drive a car but if you don't have one you can have the benefits of driving anyway" (Char 175); " makes a mockery of marriage and, indeed, almost invalidates it" (Indiv 188); "against proposals which further blur the lines between cohabiting and married couples" (Faith 195); "erodes distinctiveness of marriage" (Indiv 200); "the ideal (of marriage) should be promoted rather than dragging everything down to the lowest common denominator" (Indiv 227). *Improving Family Law in Scotland* (n 125), [5.1].

<sup>129</sup> The Office for National Statistics reports on the number of marriages in Scotland: 2005: 30,881 marriages; 2006: 29,898 marriages; 2007: 29,866 marriages; 2008: 28,903 marriages; 2009: 27,524 marriages; 2010: 28,480 marriages; 2011: 29,135 marriages. Table available at <<http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcn%3A77-262743>>

<sup>130</sup> See Scottish Government News <<http://www.scotland.gov.uk/News/Releases/2012/07/same-sex25072012.>>

<sup>131</sup> This is the first empirical research to be carried assessing the effectiveness of the new provisions. It is evident that the new legislative provisions in sections 25 to 29 of the Act are still a little unfamiliar to some practitioners, '...practitioners currently feel somewhat uncertain in interpreting and applying the cohabitation provisions of the 2006 Act, not least given the limited extent of the reported case law.' p 206 of the report.

2006.<sup>132</sup> According to this research, practitioners reported that cases involving separation were more frequently dealt with than cases involving financial relief upon death.<sup>133</sup> The legislative provisions differ from the Law Commission's proposals for England and Wales. The Family Law (Scotland) Act 2006 defines cohabitants as: 'a man and a woman who are (or were) living together as if they were husband and wife; or two persons of the same-sex who are (or were) living together as if they were civil partners'<sup>134</sup>

In order for the courts to determine whether a person is a cohabitant capable of falling under the protection of the Act the court has to pay regard to: the length of the relationship;<sup>135</sup> the nature of the relationship;<sup>136</sup> and the extent of any financial arrangements between the couple.<sup>137</sup> The rights to household goods<sup>138</sup> is dealt with under s.26, which sets out the rebuttable presumption being that each cohabitant has an equal share in any goods acquired during the relationship.<sup>139</sup> Section 28 requires the court to pay regard to any economic advantages or disadvantages acquired during the relationship and consider the interests of a relevant child before making an order.<sup>140</sup> Unlike the proposals for financial remedies in England and Wales, under s.28 of the 2006 Act a cohabitant may make a financial claim upon separation regardless of the length of their relationship.

The research project revealed that 73% of the cases involved 'long-standing' cohabitations of six years or more. Moreover, 35% of the cases were brought by cohabitants who had been together for over a decade, 23% of the couples had been together over twenty years, with just 8% of the cases being relationships lasting two years or less.<sup>141</sup> The vast majority of the cases looked at<sup>142</sup> involved people over the age of 35 who were in paid employment and

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<sup>132</sup> The report is available electronically at <[www.crfr.ac.uk/reports/Cohabitation%20final%20report.pdf](http://www.crfr.ac.uk/reports/Cohabitation%20final%20report.pdf)> Last accessed 27 June 2011.

<sup>133</sup> F Wasoff, J Miles and E Mordaunt (n 124) 50.

<sup>134</sup> Family Law (Scotland) Act 2006, s. 25 (1)(a) and (b).

<sup>135</sup> (n 134) s. 25 (2)(a).

<sup>136</sup> (n 134) s. 25 (2)(b).

<sup>137</sup> (n 134) s. 25 (2)(c).

<sup>138</sup> This is defined under the Act. Family Law (Scotland) Act 2006, s. 26 (4)(c) In this section, "household goods" means any goods (including decorative or ornamental goods) kept or used at any time during the cohabitation in any residence in which the cohabitants are (or were) cohabiting for their joint domestic purposes; but does not include- (a) money; (b) securities; (c) any motor car; caravan or other road vehicle; or (d) any domestic animal.

<sup>139</sup> (n 134) s. 26 (2) and (3).

<sup>140</sup> (n 134) s. 28 (5) and (6).

<sup>141</sup> F Wasoff, J Miles and E Mordaunt (n 124) 50-51.

<sup>142</sup> The Methodology used to collect this information was through the use of an online/postal questionnaire sent to a cross section of family lawyers. F Wasoff, J Miles and E Mordaunt (n 124) Methodology at 38.

homeowners. The results indicate that the legislative provisions are not being used by the majority of the cohabiting population in Scotland.<sup>143</sup>

### **Private Agreements in Scotland**

Marital property agreements have always been enforceable in Scotland.<sup>144</sup> Firstly it is important to note the historical differences which have influenced divorce, financial relief and private agreements. The division between divorce law in Scotland and England and Wales was discussed in Chapter Five, particularly the fact that Scotland had allowed judicial divorce around 300 years prior to England and Wales.<sup>145</sup> Scottish law did not view marriage as involving the undertaking of a life-long obligation.<sup>146</sup>

This conception of marriage has resulted in differences in the way in which assets are divided upon divorce in Scotland.<sup>147</sup> Under the Family Law (Scotland) Act 1985 the court must pay regard to the principles set out in the Act<sup>148</sup> and ensure that the order made is reasonable when taking the parties' resources into consideration.<sup>149</sup> Section 9 of the Act sets out five principles to be applied by the court when making an order. The net value of the matrimonial home is to be shared fairly<sup>150</sup> and economic advantages and disadvantages are taken into account.<sup>151</sup> The economic burden for caring for children under the age of sixteen is shared fairly.<sup>152</sup> A party who is financially dependant on the other spouse can be given financial provision for no more than three years<sup>153</sup> and if a party is likely to suffer serious financial hardship then they can be awarded financial provision in order to relieve this hardship over a reasonable period of time.<sup>154</sup> The default rules in place in Scotland provide the courts with less discretion than the legislative provisions in England and Wales, and as a result of this there is a higher level of certainty. This issue will be discussed again in Chapter Eight, but it

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<sup>143</sup> F Wasoff, J Miles and E Mordaunt (n 124) 51.

<sup>144</sup> K Norrie's paper, 'Marital Agreements and Private Autonomy in a Comparative Perspective', delivered at Cambridge University 27 June 2009, p 2.

<sup>145</sup> See p 135.

<sup>146</sup> See K Norrie's paper (n 144) 3. See also Speech by Lord Hope, *Family Law in the UK Supreme Court*, Family Law Association Conference, 18 Nov 11, p 12. Lord Hope comments on the public policy rules surrounding marital property agreements in England and Wales: 'The reasoning was founded on equitable principles which never caught on in Scotland.'

<sup>147</sup> Marriage itself does not affect the ownership of property in Scotland, Family Law (Scotland) Act 1985, s.24.

<sup>148</sup> Family Law (Scotland) Act 1985, s.8 (2)(a).

<sup>149</sup> (n 148) s.8 (2)(b).

<sup>150</sup> (n 148) s. 9 (1)(a).

<sup>151</sup> (n 148) s. 9 (1)(b).

<sup>152</sup> (n 148) s. 9 (1)(c).

<sup>153</sup> (n 148) s. 9 (1)(d).

<sup>154</sup> (n 148) s. 9 (1)(e).

is undoubtedly relevant to the discussion surrounding unmarried cohabitants and the choices available to them.

Marital property agreements are presently governed by Family Law (Scotland) Act 1985, s.16 (1)(b), which allows the court to set aside or vary the agreement or any term if it was not fair and reasonable at the time it was entered into. Lord Hope comments on this approach:

As far as we are concerned, the parties to a marriage can oust the jurisdiction of the courts to make financial provision on divorce if they want to. Assuming that their agreement was not reducible on the contractual grounds of force and fear, facility or circumvention, the only question is whether it was fair and reasonable when it was entered into. This is a fairly broad test, as it allows all the circumstances when the contract was entered into to be examined.<sup>155</sup>

The inclusion of this test allows autonomy to be recognised, but allows an intervention by the court in order to protect a weaker spouse.

Cohabitation agreements are also enforceable in Scotland, and thus can oust the court's jurisdiction granted under the Family Law (Scotland) Act 2006 Act. The 2006 Act states that money and property shall be treated as belonging to each cohabitant in equal shares, unless there is an agreement between the cohabitants to the contrary.<sup>156</sup> Although it should be noted that there is no mechanism in place to allow the court to intervene in the enforcement of the agreement on the basis of fairness, as is the case with marital property agreements in Scotland.

### **Initial Conclusions**

Despite the cautious words from the Scottish Executive regarding the legal safeguards granted to unmarried cohabitants in 2006, it is arguable that a reform of this nature would bring the position of cohabitants closer to status in England and Wales. The Scottish provisions do not however provide status in the sense of granting equivalence to marriage, or providing an alternative to it. A reform of this nature would show a further narrowing of the status-contract continuum which currently subsists between married couples and unmarried couples upon separation.

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<sup>155</sup> Speech by Lord Hope, *Family Law in the UK Supreme Court*, Family Law Association Conference, 18 Nov 11, p 15.

<sup>156</sup> (n 134) s. 27 (2).

### Australia: Status and Rights

An amendment concerning unmarried cohabitants occurred in Australia in the early part of 2009.<sup>157</sup> The Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 amends the Family Law Act 1975 in Australia.<sup>158</sup> It would be incorrect to state that this introduces a new concept to Australian family law, as prior to the implementation of this federal legislation, states and territories across Australia had provisions to deal with separating cohabiting couples.<sup>159</sup> This Act should therefore be viewed as a move to create equal rights for cohabiting couples in Australia, and furthermore enabling separating cohabitants to access the Family Court of Australia and the Federal Magistrates Court for orders relating to maintenance and the division of property, in the same way as separating married couples.

It is also crucial to remember the purpose of this Act in terms of recognising same-sex couples in Australia. Attorney General Robert McClelland commented:

The bill is consistent with the government's policy not to discriminate on the basis of sexuality. The bill applies to both opposite-sex and same-sex de facto couples.... De facto couples will be able to obtain a property settlement, split their superannuation interests and make financial agreements, all recognised and enforceable by the federal family law courts.<sup>160</sup>

Marriage has not been opened up to same-sex couples in Australia.<sup>161</sup> The legal recognition and protection of same-sex couples is by the couple being classified as a de facto couple. During the second reading of the bill on 15 October 2008, Senator Ludwig, Minister for Human Services, commented:

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<sup>157</sup> In addition to the provisions available for unmarried cohabitants it is noteworthy that Sixty five Family Relationship Centres provide a source of assistance for all aspects of family life; the centres were funded by the Australian Government. Australia's family law system is undergoing significant changes, the Attorney General's Department described the new centres as, 'the biggest ever investment in the family system and the most significant changes to family law in 30 years. It is apparent that much attention has been spent on Australian family law in recent years, culminating in legislative reform. Information found at Family Relationships Online <<http://www.familyrelationships.gov.au/SERVICES/FRC/Pages/default.aspx>> Last accessed 27 June 2011.

<sup>158</sup> This new regime came into force 1 March 2009, yet in South Australia the provisions came into force 1 July 2010. These dates will undoubtedly turn out to be crucial for a couple wishing to access these provisions, as they will need to prove that the relationship broke down on the day of implementation, or at a point after either of these dates.

<sup>159</sup> See H Baker, 'In Practice: New Cohabitation Law in Australia' [2009] Fam Law 1201.

<sup>160</sup> Second Reading speech Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 Attorney General Robert McClelland 25 June 2008.

<sup>161</sup> Registered partnership is discussed in the following chapter, see p 212, where it is noted that this provision is available in Australia: Tasmania.

Once this bill is passed there will be, for the first time, a uniform federal system applying to de facto couples when the relationship breaks down. De facto couples will be able to use specialist family law procedures and dispute mechanisms. Property matters will be decided on the basis of what contributions couples have made and, just as importantly, on what their future needs will be. Spouse maintenance orders will be available, where a court determines this to be appropriate, on the same basis as for married couples.<sup>162</sup>

In response to any opposition to the Act, Ludwig stated, 'We do not support remarks that, far from providing greater rights for de facto couples, we should be discriminating in favour of married couples. It has long been recognised that such discrimination would not be consistent with a fair and egalitarian society.'<sup>163</sup> Australia has taken the ultimate step in striving for equality between married and unmarried couples by providing equivalence; but the legal protection of same-sex couples has undoubtedly driven this move.

### **The Australian Provisions for Separating Cohabitants**

Under the 2008 Act the courts can make a financial order if one of the following circumstances is satisfied by the couple in a de facto relationship:<sup>164</sup>

The period (or the total of the periods) of the de facto relationship is at least 2 years, there is a child of the de facto relationship, one of the partners made substantial financial or non-financial contributions to their property or as a homemaker or parent and serious injustice to that partner would result if the order was not made, or the de facto relationship has been registered in a State or Territory with laws for the registration of relationships.<sup>165</sup>

When deciding what order should be made, if any, for a divorcing couple the court takes into account: financial contributions;<sup>166</sup> non-financial contributions;<sup>167</sup> the contribution made to

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<sup>162</sup> Senator Ludwig (Minister for Human Services), Commonwealth of Australia, *Parliamentary Debates*, Senate Official Hansard No. 11 2008. p 6017. Available electronically at <  
[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result/Second%20Reading%20Speeches.aspx?bId=r3041](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result/Second%20Reading%20Speeches.aspx?bId=r3041)>

<sup>163</sup> Senator Ludwig (Minister for Human Services), Commonwealth of Australia, *Parliamentary Debates*, Senate Official Hansard No. 11 2008. p 6019.

<sup>164</sup> The Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008, Schedule 1, Part 1, Amendment 21, 4AA (2)(a)-(i) has provided a new meaning of *de facto* relationship: The duration of their relationship, the nature and extent of their common residence, whether a sexual relationship exists, the degree of financial dependence or interdependence, and any arrangements for financial support between them, the ownership, use and acquisition of their property, their degree of mutual commitment to a shared life, whether the relationship has been registered in a State or Territory with laws for the registration of relationships, the care and support of children, and the reputation and public aspects of their relationship.

<sup>165</sup> The Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008, s. 90SB. Couples will have two years from relationship breakdown in which to make an application.

<sup>166</sup> Family Law Act 1975 s.79 (4)(a).

<sup>167</sup> (n 166) s.79 (4)(b).

family welfare;<sup>168</sup> the effect of an order on earning capacity;<sup>169</sup> the effect of the order on a child<sup>170</sup> and child support.<sup>171</sup> When assessing maintenance the court looks at an even wider range of considerations,<sup>172</sup> including age and health;<sup>173</sup> financial resources<sup>174</sup> and attaining a reasonable standard of living.<sup>175</sup> The discretion granted to the judiciary in the division of assets is very high. This regime undoubtedly curtails the autonomy of cohabiting couples, yet this has been overridden in order to provide equality.

### **Cohabitation Provisions and Marriage in Australia**

Baker comments on the different approach taken in Australia to the suggestion put forward by the Law Commission's report that equivalence with marriage would be politically unattainable in England and Wales.<sup>176</sup> In comparing the two systems Baker comments, 'It is apparent that, however liberal and forward-thinking English society perceives itself to be, any ostensible and direct challenge to the institution of or 'sanctity' of marriage is still regarded as political suicide.'<sup>177</sup> This is despite evidence to suggest that the introduction of remedies for cohabitants is not linked to the uptake of marriage. Bridge commented, 'Recent research has examined the impact of such reform on marriage rates in Australia: analysis of the available data finds no statistical evidence of a relationship between marriage rates and the introduction of remedies between cohabitants.'<sup>178</sup> In reality therefore, it is possible that there would be no impact upon marriage. The foreseeable advantages and disadvantages to adopting a model which would utilise current legislation have been outlined.<sup>179</sup>

### **Private Agreements in Australia**

A marital property agreement was not capable of ousting the jurisdiction of the court in Australia prior to 27 December 2000. The amendment which occurred in 2000 changed the

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<sup>168</sup> (n 166) s.79 (4)(c).

<sup>169</sup> (n 166) s.79 (4)(d).

<sup>170</sup> (n 166) s.79 (4)(f).

<sup>171</sup> (n 166) s.79 (4)(g).

<sup>172</sup> (n 166) s.75.

<sup>173</sup> (n 166) s.75 (1)(a).

<sup>174</sup> (n 166) s.75 (1)(b).

<sup>175</sup> (n 166) s.75 (1)(g).

<sup>176</sup> The Law Commission *Cohabitation* (n 4) para 4.8. The quotation is included above, but repeated here for clarity: 'Applying the MCA would impose an equivalence with marriage which many people would find inappropriate, and some consultees suggested that it is unlikely that a scheme which equated cohabitation with marriage in this way would be politically unattainable.'

<sup>177</sup> H Baker, 'In Practice: New Cohabitation Law in Australia' [2009] Fam Law 1201.

<sup>178</sup> Quotation from <<http://www.familylawweek.co.uk/site.aspx?i=ed743>> Last accessed 12 July 2011.

<sup>179</sup> This discussion begins at p 172.

status of marital property agreements to binding,<sup>180</sup> if they met certain stipulations. De facto couples in Australia can create binding financial agreements. These agreements can be made during the relationship, or even prior to the relationship. In addition, there is a requirement for each person to have received independent legal advice in order to create a binding agreement.

The Family Law Act 1975 now contains provisions for Financial Agreements;<sup>181</sup> these provisions are applicable to both married couples and couples living in de facto relationships. Section 90UJ contains the stipulations such as; the agreement must be signed by both parties, the requirement for independent legal advice.<sup>182</sup> These stipulations apply to spouses and cohabitants.<sup>183</sup> An agreement can be set aside by the court on the basis of: fraud,<sup>184</sup> where it is unenforceable under the law of contract,<sup>185</sup> where there has been a change in circumstance which renders the contract to be impractical;<sup>186</sup> or where a change in circumstance would bring hardship to a child or caretaking parent.<sup>187</sup> This piece of legislation has provided 'strict'<sup>188</sup> requirements for cohabitation agreements, whilst providing further equivalence for unmarried cohabitants to married couples.<sup>189</sup>

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<sup>180</sup> (n 166) s. 90G (1).

<sup>181</sup> As amended by the Family Law Amendment (De Facto Financial Matters and other Measures) Act 2008 (no. 115, 2008).

<sup>182</sup> ...the agreement is signed by all parties; and (b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and (c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and (ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and (d) the agreement has not been terminated and has not been set aside by a court.

<sup>183</sup> Section 4 Family Law Act 1975 states, "spouse party" means: (b) in relation to a Part VIIIAB financial agreement--a party to the agreement who is a party to the contemplated de facto relationship, de facto relationship or former de facto relationship to which the agreement relates.

<sup>184</sup> (n 166) s. 90K (1)(a).

<sup>185</sup> (n 166), s. 90KA.

<sup>186</sup> (n 166) s. 90K (1)(c).

<sup>187</sup> (n 166) s. 90K (1)(d).

<sup>188</sup> See S Leigh and D Barry, 'Cohabitation: Compare and Contrast the Australian System' April [2011] Fam Law.

<sup>189</sup> An Australian website offering guidance on Financial Agreements reports: 'Changes to the Family Law Act which came into effect on the 1st March 2009 allow de facto couples to make application to the Family court for orders in respect of the division of property (property settlement) and maintenance for couples in a de facto relationship. This means that even though a couple may not be legally married there is no discernible difference in the rights of the couple under the law, in a relationship of sufficient duration or where children are involved.' <<http://www.financialagreements.com.au/defacto/cohabitation.html>> Last accessed 1 December 2011.

## **Initial Conclusions**

The provisions available to separating cohabiting couples in Australia do provide equality with married couples. This form of reform has the advantage of familiarity for the courts in determining financial relief. Although, it should be noted that such provisions have been influenced by the desire to maintain marriage as a heterosexual institution and to provide legal protection for same-sex couples. The discretion available to the courts in determining the division of assets upon relationship breakdown is high. However, the provisions provide the court with a high threshold of stipulations in order for an agreement to be deemed as binding, this applies to both married couples and cohabiting couples alike. This has proved unpopular with lawyers, who are reluctant to give advice for the fear of negligence claims.<sup>190</sup>

### **France: Contract and Rights<sup>191</sup>**

An evaluation of the French Pacte Civil de Solidarité<sup>192</sup> can be used as a model for reform which would pinpoint cohabitants at the contract end of the continuum through registration. In exploring the reforms which had occurred across Europe up to 1999, Barlow and Probert comment, ‘...it should be noted that no country has a particularly long tradition of dealing with cohabitation. It is only recently that the institution of marriage has been displaced as the exclusive means by which legal rights are triggered.’<sup>193</sup> Marital property agreements do not displace marriage, but they do make the status-continuum narrower by introducing a further contractual element into family law.

### **The French Provisions for Cohabitants**

The French National Assembly introduced PACS on 13 October 1999 and is different to any equivalent legal provision available in English Law in that it is available for opposite-sex and same-sex couples.<sup>194</sup> The PACS would cause difficulties in moving towards a harmonised legal system in Europe, as there may be not be an equivalent relationship recognised in other jurisdictions.<sup>195</sup> It would seem that the introduction of PACS into French law can also be seen

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<sup>190</sup> B Fehlberg and B Smyth ‘Binding Pre-Nuptial Agreements in the First Year’ (2002) *International Journal of Law, Policy and the Family*.

<sup>191</sup> For example see, R Probert, ‘From lack of status to contract’ (n 120) 258.

<sup>192</sup> Will later be referred to as PACS.

<sup>193</sup> A Barlow and R Probert, ‘Cohabitants: a survey of European Reforms’ 149 *NLJ* 1738.

<sup>194</sup> Comment will be made on the PACS in Chapter Seven also, see in particular p 217.

<sup>195</sup> J Scherpe highlights, ‘the French pacte civil de solidarité will seek recognition of their relationship and it will be interesting to see which position English courts will take.’ J Scherpe ‘A Comparative View of Pre-Nuptial Agreements’ *IFLJ* March 2007 (18).

as a move away from introducing the concept of same-sex marriage. Antoktolskaia asserts that this was part of the impetus for reform, 'The opening up of marriage to same-sex couples was a collateral issue in the decision introducing the PACS...the majority of French scholars neither support the idea of same-sex marriage nor feel restrained from expressing their negative attitude.'<sup>196</sup> This reform can therefore be considered against the Australian provision, that is to say that the impetus behind the provisions was in order to recognise same-sex couples without altering the nature of marriage.

The fact that PACS carries no religious connotations led some commentators to discuss the separation of society with religion. For example, Wheldon asserts that this new institution corresponds '... neatly with Europe's open aspiration to bring about a post-Christian society in which tradition and sacrament play no part' and sees the institution as, 'a desperate attempt to keep us together somehow, anyhow.'<sup>197</sup> This view does not take into account that marriage can be secular. Perhaps what Wheldon is indicating is that marriage still holds religious connotations to many people, and that the separate and new PACS would not hold any such associations.

Upon entering a PACS there are several financial benefits; these can be seen within the workplace, tax advantages, housing rights, and social security benefits. Each of the partners becomes liable for each other's debts,<sup>198</sup> and after three years of registration a couple would be taxed on their joint income. The couple would have an allowance for inheritance tax following a minimum period of two years. Another potential benefit of registering the partnership is that a PACS can count towards having a personal connection with France when applying for a residence permit. Although the provision is aimed at intimate couples, there is the potential for abuse given the benefits on offer through registering a PACS. The termination of a PACS appears to be a relatively simple process; it can be carried out upon the request of one party to the court, by a mutual statement to the court, or, of course, through death of one of the parties.<sup>199</sup> The PACS is ended within just three months following the

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<sup>196</sup> M Antoktolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective* (Intersentia, EFL, 2006) 283-284.

<sup>197</sup> F Wheldon 'Will you marry me... just a little bit?' *The Times* (12 May 2004).

<[http://www.timesonline.co.uk/tol/life\\_and\\_style/article421228.ece](http://www.timesonline.co.uk/tol/life_and_style/article421228.ece)>Last accessed 19 May 2011.

<sup>198</sup> Chapitre Ier : Du pacte civil de solidarité Article 515-1 (Modifié par Loi 2007-308 2007-03-05 art. 1 3° JORF 7 Mars 2007 en vigueur le 1er Janvier 2009) Article 515-4.

<sup>199</sup> Chapitre Ier : Du pacte civil de solidarité Article 515-1 (Modifié par Loi 2007-308 2007-03-05 art. 1 3° JORF 7 Mars 2007 en vigueur le 1er Janvier 2009) Article 515-7.

application. The relative ease in which a PACS can be entered into and dissolved, does suggest that this would not demonstrate the commitment of marriage.<sup>200</sup>

### **Cohabitation Provisions and Marriage in France**

Research has been carried out on the impact of the PACS a decade after its implementation.

Prix and Mazuy state:

The popularity of the PACS has increased year on year. More than 6,000 PACS contracts were concluded between 15 November and 31 December 1999, 30,000 in 2003, more than 100,000 in 2007 and nearly 150,000 in 2008. This type of civil union has met with substantial success over the ten years of its existence, totalling close to 600,000 PACS and at least one million contracting parties (because the same person may have formed and dissolved several PACS unions in this period).<sup>201</sup>

The research shows that although PACS is open to all couples it is most frequently used by heterosexual couples, but that this imbalance is proportional to the number of heterosexual couples available to form a PACS.<sup>202</sup> Unlike the models to pinpoint status, the introduction of the PACS has had an effect on the take up of marriage in France. The National Institute for Statistics and Economic Studies report, 'The number of marriages has continued decreasing while PACS are more and more popular.'<sup>203</sup> It is reported that in 2008 just over one PACS was registered for every two marriages, although it is noted that some of the couples choosing a PACS may go on to marry in the future.<sup>204</sup> If an unmarried couple were considering marriage, then their financial future in France is more certain than the position of a couple in England and Wales. The community of property regime is discussed further in Chapter Eight.<sup>205</sup> Couples contemplating marriage in France also have the option to create enforceable marital property agreements in order to opt out of the default regime in place. The increasing

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<sup>200</sup> Jaeger comments, 'Signing up for one is as easy as renewing a parking permit: present yourself to a court, add your signature to the papers. Getting out of it is even easier: you simply write to the court asking for an annulment.' A Jaeger, 'What the law says' *The Times* (12 May 2004).

<<http://www.timesonline.co.uk/tol/sitesearch.do?query=pacs&turnOffGoogleAds=false&submitStatus=searchFormSubmitted&mode=simple&sectionId=674>> Last accessed 19 May 2011.

<sup>201</sup> F Prioix and M Mazuy, *Recent Demographic Developments in France: Tenth Anniversary of the PACS Civil Partnership and Over a Million Contracting Parties* Institut national d'études démographiques. *Population-E*, 64 (3), 2009, 393-442, 407.

<sup>202</sup> F Prioix and M Mazuy, *Recent Demographic Developments in France* (n 201) 408: 'Heterosexual couples account for the great majority of PACS unions simply because of the very large stock of unmarried couples available to form a PACS. But although the share of same-sex couples fell slightly from 6.1% in 2007 to 5.6% in 2008, the frequency of PACS unions increased among these couples. Their number rose by 32% between 2007 and 2008, from 6,217 to 8,203, with a slightly larger increase for PACS between two women (+ 36%) than for those between two men (+ 29%).'

<sup>203</sup> National Institute for Statistics and Economic Studies

<[http://www.insee.fr/en/themes/document.asp?reg\\_id=0&id=1358](http://www.insee.fr/en/themes/document.asp?reg_id=0&id=1358)> Last accessed 10 July 2011.

<sup>204</sup> F Prioix and M Mazuy, *Recent Demographic Developments in France* (n 201) 408.

<sup>205</sup> This discussion begins at p 244.

popular PACS concurs with the notion that marriage is becoming an increasingly unpopular institution.<sup>206</sup>

### **Private Agreements in France**

If cohabiting couple were considering marriage in France then they would be able to make a pre-nuptial agreement by virtue of Article 1387 of the French Civil Code. A post-nuptial agreement is available to spouses after two years of marriage under Article 1397 FCC. In order to create a binding agreement a couple must use a notary to draft their agreement. The notary's role is to advise the couple objectively, which brings the inherent difficulty of possible negligence claims.<sup>207</sup> Full disclosure of assets is not required in France. Research demonstrates that the vast majority of the French population do not contract out of the default regime.<sup>208</sup> The default regime in France is the immediate community of property regime,<sup>209</sup> which offers a great level of certainty in terms of the division of assets. The limited use of these agreements and the level of certainty offered by the default regime is discussed further in Chapter Eight.

### **Initial Conclusions**

Unlike the provisions in Australia and Scotland, the PACS provides a legal mechanism for both same-sex and opposite-sex couples through a registration system, and thus provides an alternative to marriage. The aim was perhaps to avert the notion of same-sex marriage. However, many opposite-sex couples are opting for a PACS and so the uptake of marriage is declining. This would undoubtedly form a considerable policy issue should such a reform be considered for England and Wales.

## **6.4 CONCLUSION**

Analysing the attempted reforms in this area highlights the opposition to providing unmarried couples a financial remedy akin to married couples upon relationship breakdown. Rather than conferring status to cohabitants, that is to say that a remedy may be available once a set of

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<sup>206</sup> C McGlynn comments on marriage within the European Union, 'Rates of marriage are declining in the European Union. Rates of divorce in some member states are increasing rapidly. Rates of cohabitation are escalating. It seems, in fact, that the institution of marriage is unpopular and increasingly so. C McGlynn, *Families and the European Union: Law Politics and Pluralism* (Cambridge University Press, 2006) 112.

<sup>207</sup> Article 1394 French Civil Code.

<sup>208</sup> E Cooke, A Barlow, T Callus *Community of Property* (n 70) 5.

<sup>209</sup> Articles 1401 -1408 French Civil Code.

circumstances are shown,<sup>210</sup> it is perhaps more feasible that the narrowing of the continuum could prompt calls to provide a contractual option for unmarried cohabitants. Barlow and Probert comment on this position with regard to the French reform, 'Whilst a PACS style law may not be the answer in our common law jurisdiction, given the lack of enthusiasm for a contractual solution, surely the time has come in the UK to attempt a modern legal definition of cohabitation which is not tied to the marriage model...'<sup>211</sup> It may have been possible to have considered the requirements for cohabitation contracts in the consultation on Marital Property Agreements,<sup>212</sup> however, if reform does go ahead for marital property agreements then this could be viewed as an initial step for introducing a 'contractual solution' into English family law.<sup>213</sup>

In terms of the continuum, a reform akin to the Scottish or Australian model set out above would confer status on unmarried cohabitants; this may still be seen as problematic and politically unattainable, based on the notion of providing equivalence with marriage.<sup>214</sup>

Garrison comments on the advantages of a contractual model in terms of upholding autonomy whilst affording protection:

A registration option coupled with the possibility of individualized contracts thus solves the classification problems inherent in the constrictive model, and it does so in a way that meets the parties' expectations – they have chosen the option that suits them best – and provides prospective notice of status, with virtually no administrative costs.<sup>215</sup>

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<sup>210</sup> J Scherpe describes this as 'informal cohabitation' in 'The Nordic Countries in the Vanguard of European Family Law' (n 79) 275.

<sup>211</sup> A Barlow and R Probert, 'Le PACS est arrive – France embraces its new style family.' December [2000] IFL.

<sup>212</sup> The Law Commission, *Marital Property Agreements* (n 2).

<sup>213</sup> This is not the first time these two reforms have been considered side by side: In 1999 Barlow and Probert studied the position of cohabitants living in France, concluding that, 'As the rhetoric on 'strengthening marriage' in the Home Office consultation paper *Supporting Families* (1998) at chapter 4 bears witness, the current Government continues to ignore the need for a coherent legal framework for cohabitation. It prefers instead to hope against hope that the dominance of the heterosexual married family form can be reasserted. Will events on the other side of the Channel, however, convince the Government that more than one type of family form now merits a formal legal status?' A Barlow and R Probert, 'Reforming The Rights of Cohabitants – Lessons From Across the Channel' [1999] Fam Law 477. It is within this chapter of the consultation paper that the previous Government stated that they would 'Make 'pre-nuptial' written agreements about the distribution of money and property legally binding, for those who wish to use them.' Home Office consultation paper *Supporting Families* (1998) Quotation at p 31. More than a decade has passed since this consultation paper and there has been no legal change on either front.

<sup>214</sup> See above at p 175: K Kieran, A Barlow and R Merlo, 'Cohabitation Law Reform' (n 109).

<sup>215</sup> M Garrison 'Cohabitant Obligations: Contract Versus Status' in K Boele-Woelki, J Miles and J Scherpe (eds), *The Future of Family Property Law in Europe* (Intertax, Cambridge, 2011) 128.

The comparative study carried out above has revealed the consequences of introducing a contractual solution for unmarried cohabitants and also the outcome of introducing a model which would confer status. Based on this evaluation, it is possible to suggest a package most suitable for England and Wales.

### **The Future of Cohabitation and Marital Agreements in England and Wales**

Any reform to allow enforceable marital property agreements would demonstrate a narrowing of the continuum between status and contract. The nature of the reform would pinpoint this movement further. The distance on the continuum between contracts created by unmarried cohabitants and marital property agreements would be dependent upon the safeguards and requirements set beyond the law of contract. The Law Commission's consultation paper has proposed that in order to create a qualifying nuptial agreement it must be signed, there must be disclosure and the couple must have sought legal advice. These requirements are discussed further in Chapter Nine.<sup>216</sup> Barton comments, '...as always seems to be the case in these discussions, CP 198 ignores the fact that for many of those who choose not to marry, the more likely default position is not singledom but (probably – continuing) extra – marital cohabitation, privately-ordered or otherwise.'<sup>217</sup> Cohabitation contracts are not considered within the scope of the *Marital Property Agreements* Consultation Paper.<sup>218</sup> It is proposed that any future legislative reform concerning marital property agreements should give consideration to widening the provisions to unmarried cohabitants also.

The Australian legislation deals with Financial Agreements made between married couples and de facto couples in the same manner. This position can be accounted for when considering the impetus to provide recognition to same-sex couples, without introducing same-sex marriage. This model would be unsuitable for England and Wales as the division is different. The division, in terms of the enforceability of agreements, is between: unmarried or

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<sup>216</sup> See in particular the discussion which begins at p 280.

<sup>217</sup> C Barton, 'Marital Property Agreements: The Law Commission's Cut' Sep [2011] Fam Law.

<sup>218</sup> It is notable, although falling out of the scope of this thesis, that reference is made to the ability of a spouse to contract out of the Inheritance (Provision for the Family and Dependents) Act 1975, the Law Commission comment that it is hard to see why such agreements should not be capable of contracting out of this Act if they are capable of ousting the court's jurisdiction upon ancillary relief (*Marital Property Agreements (n 2)*, paragraph 7.86). By contrast, in *Cohabitation: The Financial Consequences of Relationship Breakdown* Law Com No 307, paragraph 6.47) it is stated, 'It is indeed the case that no other class of applicant may "opt out" of the 1975 Act by private agreement, and it is not obvious why cohabitants should, uniquely, be permitted to do so.' Thus, as the law stands currently with regard to this piece of legislation, there would be a further divide between these two types of agreement.

couples without a civil partnership and those who are married or civilly partnered.<sup>219</sup> This issue is discussed further in the following Chapter.

It is proposed that the Scottish model is more suitable for adoption into this jurisdiction. The Scottish legislation allows for both binding marital property agreements and cohabitation agreements, but does not treat them in the same way. This distinction could be dealt with in a legislative reform, setting out the requirements of creating a binding marital property agreement and cohabitation agreement.

### **Legal Safeguards for Cohabitants**

It is noted that the widening of the proposals to include cohabitation agreements is not going to solve the problem in its entirety. The dearth of cases involving cohabitation contracts is notable.<sup>220</sup> One possible explanation for this can be taken from the Law Commission's criticism of the test for establishing a common intention constructive trust under the present law, 'In many cases, a couple will not engage in discussion...'<sup>221</sup> Furthermore, the arguments put forward by Barlow at the beginning of this Chapter can also be considered in relation to the possibility of creating a contract, 'the woeful ignorance of people in general and cohabitants in particular about the different legal treatment of cohabitation as compared with marriage...their preference for inaction even when they are aware and do intend to take action...'<sup>222</sup> The misplaced belief, although 'rational and justified,'<sup>223</sup> in rights accrued through the existence of a common law marriage could still certainly be plaguing this area of law. It would seem, therefore, that in the majority of cases a legal mechanism is required upon relationship break down, and furthermore, that this would need to be well publicised to be effective.<sup>224</sup>

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<sup>219</sup> The Law Commission, *Marital Property Agreements* (n 2) iii.

<sup>220</sup> C Barton notes, 'Over the last decade and a half or so, there have been at least 14 English reported cases which contain at least some reference to PMCs but perhaps just two about CCs.' C Barton, 'Domestic Partnership Contracts' (n 46).

<sup>221</sup> The Law Commission *Sharing Homes* (n 22) para 4.26.

<sup>222</sup> A Barlow, 'Cohabitation Law Reform – Messages From Research Feminist Legal Studies (2006) 14:167-180, 173.

<sup>223</sup> See, R Probert, 'The evolution of the common-law marriage myth' [2011] Fam Law 41.

<sup>224</sup> R Probert comments on the impact of the Living Together Campaign against the Law Commissions proposals in, 'Why Couples Still Believe In Common-Law Marriage' May [2007] Fam Law: 'There is an ironic coda to this tale of myths and misinformation. If the Law Commission – and it seems likely – recommends change in its final report...and if the Government legislates to give effect to its proposals, then cohabiting couples will acquire new rights. It might then be necessary to embark on a further media campaign to inform couples of this fact – and any couples who had stopped believing that they had legal rights will have to start again.'

In comparing the options which would pinpoint either status or contract, it is in fact the model which provides a more contractual option through registration which has had an impact on the uptake of marriage. The French PACS provides an alternative to marriage for opposite-sex couples, in addition to providing legal recognition to same-sex couples through registration. It seems highly unlikely that such a model would be adopted in this jurisdiction due to the impact upon marriage. The Australian system has provided legal rights to de facto couples by providing equivalence with marriage. Such a model would be incongruous with English family law. It seems unlikely that legislation providing this equality to marriage for unmarried opposite-sex couples would ever be adopted in England and Wales. Furthermore, England and Wales has made provisions for the legal recognition of same-sex marriage. A reform akin to Scottish law seems the most appropriate. This would allow the legal protection of unmarried couples, and at the same time it would not provide an alternative to marriage.

This Chapter has identified where unmarried cohabitants currently appear on the status-contract continuum and examined how this position has been influenced by opposition to providing unmarried cohabitants an equivalence to married couples upon relationship breakdown. It is suggested however that the narrowing of the continuum which could be demonstrated by legislative reform could have an impact on this area. Initially the introduction of legislation detailing cohabitation agreements in English law could provide greater clarification to the requirements and safeguards required create an enforceable agreement. Attention has been drawn to the issue that the promotion of a contractual solution in the form of a registration system for cohabitants may be viewed as the next logical step, but it may not be suitable for this jurisdiction. Instead, a model based on providing separating cohabitants with a legal safeguard should be pursued. The narrowing of the continuum has the potential to impact on this area of family law.

## CHAPTER SEVEN

### SAME-SEX MARRIAGE AND THE REVIVAL OF STATUS

This Chapter will explore the revival of status when the position of same-sex marriage was questioned and also the two facets of status demonstrated by the conjunction of same-sex couples and enforceable private agreements on the status-contract continuum. The two facets of status were analysed in the Introduction.<sup>1</sup> There is the facet, or interpretation, of status which means that marriage is a public union and thus the State and wider community holds an interest in the financial arrangements made by a couple on divorce.<sup>2</sup> Furthermore, there is a set definition of marriage due to this public nature of marriage.<sup>3</sup> It was identified that in England and Wales this can be traced to the words of Lord Penzance in *Hyde v Hyde and Woodmansee*.<sup>4</sup> The conjunction of same-sex couples and private agreements demonstrates that these are two separate facets. The Law Commission set out the topic of the *Marital Property Agreement* at the outset:

This Consultation Paper reviews the law relating to agreements made before or during marriage or civil partnership which seek to regulate the couple's financial affairs during the relationship or to make financial arrangements for any period of separation or for the financial consequences of divorce or dissolution.<sup>5</sup>

Marriage and civil partnership are treated in the same manner with regard to these relationships being public unions and thus restricting a couple's ability to contract out of the default position prior to or during the relationship. Yet, same-sex couples are precluded from the other element of status: the set definition of the public institution of marriage has been used to restrict same-sex marriage. The current use of status is contradictory. Taking marriage to the extreme end of the continuum to contract would mean that marriage is

<sup>1</sup> See above pp. 7 – 13.

<sup>2</sup> As set out previously at p 42, and repeated for clarity Lord Aitkin in *Hyman v Hyman* [1929] All ER Rep 245, 258: 'In the absence of any statutory enactment the former wife would be left without any provision for her maintenance other than recourse to the poor law authorities. In my opinion the statutory powers of the Court to which I have referred were granted partly in the public interest to provide a substitute for this husband's duty of maintenance and to prevent the wife from being thrown upon the public for support.'

<sup>3</sup> J Halley, 'Behind the Law of Marriage (I): From Status/ Contract to the Marriage System' *Harvard Journal of the Left*, Vol. 6.1, 2010, 4.

<sup>4</sup> (1866) LR 1 P&D 130. The following quotation is set out above at p 8, Lord Penzance: 'What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different nations but what are its essential elements and invariable features? If it be of common acceptance and existence, it must (however varied in different countries in its minor incidents) have some prevailing identity and universal basis. I conceive that marriage as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.'

<sup>5</sup> The Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) iii.

completely a private union, controlled by the parties rather than the State, and therefore variable.<sup>6</sup> Enforceable marital property agreements alone would not demonstrate this comprehensive move to contract, but they could shift marriage to a more neutral point on the continuum between status and contract; thus redefining marriage.

### 7.1 SAME-SEX COUPLES ON THE PROPOSED CONTINUUM

Prior to the introduction of the Civil Partnership Act 2004<sup>7</sup> the perceived hierarchy<sup>8</sup> in family law was described as having marriage at the top, followed by unmarried heterosexual couples, with same-sex couples occupying the lower tier of this hierarchy.<sup>9</sup> The legal recognition of same-sex couples rearranged this hierarchy, elevating same-sex couples who had registered their partnership to the second tier. The upholding of *Hyde* restricted the opening up of marriage to give full equality. The ideas and interpretation surrounding status were revived and used to deny marriage to same-sex couples. Yet when the continuum model is placed vertically through this current hierarchy with regard to the enforceability of private agreements it reveals an anomaly.

Cohabitants currently occupy the bottom of the hierarchy, and so have the contractual freedom linked to the contractual side of the continuum. However, agreements made between both civil partners and married couples have been deemed as unenforceable because of the status end of the continuum. Black, Bridge, Bond and Gribbin comment:

As for pre-partnership agreements, these are unenforceable ... It is important to remember, however, that there is no concept of a life-long arrangement in civil

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<sup>6</sup> See for example J Halley, 'Behind the Law of Marriage' (n 3) See also P Swisher, A Miller, and B Singer, 'Family Law: Cases, Materials and Problems' (Matthew Bender & Co; 2nd edition, Oct 1998.) The terminology of status and contract and the strain between these two concepts is explained at p 2 with the addition of public and private; 'tension between marriage as a public status and marriage as a private contract.'

<sup>7</sup> This can be considered one of the major reforms to have occurred in family law. The Civil Partnership Act 2004 was implemented on 5 December 2005. The Office for National Statistics has reported figures the number of Civil Partnerships created for the short period they were available in 2005 through to 2010. Figures obtained from ONS < <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-224152>> Last checked 21 June 2012. Following an initial surge in uptake, it would seem that the numbers of couples creating civil partnerships is levelling out. Civil partnership is not immune from dissolution, and figures demonstrate a steady rise from just 40 dissolutions in 2007 to 472 dissolutions in 2010. Figures obtained from ONS < <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-224152>> Last checked 21 June 2012.

<sup>8</sup> This model for describing status and contract was considered in the Introduction.

<sup>9</sup> Issue discussed in R Bailey-Harris 'New Families for a New Society?' in S Cretney (ed) *Family Law Essays for the New Millennium* (Jordan Publishing Limited, Bristol 2000) 67-77.

partnerships, as there is in marriage, and hence arguably greater justification in the parties seeking to organise their financial affairs before forming a civil partnership.<sup>10</sup>

Same-sex partners have been denied the equality of marriage because of the legal interpretation of marriage creating a status. The break away from the requirements of the flawed 'definition' from *Hyde* in new legislation would indicate further steps being taken to create a new description of marriage. It is possible to scrutinise the passing of this Civil Partnership Act against the background of both the evolution of public policy and the incorporation of the European Convention for the Protection of Human Rights into domestic law.<sup>11</sup> The effect of the Convention will be observed in the areas of the legal recognition of same-sex partners.

## 7.2 THE INFLUENCE OF STATUS ON THE LEGAL RECOGNITION OF SAME-SEX COUPLES

This part of the Chapter will trace the legislative changes that have occurred, scrutinising the strength of the public policy arguments at each stage and also taking into account influences on the law.<sup>12</sup> Tracing the influence of status on this area of law demonstrates a remarkable move from criminalisation through to the current position on the status-contract continuum. This area is very well trodden ground,<sup>13</sup> and so this section will err on the side of brevity. It is, however, crucial that the influence of status is observed before analysing how this area may be affected by a more contractual approach.

The Criminal Law Amendment Act 1885 criminalised all aspects of homosexual behaviour.<sup>14</sup> It was primarily introduced to reduce the number of girls being sent to foreign brothels by

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<sup>10</sup> J Black, J Bridge, T Bond and L Gribbin, *A Practical Approach to Family Law* (8<sup>th</sup> edn, Oxford University Press 2007) 317, para 19.134.

<sup>11</sup> As discussed in Chapter Four, there is scope for the European Convention to have an impact upon the enforceability of marital property agreements and the status-contract tension.

<sup>12</sup> For example, there is a clear link between Biblical teachings and the law with regard to sodomy, it is stated at Genesis 13.13, 'But the men of Sodom were wicked and sinners before the Lord exceedingly' and also later at Leviticus 18.22, 'Thou shalt not lie with mankind, as with womankind: it is an abomination.'

<sup>13</sup> For example see S Cretney, *Same-Sex Relations: From 'Odious Crime' to 'Gay Marriage'* (Oxford University Press, 2006): 'In little more than fifty years, behaviour regarded as *criminal* (that is to say, so wrong that it is properly the business of the state to pursue the perpetrator and imposes penal sanctions intended in part to mark society's disapproval of what he has done) has been moved not merely into the neutral zone where the state leaves it to the individual to make decisions but into the zone in which the state, by creating supporting or administrative structures, recognises and approves the conduct in question.'

<sup>14</sup> Hamilton comments on the consequences of this clause, 'The amendment effectively criminalised all aspects of gay behaviour, public and private, with up to two years in prison with the option of hard labour for any act of "gross indecency."' For many years afterwards acts of sodomy, or buggery as the law prefers to describe it, were punished by 15 strokes of the birch.' A Hamilton 'How the ruling class hid behind secrets and lies.' *The Times* (20 November 2002) Available electronically

<<http://www.timesonline.co.uk/tol/news/politics/article1180880.ece>> Last accessed 10<sup>th</sup> May 2010. This clause

increasing the age of consent from thirteen to sixteen. Henry Labouchere, Member of Parliament, suggested that the legislation should include a clause to cover 'outrages on public decency.'<sup>15</sup> In 1954 the British Government commissioned a committee to examine the laws governing homosexuality and prostitution, the committee was chaired by the Vice-Chancellor of Reading University, Sir John Wolfenden.<sup>16</sup> In 1957 the committee published the *Report of the Committee on Homosexual Offences and Prostitution*,<sup>17</sup> now commonly referred to as the Wolfenden Report. The report proposed that private and consensual acts of homosexuality between people over the age of twenty-one should no longer be classified as a criminal offence. This view certainly ran contrary to the opinion held by the Home Secretary at the time. Sir David Maxwell Fyfe<sup>18</sup> stated, 'Homosexuals in general are exhibitionists and proselytizers and are a danger to others, especially the young. So long as I hold the office of Home Secretary I shall give no countenance to the view that they should not be prevented from being such a danger.'<sup>19</sup>

The Wolfenden Report was faced with the task of balancing the rights of private individuals against upholding the idea of male homosexuality being a sin and a danger to society.<sup>20</sup> The

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was evident in the Sexual Offences Act 1956, s.13, and was Repealed by the Sexual Offences Act 2003, ss 139, 140, Sch 6, para 11(a), Sch 7.

<sup>15</sup> *Hansard*, HC Deb 06 August 1885 vol 300 cc1386-428, 1397: Mr. Labouchere said, his Amendment was as follows:—After Clause 9, to insert the following clause:— 'Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year with or without hard labour. That was his Amendment, and the meaning of it was that at present any person on whom an assault of the kind here dealt with was committed must be under the age of 13, and the object with which he had brought forward this clause was to make the law applicable to any person, whether under the age of 13 or over that age. He did not think it necessary to discuss the proposal at any length, as he understood Her Majesty's Government were willing to accept it. He, therefore, left it for the House and the Government to deal with as might be thought best. New Clause (Outrages on public decency.)—(Mr. Labouchere.)—brought up, and read the first and second time.'

<sup>16</sup> R Rooney, 'Male homosexuality in Britain: The hidden history' Association for Journalism Education (2000) This article reveals the thought and impetus behind the commissioning of such a committee from a journalistic perspective with regard to the high profile cases of homosexuality at the time: 'In 1954 the Cabinet was so concerned about this that it discussed the possibility of encouraging a private member's bill to restrict newspaper reporting of court cases involving homosexuality. It realised that it could not get away with this so instead set up a Home Office departmental committee of inquiry into homosexuality and how it might be contained (a Royal Commission was ruled out because this would have to take evidence in public.)' Available electronically <<http://www.scribd.com/doc/26608050/Male-Homosexuality-in-Britain-the-Hidden-History>> Last accessed 10 May 2010.

<sup>17</sup> (Cm 247, 1957).

<sup>18</sup> Sir David Maxwell Fyfe was appointed as Home Secretary in November 1953.

<sup>19</sup> *Hansard*, HC Deb 03 December 1953 vol 521 cc1295-9, 1297-8.

<sup>20</sup> The main argument presented in the report for decriminalising acts of homosexuality was: '...namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private

report suggests that if these actions are not visible to society, they can in no way be thought to be a matter of public policy. Devlin provides an alternative view point, questioning the link between the individual, law and morality as discussed in the Wolfenden report:

The error of jurisprudence in the Wolfenden Report is caused by the search for a single principle to explain the division between crime and sin. The Report finds it in the principle that the criminal law exists for the protection of individuals; on this principle fornication in private between consenting adults is outside the law and thus it becomes logically indefensible to bring homosexuality between consenting adults in private within it. But the true principle is that the law exists for the protection of society. It does not discharge its function by protecting the individual...the law must protect also the institutions and community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies.<sup>21</sup>

This viewpoint perhaps reflects the more widely held view of the role of the law and public policy. The proposals set out in the Wolfenden report were rejected by Parliament in June 1960.<sup>22</sup> The Sexual Offences Act 1967 implemented the recommendations of the report on 27 July 1967. Although it should be noted that even the supporters of the 1967 Bill were guarded upon the passing of the Act.<sup>23</sup> Homosexuality was no longer criminalised, but it is apparent that society's perception had not really altered; people were still reluctant to make this legal challenge which would have certainly required public scrutiny of their relationship.<sup>24</sup> Yet there were challenges with regard to the definition of 'living together as husband and wife' contained within legislation.

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immorality.' P Devlin 'Morals and the Criminal Law' in D Dyzenhaus, S Reibstanz Moreau and A Ripstein (eds), *Law and Morality, Readings in Legal Philosophy* (3<sup>rd</sup> edn University of Toronto Press Incorporated, Canada 2007) 371. Interestingly this quotation seems to suggest that it is possible to isolate the actions of an individual from the potential effect this may have on society as a whole.

<sup>21</sup> P Devlin 'Morals and the Criminal Law' in D Dyzenhaus, S Reibstanz Moreau and A Ripstein (eds), *Law and Morality, Readings in Legal Philosophy* (3<sup>rd</sup> ed University of Toronto Press Incorporated, Canada 2007) 388.

<sup>22</sup> *Hansard*, HC Deb 29 June 1960 vol 625 cc1453-514.

<sup>23</sup> On 21 July 1967 Lord Arran made a rather cautious speech in the House of Lords:

'This is no occasion for jubilation; certainly not for celebration. Any form of ostentatious behaviour; now or in the future, any form of public flaunting, would be utterly distasteful and would, I believe, make the sponsors of the Bill regret that they have done what they have done. Homosexuals must continue to remember that while there may be nothing bad in being a homosexual, there is certainly nothing good.' *Hansard* HL vol 285 cols 522-524 (21<sup>st</sup> July 1967).

<sup>24</sup> The year 1967 marked the limited acceptance of homosexuality. The restrictions contained within the legislation were perhaps there to conceal this change from society; thus disengaging the public policy argument. This concealment or suppression perhaps explains why, 'there is no reported case in which anyone in this country tried to persuade a court that a relationship between persons of the same sex was capable of constituting a 'marriage.'" S Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press, Oxford 2005) 69.

## Redefining the 'Family'

The passing of the Housing Act 1980 reduced the council's power to retake possession of property by introducing the concept of 'secure tenancy.' The Act granted succession rights to secure tenants: spouse<sup>25</sup> or a member of the family who had resided with the tenant for a year preceding the tenant's death.<sup>26</sup> The Act defined 'family' as close blood, half blood or step relationship, and persons who live together as husband and wife.<sup>27</sup> The Court of Appeal in *Harrogate BC v Simpson*<sup>28</sup> agreed that the definition of family had been included into the legislation to afford protection to heterosexual cohabiting couples, and that this definition could not be extended to homosexual couples. This is an interesting judgment, on one hand accepting that society has evolved to the point where the judiciary is able to give protection to a heterosexual cohabiting couple, but not quite being able to stretch this thinking to also protect homosexual couples in an equivalent position.<sup>29</sup>

When discussing the public opinion of homosexuality in the 1980s, s.28 of the Local Government Act 1988 is worthy of note, as this had the effect of obstructing local authorities endorsing homosexuality.<sup>30</sup> In 1990 research by Cardiff Law School demonstrated there had not been a single case where a local authority had been taken to court over this,<sup>31</sup> and so there was never an opportunity to interpret this legislation. Thorp and Allen produced the report '*The Local Government Bill [HL]: the 'Section 28' debate*'<sup>32</sup> where it is suggested that 'the provision is nonetheless badly drafted: even supporters of Section 28 have suggested that its

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<sup>25</sup> Housing Act 1980, s. 30 (2)(a).

<sup>26</sup> (n 25) s. 30 (2)(b).

<sup>27</sup> (n 25) s. 50 (3).

<sup>28</sup> [1985] 2 F.L.R. 91, [1986] Fam. Law 359.

<sup>29</sup> Loveland expresses his view regarding the public policy issue in this case: 'The court made no attempt to evaluate "public opinion" on this issue, and it seems that no evidence was adduced on the question. That broad swathes of the British public in the 1980s harboured discriminatory sentiments against non-heterosexuals is perhaps a conclusion with which we might intuitively agree. Watkins L.J. certainly seemed to rely only on intuition: the court essentially moved from assertion to conclusion on this point without troubling itself with the intermediate stage of argument.' I Loveland 'Making it up as they go along? The Court of Appeal on same sex spouses and succession rights to tenancies' P.L. 2003, Sum 223.

<sup>30</sup> This legislation inserted s.2A into the Local Government Act 1986, s.2A(1) states, 'A local authority shall not (a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality; (b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship.'

<sup>31</sup> P Thomas and R Costigan *Promoting homosexuality: Section 28 of the Local Government Act 1988* (Cardiff Law School 1990) 13.

<sup>32</sup> A Thorp and G Allen '*The Local Government Bill [HL]: the 'Section 28' debate.*' Bill 87 of 1999-2000, Research Paper 00/47, 6 April 2000 House of Commons Library.

<<http://www.parliament.uk/documents/commons/lib/research/rp2000/rp00-047.pdf>> Last accessed 19th May 2010.

language seems almost deliberately provocative.<sup>33</sup> The title of Norrie's journal article, 'Symbolic and meaningless legislation'<sup>34</sup> perhaps succinctly summaries this addition, yet the mere fact that this piece of legislation was passed does give a strong indication of the public attitude in the 1980s.

The same-sex couple in *Harrogate BC v Simpson* went further, with Ms Simpson relying upon Article 8, Article 1 of the First Protocol and Article 14 of the European Convention on Human Rights when she took her case to Strasbourg. Her argument based on Article 8 and Article 1 of the First Protocol was rejected as she could not demonstrate a legal interest in the property. Her claim under Article 14 was also rejected; any discrimination was justified by the notion of protecting the family, thus maintaining the very narrow view of what constitutes a 'family.'

### **Expanding the Concept of Family**

*Fitzpatrick v Sterling Housing Association*<sup>35</sup> demonstrates the broadening of the definition of family to include same-sex couples.<sup>36</sup> The Rent Act 1977 presented two possible ways in which a homosexual may gain protection of their succession rights. Protection was offered under Schedule 1, paragraph 2(2) if the couple could demonstrate they had been 'living with the original tenant as his or her wife or husband.' Alternatively, the use of 'family' was again present under Schedule 1, paragraph 3(1), 'as a member of his or her own family residing with him or her in the dwelling house.' Three of the five judges, Lord Nicholls of Birkenhead, Lord Slynn of Hadley and Lord Clyde, agreed that a homosexual couple could

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<sup>33</sup> A Thorp and G Allen 'The Local Government Bill (n 32) This Report also reveals that there was some effort made to decipher just how this legislation could have been interpreted: 'In June 1988, shortly after the section came into force, the Association of London Authorities (ALA) and the National Council for Civil Liberties jointly commissioned a legal opinion from Lord Gifford QC seeking some guidance on the likely interpretation of section 2A in the courts. On 'promoting homosexuality' Lord Gifford concluded: 'promote homosexuality' "involves active advocacy directed by local authorities towards individuals in order to persuade them to become homosexual, or to experiment with homosexual relationships.' p 14.

<sup>34</sup> Journal of the Law Society of Scotland September 1988.

<sup>35</sup> [2001] 1 AC 27.

<sup>36</sup> There are some slight differences in the case facts, as summarised by Loveland, 'Fitzpatrick was concerned with succession rights in the private rather than public rented sector; and specifically with succession rights to "protected tenancies" initially created by the Rent Act 1965. As the law then stood, the "spouse" of a protected tenant could succeed to a statutory continuation of the initial protected tenancy. Until 1988, "spouse" had been taken to mean husband or wife in the *de jure* sense. A statutory amendment introduced in that year (taking effect as para.2 (2) of Sch.1 to the Rent Act 1977) broadened the concept of spouse to include persons living together "as" husband and wife.' I Loveland 'Making it up as they go along? (n 29) 223.

fall into the definition of family.<sup>37</sup> Yet the narrow view of what constitutes a family was still upheld by Lord Hutton and Lord Hobhouse of Woodborough. Lord Hutton stated:

For there to be a de facto family relationship there must be the outward appearance of a de jure family relationship to which it is the equivalent, but because the essence of marriage is a relationship between a man and a woman there is no de jure family relationship to which a homosexual relationship is equivalent...<sup>38</sup>

The judgment certainly represents even more acceptance of homosexual couples, yet the dissenting judgments perhaps act as a reminder that such acceptance was in no way universal; it was still certainly deemed that a homosexual relationship could not be considered to be legally equivalent to a cohabiting heterosexual couple. This judgment reflects the legal position of homosexual couples in 1999, and so the leap taken by the Court of Appeal in *Ghaidan v Godin-Mendoza*<sup>39</sup> seems a rather far-reaching step ahead of the development of the concept of public policy. Glennon comments on this position:

Lord Slynn, one of the majority judges in *Fitzpatrick* once remarked that it was most appropriate for a Law Lord to be offered fudge when coffee was served. Drawing on this analogy it is suggested that the ruling of the majority in *Fitzpatrick* was a carefully crafted 'fudge', achieving justice for the appellant whilst simultaneously creating the conditions for a successful discrimination-based claim under the Human Rights Act 1998 which ultimately had greater transformative potential.<sup>40</sup>

The next section will examine this successful claim.

### **The Concept of Family and the Impact of the Human Rights Act 1998**

Juan Godin-Mendoza and Hugh Walwyn-Jones had lived in a monogamous relationship from 1972 until 2001, until the death of Walwyn-Jones, the holder of the protected tenancy. The stance put forward in *Fitzpatrick* was reiterated.<sup>41</sup> The case was then presented to the Court of Appeal, *Millbank* describes the complete change around in approach, '...just two years after

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<sup>37</sup> Lord Nicholls of Birkenhead explained this decision: The question calling for decision in the present case is a question of statutory interpretation... I am in no doubt that this question should be answered affirmatively. A man and woman living together in a stable and permanent sexual relationship are capable of being members of a family for this purpose. Once this is accepted, there can be no rational or other basis on which the like conclusion can be withheld from a similarly stable and permanent sexual relationship between two men or between two women.' *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27, 44.

<sup>38</sup> [1999] 3 WLR 1113, 1146.

<sup>39</sup> [2004] 2 FCR 481.

<sup>40</sup> L Glennon, 'Fitzpatrick v Sterling Housing Association' in S Gilmore, J Herring and R Probert (eds), *Landmark Cases in Family Law* Edited by (Hart Publishing, Oxford, 2011) 269.

<sup>41</sup> It was claimed that protection could be gained under the Rent Act 1977 Schedule 1, paragraph 3(1) 'as a member of his or her family,' in addition to the refusal to extend this to allow a homosexual couple to fall into the definition of 'living with the original tenant as his or her wife or husband.' The Rent Act 1977 Schedule 1, paragraph 2(2).

the unanimous House of Lords decision held in Fitzpatrick that a same-sex couple could not live as spouses, a unanimous Court of Appeal held that a gay couple were indeed living as spouses under exactly the same statutory provisions.<sup>42</sup> Yet this turn around by the judiciary was not the result of some momentous change in society or a rapid evolution of public policy; but because of the incorporation of the European Convention for the Protection of Human Rights into domestic law, through the mechanism of the Human Rights Act 1998, which occurred 2 October 2000.

The Human Rights Act provided a further role for the judiciary to complete under s.3(1), 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way that is compatible with the Convention rights.' Sexual orientation is not specifically mentioned in Article 14,<sup>43</sup> yet when the case was being looked at in the Court of Appeal Lord Buxton stated:

This court bears the burden of having to construe the Convention as a living instrument...Looking at that question in 2002 it seems to me that there can only be one answer. Sexual orientation is now clearly recognised as an impermissible ground of discrimination, on the same level as the examples, which is all that they are, specifically set out in the text of art 14.<sup>44</sup>

Therefore, with the use of s.3 (1), the judiciary were compelled to extend the definition of 'as husband and wife' to the slightly wider, 'as if they were husband and wife,' and so making this piece of legislation convention compatible.

In the House of Lords decision, Lord Millet describes this change in thinking:

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<sup>42</sup> J Millbank 'The role of 'functional family' in same-sex family recognition trends' CFLQ Vol 20, No 2, 2008 155 – 182.

<sup>43</sup> Lord Justice Buxton outlined the four part test to be met to demonstrate a breach of Article 14, which is not a substantive right: (i) Do the facts fall within the ambit of one or more of the substantive European provisions? (ii) If so, was there different treatment in respect of that right between the complainant on the one hand and the other persons put forward for comparison (the chosen comparators) on the other? (iii) Were the chosen comparators in an analogous situation to the complainant's? (iv) If so, did the difference have an objective and reasonable justification? In other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved? [2003] 1 FLR 468 Buxton LJ at paragraph 7. In answer to the first part of this test, the case of *Petrivic v Austria* (2001) 33 EHRR 14 had set out that even a weak link to a substantive right would satisfy this criterion. It was shown that the partner's home fell into the ambit of Article 8, as validated by *Michalak v Wandsworth London Borough Council* [2002] EWCA Civ 271, [2002] 4 All ER 1136. When looking at *Salgueiro da Silva Mouta v Portugal* (2001) 31 EHRR 47 the European Court of Human Rights confirms this position. In conclusion to parts two to four of this test, Wilson and Bailey Harris summarise, '...to ask whether such difference in treatment has a legitimate and objective justification, being proportionate to the achievement of a legitimate aim – the burden of which falls on the discriminator and was held not to have been discharged in *Mendoza v Ghaidan*.' R Bailey- Harris 'Mendoza v Ghaidan and the Rights of De Facto Spouses' August [2003] Fam Law.

<sup>44</sup> [2002] 3 FCR 591, 604.

I have used the term 'marriage-like' to describe the sort of relationship which meets the statutory test of living together 'as husband and wife'. Once upon a time it might have been difficult to apply those words to a same sex relationship because both in law and in reality the roles of the husband and wife were so different and those differences were defined by their genders. That is no longer the case. The law now differentiates between husband and wife in only a very few and unimportant respects.<sup>45</sup>

Yet this 'once upon a time' reflects the thinking of the House of Lords in 1999, just six years prior to this statement. It was held that in the case of *Fitzpatrick* the idea of husband and wife could not apply to a same sex couple:

I should stress that the present case is to be distinguished from that of spouses or unmarried couples living in a relationship where marriage may be possible. I am not holding that a homosexual partnership is like or is akin to such a relationship. Indeed, as I have already held, I do not consider that paragraph 2(2), as presently worded, can be extended to cover such a case... Nor does it seem to me useful to employ such expressions as a relationship "akin to marriage"... It is simply a matter of the application of ordinary language to this particular statutory provision in the light of current social conditions.<sup>46</sup>

It seems extremely unlikely that the traditional roles carried out by husband and wife had altered so dramatically between 1999 and 2004, and so it would appear that it was the incorporation of the European Convention for the Protection of Human Rights into domestic law that had caused this rapid shift in legal definitions within family law. Interestingly Sir David Maxwell Fyfe also played a role here. Kirby traced the historical influences on the Human Rights Act 1998, 'In Europe, British lawyers, led by Sir David Maxwell Fyfe, the former Nuremburg prosecutor and chair of the Council of Europe's legal division, drafted the European Convention on Human Rights in 1950, designed for a continent racked by war twice during the first half of the century'<sup>47</sup> Rather ironically, despite his personal feelings towards homosexuality as discussed earlier, it would seem that Sir David Maxwell Fyfe has in fact unwittingly played a fairly large role in reaching the legal position we have today.

### **The Use of the Human Rights Act 1998**

The Department for Constitutional Affairs produced the, 'Review of the Implementation of the Human Rights Act'<sup>48</sup> in July 2006. The use of s.3(1) had been criticised by some; as when

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<sup>45</sup> [2004] 2 FCR 481, 529.

<sup>46</sup> [2001] 1 AC 27, 54.

<sup>47</sup> T Kirby 'The Human Rights Act: 800 years in the making' *The Guardian* (2 July 2009) Available electronically <<http://www.guardian.co.uk/humanrightsandwrongs/800-years-making>> Last Accessed 11 May 2010.

<sup>48</sup> Review available at <[http://www.justice.gov.uk/about/docs/full\\_review.pdf](http://www.justice.gov.uk/about/docs/full_review.pdf)> Last accessed 19 May 2010.

analysing this case it does appear that the judiciary may be stepping away from their constitutional role. Lord Steyn considered the power of s.3:

In accordance with the will of Parliament as reflected in s.3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions.<sup>49</sup>

However, Bamforth comments that some of the objections made towards the use of s.3 in this particular case may on some occasions be driven by animosity towards the legal recognition of same-sex couples, ‘...given the strong feelings aroused in some quarters by just about any issue concerned with sexuality and gender roles, they also tend in some situations to be used as proxy for opposition to claims for the legal recognition of same-sex partnerships on their merits.’<sup>50</sup> In conclusion the review carried out by the Department for Constitutional Affairs highlights the limited use of this provision, and therefore the minimal impact this Act of Parliament has had on the constitutional roles.<sup>51</sup>

Under s.4 of the Convention the judiciary can declare that the legislation is incompatible. This provision was used in the House of Lords in *Bellinger v Bellinger*,<sup>52</sup> where a male to female transsexual sought the declaration that s.11(c) Matrimonial Causes Act 1973 was incompatible with both Article 8 and Article 12 of the Convention, thus establishing that her marriage to Mr Bellinger was still valid. In addition, this would have opened up the possibility of same-sex marriage, as under s.11(c) a marriage is void if the parties are not respectively male and female. It would have been possible to interpret this provision to extend it to cover the gender that the parties feel they belonged to. Lord Hobhouse of Woodborough described how this could be achieved, by including, ‘additional words such as ‘or two people of the same sex one of whom has changed his/her sex to that of the opposite

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<sup>49</sup> [2003] 1 FLR 468, [67]–[68].

<sup>50</sup> N Bamforth ‘Same-sex partnerships: some comparative constitutional lessons.’ E.H.R.L.R 2007, 1, 47-65, 65

<sup>51</sup> The Department for Constitutional Affairs states: ‘...there have been only 11 occasions upon which the superior courts have upheld Declarations that Acts of Parliament were incompatible with the Convention rights, and on each occasion Parliament has passed further legislation putting the law back into conformity. Similarly, the courts have used Section 3 of the Act...on only 12 occasions. Arguments that the Human Rights Act has significantly altered the constitutional balance between Parliament, the Executive and the Judiciary have therefore been considerably exaggerated.’ Quotation obtained from <  
[www.justice.gov.uk/guidance/docs/exec\\_summ\\_intro.pdf](http://www.justice.gov.uk/guidance/docs/exec_summ_intro.pdf)> Last Accessed 2 July 2011.

<sup>52</sup> [2003] UKHL 21, [2003] 2 AC 467.

sex.<sup>53</sup> Yet instead a declaration of incompatibility was made; consideration was being given to legislative provisions and the Gender Recognition Act 2004 was passed in July 2004.<sup>54</sup>

### **Status: The Separation of Marriage and Civil Partnership**

Lord Nicholls gave great consideration to the historical view of marriage when coming to this conclusion, demonstrating that the traditional view of marriage was being firmly upheld. The judiciary were reluctant to make any new interpretation of the Matrimonial Causes Act 1973 that would have a fundamental impact on our understanding and formation of this institution:

Marriage is an institution, or relationship, deeply embedded in the religious and social culture of this country. It is deeply embedded as a relationship between two persons of the opposite sex. There was a time when the reproductive functions of male and female were regarded as the primary *raison d'être* of marriage. The Church of England Book of Common Prayer of 1662 declared that the first cause for which matrimony was ordained was the 'procreation of children'. For centuries this was proclaimed at innumerable marriage services. For a long time now the emphasis has been different. Various expressed, there is much more emphasis now on the 'mutual society, help and comfort that the one ought to have of the other'....It hardly needs saying that this approach would involve a fundamental change in the traditional concept of marriage.<sup>55</sup>

This quotation recognises that the understanding of marriage has changed over this period of time, with the 'procreation of children' now taking less emphasis within the meaning of a marriage. With this in mind, it would have been possible for other couples to form a marriage, rather than remaining with the traditional view of a heterosexual male and female. Yet a re-interpretation of a key provision from the Matrimonial Causes Act 1973 was just too closely linked to the possibility of deeply and fundamentally changing the meaning of marriage. Weitzman explains this concept further from an American perspective:

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<sup>53</sup> (n 52) 78.

<sup>54</sup> On 1 July 2004 the Gender Recognition Act 2004 was implemented, meaning that a gender recognition certificate could be granted if an applicant with gender dysphoria could demonstrate that they have lived in the acquired gender for a period of two years, and have the intention to remain in that acquired gender for the rest of their lives, and so changing their legal classification of gender. The Act also acknowledges the situation where the applicant is already legally recognised as their acquired gender in another country, in this instance the certificate would be issued automatically. If there is a family already in existence the legal family labels are still preserved, and as the granting of a certificate does not require any form of surgical procedure it is possible for a person to be a mother in one family unit and a legal father in another. The implementation of this Act did have some ramifications to the Matrimonial Causes Act 1973, under s.12 (h) a marriage can be nullified if one partner is unaware that their spouse had already obtained a gender recognition certificate prior to the marriage. The case *S-T (Formerly J) v J* [1997] 3 WLR 1287 illustrates that this is a possibility, with the wife being unaware of her husband's female gender until his birth certificate was shown at the divorce petition. Also, an application for nullity can be presented if one spouse is granted an interim certificate during the course of the marriage.

<sup>55</sup> (n 52) 46-48.

Our current social and legal prohibitions against homosexuality in general, and homosexual marriage in particular, originate in English common law. This law continued the ecclesiastical tradition, which was, in turn, based on Judeo-Christian prohibitions against homosexuality. Whereas homosexual behaviour was tolerated in the Greco-Roman world, the Christian church adopted the Hebrew prohibition of homosexual conduct for either sex as part of its wider prohibition of any sexual act that did not lead to procreation.<sup>56</sup>

It would therefore appear that the concept of procreation is very deeply rooted into the understanding of marriage, and so although this quotation from Lord Nicholls demonstrates that we may have moved away from this a little, it is unlikely that this notion will completely disappear and so this must have had some bearing upon the decision not to create same-sex marriage. It must also be remembered that when this case was being looked at by the House of Lords, government had already announced that there were plans for reform in this area, so perhaps there was also some reluctance to impede on an area of family law already due to change.

The result of this change in legal recognition of same-sex partners required legislative action. Bailey–Harris discusses the balance to be struck between status and contract, with regard to the need to, ‘promote equality and personal choice in family matters without appearing to undermine the sanctity of marriage.’<sup>57</sup> The removal of s.11 (c) of the Matrimonial Causes Act would have been by far the simplest way to give equal ‘rights, responsibilities, benefits and advantages...’<sup>58</sup> to same-sex partners.<sup>59</sup>

Difficulties have arisen where a couple have had a same-sex marriage in one country, to then move to find that this is no longer recognised,<sup>60</sup> as was the case in *Wilkinson v Kitzinger*.<sup>61</sup>

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<sup>56</sup> L Weitzman, *The Marriage Contract: A Guide to Living with Lovers and Spouses* (Free Press, 1981) 216 - 217.

<sup>57</sup> R Bailey – Harris, ‘New Families for a New Society?’ (n 9) 68.

<sup>58</sup> Sir Mark Potter, President of the Family Law Division, *Wilkinson v Kitzinger* [2006] EWHC (Fam), quotation at para 21.

<sup>59</sup> Herring questions, ‘The reader may well wonder why the Government did not take the simple step of allowing same-sex marriage. The reason was essentially political. There was remarkably little opposition to the CPA 2004 because it did not create same-sex marriage. To create this status, which is legally equivalent to marriage, we needed an Act with 264 sections and 30 schedules.’ J Herring *Family Law* (3<sup>rd</sup> edn, Pearson Longman, Essex 2007) 62.

<sup>60</sup> A varying legal approach to recognising same-sex couples can be seen in Schedule 20 of the Civil Partnership Act 2004, which gives a list of the countries that do recognise a specified legal relationship for same-sex couples. J Scherpe summarises the divide in the current international provisions: ‘Some jurisdictions, like the Netherlands, Belgium, Spain, South Africa, Massachusetts and Canada, allow same-sex marriage. Others, like the Nordic Countries, Germany, Switzerland, Vermont and Connecticut, allow ‘registered partnerships’ or ‘civil unions’, which are very much like marriage in their legal consequences. England and Wales is also in the latter group, and the civil partnership available to same-sex couples in this jurisdiction is generally accepted to be “marriage in everything but name.” J M Scherpe, ‘Equal but different?’ C.L.J. 2007, 66(1), 32-35.

<sup>61</sup> [2006] EWHC 2022 (Fam).

The couple had married in British Columbia and wished for their marriage to be recognised in this jurisdiction, seeking a declaration of incompatibility under s.4 of the Human Rights Act 1998 in relation to s.11(c) of the Matrimonial Causes Act 1973. This case demonstrates the revival of status. Sir Mark Potter set out the definition of the public institution of marriage at the outset of the case, ‘The common law definition of marriage is that stated by Lord Penzance in *Hyde v Hyde*...“The voluntary union for life of one man and one woman, to the exclusion of all others.” This definition has been applied and acted upon by the courts ever since.’<sup>62</sup> The limitations of the Civil Partnership Act were also considered in terms of withholding status:

It was introduced and has effect as a measure to afford equivalent legal rights to same-sex partnerships as are available to opposite partners through marriage. By withholding from same-sex partners the actual title and status of marriage, the Government declined to alter the deep-rooted and almost universal recognition of marriage as a relationship between a man and a woman, but without in any way interfering with or failing to recognise the right of same-sex couples to respect for their private or family life in the sense, or to the extent, that European jurisprudence regards them as requiring protection.<sup>63</sup>

He went on to rely on the decision in *Vervaeke v Smith*,<sup>64</sup> ‘There is abundant authority that an English court will decline to recognise or apply what would otherwise be the appropriate foreign rule of law when to do so would be against English public policy’<sup>65</sup> So, the conclusion in this case was, ‘As already indicated, English public policy in the matter is demonstrated by s 11(c) of the MCA and the relevant provisions of the CPA.’<sup>66</sup> This is a very clear statement on the influence of public policy and status on the separation upheld between marriage and civil partnership.

Further indications of the influence of status on civil partnership can be found by analysing the differences which currently lie between the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004.<sup>67</sup> Adultery has not been carried across to civil partnership.<sup>68</sup> Yet a civil

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<sup>62</sup> (n 61) [11].

<sup>63</sup> (n 61) (Fam).

<sup>64</sup> [1983] 1 A.C. 145.

<sup>65</sup> *Vervaeke v Smith* [1983] 1 A.C. 145 p 164.

<sup>66</sup> *Wilkinson v Kitzinger* (n 61) 130.

<sup>67</sup> Barton comments on an area that has been overlooked by the law, ‘Although the law has recently institutionalised the, innately visible, same-sex relationship, there has been little improved understanding of the many less apparent manifestations of sexual diversity. C Barton ‘Sex and the Family’ [2005] Fam Law 628.

<sup>68</sup> Bamforth explains this omission, ‘The difference has been explained on the basis that ‘adultery’ is defined by relation to heterosexual marriage, as something involving partial or complete penetration of a woman by a man, neither party being married to the other and at least one of the two being married to someone else. This might be thought unduly formalistic: for whatever the sex of the parties, the law is seeking to deal with the consequences of sexual infidelity within a relationship, and one might imagine – given that other aspects of the law governing

partner could almost certainly obtain dissolution due to infidelity, but instead base the irretrievable breakdown on behaviour; the importance of fidelity can still be recognised in both institutions. In practice this will therefore have very little impact, but the omission from the legislation indicates Parliament's reluctance or embarrassment to give consideration to this issue.<sup>69</sup> It may also link back to the definition of the 'adulteration of the male blood line,'<sup>70</sup> if this is the case then this seems logical as within a same-sex relationship this would bear no relevance. Also, a civil partnership cannot be ended due to non-consummation or venereal disease. Bamforth offers an explanation as to why this is the case:

Other than the marginally greater difficulty of defining non-consummation in the case of a same-sex relationship, and the distaste perhaps felt by parliamentarians about specifying the various forms of transmissible sexual infection, no obvious reason has been offered for these drafting differences.<sup>71</sup>

In practice this will have limited significance as non-consummation only renders a marriage voidable. The formation of a sham marriage and a sham civil partnership is equally possible. The inclusion of non-consummation within the Matrimonial Causes Act 1973 is still rooted to the idea of procreation within the marriage, thus allowing a party to get out of the marriage if this is not an option.<sup>72</sup>

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marriage have been adapted to cover same-sex relationships – that a more flexibly phrased but directly analogous concept to adultery could have been included within the legislation.' N Bamforth 'The benefits of marriage in all but name? Same-sex couples and the Civil Partnership Act 2004' [2007] CFLQ 133.

<sup>69</sup> *Hansard* HL Deb 12 May 2004 vol 661 cc115-80GC, 174CG -175CG: Lord Filkin: 'The noble Baroness spotted one difference—why not adultery? In a sense adultery is a concept—without going into the physiology of it—that applies to opposite-sex marriage. Clearly that does not apply in this respect. However, that does not mean that a party to a civil partnership who behaves in an adulterous way would not afford the opportunity for their partner—if they felt as they may well do, aggrieved by that—to take action in the courts to end the relationship. They would be able to advance the fact that there had been an "extra-sexual relationship", if I can put it that way, that they felt went to the heart of the trust in the relationship and that therefore they would advance that as an argumentation for irretrievable breakdown of the marriage. Lord Higgins: I, too, welcome the noble Lord to our deliberations. I am not quite clear what the definition of adultery is in the case of two-sex couples.'

<sup>70</sup> K Norrie, 'Marriage Is For Heterosexuals - May The Rest Of Us Be Saved From It' [2000] CFLQ 363.

<sup>71</sup> N Bamforth 'The benefits of marriage in all but name?' (n 68).

<sup>72</sup> Matrimonial Causes Act 1973, s.12(a) and (b): that the marriage has not been consummated owing to the incapacity of either party to consummate it; that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it. The age of consent between homosexual males has also been problematic, originally being twenty one under the recommendations of the 'Report of the Committee on Homosexual Offences and Prostitution.' (Cm 247, 1957). In 1994 Edwina Currie MP supported the move to reduce the age of consent to sixteen. *Hansard Online* <<http://www.publications.parliament.uk/pa/cm199394/cmhansrd/1994-02-21/Debate-12.html>> Last accessed 20<sup>th</sup> May 2010: 'If we are to have a nation at ease with itself and a nation at the heart of Europe, the unpleasant homophobic nature of current legislation must be changed - and the sooner, the better...I may be told that public opinion is not with us. If there is one thing that is very clear it is that the polls are confusing and that we should not rely on them. The poll in yesterday's Sunday Times showed that many people still want to ban homosexuality altogether ; others want equality, but at a different, higher, age. Since the age of consent for the rest of us has been 16 since 1885 that is somewhat unrealistic.' This notion was rejected, but a compromise was

### 7.3 THE POTENTIAL INFLUENCE OF CONTRACT ON CIVIL PARTNERSHIP

In considering the potential for contract to influence the position of same-sex couples in family law it is critical to observe some of the recent changes and campaigns which have impacted on this area. Most recently the Conservative led coalition government released its consultation paper on same-sex marriage and civil partnerships on 15 March 2012.<sup>73</sup> The consultation explores the possibility of opening up civil marriage to same-sex couples and civil partnership to heterosexual couples, the basis being that, 'having two separate provisions for same-sex and opposite-sex couples perpetuated misconceptions and discrimination.'<sup>74</sup> The consultation paper is unequivocal in the proposals impact on religious organisations:

The Government does not intend to make any changes to the way that religious marriages are solemnized, or how religious organisations define religious marriage, and it would not be legally possible under these proposals for religious organisations to solemnize religious marriages for same-sex couples.<sup>75</sup>

The consultation closed on 14 June 2012. It has received a mixed reaction, particularly from various religious groups. The Church of England commented that the proposals, 'would alter the intrinsic nature of marriage as the union of a man and a woman, as enshrined in human institutions throughout history.'<sup>76</sup> The Roman Catholic Church has also voiced opposition to the proposals.<sup>77</sup> Quakers, Liberal Judaism and Unitarians however welcomed the consultation.<sup>78</sup> It is notable that the Scottish Government are also proposing same-sex marriage. The Scottish consultation closed on 9 December 2011. Robertson-Cragforth has analysed the responses and summarises, 'Across all respondents, a clear majority (67%)

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reached in reducing the age of consent to eighteen. It was not until the year 2000 that the age of consent was lowered to sixteen, through the Sexual Offences (Amendment) Act 2000; yet this equality was only achieved through using the Parliament Acts 1911 and 1949. This once again highlights the discomfort felt towards this area.

<sup>73</sup> The Government Equalities Office, *Equal Civil Marriage: A Consultation* 15 March 2012.

<sup>74</sup> L Featherston's Written Ministerial Statement. < <http://www.homeoffice.gov.uk/publications/about-us/parliamentary-business/written-ministerial-statement/equal-civil-marriage-wms/>>

<sup>75</sup> Quotation found in <[www.parliament.uk/briefing-papers/SN05882.pdf](http://www.parliament.uk/briefing-papers/SN05882.pdf)>

<sup>76</sup> Church of England Response available at < <http://www.churchofengland.org/media/1475149/s-s%20marriage.pdf>>

<sup>77</sup> The Response is available at <[www.catholic-ew.org.uk/content/download/29644/206517/file/CBCEW-response-equal-civil-marriage-consultation-June-2012.pdf](http://www.catholic-ew.org.uk/content/download/29644/206517/file/CBCEW-response-equal-civil-marriage-consultation-June-2012.pdf)>The consultation document makes clear that the Government is principally concerned to elicit views on how legislative change could best be achieved and not with whether or not such change should happen. It is of serious concern to us that this proposal, which has such immense social importance for the stability of our society and which has significant implications for the unique institution of marriage and of family life, should be proposed on this basis and with such limited argument. These are issues of great magnitude with far reaching consequences for how our society sees itself well into the future.

<sup>78</sup> Details available at <<http://news.pinkpaper.com/NewsStory/7126/15/03/2012/quakers-liberal-judaism-and-unitarians-welcome-gay-marriage-consultation.aspx>>

opposed changing the law to allow same-sex marriage.<sup>79</sup> Similar concerns can be seen in the responses to the Scottish consultation:

It was when considering whether any legislation should *allow* rather than *require* religious bodies to be involved that consensus did emerge and there were very few respondents who considered that religious bodies or celebrants should be required to undertake ceremonies which they were not comfortable with.<sup>80</sup>

There is a great deal of media attention being devoted to the opposition being shown by the Catholic Church in Scotland.<sup>81</sup> It remains to be seen whether reform will go ahead in either jurisdictions.

The Equality Act 2010 removed the prohibition on civil partnerships being registered on religious premises.<sup>82</sup> It is notable that various religions again took different views.<sup>83</sup> These proposals indicate yet more progress towards equality; the division between marriage and civil partnership is becoming more blurred. At the time of writing, The Equal Love campaign is challenging the legal position on the prohibition of both gay marriage and heterosexual civil partnership, this campaign is being organised by 'OutRage!' Eight couples are involved in this demonstration; four heterosexual couples have tried to file an application for a civil partnership and four same-sex couples have applied to be married.<sup>84</sup> The responses from the

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<sup>79</sup> L Robertson-Cragforth, *Registration of Civil Partnerships. Same Sex Marriage: Consultation Analysis* (Scottish Government Social Research 2012) [16].

<sup>80</sup> L Robertson-Cragforth, *Registration of Civil Partnerships*. (n 79) [9.11].

<sup>81</sup> See for example L Davies, 'Same-sex marriage: Scotland urged to resist Catholic Church campaign' *The Guardian* (26 August 2012).

<sup>82</sup> The purpose of the Act was to 'update, simplify and strengthen the previous legislation.' (Quotation obtained from <[http://www.equalities.gov.uk/equality\\_act\\_2010.aspx](http://www.equalities.gov.uk/equality_act_2010.aspx)> Last Accessed 4 July 2011.) The majority of the provisions came into force 1 October 2010. From 31 March 2011 through to 23 June 2011 there has been a consultation regarding s.202 of the Act (*Civil Partnerships on Religious Premises: A Consultation* available at <[http://www.equalities.gov.uk/equality\\_act\\_2010/civil\\_partnership\\_consultation.aspx](http://www.equalities.gov.uk/equality_act_2010/civil_partnership_consultation.aspx)> Last Accessed 4 July 2011) This provision does not put any requirement on a faith group to host the registration, and the civil partnership will still remain secular. In order for a religious premises to host a civil partnership they would first need to obtain approval from the local authority, in a similar way in which secular buildings are currently approved to host marriages and civil partnerships. In order for a religious premises to host a civil partnership they would first need to obtain approval from the local authority, in a similar way in which secular buildings are currently approved to host marriages and civil partnerships. The application would be placed in the local paper, allowing twenty one days for objections to be sent to the local authority.

<sup>83</sup> For example these proposals have been welcomed by Quakers: Quakers warmly welcome the move to allow the celebration of civil partnerships on religious premises. We are also heartened by proposals to address calls for full equality of civil marriages and civil partnerships, as our religious experience leads us to seek a change in the law so that same sex marriages can be celebrated, witnessed and reported to the state in the same way as heterosexual marriages. Quotation obtained from <[http://www.equalities.gov.uk/news/religious\\_buildings.aspx](http://www.equalities.gov.uk/news/religious_buildings.aspx)> Last Accessed 4 July 2011.

<sup>84</sup> The campaign website outlines the driving force behind this challenge to the law: 'The only apparent reason for maintaining the system of segregation is to use the law to mark same-sex couples as socially and legally inferior, and different-sex couples as socially and legally superior. Same-sex couples are excluded from marriage, which is the universal system for legally recognizing a loving, committed, sexual relationship between two adults. This legal segregation is similar to having separate beaches and drinking fountains for white and

register offices to the eight couples were as expected, based on the current legislation.<sup>85</sup> Arguably, allowing same-sex marriage would have been the only way to ensure that true equality between heterosexual couples and same-sex couples was achieved, and would have avoided much criticism; such as the view taken by Tatchell:

The Civil Partnership Bill creates a form of sexual apartheid, with one law for heterosexuals and another for gays. Same-sex couples are excluded from marriage and opposite-sex partners are excluded from civil partnerships. This is not equality. It reinforces and perpetuates discrimination.<sup>86</sup>

The alternative view on this issue is stated by Norrie, he raises the argument that same-sex couples may not have wanted marriage anyway:

...marriage would inevitably come with all the (hetero) sexual baggage of consummation, incest, impotency and adultery. It would involve all the property baggage of loss of control of personal finances and all the inhibiting baggage of requiring the state's permission to escape from the relationship. The social advantage of status that marriage would bring is not, in my view, sufficient compensation.<sup>87</sup>

In creating the Civil Partnership Act 2004, the law has been able to comply with the European Convention for the Protection of Human Rights without altering the institution of marriage.

### **Recognition on the basis of Status or Contract: A Comparative Perspective**

It is possible to analyse the reforms which have occurred in other jurisdictions on the status-contract continuum. Same-sex couples are placed at the status end of the proposed continuum in ten countries and eight US States at the time of writing.<sup>88</sup> Many more countries apply a

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black people, as existed in South Africa under apartheid. It is comparable to having a system of marriage for Christians and civil partnership for non-Christians.' Quotation obtained from <<http://equallove.org.uk/the-legal-case/>> Last Accessed 3 July 2011.

<sup>85</sup> The heterosexual couples were informed that this would not be possible due to s.3 (1) of the Civil Partnership Act 2004, 'Two people are not eligible to register as civil partners...if they are not of the same sex.' The same-sex couples were notified that they could not marry as s.11(c) of the Matrimonial Causes Act states, 'A marriage...shall be void if the parties are not respectively male and female.' On 2 February 2011 the case was taken to the European Court of Human Rights, the couples are basing their claim on discrimination which violates Article 14, alongside claims of the violation of the right to marry under Article 12, and the respect for family life under Article 8. Much discontent remains with regard to this division.

<sup>86</sup> Quotation found on Green Party website <<http://www.greenparty.org.uk/news-archive/838.html>> Last accessed 20 May 2010.

<sup>87</sup> K Norrie 'Marriage Is For Heterosexuals' (n 70).

<sup>88</sup> Netherlands (2001); Belgium (2003); Spain (2005); Canada (2005); South Africa (2009); Norway (2009); Sweden (2009); Portugal (2010); Iceland (2010); Argentina (2010); Denmark (2012). Subnational jurisdictions: Mexico (Mexico City) (2009); US States: Massachusetts; Iowa; Connecticut; Maine; New Hampshire; Vermont; Maryland and New York. It is unlikely that this list will remain static. For example on 29 August 2012 New Zealand parliament voted in favour of the first reading of a Bill which proposes to introduce same-



more contractual approach to the legal recognition of same-sex couples.<sup>89</sup> The provisions available to same-sex couples in England and Wales sit at the contractual end of the continuum at the time of writing. The Netherlands was the first country to open up marriage to same-sex couples in 2001. This legal system can in fact be categorised as offering both status and contract. The Netherlands provides both same-sex marriage and the *Geregistreerd Partnerschap*, or registered partnership. This jurisdiction has been analysed in greater depth in order to examine the link between the choice between same-sex marriage and a more contractual option. Spain has been considered further in relation to conferring status. This country has been scrutinised as this reform occurred in the same year as the passing of the Civil Partnership 2004 and therefore provides comparable statistics over the same period of time. Also, Spain provides an example of a country where there are strong links between State and religion, and so this relationship has been examined further.

### **Legal Recognition on the basis of Contract**

In the previous Chapter models for pinpointing contract and status were considered in relation to unmarried cohabitants. The overlap between legislation providing recognition for same-sex couples and heterosexual cohabitants was identified in France and Australia. This section will examine the Netherlands and Belgium, where a contractual option sits alongside the option to marry.

#### **The Netherlands**

The *Geregistreerd Partnerschap*, or Registered Partnership was introduced in the Netherlands in 1998. In a similar way to the French *pacte civil de solidarité* this provision is available to both same-sex couples and opposite-sex couples. The Netherlands was the first country to recognise same-sex marriage, and as set out above, the Netherlands can in fact be categorised as providing legal recognition to same-sex couples on the basis of either status or contract.

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sex marriage. See Library of Congress, New Zealand: Same-Sex Marriage Bill Passes First Vote: 'The 80-40 vote in favor of the bill means that it will now be referred to a select committee, which will receive public submissions and hold hearings on the bill. The bill will then need to pass two further votes in Parliament before it becomes law.' <[http://www.loc.gov/lawweb/servlet/lloc\\_news?home?disp3\\_3306\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?home?disp3_3306_text)> See also K Norrie, 'National Report: New Zealand' (2011) 19(1) *Journal of Gender, Social Policy & the Law* 265.

<sup>89</sup> When the Civil Partnership Act was passed in 2005 these were: (1) Andorra; (2) Australia: Tasmania; (3) Canada: Nova Scotia; (4) Canada: Quebec; (5) Denmark; (6) Finland; (7) France; (8) Germany; (9) Iceland; (10) Luxemburg; (11) New Zealand; (12) Norway; (13) Sweden; (14) US: California; (15) US: Connecticut; (16) US: Maine; (17) US: New Jersey; (18) US: Vermont. However since the passing of this Act many more countries have taken this step (for example Slovenia and Uruguay) and many more are in the process of implementing such legislation, or there is at least the proposal for such reform (for example Brazil and Colombia).

Writing in 1999, Schrama summarises the deliberation to open up marriage to same-sex couples and the possibility of abolishing the notion of registered partnership in its wake:

In February 1998 the Government initially expressed the view that it was opposed to giving homosexuals the right to marry, but a majority in Parliament did not agree. Following the general election in May 1998 the political parties agreed to prepare a bill to make marriage available to same-sex couples. In December 1998 a bill was presented to the Council of State. The institution of registered partnership will not yet be abolished. After 2003 the Act will be evaluated and only then will a decision be taken.<sup>90</sup>

The option to create a registered partnership has been retained.

### **The Geregistreerd Partnerschap**

The Registered Partnership Act can be found in Book One of the Dutch Civil Code, which contains the ‘Law of Persons and Family Law.’ The provisions set out that a partnership can be established by two people, regardless of their sex.<sup>91</sup> Furthermore, a partnership cannot be registered if either of the partners is married or has already registered a partnership with someone else.<sup>92</sup> The two partners must either be Dutch citizens<sup>93</sup> or be in possession of a valid residence permit.<sup>94</sup> The minimum age at which someone can register a partnership is eighteen.<sup>95</sup> If a person is below this age, then permission must be sought from the Minister of Justice<sup>96</sup> and they are required to obtain parental consent.<sup>97</sup> Neither of the partners may have a mental illness.<sup>98</sup> Registration between parent-child or siblings is barred.<sup>99</sup> The consequences of the registration are directly linked to the Marriage Act,<sup>100</sup> the broad upshot of this is the notions of fidelity; parental responsibility; the obligation to cohabit; the application of a community of property; maintenance and pension rights. The partners may use each other’s names and they become related to their partner’s relatives. A partnership can be ended by the partners creating an agreement.<sup>101</sup>

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<sup>90</sup> W Schrama, ‘Registered Partnership in the Netherlands’ (1999)13 Int’l J.L. Pol. & Fam. 315, 318.

<sup>91</sup> Article 1:80a (3) Dutch Civil Code.

<sup>92</sup> Article 1:80a (3) and (4) Dutch Civil Code.

<sup>93</sup> Article 1:80a (1) Dutch Civil Code.

<sup>94</sup> Article 1:80a (2) Dutch Civil Code.

<sup>95</sup> Article 1:31 Dutch Civil Code.

<sup>96</sup> Article 1:31 Dutch Civil Code.

<sup>97</sup> Article 1:35 and 1:36 Dutch Civil Code.

<sup>98</sup> Article 1:32 Dutch Civil Code.

<sup>99</sup> Article 1:41 Dutch Civil Code.

<sup>100</sup> Namely the application of Titles 6, 7 and 8 of Book One of the Dutch Civil Code.

<sup>101</sup> Information provided by the Government of the Netherlands < <http://www.government.nl/issues/family-law/marriage-registered-partnership-and-cohabitation-agreements>> accessed 28 July 2012. ‘A registered

## Marriage and Registered Partners in the Netherlands

Registered partners and married couples have almost identical rights. The main difference is that in a registered partnership a man does not automatically become the lawful father of a child born to his partner. However, this status can be acquired through the father officially acknowledging the child.<sup>102</sup> Further to this, equality has been achieved in all fields by the legislator extending any provisions relating to spouses to also cover registered partners.<sup>103</sup> The equivalence to marriage that this Act otherwise creates has been criticised by some in the sense that it provides an alternative to marriage.<sup>104</sup> Festy comments, “‘Demarriage’ is now widespread in Europe, though historically it began in the Northern countries, which were also the first to adopt laws on registered partnership.”<sup>105</sup> This trend can be explored in more detail.

In the year the 1998 Act was introduced there were 4,556 partnerships registered, opposite-sex couples accounted for 34% of this figure.<sup>106</sup> In 2001, it was possible for a couple to convert their marriage into a registered partnership. One of the foreseeable advantages for this conversion was in order to access an annulment without having to go to court. This option has since been rescinded in March 2009. The reasoning for this move is stated by the Central Bureau of Statistics, Netherlands to be: ‘The regulation was rescinded because flash divorces were not always recognised as a divorce outside the Netherlands, and because no arrangements - for example - children could be laid down by a judge in court.’<sup>107</sup> Statistics show that during the period these so called ‘flash divorces’ were available; approximately 30,000 couples used this procedure. In 2004 around 5,000 couples obtained a ‘flash divorce.’ However, when the procedure was rescinded in 2009, the figure dropped to under 1,000 in that year.<sup>108</sup> This evidence suggests, overwhelmingly, that the decision by couple to convert their marriage into a registered partnership was in order to access a more simple divorce

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partnership may end because one or both partners want to revoke the registration. If there are no children, this can be done without going to court. The partners draw up and conduct an agreement. The lawyer or notary declares that such an agreement had been conducted, after which this agreement is recorded in the Register of Births, Deaths, Marriages and Registered Partnerships.’

<sup>102</sup> Article 1:199 Dutch Civil Code. See also the information provided by the Government of the Netherlands <<http://www.government.nl/issues/family-law/marriage-registered-partnership-and-cohabitation-agreements>> accessed 28 July 2012.

<sup>103</sup> The Aanpassingswet geregistreerd partnerschap, or Amending Registered Partnerships.

<sup>104</sup> See W Schrama, ‘Registered Partnership in the Netherlands’ (n 90) 322-324.

<sup>105</sup> P Festy ‘Legal Recognition of same-sex couples in Europe’ *I.N.E.D Population* 2006/4 - Vol. 61, pp. 417 à 453, 447.

<sup>106</sup> W Schrama, ‘Registered Partnership in the Netherlands’ (n 90) 323.

<sup>107</sup> The Central Bureau of Statistics, Netherlands <<http://www.cbs.nl/en-GB/menu/methoden/toelichtingen/alfabet/f/flash-divorce-regulation-rescinded.htm>>

<sup>108</sup> The Central Bureau of Statistics, Netherlands <<http://www.cbs.nl/en-GB/menu/themas/bevolking/publicaties/artikelen/archief/2010/2010-3017-wm.htm>>

procedure, and not as some form of protest to the introduction of same-sex marriage, as some critics suggested.<sup>109</sup>

The Central Bureau of Statistics recorded that in 2010 there were 57,000 same-sex couples living together in the Netherlands. In that year approximately 19% of these couples married and approximately 11% had registered partnerships. These figures demonstrate that marriage is a popular option for same-sex couples when presented with the choice between marriage or a contractual option. Presenting opposite-sex couples with this choice has led to an overall decline in marriage. This pattern is comparable with the trend identified in France when heterosexual couples were presented with the option of a civil solidarity pact.<sup>110</sup> Since 2001 the number of registered partnerships in the Netherlands has increased almost fivefold. The number of marriages however is significantly lower than around the turn of the century.<sup>111</sup>

### Legal Recognition on the basis of Status

Other jurisdictions have taken the step of altering the nature of marriage in opening it up to same-sex couples. Norrie describes how this would be achieved, 'The solution is to break marriage, as a legal concept, down into its constituent legal parts, with rights and liabilities being allocated, not according to marital status, but according to need, fairness and appropriateness in the individual case.'<sup>112</sup> It is apparent that this is an extremely current area of family law which is developing at different rates across the world. The nature of marriage is being altered in some jurisdictions.

### Spain

Spain took the step to allow same-sex marriage in 2005. Article 44 of the Spanish Civil Code states, 'Men and women have the right to marry under the provisions of this Code. Marriage will have the same requirements and effects when both parties are the same or different

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<sup>109</sup> S Kurtz, 'Standing Out' <<http://www.nationalreview.com/articles/216868/standing-out/stanley-kurtz>> Kurtz states: 'all signs point to same-sex marriage as a significant causal factor in Dutch marital decline.' Such comment was also made when the uptake of marriage declined in 2001 following the introduction of same-sex marriage. Gerber and Sifris comment that many heterosexual couples may have waited to marry in 2002 in order to marry on an auspicious date such as 2.2.2002; 20.02.2002 or 22.02.2002. P Gerber and A Sifris, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*. (April 2012) Submission to the House Standing Committee on Social Policy and Legal Affairs. Castan Centre for Human Rights Law Monash University Melbourne. 20

<sup>110</sup> See p 188.

<sup>111</sup> The Central Bureau of Statistics, Netherlands (Centraal Bureau voor de Statistiek) <<http://www.cbs.nl/en-GB/menu/themas/bevolking/publicaties/artikelen/archief/2011/2011-3331-wm.htm>> Last accessed 28 July 2012.

<sup>112</sup> K Norrie, 'Marriage Is For Heterosexuals' (n 70).

sex.’<sup>113</sup> This reform provides complete equality upon marriage for same-sex couples and opposite-sex couples.

The introduction of same-sex marriage was strongly opposed by the Roman Catholic Church. Most remarkable however was the comparison of same-sex marriage and the actions carried out by German officials in Auschwitz during the Second World War:

The Archbishop emeritus of Barcelona, Cardinal Ricard Maria Carles, expressed his support for mayors of Spain’s Partido Popular who are opposing homosexual “marriages,” because the law cannot be above conscience. In an interview with TV3, the cardinal drew a parallel between the Spanish government’s intention to require adherence to the law on homosexual unions and the actions by German officials during the World War II. He explained that the concentration camps were a result in part of the fact that some people thought they should “obey the law before their conscience.” He noted that Auschwitz was not created by criminals, but people “who believed they had to obey the laws of the Nazi government first instead of their conscience.”<sup>114</sup>

The Spanish Prime Minister at the time, José Luis Rodríguez Zapatero, commented on change, ‘We are not the first, but I am sure we will not be the last...After us will come many countries, driven, ladies and gentlemen, by two unstoppable forces: freedom and equality.’<sup>115</sup>

Since this change in the law however, the Spanish Socialist Workers’ Party have lost power in Spain. The conservative Popular Party were elected to power in December 2011, led by Mariano Rajoy. The socialist mayor Francisco Morato commented on the increase of same-sex marriages just before this change in political parties: ‘I have been holding marriages every weekend – sometimes as many as three weddings in one day – I simply haven’t stopped. A lot of people tell me they fear that Mariano Rajoy will revoke the law, so there has been a rush to go ahead with their weddings before it is too late.’<sup>116</sup> There is however no publically available evidence that the new Government is planning this turn-around.<sup>117</sup>

The National Institute of Statistics Spain released figures in 2008 which indicate that marriage between heterosexual couples is declining, whilst marriage between same-sex

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<sup>113</sup> Spanish Civil Code, Book One, Part IV Chapter II.

<sup>114</sup> Comment reported by the Catholic News Agency. Available electronically <[http://www.catholicnewsagency.com/news/cardinal\\_carles\\_conscience\\_is\\_above\\_the\\_law/](http://www.catholicnewsagency.com/news/cardinal_carles_conscience_is_above_the_law/)> accessed 26 July 2012.

<sup>115</sup> Quotation obtained from ‘Spain legalises gay marriage’ *The Guardian* (30 June 2005)

<sup>116</sup> F Govan, ‘Spain fears for turning back clock on liberal reforms’ *The Telegraph* (18 November 2011).

<sup>117</sup> A search of the Spanish Government Website returned no matching results <<http://www.lamoncloa.gob.es/IDIOMAS/9/home.htm>> accessed 28 July 2011, rechecked 12 November 2012.

couples was increasing.<sup>118</sup> This however concurs with the heterosexual ‘declining interest in the institution of marriage’ across Europe.<sup>119</sup>

### **Status and / or Contract: Some Initial Conclusions for England and Wales**

It would have been possible for England and Wales to have adopted a similar method as used in Netherlands in the creation of the *Geregistreerd Partnerschap*. Harper and Landells describe the approach to creating the 1998 provisions, ‘their Registered Partnership Act is only a few pages long, stating essentially that for every reference to spouse in existing legislation it should be taken for reference also to registered partners...’<sup>120</sup> By contrast, in our own jurisdiction a completely separate piece of legislation was created; this Act reflects the provisions contained in the *Matrimonial Causes Act 1973*, but in no way depends upon it. The implementation of a stand-alone Act has created a visual division between the provisions available to married couples and civil partners.

The French registration system has been discussed within the scope of Chapter Six, in particular the impetus behind this in terms of averting same-sex marriage. In terms of providing equal status for same-sex couples however such a move would not remedy the current position. Murphy comments on the recognition of same-sex families in Britain, he highlights:

In relation to the recognition of registered same-sex partnerships, there are two broad problems that face the courts: first, whether to deal with them on the basis of ‘contract’ or on the basis of ‘status’; and second, how to deal with the fact that there are many different forms of such partnerships.<sup>121</sup>

He concluded ‘...the status approach is far preferable to the one based on a contract analogy.’<sup>122</sup> The Spanish reform has provided complete equality. This should remain the aim of any future reform of the recognition of same-sex couples in England and Wales.

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<sup>118</sup> Instituto Nacional de Estadística *Vital Statistics: Provisional data 2008* (Press Release 4 June 2009) Available at <[http://www.ine.es/en/prensa/np552\\_en.pdf](http://www.ine.es/en/prensa/np552_en.pdf)> accessed 27 July 2012.

<sup>119</sup> P Festy ‘Legal Recognition of same-sex couples in Europe’ (n 105) 417.

<sup>120</sup> M Harper and K Landells, ‘The Civil Partnership Act 2004 in Force’ [2005] *Fam Law* 963.

<sup>121</sup> J Murphy, ‘The recognition of same-sex families in Britain - the role of private international law’ (2002) *International Journal of Law, Policy and the Family*.

<sup>122</sup> J Murphy (n 121).

## 7.4 CONCLUSION

Previous Chapters have discussed the perception that binding marital property agreement would promote the contractual model within marriage. It is possible to view this move against two of the key aspects of the *Hyde* description, 'for life' and 'one man and one woman.' The unenforceability of private agreements does give more insight in to the nature of civil partnership. The lifelong nature of marriage has been transposed across to civil partnership, and so agreements made by a same-sex couple are currently unenforceable. This highlights another concept that has been carried across, without using the term marriage. Halley describes:

...within the current debate over whether there is, or should be, same-sex marriage...we can detect a new convergence between pro-gay, rights-maximising left/liberal projects and conservative projects of various kinds. An ideologically diverse coalition is now arguing hard for seeing and enforcing marriage as a status.<sup>123</sup>

The arguments both for and against same-sex marriage supports the notion of marriage being a public union. This can be compared to the words of Cooke when describing the possibility of enforceable marital property agreements, 'Both those who advocate reform and those who oppose it argue that their position supports the institution of marriage.'<sup>124</sup> Placing same-sex couples and enforceable private agreements on the continuum reveals the separation of the facets status; the public nature of marriage and the set definition of marriage because it is a public union and thus requires a 'prevailing identity and universal basis' by having 'essential elements and invariable features.'<sup>125</sup> Bartlett contrasts this standardisation to the possibility of variation:

...it is the value I place on family diversity and on the freedom of individuals to choose from a variety of family forms, rather than my commitment to avoiding value judgements...This same value leads me to be generally opposed to efforts to standardise families into a certain type of nuclear family because a majority may believe this is the best kind of family or because it is the most deeply rooted ideologically in our traditions.<sup>126</sup>

There is support to uphold the public nature of marriage, but the essential elements are restraining progression and equality. Regan comments on this separation, 'I would maintain...the moral aspiration that marriage has expressed is not heterosexual intimacy per

<sup>123</sup> J Halley 'Behind the Law of Marriage' (n 3) 11.

<sup>124</sup> E Cooke, 'The Law Commission Consultation on Marital Property Agreements' Feb [2011] Fam Law.

<sup>125</sup> Lord Penzance in *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130.

<sup>126</sup> K Bartlett, 'Saving the Family from the Reformers' 31.U.C. Davis L. REV. (1998) 809, 817.

se, but the more general vision of responsibility based on the cultivation of a relational sense of identity.<sup>127</sup> Probert comments on how this might be achieved, ‘A more meaningful definition of marriage was advanced by Thorpe LJ, who delivered a dissenting judgment in the Court of Appeal in *Bellinger v Bellinger*.<sup>128</sup> In considering the essential elements set out in *Hyde* Thorpe LJ articulated:

But the world that engendered those classic definitions has long since gone. We live in a multi-racial, multi-faith society. The intervening 130 years have seen huge social and scientific changes. Adults live longer, infant mortality has been largely conquered, effective contraception is available to men and women as is sterilisation for men and women within marriage. Illegitimacy with its stigma has been legislated away: gone is any social condemnation of cohabitation in advance of or in place of marriage. Then marriage was terminated by death: for the vast majority of the population divorce was not an option. For those within whose reach it lay, it carried a considerable social stigma that did not evaporate until relatively recent times. Now more marriages are terminated by divorce than death. Divorce could be said without undue cynicism to be available on demand. These last changes are all reflected in the statistics establishing the relative decline in marriage and consequentially in the number of children born within marriage. Marriage has become a state into which and from which people choose to enter and exit.<sup>129</sup>

The definition of marriage put forward by Thorpe LJ following these considerations has no mention of a gender requirement, nor mention of the aspirational notion that marriage should be for life; yet upholds the public nature of status. He stated:

...I would now redefine marriage as a contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations....even in the last 30 years there has been some shift in the status of marriage within our society that has some relevance to the question of whether a minority group should be denied the election to marry.<sup>130</sup>

The nature of marriage in the modern law could be potentially very different in the future. The legal recognition of same-sex couples has on some occasions moved ahead of the development of public policy, largely because of the impetus to ensure that our law is not in breach of the European Convention for the Protection of Human Rights. Yet, the law has managed to create some form of equality so as to be Convention compatible, whilst still very much upholding the strong public policy argument over the protection of the status of

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<sup>127</sup> M Regan Jr, *Family Law and the Pursuit of Intimacy* (New York University Press, 1993) 120.

<sup>128</sup> R Probert, ‘*Hyde v Hyde*: defining or defending marriage?’ [2007] CFLQ 322.

<sup>129</sup> *Bellinger v Bellinger* [2001] EWCA Civ 1140, [128]. Notably at the following paragraph Thorpe LJ commented, ‘Of course the changes which I trace are most dramatically drawn by a contrast between the age of high Victorian moral confidence and our uncertain present.’

<sup>130</sup> *Bellinger* (n 129) [128]-[129].

marriage. The public policy issues surrounding the protection of marriage were still very much recognised in the creation of this new legal relationship. This is an area of family law which has evolved without altering the nature of marriage; it is questionable whether this position will remain tenable. This Chapter reveals that there are many elements influencing the opposition to same-sex marriage, but it is suggested that the further break away from the *Hyde* definition of marriage demonstrated by marital property agreements can be viewed as the further steps towards a more neutral definition of marriage.

## PART THREE

### MARITAL PROPERTY AGREEMENTS AND THE ROLE OF THE COURT

#### INTRODUCTION

This Part of the thesis examines the rule of public policy established in the 1929 separation agreement case *Hyman v Hyman*.<sup>1</sup> This case held that a private agreement was not capable of ousting the jurisdiction of the court.<sup>2</sup> This issue has been identified and upheld throughout the body of case law dealing with marital property agreements. Chapter One traced this facet of public policy from its conception through to *Radmacher v Granatino*;<sup>3</sup> Lady Hale reinforced the relevance of this public policy issue in 2010, ‘The issue may be simple, but underlying it are some profound questions about the nature of marriage in the modern law and the role of the courts in determining it.’<sup>4</sup> This Part focusses on the second part of this statement and examines how the role of the court is linked to the status-contract tension.

As set out in the Introduction, status and contract are traditionally viewed as being antithetical in nature, yet it is possible to observe that these concepts overlap significantly in areas where there are both private interests and public interests to take into consideration.<sup>5</sup> Furthermore, marriage as a status is regarded to be an institution, a public union, thus controlled by the State, yet marriage as a contract is a private union, controlled by the parties, and is therefore variable.<sup>6</sup> The status-contract tension can be observed with regard to financial orders: the financial division is a matter of public concern and therefore can not be surpassed by a private agreement.

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<sup>1</sup> [1929] AC 601.

<sup>2</sup> This quotation appears in Chapter One at p 41, but repeated here for clarity: Lord Halisham LC stated, ‘... the power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction.’ *Hyman v Hyman* [1929] All ER Rep 245, 251.

<sup>3</sup> *Radmacher v Granatino* [2010] UKSC 42.

<sup>4</sup> *Radmacher* (n 3) [132].

<sup>5</sup> H Hunter, ‘An Essay on Status and Contract: Race, Marriage, and the Meretricious Spouse.’ 64 Va. L. Rev. 1039 (1978), 1039.

<sup>6</sup> See for example J Halley ‘Behind the Law of Marriage (I): From Status/ Contract to the Marriage System’ Harvard Journal of the Left, Vol. 6.1, 2010. See also Swisher, P. Miller, A and Singer, B ‘Family Law: Cases, Materials and Problems’ (Matthew Bender & Co; 2nd edition, Oct 1998.) The terminology of status and contract and the strain between these two concepts is explained at p 2 with the addition of public and private; ‘tension between marriage as a public status and marriage as a private contract.’

This Part of the thesis is set out in two Chapters. Chapter Eight questions whether the current level of discretion afforded to the judiciary is propelling the movement along the status-contract continuum due to dissatisfaction with the current provisions regulating financial orders. Chapter Nine further scrutinises the proposals from the Law Commission and demonstrates that if reform were to occur, then the model for reform selected would potentially pinpoint marriage on the continuum depending on to what extent the model relies upon the public nature of marriage against contractual freedom.

## CHAPTER EIGHT

### THE COURT'S DISCRETION: PROPELLING MOVEMENT TOWARDS CONTRACT?

The result of restricting the ability of a couple to create an enforceable marital property agreement is that the courts presently retain the discretion to take the final decision on the division of property, if this should be required. The current stance taken by the judiciary is that such an agreement can be taken into account as a factor in s.25 Matrimonial Causes Act 1973.<sup>1</sup> Intervention from Parliament would still be required in order to alter the position any further.<sup>2</sup> It was described in Chapter Three that this position moves marital property agreements to being as close to binding as the judiciary could do so.<sup>3</sup> Lord Philips set out this current stance in *Radmacher v Granatino*:<sup>4</sup>

A court when considering the grant of ancillary relief is not obliged to give effect to nuptial agreements...The parties cannot, by agreement, oust the jurisdiction of the court. The court must, however, give appropriate weight to the agreement...Under English law it is the court that is the arbiter of the financial agreements between the parties when it brings a marriage to an end. A prior agreement between the parties is only one of the matters to which the court will regard.<sup>5</sup>

The later rule of public policy set out in 1929<sup>6</sup> is directly connected to the upholding of the public status of marriage, it is related to the notion that society has an interest in the economic arrangements of a couple upon divorce and that this can be most effectively carried out by the courts. The enforceability of private agreements directly challenges this notion. Lady Hale commented in *Radmacher*, 'The question for us is how far individual couples should be free

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<sup>1</sup> Chapter Three set out the current position from the decision in *Radmacher v Granatino* [2010] UKSC 42, [52]: 'If parties who have made such an agreement, whether ante-nuptial or post-nuptial, then decide to live apart, we can see no reason why they should not be entitled to enforce their agreement. This right will, however, prove nugatory if one or other objects to the terms of the agreement, for this is likely to result in the party who objects initiating proceedings for divorce or judicial separation and, arguing in ancillary relief proceedings that he or she should not be held to the terms of the agreement.' See above at p 105.

<sup>2</sup> The Law Commission describe: 'Our consultation asks whether there should be legislative reform to enable couples effectively to contract out of ancillary relief, and out of the court's discretion, by entering into an agreements in a prescribed form and subject to appropriate safeguards.'  
The Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) para 1.11

<sup>3</sup> See Chapter Three p 112, and specifically D Hodson, 'English Marital Agreements for International Families After *Radmacher*' [2011] IFL 31. See also, H Trimm, '*Radmacher v Granatino*: The Wait is Over' Nov [2010] Fam Law, 'Rightly or wrongly there is now a presumption that the court will give effect to a nuptial agreement...It is no longer just one of the circumstances of the case. While this may encourage more couples to enter such agreements knowing that the court is much more likely to give effect to them, it is unlikely to reduce ancillary relief litigation as there remains plenty to fight about.'

<sup>4</sup> [2010] UKSC 42.

<sup>5</sup> (n 4) [2]-[3].

<sup>6</sup> *Hyman v Hyman* [1929] All ER Rep 245.

to re-write that essential feature of the marital relationship as they choose.<sup>7</sup> Enforceable marital property agreements would demonstrate a move along the status-contract continuum, towards recognising private autonomy.<sup>8</sup> This Chapter demonstrates that the desire for enforceable marital property agreements can be linked to the fact that the current system has been described as ‘not unlike entering a casino.’<sup>9</sup>

The question this Chapter addresses is if the level of discretion held by the courts is propelling movement towards contract then it is feasible that a more fundamental reform should occur prior to any reform to make marital property agreements enforceable. Moreover, this Chapter proposes how marital property agreements could fit into a modified system. The meeting of needs is considered, followed by division of any surplus funds. The meeting of needs can be improved by providing an objective or the use of guidelines. Once needs have been met, it is proposed that equal sharing of matrimonial property should be the default basis of allocating a surplus. However, there should be the ability to escape this starting point by private agreement, although the meeting of needs would be safeguarded. This would strike the balance between certainty, autonomy and ensuring that needs are met. There is scope for introducing a hybrid system, combining the antithetical elements of discretion and certainty. These two concepts provide a further example of notions which sit at the two ends of the status-contract continuum.

### 8.1 THE LAW OF FINANCIAL RELIEF ON THE PROPOSED CONTINUUM

There have been very recent developments in this area. The Law Commission’s project on marital property agreements has been extended to include the court’s treatment of non-matrimonial property in financial provision and to bring necessary clarity to the needs to be met following a divorce.<sup>10</sup> The supplementary consultation paper, *Matrimonial Property, Needs and Agreements*<sup>11</sup> was released in September 2012. Prior to this Consultation, the

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<sup>7</sup> *Radmacher v Granatino* (n 4) [132].

<sup>8</sup> The availability of separation agreements under the banner marital property agreements was recognised in Part One.

<sup>9</sup> J Morley ‘Enforceable Prenuptial Agreements: Their Time Has Come’ [2006] Fam Law 768.

<sup>10</sup> Further details of the extended project are available at <<http://lawcommission.justice.gov.uk/areas/marital-property-agreements.htm>> and E Cooke, ‘Pre-nups and Beyond: What is the Law Commission up to now?’ [2012] Fam Law 323.

<sup>11</sup> The Law Commission, *Matrimonial Property, Needs and Agreements: A Supplementary Consultation Paper* (Consultation Paper No 208, 2012).

movements in the judicial interpretation of s.25 of the Matrimonial Causes Act had been highlighted as a possible factor which has increased the impetus for reform in this area.<sup>12</sup>

Cretney commented on the position in 2003, providing a concise account of the difficulties caused in this area of the law by upholding of the notion that marriage carries legal status:

...the justification for the survival, especially in its application to financial matters, of the principle that marriage creates a legal status the incidents of which the parties are debarred from amending... the law's refusal to allow the parties to regulate the financial consequences of the ending of their partnership by private agreement is no longer acceptable and that legislation is accordingly required.<sup>13</sup>

Cretney is critical of the current stance taken towards marital property agreements in England and Wales, commenting, 'the paternalism implicit in our refusal to recognise what is widely accepted in continental Europe and the US seems to reflect a view of the relationship between the courts and the family almost as outdated as the rules seeking by legal means to uphold the stability of the family...'<sup>14</sup> It is apparent that the process of financial relief, the availability of enforceable marital property agreements and the legal status of marriage are very much interrelated issues. The vast discretion vested in the courts in deciding financial relief upon divorce is a consequence of the traditional notion that the whole community has an interest in the financial circumstances of a divorcing couple; therefore restricting the ability to oust the jurisdiction of the court is a matter of public policy. A move to limit this discretion through legislative reform of s.25 MCA 1973 would alter this dynamic.<sup>15</sup> Yet the link between marital property agreements and the potential requirement for a reform of financial relief is very clear. The calls for reform are noted by the Law Commission, commenting, '...if the

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<sup>12</sup> Scherpe has linked this to the change in the application of s.25 commenting that England and Wales grant wide discretion to the judiciary rather than having a matrimonial property regime as seen across Europe. See J Scherpe, 'A Comparative View of Pre-Nuptial Agreements' IFLJ March 2007 (18). '...England and Wales, unlike continental jurisdictions, do not have a matrimonial property regime as such but allow for a wide discretion of the court as to the division of property and ancillary relief. However, recent decisions, and of course particularly *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186, have caused some to renew their call to give pre-nuptial agreements greater importance in this country.'

<sup>13</sup> S Cretney, 'The Family and The Law – Status Or Contract?' [2003] CFLQ 403.

<sup>14</sup> S Cretney, 'The Family and The Law – Status Or Contract?' (n 13).

<sup>15</sup> The Board in *MacLeod v MacLeod* commented that the Law Commission had declined to review the set of principles which regulate ancillary relief upon divorce. The legal status of marriage would be an overwhelming factor to be considered in proposals to reform the ancillary relief system in this jurisdiction. *MacLeod v MacLeod* [2008] UKPC 64, [34], 'The Board notes that the Law Commission for England and Wales, in their 10th programme of Law Reform, have declined to embark upon a review of the principles governing ancillary relief on divorce. But they have announced their intention to examine the status and enforceability of agreements made between spouses and civil partners (or those contemplating marriage or civil partnership) concerning their property and finances.' Reference is made to the *Tenth Programme of Law Reform* (Law Com No 311, 2008); the scope of the marital property agreement project is outlined at paras 2.17 – 2.20.

difficulty with the law of ancillary relief – at least for the rich – is its uncertainty, one solution may be to look closely at the potential for couples to contract out of uncertainty.<sup>16</sup>

### **The Current Law: Financial Relief under the Matrimonial Causes Act 1973**

The current law relating to financial relief will now be considered in order to scrutinise how this system is developing and to place the current position on the continuum. This section of the Chapter will provide a basis to discuss how financial relief has been influenced by the understanding of status and also give the foundation upon which it is possible to analyse how this present position could be influenced by contract.

The current provisions for financial relief are contained in the Matrimonial Causes Act, which largely came into force 23 May 1973. This Act contains provisions for many of the areas discussed in previous chapters, for example the requirements for obtaining a divorce<sup>17</sup> and the validity of maintenance agreements.<sup>18</sup> Probert comments on the overall amount of discretion granted to the judiciary in the application of the provisions available for financial relief, stating that English law is remarkable on two accounts; the extent of the powers granted to the courts over both income and assets and the ‘almost unfettered discretion’ which is granted to our judiciary.<sup>19</sup> The current system can be criticised for being too unpredictable, but it does allow for a bespoke ‘package’ to be created for individual couples. Under the Matrimonial Causes Act 1973 Part II the court has very wide ranging powers to redistribute both finances and property, in relation to periodical payments,<sup>20</sup> lump sum orders,<sup>21</sup> transfer of property,<sup>22</sup> orders for sale of property<sup>23</sup> and pension sharing orders.<sup>24</sup> The court will then be able to use its powers to redistribute the property. A clean break principle will be worked towards.<sup>25</sup>

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<sup>16</sup> The Law Commission, *Marital Property Agreements (n 2)* para 2.69.

<sup>17</sup> s.1 Matrimonial Causes Act 1973.

<sup>18</sup> s.34 Matrimonial Causes Act 1973.

<sup>19</sup> See R Probert, *Cretney's Family Law* (6<sup>th</sup> edn, Thomson Sweet & Maxwell, London, 2006).

<sup>20</sup> s.23(1) Matrimonial Causes Act 1973.

<sup>21</sup> s.23 (1)(c) Matrimonial Causes Act 1973.

<sup>22</sup> s.24 Matrimonial Causes Act 1973.

<sup>23</sup> s.24 (A) Matrimonial Causes Act 1973.

<sup>24</sup> s.24 B Matrimonial Causes Act 1973.

<sup>25</sup> This principle was set out by the House of Lords in *Minton v Minton* [1979] AC 593. Scarman LJ stated: ‘There are two principles which inform the modern legislation. One is the public interest that spouses, to the extent that their means permit, should provide for themselves and their children. But the other - of equal importance - is the principle of the ‘clean break’. The law now encourages spouses to avoid bitterness after family breakdown and to settle their money and property problems. An object of the modern law is to encourage

## Section 25 Factors

These provisions have been briefly covered in Chapter Six, where a comparison was drawn between these provisions to the Law Commission proposals for cohabitants.<sup>26</sup> The first factor to be addressed by the judiciary is contained in s.25 (1) Matrimonial Causes Act 1973, which states that the initial consideration has to be the welfare of any child of the family under the age of eighteen. The following subsection of s.25 contains eight factors which have to be taken into consideration before the order can be made. The first of the factors listed in this section takes into account the income, foreseeable sources of income and related factors such as increases in earning capacity of each spouse.<sup>27</sup> Within this factor there is discretion; the court did not expect a forty year old woman who had carried out a traditional role within the marriage to gain employment. The wife in *A v A (Financial Provision)*<sup>28</sup> had a degree in engineering, but as she had married a wealthy business man at the age of twenty four she had never gained any work experience.<sup>29</sup> The courts took this into account, and made an appropriate order to reflect this.

The second element listed is the idea of the 'needs' of the parties.<sup>30</sup> This is a particularly subjective notion and so the courts developed the idea of meeting 'reasonable requirements,' when dealing with wealthier couples. This will be discussed later. The factor relating to the standard of living of the family prior to the breakdown of the marriage<sup>31</sup> has also required some judicial discretion, setting out that, 'hopes and expectations, as such, are not an appropriate basis on which to assess financial needs.'<sup>32</sup> The age of the parties and the length

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each to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.' *Minton v Minton* [1979] AC 593, 608.

<sup>26</sup> Chapter Six examined the proposals set out in The Law Commission *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307 Cm 7182, 2007). This discussion begins at p 165.

<sup>27</sup> s.25 (2)(a) Matrimonial Causes Act 1973: the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including the case of earning capacity any increase in that capacity which would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire.

<sup>28</sup> [1998] 3 FCR 421.

<sup>29</sup> *A v A (Financial Provision)* [1998] 3 FCR 421. 'In the present case, it was not reasonable to expect the wife in the context of this marriage at her present age to embark upon what to produce such a sum would most likely have to be either full-time employment in some modest capacity having regard to her lack of specific skills, or the risk of a small business of her own or in partnership with others the like of which she had had no experience of running. Therefore appropriate provision should be made on the basis that she was not able to develop a significant earning capacity.'

<sup>30</sup> s.25 (2)(b) Matrimonial Causes Act 1973: the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future.

<sup>31</sup> s.25 (2)(c) Matrimonial Causes Act 1973.

<sup>32</sup> Lord Nicholls of Birkenhead speaking in *Miller; McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186 [58].

of the marriage is another factor to be considered;<sup>33</sup> with the fundamental idea that the shorter the marriage the smaller the award is likely to be. Yet it is dependent upon the circumstances of the case, for example, if a child has been born during the marriage then this will clearly make a difference to the award. Disabilities are listed in this section,<sup>34</sup> if a spouse has a disability this will potentially increase the amount of support they will require after the ending of the marriage. The factor of contributions is a current issue;<sup>35</sup> this is discussed below in relation to the recent cases which have made some significant changes to the way in which this is taken into account.

The conduct of the parties is a consideration for the courts,<sup>36</sup> the way in which this has been interpreted means that it would presently require a spouse to demonstrate extreme behaviour for this to influence the division of property.<sup>37</sup> This factor became the focus of speculation following *Miller v Miller*<sup>38</sup> in 2005, in which the judiciary suggested that the short marriage could be given less weight on the basis that the husband was to blame for the breakdown of the marriage.<sup>39</sup> If conduct was to be interpreted as contributing to marital breakdown this position becomes far more difficult to ascertain, Eekelaar states, ‘...marriage breakdown is so ubiquitous, can we be confident that no judge likely to exercise this jurisdiction could ever have been responsible for the breakdown of a marriage?’<sup>40</sup> Bird provides a practitioner’s view point on this element of s.25, ‘Ask any practitioner what is the most difficult task he or she faces and high on the list will be that of persuading the client that the court is not

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<sup>33</sup> s.25 (2)(d) Matrimonial Causes Act 1973.

<sup>34</sup> s.25(2)(e) Matrimonial Causes Act 1973: any physical or mental disability of either parties to the marriage.

<sup>35</sup> s.25(2)(f) Matrimonial Causes Act 1973: the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family.

<sup>36</sup> s.25 (2)(g) Matrimonial Causes Act 1973: the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard.

<sup>37</sup> The shift in approach taken towards this factor has been examined in Chapter Five, see p 172, where reference was made to *Wachtel v Wachtel* [1973] Fam 72. Notably, the matter was considered by the Law Commission in *Family Law – The Financial Consequences of Divorce*, (1981) (Law Com no 112), the proposal ‘to take account of conduct where to do otherwise would offend a reasonable person’s sense of justice’ was implemented by paragraph (g) through 25(2) of the Matrimonial and Family Proceedings Act 1984.

<sup>38</sup> [2006] UKHL 24.

<sup>39</sup> Lord Nicholls: ‘...there remains a widespread feeling in this country that when making orders for financial ancillary relief the judge should know who was to blame for the breakdown of the marriage. The judge should take this into account. If a wife walks out on her wealthy husband after a short marriage it is not “fair” this should be ignored. Similarly if a rich husband leaves his wife for a younger woman. At one level this view is readily understandable. But the difficulties confronting judges if they seek to unravel mutual recriminations about happenings within the marriage, and the undesirability of their attempting to do so, have been rehearsed many times. In *Wachtel v Wachtel*, [1973] 1 All ER 113, [1973] 2 WLR 84 [1973] Fam 72, 90, Lord Denning MR led the way by confining relevant misconduct to those cases where the conduct was “obvious and gross”. [2006] UKHL 24, [60]-[61]. See above also at pp. 172 and 173.

<sup>40</sup> J Eekelaar, ‘Miller v Miller: The Descent into Chaos’ [2005] Fam Law 870, 871.

interested in who was to blame for the breakdown of the marriage.’<sup>41</sup> Evidently this case caused some confusion; *Miller v Miller* is discussed in more detail later. The eighth and final element for the consideration of the court is the loss of a benefit because of the ending of the marriage; this encompasses the ideas of pensions and also future inheritances.<sup>42</sup>

### **Section 25 (2) in Practice: *Piglowski* and Pluralism**

*Piglowski v Piglowski*<sup>43</sup> established that there is no particular order for these considerations to be approached, the s.25 list of factors has been deliberately created in this way by Parliament so as to allow flexibility and the exercise of judicial discretion. Lord Hoffman deliberated over the balance to be struck between the inherent flexibility conferred by Act, and the diversity in awards which could potentially flow from this:

The Act does not...lay down any hierarchy. ...These guidelines, not expressly stated by Parliament, are derived by the courts from values about family life which it considers would be widely accepted in the community. But there are many cases which involve value judgments on which there are no such generally held views... on which reasonable people may differ. Since judges are also people, this means that some degree of diversity in their application of values is inevitable and, within limits, an acceptable price to pay for the flexibility of the discretion conferred by the Act of 1973. The appellate court must be willing to permit a degree of pluralism in these matters.<sup>44</sup>

The courts will make an order that presents the best way forward for the couple based on the factors listed in s.25; maintaining a strong focus on the housing of the children and the primary carer, and then the housing needs of the other parent. The income needs of all concerned are addressed as best as possible, and any remaining assets can be redistributed. Given the large amount of discretion that is granted to the judiciary in the distribution of assets upon divorce it is perhaps unsurprising that this is not a static area of the law; the way in which the judiciary have used this overarching discretion has evolved.

Prior to the introduction of the Matrimonial and Family Proceedings Act 1984, the Matrimonial Causes Act 1973 had a statutory objective that the judiciary must aim to ‘place the parties in the financial position in which they would have been if the marriage had not broken down.’ When this overarching principle was removed nothing was put into the

<sup>41</sup> R Bird, ‘*Miller v Miller*: Guidance or Confusion?’ [2005] Fam Law 874, 881.

<sup>42</sup> s.25 (2)(h) Matrimonial Causes Act 1973: in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, the party will lose the chance of acquiring.

<sup>43</sup> [1999] 2 FLR 276; [1999] 2 FCR 481.

<sup>44</sup> Lord Hoffman, *Piglowski v Piglowski* [1999] 2 FLR 276; [1999] 2 FCR 481, 495.

legislation to replace it.<sup>45</sup> Lady Hale commented on the current position, ‘Under the former “tailpiece” or statutory objective, this was a life-long commitment, surviving divorce although ending on the receiving party’s remarriage. Under the present law, it is no longer life-long.’<sup>46</sup> This will not be the case if the couple has children, or if one of the spouses developed a disability during the course of the marriage; if either of these circumstances arises there may well be a longer financial commitment. Lord Justice Thorpe comments:

The removal of an overriding objective without any replacement had the obvious consequences of enlarging yet further the ambit of the judges’ discretion. However, the judges reasonably inferred the Parliament must have intended them to craft outcomes that were seen to be fair to each party, even if Parliament had not so stated.<sup>47</sup>

The removal of this statutory objective did leave these provisions yet more open to judicial discretion. It will be seen below that the Law Commission are aiming to give the meeting of needs an objective, a change which would provide greater certainty.

### **Meeting Needs: The Unwavering Factor**

The attempt to meet the needs of the parties is an unwavering desire, and is currently subject to the Law Commission’s scrutiny in their supplementary consultation paper. Currently, in cases where the couple have children the court will initially look at the primary carer of the children, and attempt to secure a home and income for them within the division of assets. It has been stated that, ‘maintaining the home and its contents and in meeting her other expenditure external to the home, such as school fees, holidays, routine travel expenses, entertainments, presents, etc.’<sup>48</sup> will also be taken into consideration when considering meeting the needs of the primary carer. In the consultation paper *Marital Property Agreements*,<sup>49</sup> the Law Commission identified five distinctive features of the court’s present interpretation of the idea of meeting needs. Firstly, the court will look at the income needs of the parties and make periodical payments accordingly. This idea takes into account the loss of income from giving up a career to care for children, and furthermore recognises that it may not be possible to simply return to employment after a passage of time.

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<sup>45</sup> The statutory objective was substituted by s.3 Matrimonial and Family Proceedings Act 1984.

<sup>46</sup> *Radmacher v Granatino* (n 4) [187].

<sup>47</sup> Lord Justice Thorpe, ‘London: the Divorce Capital of the World’ [2009] Fam Law 21.

<sup>48</sup> Thorpe LJ, *Re P* [2003] EWCA Civ 837, [47].

<sup>49</sup> The Law Commission, *Marital Property Agreements* (n 2) 25 and 26.

The second element that the court keeps in mind is the importance of ownership of the matrimonial home. The Law Commission contrasts the value placed on owner occupation in this jurisdiction to the position in continental Europe, and therefore the emphasis placed on the division of the capital value of the family home.<sup>50</sup> This cultural difference is an element recognised very early on in the interpretation of the Matrimonial Causes Act 1973, and remains an extremely relevant factor in terms of England and Wales considering a community of property regime, as discussed later. Speaking in *Mesher v Mesher and Hall*<sup>51</sup> Davies LJ set out a principle which is now recognised as a ‘Mesher Order.’<sup>52</sup> Furthermore, the court acknowledges the future ability of the parties to secure a mortgage by granting a larger share of the value of the house to the parent who is no longer in work. The court will always avoid making an order which will leave one spouse dependent on state benefits, and will not structure the financial relief so that there is no longer an incentive to remain in employment. The last feature of the court’s interpretation is the ability to share out assets which the couple had intended to become a provision in old age.

There is some discussion regarding how needs should be interpreted in case law Lord Nicholls provided a broad view of what should be considered when addressing needs:

When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.<sup>53</sup>

Baroness Hale however provided a narrower view of how the courts should account for needs:

The most common rationale is that the relationship has generated needs which it is right that the other party should meet. In the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage...This is a perfectly sound rationale where the needs are the

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<sup>50</sup> The Law Commission, *Marital Property Agreements* (n 2) para 2.28: ‘We live in a society where owner-occupation is nowhere near so plentiful or so acceptable as it is, for the most part, in continental Europe.’

<sup>51</sup> [1980] 1 All ER 126.

<sup>52</sup> *Mesher v Mesher and Hall* [1980] 1 All ER 126, 128: Davies LJ, ‘What is wanted here is to see that the wife and daughter...should have a home in which to live rather than that she should have a large sum of available capital...It would, in my judgment, be wrong to strip the husband entirely of any interest in the house...the house is held by the parties in equal shares on trust for sale but that it is not to be sold until the child of the marriage reaches a specified age or with the leave of the court.’

<sup>53</sup> *Miller; McFarlane* (n 32) [11].

consequence of the parties' relationship, as they usually are. The needs generated by such choices are a perfectly sound rationale for adjusting the parties' respective resources in compensation.<sup>54</sup>

Notably, this view takes into account the idea of compensation as a rationale, this notion is currently being considered by the Law Commission. It is crucial to bear in mind however when considering the application of s.25 and the concept of 'needs' that in a great deal of cases there may only just be enough assets to meet needs. However, where there is a surplus of assets following this consideration, then the courts originally worked towards meeting the reasonable requirements of the spouses. The approach has been abandoned.<sup>55</sup> The way in which the judiciary have dealt with the surplus has developed recently.

### **Dealing with a Surplus by Judicial Decision**

Two key cases demonstrate the changing judicial interpretation and application of s.25 of the Matrimonial Causes Act 1973 in a bid to create 'fairness.' Yet, as Lord Nicholls stated, 'Fairness is an elusive concept.'<sup>56</sup> This is perhaps partly why this is left to the discretion of the judiciary, as Lord Nicholls goes on to state, 'Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next.'<sup>57</sup> The change in the social and moral values which dictate our understanding of 'fairness' can be best reflected by a judiciary who have been vested with vast discretionary powers; rather than a rigid formulaic approach. Furthermore, it should not be forgotten that it is the evolving nature of marriage within our society which is at the heart of this change in approach. This is however based upon discretion, the interest demonstrated towards enforceable marital property agreements suggests that a certain level of certainty is now required.

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<sup>54</sup> *Miller; McFarlane* (n 32) [138].

<sup>55</sup> The ceiling of reasonable requirements can be seen as keeping spouses in the manner to which they had become accustomed to, and so there was always going to be a ceiling to this requirement. The Law Commission commented, 'The overall effect was a "glass ceiling" that limited the maximum award to somewhere between £12 million and £15 million.' The Law Commission, *Marital Property Agreements* (n 2) 27. The gender discrimination demonstrated by this approach certainly did not go unnoticed as Barlow comments '...it was discriminatory to the homemaker, typically the wife, to place a greater value on financial contributions than on domestic contributions to the welfare of the family when deciding property division.' A Barlow *National Report: England and Wales* Available online <[www.ceflonline.net/Reports/pdf3/England.pdf](http://www.ceflonline.net/Reports/pdf3/England.pdf)> Last accessed 28 July 2011.

<sup>56</sup> *Miller; McFarlane* (n 32) [4].

<sup>57</sup> *Miller; McFarlane* (n 32) [4].

### ***White v White: The Yardstick of Equality***

The Whites had been married for thirty three years and had net assets of £4.6 million. Both husband and wife had farmed individually prior to their marriage in 1961, once married they continued to farm forming an equal partnership. Upon divorce the wife sought to claim £2.2 million so as to enable her to continue to farm on her own again, she had originally brought £1.5 million into the marriage. The trial judge awarded the wife £800,000 on a clean break basis meeting her needs for the rest of her life; this award left the farm with the husband. When the case reached the House of Lords, Lord Nicholls discussed that equal division of the assets should not be seen as a presumption, but rather a yardstick:

Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination. This is not to introduce a presumption of equal division under another guise.<sup>58</sup>

The equality of division should therefore be seen merely as a guide. Discretion, rather than certainty, is still the prevailing concept. Hence, Cretney's comment that this development is justified within the scope of this provision.<sup>59</sup> This can be contrasted to the view held by Eekelaar on the issue of equal division, 'even if confined to after-acquired property...that could only rest on a principle that marriage in itself, from day 1, establishes an entitlement to an equal share to such property. That is hard to extract from s.25...'<sup>60</sup> In *White* the wife was unable to claim 50% based on the consideration being given to the husband's family's contribution. Yet, Eekelaar considers even with the ability to adjust the equal division by introducing discounts that this interpretation is 'extending judicial creativity to its limits, and perhaps beyond.'<sup>61</sup> The yardstick approach to equal sharing does however have the benefit of allowing equal recognition to be given to both financial and non-financial contributions provided by husband and wife. Mr Justice Mostyn comments on the shift in the interpretation of s.25 Matrimonial Causes Act 1973:

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<sup>58</sup> *White v White* [2000] 2 FLR 981.

<sup>59</sup> This comment was made earlier in the Chapter, see S Cretney, 'The Family and The Law – Status Or Contract?' (n 13).

<sup>60</sup> J Eekelaar, 'Asset Distribution on Divorce and Property' [2003] Fam Law 828, 833.

<sup>61</sup> J Eekelaar, 'Asset Distribution on Divorce and Property' (n 60) 833.

It is an extraordinary truth that when two people get married they likely have little idea what they are signing up for particularly in terms of economic obligations. And even if they were very well informed had they married before 2000 they would have thought they were signing up for very different economic arrangements to those now imposed.<sup>62</sup>

The suggestion of equal division put forward in *White* was repeated in *Lambert v Lambert*<sup>63</sup> with Thorpe LJ stating, ‘...a formula for the equal division of whatever surplus there may be having made fair provision for the assessed needs of each of the parties before the court would produce a fair outcome in many test cases.’<sup>64</sup> Cooke comments, ‘Of course, the effect of the yardstick of equality, was not, I think, supposed to ‘trickle down’ to the ‘ordinary divorce.’<sup>65</sup> It is apparent that the approach of equal sharing can only be taken to a surplus of money.<sup>66</sup>

### ***Miller v Miller; McFarlane v McFarlane: Needs, Compensation and Sharing***

The Miller’s marriage was relatively short; lasting just under three years. The husband had assets of over £17 million, this figure had risen during their marriage. Although they were only married for three years the wife was awarded £5 million; this representing half of the increase of assets during the course of the marriage. The McFarlanes, on the other hand, had been married for sixteen years, during this time the wife had given up a successful career in order to bring up their children. The couple had agreed to share their £3 million assets, but the House of Lords was required to decide on the amount to be paid in periodical payments. The husband earned £750,000 per year, and the Law Lords decided that a third of this should be paid to the wife in the form of a periodical payment. At the outset of this case Lord Nicholls commented on the vast amount of discretion granted to the court, ‘Primary consideration must be given to the welfare of any children of the family. The court must consider the feasibility of a ‘clean break.’ Beyond this the courts are largely left to get on with it for themselves. The courts are told simply that they must have regard to all the circumstances of the case.’<sup>67</sup> Again, this demonstrates the ‘unfettered’ discretion granted to

<sup>62</sup> Mr Justice Mostyn’s speech to the All Party Parliamentary Group on Family Law, ‘What is Marriage? What should it be?’ Available electronically at < <http://www.familylawweek.co.uk/site.aspx?i=ed70848> > Last accessed 11 November 2011.

<sup>63</sup> [2002] EWCA Civ 1685, [39].

<sup>64</sup> *Lambert v Lambert* [2002] EWCA Civ 1685, [39].

<sup>65</sup> E Cooke, ‘The Future for Ancillary Relief’ in N Lowe and G Douglas (eds), *The Continuing Evolution of Family Law* (Jordan Publishing Limited, Bristol, 2009) 219.

<sup>66</sup> Although evidence suggests that this approach may be being applied in ordinary cases. See, L Fisher, ‘The Unexpected Impact of *White* [2002] Fam Law 108.

<sup>67</sup> *Miller; McFarlane* (n 32) 4- 5.

the courts in such cases. The courts developed further guidelines for the division of any surplus assets, Baroness Hale considered the 'rationale for distribution' to be; 'the relationship has generated needs,'<sup>68</sup> 'compensation for relationship generated disadvantage'<sup>69</sup> and 'the sharing of fruits of the matrimonial partnership.'<sup>70</sup> The application of compensation and sharing can only be considered once needs have been met.

Thorpe LJ explained the application of the *White* yardstick of equality in the 'typical' case:

The cross-check of equality of outcome is intended to be a safeguard against discrimination....it is the first duty of the court of trial to apply the s 25 criteria in search of the overarching objective of fairness. It seems to me that in search of that overarching objective in the typical ancillary relief case the District Judge will always look first to the housing needs of the parties. Homes are of fundamental importance and there is nothing more awful than homelessness. So in the ordinary case the court's first concern will be to provide a home for the primary carer and the children (whose welfare is the first consideration). Of course in many cases the satisfaction of that need may absorb all that is immediately available.<sup>71</sup>

In reality the idea of 'compensation' is already being calculated within 'need.'<sup>72</sup> The introduction of 'sharing' alongside the yardstick of equality has prompted much commentary and comparisons being drawn to a community of property regime. It is noteworthy that this change in approach was discussed by the Law Commission in the *First Report in Family Property: A New Approach* in 1973 when discussing the possibility of introducing a community of property regime in England and Wales:

The pattern of social development in the future may be that on the end of a marriage an able-bodied spouse would be expected to become self-reliant and independent as soon as possible rather than to look to the former marriage partner as a source of support for life. A system of sharing on fixed principles may be more in harmony with this idea than the present system of separate property, reinforced, in certain situations, by the enforcement, possibly over a long period, of maintenance obligations determined with regard to discretionary factors.<sup>73</sup>

Whilst some may view the developments being made by the court as positive demonstration of the advantageous discretion which has been vested upon them by Parliament, it is apparent

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<sup>68</sup> *Miller, McFarlane* (n 32) 659.

<sup>69</sup> *Miller, McFarlane* (n 32) 660.

<sup>70</sup> *Miller, McFarlane* (n 32) 660.

<sup>71</sup> *Cordle v Cordle* [2001] EWCA Civ 1791, [2002] 1 WLR 1441, [33].

<sup>72</sup> This is certainly the view take by the Law Commission, *Marital Property Agreements* (n 2) para 2.56: 'The introduction of compensation as a distinct concept has made no difference in the level or nature of the awards made. We think that is may be best regarded as a way of spelling out something that has always been regarded as an element of needs.'

<sup>73</sup> The Law Commission, *First Report in Family Property: A New Approach* (Law Com. No. 52, 1973) 42.

that this view is not universal. For example, Bailey-Harris comments, '...the pattern of the law's development fails to please. It is impossible to predict when an articulated statutory principle will be seized upon in a judgment, or when a new sub-principle will be invented, or when the search for principle will simply be disclaimed.'<sup>74</sup> It is possible that the interpretation of s.25 of the Matrimonial Causes Act 1973 has simply grown beyond its original strength and that a new piece of legislation is required to codify these principles.

### **The Supplementary Consultation Paper: Matrimonial Property, Needs and Agreements**

The Law Commission begin by questioning whether the meeting of needs is still required following the introduction of sharing in *White*. However, given that there may be nothing to share, or that sharing can leave needs unmet, it is decided that this is still a necessary provision.<sup>75</sup> What it lacks however is an objective. Comparisons are drawn between a family law judge and a bus driver who has only been told to take the bus to a reasonable destination.<sup>76</sup>

#### **Needs: Finding a Suitable Objective**

The Law Commission consider the principled basis for reform being a compensatory basis. The discussion for this model draws on the work of Ellman in 1989, 'The Theory of Alimony.'<sup>77</sup> This work proposed that the financially weaker spouse should receive what they would have received if they had not given up work, rather than what they would have received if they had remained married.<sup>78</sup> This is a very different to the approach outlined by Baroness Hale, with regard to setting needs at a level as close as possible to the standard of living which they enjoyed during the marriage. Ellman's hypothesis may be more achievable in most instances, however the problems of this view are outlined within the consultation. Namely, there would be the difficulty of looking back and speculating what might have happened and also how this basis would apply if one spouse becomes disabled during the relationship.<sup>79</sup> The 2002 reform of New Zealand utilises the compensatory basis allowing a one off lump sum payment by way of recompense.<sup>80</sup> In conclusion, the Law Commission

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<sup>74</sup> R Bailey-Harris, 'The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales' *IJLP&F* 2005 19 (229).

<sup>75</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) para 4.19.

<sup>76</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) para 3.3.

<sup>77</sup> 77(1) California Law Review 1.

<sup>78</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) para 4.37.

<sup>79</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) paras 4.40 and 4.49.

<sup>80</sup> s.15 Property (Relationships) Act 1976.

describe this approach as inflexible and arbitrary.<sup>81</sup> Another objective considered in the consultation is the notion of reforming the system to encourage independence, particularly the encouragement of women to become independent of their husbands after divorce. Understandably the Law Commission seem to dismiss this approach somewhat by making reference to the stress and hardship potentially caused to women who are caring for young children.<sup>82</sup> It is possible that this approach could be adopted in certain circumstances, for example based on age and family commitments.

### **Discretion or Formula?**

One way to avoid the calculation of loss, and avert the notion of speculating as to what might have been, is instead to aim to equalise the spouses' position by unravelling the 'merger over time.'<sup>83</sup> This basis is used by the American Law Institute's Principles of The Law of Family Dissolution and the Canadian Spousal Support Advisory Guidelines. The American approach is to provide a formulaic calculation. The Law Commission outline that the most important components of this calculation are based on loss of standard of living and loss of earning capacity.<sup>84</sup> The Canadian approach builds upon the ALI Principles, but these are guidelines and thus their use is voluntary.<sup>85</sup> Both systems make compensation available for loss of interdependence and take into account the length of the marriage. The use of a formulaic approach is not dismissed by the Law Commission, and particular regard is taken to the issue that most couples do not have access to judicial discretion in any event.<sup>86</sup> It is noted that it would not be possible to transplant these formulas into England and Wales because they are based on different economic backgrounds and societies. The issue of owner occupation is also raised in the paper: 'It may well be that the approach to owner-occupation here means that an income sharing model by itself could not work in our society where the ability to obtain satisfactory housing depends not so much on ability to pay as on ability to borrow.'<sup>87</sup>

The consultation paper aims to collect views on what the basis of assessing needs should be in the future and whether this should be handled by applying a formula, or by still allowing discretion. Furthermore, it is evident that a pilot study would need to be run initially and so

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<sup>81</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) para 4.51.

<sup>82</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) para 4.81.

<sup>83</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) para 4.55.

<sup>84</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) para 4.63.

<sup>85</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) para 4.71.

<sup>86</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) para 4.90.

<sup>87</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) para 4.91.

views are also sought on this point. Further work is needed on the issue of needs and so this element will not be contained in the Law Commission's draft Bill. It is proposed however that this issue should be addressed before a reform of marital property agreements. Using the analogy of a judge being the bus driver in need of directions, it is proposed that solicitors and couples wishing to draft marital property agreements are in equal need of this map in order to ascertain if their journey is going to be possible.

### **Allocating a Surplus: Non-Matrimonial Property**

The link between marital property agreements and non-matrimonial property is clear in the consultation paper: 'If it becomes possible to contract out of sharing named items of property, agreements should specify what is to happen if the property is sold and replaced, or if the other spouse invests in it, and so on; but default rules are needed in case the parties do not make provision for this.'<sup>88</sup> Useful examples of non-matrimonial property are given by the Law Commission: property inherited from parents; jewellery; a collection; a property owned prior to marriage or a gift received during the marriage.<sup>89</sup> It is likely that the meeting of needs will be required before non-matrimonial property will be considered:

We are committed to a policy of giving priority to needs; in particular, qualifying nuptial agreements will be subject to challenge if their effect is that needs are not met. So our preliminary view is that non-matrimonial property, while generally not shared, should be accessible to meet needs.<sup>90</sup>

What is required however is a clear definition of what non-matrimonial property is. The provisional proposal is that it should include property held in a sole name prior to the marriage and property received by way of gift or inheritance. This would have an impact upon the sharing of the matrimonial home in some instances. The next problem facing the Law Commission is ascertaining whether property can become matrimonial property, even though its source has no relation to the marriage. The proposal put forward in the consultation is that property should not lose its definition of non-matrimonial property if it has been used by the family.<sup>91</sup> If the property has been sold and the proceeds put towards the matrimonial home however, the status would change.<sup>92</sup> The final quandary discussed in the consultation is where one or both spouses have invested in the non-matrimonial property and as a result the

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<sup>88</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) para 6.3.

<sup>89</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) para 6.17.

<sup>90</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) para 6.33.

<sup>91</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) para 6.77.

<sup>92</sup> The Law Commission, *Matrimonial Property, Needs and Agreements* (n 11) para 6.88.

property has grown in value. No proposal has been set out to this quandary. In the same way as described in relation to needs, it is proposed that these questions need to be addressed before a reform of marital property agreements. Suggestions are made as to how needs, a possible surplus and private agreements could interact against a set of default rules when considering the final research question examined in this Chapter.

## 8.2 THE INFLUENCE OF STATUS ON THE LAW OF FINANCIAL RELIEF

The influence of upholding status within the making of financial orders in England and Wales is particularly noteworthy in the context of this recent change in approach being demonstrated by the judiciary. The original aims of financial relief were undoubtedly influenced by the interpretation of the status of marriage. At common law a husband was bound to maintain his wife during the marriage. This duty was abolished by s.198 of the Equality Act 2010. When statutory divorce was introduced in 1857 it was thought that the wife should be entitled to apply for the pecuniary support she would have received had the marriage lasted. In its original form financial relief was to ensure that it was made clear that even after divorce there would be a link between the two spouses, and thus upholding the concept that marriage was for life. This can be compared to the financial relief provisions currently in place in Ireland where there is no mention of a ‘clean break.’<sup>93</sup> This is a point which has been discussed in case law, in *T v T*<sup>94</sup> in 2002 Lavan J stated, ‘There is no “clean break” provision in Irish Law.’<sup>95</sup> Yet this can be compared to the view of Kean CJ in the same case, which gave more scope for a clean break:

I am satisfied that, while the Irish legislation is careful to avoid going as far as the English legislation in adopting the “clean break” approach, not least because of the constitutional constraints, it is not correct to say that the legislation goes so far as virtually to prevent financial finality.<sup>96</sup>

Understandably this was a paramount issue to stress at the point of making divorce more widely available, and this concept can still be viewed in practice.<sup>97</sup>

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<sup>93</sup> Relevant legislative provisions: Judicial Separation and Family Law Reform Act 1989 (No 6), s 2. Family Law Act 1995 (No 26). Family Law (Divorce) Act 1996 (No. 33), ss 5(1) and 20.

<sup>94</sup> [2002] 3 IR 334

<sup>95</sup> *T v T* [2002] 3 IR 334, 364.

<sup>96</sup> (n 95) 386.

<sup>97</sup> It should be noted that there were calls for the introduction of a clean break principles, for example see, F Martin ‘From Prohibition to Approval: The Limitations of the ‘No Clean Break’ Divorce Regime in the Republic of Ireland’ *Int J Law Policy Family* (2002) 16 (2): 223-259, 223: ‘...it is imperative that a clean break option be available.’

Since the implementation of the Married Women's Property Act 1882 the action of marriage does not affect the property rights of each spouse: the doctrine of separation of property.<sup>98</sup> Upon marriage any property brought in by the wife automatically became the property of the husband. This is perhaps the ultimate pronouncement of marriage creating a legal status. Dissatisfaction with this position led to much activity by campaigners, resulting in various legislative provisions being introduced.<sup>99</sup> Siegel comments that, 'scholars have long described the reform of coverture as elevating married women from relations of status to contract.'<sup>100</sup> Again, this move can perhaps be better understood as a move along the continuum model, rather than the situation being presented simply as 'status' or 'contract.' There is further scrutiny of this perspective in the following Chapter.<sup>101</sup>

### **The Council of the European Union: Highlighting the Influence of Status?**

The division of marital property, and property held in a registered partnership, is a very current issue with regard to the work carried out by the Council of the European Union. The Regulations put forward by this body demonstrates the differences presently separating England and Wales from other jurisdictions; especially when considering the latest proposals on the division of matrimonial property. Some of the issues related to cross-border cases have been set out in Chapter Three, whilst examining the *Radmacher* decision. This case provided a very good example of an international couple that the EU regulations relating to private international law are aimed at; a German wife, a French husband and a marriage most closely connected to England.<sup>102</sup>

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<sup>98</sup> See for example, N Lowe, *Prenuptial agreements: the English Position* Text of the address prepared for the ISFL Colloquium on Family Law Toledo, Spain, October 11, 2007: '...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 doctrine of community of property.' This position is not identical to many other jurisdictions where a community of property system have been developed, Rešetar comments that the, 'community systems and the completely different marital property system of the common law countries...have created a picture of marital property systems in Europe that remains colourful to the present day.' B Rešetar, 'Matrimonial Property in Europe: A Link between Sociology and Family Law' EJCL Vol 12.3 (December 2008) 2.

<sup>99</sup> Much is said about this position in Chapter Five.

<sup>100</sup> R B Siegel, 'The Modernisation of Marital Status Law: Adjudicating Wives' Rights To Earnings, 1860-1930' 82 Geo. L.J. 2127 1993-1994.

<sup>101</sup> This discussion begins at p 264.

<sup>102</sup> Article 81 of the Treaty on the Functioning of the European Union states: 'The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. Furthermore Article 81(3) states, 'measures concerning family law with cross-border implications shall be established by the Council...'

In order fully to understand the importance of the new proposals related to the division of matrimonial property it is important first to briefly consider what aspects of the divorce process have already been looked at by the Council of the European Union. Council Regulation 4/2001, or Brussels I regulation, was introduced 22 December 2000 and is concerned with maintenance obligations; this regulation is now contained in the Consolidated Version of the Treaty on the Functioning of the European Union. On 29 May 2000, Council Regulation 1347/2000, or Brussels II, was introduced and is concerned with the recognition granted to foreign divorces. This was repealed shortly afterwards with Council Regulation 2201/2003 replacing this, known as Brussels II *bis*, setting out its scope to be concerned with, 'divorce, legal separation or marriage annulment, this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures.' Council Regulation 1259/2010 of 20 December 2010 is concerned with applicable law to be applied to a couples divorce; the UK opted out of Rome III.

Harding has argued that the above regulations take the approach that the issues of property ownership and maintenance are separate issues,<sup>103</sup> yet in English law this is not the case. As outlined above, the courts first look at needs and compensation, before moving on to sharing where it possible to do so. It is likely that the transfer of property could be required to meet what we understand as needs in order to meet the notion of a 'clean break;' the current principles developed by the judiciary mean that these areas are not distinct in any way. Yet, in other jurisdictions it is only maintenance payments which can be adapted to meet any relationship generated needs, as all assets falling into the community of property are usually split equally.

Boele-Woelki discusses this issue in the context of European harmonisation, 'Some regard matrimonial property law as a technical subject, of which the roots are not too deeply ingrained in the fundamental cultural values of a society, such that unification is possible.'<sup>104</sup> Harding provides an explanation for the current differences, linking these to that essential

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<sup>103</sup> M Harding, 'The Harmonisation of Private International Law in Europe: Taking the Character Out of Family Law?' *Journal of Private International Law*, April 2011, Vol. 7 No.1. See also, W Pintens, 'Matrimonial Property Law in Europe' in K Boele-Woelki, J Miles and J Sherpe (eds), *The Future of Family Property Law in Europe* (Intersia, Cambridge, 2011) 21: 'Most continental legal systems draw a clear distinction between matrimonial property and maintenance, whereas common law systems in principle deal with both issues simultaneously.'

<sup>104</sup> K Boele-Woelki *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia 2003 Oxford).

notion of marriage creating a status in this jurisdiction, ‘...the difficulties encountered in making the common law systems fit the mould are actually substantive problems linked to the common law understanding of marriage as a publicly recognised and enforceable commitment’ and that ‘sticking a round pin into a square hole...ignores the policy concerns behind “package solutions” to the consequences of divorce.’<sup>105</sup> By upholding marriage as a publicly recognised commitment, and therefore having a legal status, has the implication that the process of maintenance and property division is of interest to the public as a whole.<sup>106</sup> This line of thought also provides the public policy rule as to why a couple cannot negotiate their right to apply to the courts for financial relief by private agreement.<sup>107</sup>

Harding contrasts the position in civil law jurisdictions, ‘Divorce is increasingly seen as a right and marital property agreements are usual and commonplace.’<sup>108</sup> The origins and development of the common law understanding of marriage as a status is important to consider at this point. Graveson comments:

In all consideration of the English status of husband and wife one cannot lose sight of the fact that the body of law affecting these status is not pure Common Law, but was developed until 1857 in the ecclesiastical courts and greatly influenced by the Canon Law applied in those courts. It is not easy to say which aspects of the status of husband and wife owe their origin to the Common Law and which to Canon Law. A rough division can be made on the basis of proprietary and personal incidents of the relationship, the former being of Common Law and the latter largely of Canon Law origin.<sup>109</sup>

However, it would be incorrect to assert that marriage is not regarded as a publicly recognised and enforceable commitment in civil law jurisdictions. Harding expands on this argument:

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<sup>105</sup> M Harding, ‘The Harmonisation of Private International Law in Europe’ (n 103) 203 and 223.

<sup>106</sup> It can be argued that this interpretation of status is particular to England and Wales, for example M Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective* (Insertia, 2006) 281-82. Comment is made on the use of *Hyde v Hyde* in England and Wales in comparison to civil law jurisdictions, ‘...in spite of generally felt need for a more coherent and comprehensive marriage law, the ideological sensitivity of the matter precluded various proposals from producing anything more than piecemeal changes, which only increased incoherency. Considering the ‘close if not symbiotic relationship’ between the State and the Established Church, the general adherence to tradition and the divide of public opinion on the matters concerning the secularisation of marriage law, the reform of marriage law has been successfully postponed up until present day. There is, however, a good chance that the pending reform will bring English law more in line with other European countries in respect of the secularisation and coherency of marriage law.’

<sup>107</sup> As set out in *Hyman v Hyman* [1929] AC 601. Comment was made in Chapter Two at p 17 on Morley’s view: ‘The failure of English courts to enforce prenuptial agreements is an anachronistic peculiarity of English Law that demonstrates a stubborn refusal to adapt the law to new conditions.’ J Morely ‘Enforceable Prenuptial Agreements: Their Time has Come’ [2006] Fam Law 768.

<sup>108</sup> M Harding, ‘The Harmonisation of Private International Law in Europe’ (n 103) 203.

<sup>109</sup> R H Graveson, *Status in the Common Law* (The Athlone Press, London, 1953) 78-79.

Under Irish and English law, marriage still has a strong public element and is not viewed as private contract between individuals....In contrast while marriage is also a public commitment under civil law systems, spouses have traditionally been able to privatise their property ownership. This is easier to do under a system where determination of property ownership and financial compensation serve different purposes as only one element has to be flexible for the courts to alleviate unfairness between the parties upon divorce.<sup>110</sup>

The argument essentially runs full circle at this point, as it has been argued above that the notion of status has influenced the way in which assets are divided in England and Wales and thus the result is unfettered discretion being granted to the judiciary. If however, it was possible to make certain elements of financial provisions more certain in this jurisdiction then it is clear that this would provide a more solid base for private ordering.

The latest proposed regulations from the Council of the European Union follow the pattern of treating property and maintenance as separate issues, they are concerned with the property consequences of registered partnerships and matrimonial property regimes.<sup>111</sup> A Green Paper was released on the matter 17 July 2006, with a summary of the responses being published 5 February 2008.<sup>112</sup> The Ministry of Justice released a consultation paper in response to the proposal.<sup>113</sup> The paper contains the Government's assessment of the proposal, it is interesting that it is stated that not only do we not have a matrimonial property regime, furthermore, the 'concept' does not apply.<sup>114</sup> On 30 June 2011, the Ministry of Justice released the statement

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<sup>110</sup> M Harding, 'The Harmonisation of Private International Law in Europe' (n 103) 207.

<sup>111</sup> The requirement for two sets of proposed regulations is a clear demonstration of the idea that different family forms are emerging and so it is not possible to contain these provisions under one heading. Scherpe has studied the position of the family unit across Europe, commenting that, '...the entire concept of "family" is in flux, and our courts will be confronted with family law constructs that are not known in England and for which there will be no functional equivalents.' See J Scherpe, 'A Comparative View of Pre-Nuptial Agreements' IFLJ March 2007 (18).

<sup>112</sup> A summary of the responses is available at

<[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/116018\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/116018_en.htm)> Last accessed 1 August 2011. The issue regarding the differences between Civil law jurisdictions and Common law jurisdictions in the division of matrimonial property was acknowledged in the responses: In general, the Green Paper received a warm welcome. Despite certain comments considering this project to be too ambitious or drafted without a proper understanding of the legal traditions of certain Common law systems – it being recalled that England and Wales do not have a matrimonial property regime as understood in continental Europe - the content of the Green Paper and the usefulness of a Community initiative on this issue was not contested.

<sup>113</sup> Ministry of Justice *Matrimonial Property Regimes and the property consequences of registered partnerships – How should the UK approach the Commission's proposals in these areas?* (Consultation paper 8/2011).

<sup>114</sup> Ministry of Justice *Matrimonial Property Regimes and the property consequences of registered partnerships – How should the UK approach the Commission's proposals in these areas?* (Consultation paper 8/2011). Position outlined at p 12, para 26.

that the UK would not be opting in to the proposals.<sup>115</sup> The interpretation of the recent case law has however led some academics, notably Cretney, to compare the principle of sharing with a community of property regime. This analysis of judicial discretion has been notably described by the Law Commission as a ‘contentious view.’<sup>116</sup>

### **A Gradual Move towards a Community of Property Regime: Stalled by Status?**

Cretney comments on what he deems to be a remarkable change in approach, ‘the decisions of the House of Lords in *White v White* and the Court of Appeal in *Lambert v Lambert* is dramatic: they introduce into English law a regime of community of property (albeit only deferred community) limited to acquests.’<sup>117</sup> *Miller v Miller; McFarlane v McFarlane* affirmed the concept of equal sharing, based on the idea that non-financial contributions are of an equal importance to financial contributions. Although Lady Hale took steps to accentuate in *Miller*; ‘We do not yet have a system of community of property, whether full or deferred.’<sup>118</sup> This position has been further applied in *Radmacher*, ‘...although the economic effect of *Miller/McFarlane* may have much in common with community of property, it is clear that the exercise under the 1973 Act does not relate to a matrimonial property regime.’<sup>119</sup> Scherpe revisited Cretney’s 2003 article in 2012 and concluded:

As Cretney predicted, property owned before the marriage and acquired during the marriage through gift or inheritance is treated differently from ‘matrimonial property.’ While the law of England and Wales still eschews a formulaic approach, there seems to be a clear tendency towards (and perhaps even a presumption of) only sharing the matrimonial property equally – with said property being ‘defined’ in accordance with the specific requirements of this jurisdiction and thus always including the matrimonial home.<sup>120</sup>

The rejection of this system is certainly not a new occurrence. In 2006 Cooke, Barlow and Callus examined the community of property regimes used in France, the Netherlands and

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<sup>115</sup> ‘The broad balance of opinion from the Government’s consultation was that it would not be in the UK’s interests to participate in these proposals... Currently our courts take a wide view of the capital resources available to the parties on divorce or dissolution (including maintenance). Many of these issues are not included in traditional matrimonial property regimes.’ Quotation obtained from <<http://services.parliament.uk/hansard/Lords/ByDate/20110630/writtenministerialstatements/part010.html>> Last accessed 1 August 2011.

<sup>116</sup> The Law Commission, *Marital Property Agreements* (n 2) para 2.63.

<sup>117</sup> S Cretney ‘Community of property imposed by judicial decision’ LQR 2003 119 (Jul), 349-352, 349.

<sup>118</sup> *Miller; McFarlane* (n 32) 151.

<sup>119</sup> *Radmacher v Granatino* (n 4) [107].

<sup>120</sup> J M Scherpe, ‘Towards a Matrimonial Property Regime for England and Wales’ in R Probert and C Barton (eds) *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia, Cambridge, 2012) 145-146.

Sweden in the report, *Community of Property, A Regime for England and Wales?*<sup>121</sup> Within this report they acknowledge that ‘This is well-trodden ground. In 1956 the Morton Commission rejected the introduction of an immediate community of property system between spouses...’<sup>122</sup> The Royal Commission on Marriage and Divorce 1951 – 1955<sup>123</sup> gave some consideration to the historical influence over English law:

The introduction of community of property in England would mean a striking departure from the traditional law...in the course of the 14<sup>th</sup> century the law developed on lines which resulted in the decisive rejection of the idea of a community of goods between husband and wife...We do not suggest that community of property should be rejected on this ground alone, but it is none the less a consideration which cannot be ignored, for the handicap of unfamiliarity must prejudice any measure.<sup>124</sup>

Before the possibilities for reform in England and Wales can be considered in relation to the sharing element of financial relief, a brief overview of the various mechanisms of a community of property regime will be considered. The community of property regimes used across Europe are by no means identical in their approach.

### **Various Approaches to Community of Property**

The community of property is a matrimonial system whereby a separate body of property is created either upon marriage or civil partnership,<sup>125</sup> or at the point of separation. This body of property is then automatically split equally between spouses. There are however varying approaches to the community of property regime: systems where there is a community of property during the marriage, and systems where the community of property arises after divorce. Although there are the two very different forms of the matrimonial property regime, the issues that have shaped them are almost universal. Both the immediate and deferred systems aim to maintain the equality of the spouses, initially by giving protection to the financially weaker spouse. When these systems were originally implemented it is likely that this would have been to protect the housewife, yet now it is simply to ensure that work done to towards the upkeep of a household is given an equal economic value to financial contributions. This is therefore one area where comparisons can easily be drawn between

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<sup>121</sup> E Cooke, A Barlow, T Callus ‘Community of Property, A regime for England and Wales?’ (The Policy Press, Bristol 2006).

<sup>122</sup> *Royal Commission on Marriage and Divorce Report 1951 – 1955* (Cmd. 9678 Presented to Parliament by Command of Her Majesty March 1956) 18.

<sup>123</sup> Will later be referred to as The Royal Commission.

<sup>124</sup> *Royal Commission on Marriage and Divorce Report 1951 – 1955* (n 122) para 651.

<sup>125</sup> In the case of Civil Partnership, this may be the equivalent in that particular country.

such a regime and the current principles governing financial relief in England and Wales. In a similar fashion, the welfare of children is also widely protected. The matrimonial home is protected so that both spouses must consent to the disposal of it; the universal nature of such protection is unsurprising, this is usually the largest asset a married couple will possess. However, it is very important to highlight the differences that still exist even under the surprisingly broad category headings of immediate community of property and deferred community of property.

### **Immediate Community of Property**

When an immediate community of property regime is in place a body of property which could potentially be equally shared is created upon marriage. Certain assets will remain the sole property of one spouse if this has been expressly set out as to become a private asset, for example through inheritance. Immediate community of property regimes can be seen in France and the Netherlands, yet even within this term there is still variation as to the operation of the system. The French regime is contained in the French Civil Code<sup>126</sup> and works on the principle that it is only property which is acquired after the marriage that will be classified as community property; a community limited to acquests. It should be noted that there are options to change regime, as discussed later.<sup>127</sup>

This is quite different to the system used in the Netherlands, set out in the Dutch Civil Code<sup>128</sup> which takes into account all property, thus not distinguishing between property acquired prior to or after the marriage. This certainly would make the division of property very simple; each spouse would take a half share of everything that they possessed, yet it should be noted that there is current reform to try and restrict the universal nature of this

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<sup>126</sup> The Assets of the Community are defined in Articles 1401 -1408. Art. 1401 defines, 'The assets of the community comprise acquisitions made by the spouses together or separately during the marriage, and coming both from their personal activity and savings made on the fruits and incomes of their personal activity.'

<sup>127</sup> The four possible regimes available to a couple are contained in the French Civil Code: The Community of Property: 'Communauté réduite aux acquêts', Separate property: 'séparation de biens', Universal Property: 'communauté universelle', and Sharing of Acquired Assets: 'Participation aux acquêts.' An explanation of these can be found at <<http://www.fauchonlevy.com/world-apart.htm>> Last accessed 27 December 2011.

<sup>128</sup> The Dutch Civil Code, Book 1 Law of Persons and Family Law. Title 1.7 Marital community of property, *Section 1.7.1 General provisions*. Article 1:93 defined the Universal marital community of property between the spouses: 'As from the moment on which the marriage has been contracted, a universal marital community of property shall exist between the spouses by operation of law, to the extent that they have not made derogating arrangements by means of a prenuptial agreement.' A translation of the Dutch Civil Code is available at <<http://www.dutchcivillaw.com/legislation/dcctitle077.htm?>> Last accessed 27 December 2011.

community of property regime.<sup>129</sup> With this in mind it would not be a particularly sensible move to reform our own law to replicate a system which is now evidently unacceptable. In systems that operate an immediate community of property there is a rebuttable presumption of joint ownership. This system is becoming less popular in European jurisdictions, and would mean a vast departure from our doctrine of separate property in England and Wales.

### Deferred Community of Property

The deferred system of community of property is used in Sweden,<sup>130</sup> Denmark<sup>131</sup> and Italy.<sup>132</sup> Here, in a similar position to England and Wales, marriage does not affect the ownership of property. Only two forms of ownership will commence, this being the private capital of the husband and the private capital of the wife. Both the Swedish Marriage Code and the Italian Civil Code set out what property should be included in the community pot,<sup>133</sup> thus providing simplicity and clarity. It is certainly a possibility though that the spouses may choose to

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<sup>129</sup> See for example, M Antokolskaia and K Boele-Woelki 'Dutch Family Law in the 21<sup>st</sup> Century: Trend-Setting and Stragging Behind at the Same Time' *Electronic Journal of Comparative Law* (March 2002). 'The Netherlands remains the last country in the world where the universal community of property has remained until the 21<sup>st</sup> century as the legal regime regulating matrimonial property. According to its apologists, it is a Dutch national monument. Its adversaries, however, would like to see it become a gravestone as soon as possible... The reserved stance taken by the Government, which finally did not dare to introduce a community of assets, and in the end chose a garbled pathetic hybrid thereof, is very regretful. As the Bill is to be subjected to discussion by a group of experts before presenting it to Parliament, and many possibilities remain for improving it, there is still some hope that the Bill will be amended on this point. Then the introduction of the new law, which, however, could take a couple of years, would bring the level of modernity of matrimonial property law more into line with the modern standards of the remainder of Dutch family law.' <<http://www.ejcl.org/64/art64-5.html>> Last accessed 26 December 2011. See also W Pintens, 'Matrimonial Property Law in Europe' in K Boele-Woelki, J Miles and J Sherpe (eds), *The Future of Family Property Law in Europe* (Inertia, Cambridge, 2011) 22, footnote 4.

<sup>130</sup> Provisions contained in *Äktenskapsbalken*, Chapter 7.

<sup>131</sup> The relevant statutory provisions are contained in three Acts. Act no. 56 of 18 March 1925: *Ægteskabsloven* 2: 'Marriage Act II', Act no. 256 of 4 June 1969, *Ægteskabsloven*: 'Marriage Act I', and Act no. 155 of 30 November 1974: *Skifteloven*: 'Division Act.'

<sup>132</sup> Provisions contained in *Codice Civile*.

<sup>133</sup> Art 177 of *Codice Civile* sets out property included in the community: 'a) purchases made by both spouses together or separately during the marriage, excluding those related to personal property; b) the fruits of the assets of each of their spouses, received and not consumed at dissolution of the communion; c) income of each spouse separately if the dissolution of communion, have not been consumed d) companies managed by both spouses, and created after marriage.' Translation from <[http://www.jus.unitn.it/cardozo/obiter\\_dictum/codciv/codciv.htm](http://www.jus.unitn.it/cardozo/obiter_dictum/codciv/codciv.htm)> Chapter 7 of *Äktenskapsbalken* sets out: 'A spouse's property is marital property to the extent that it is not private property. Individual property is 1. property as a result of marital property is individual, 2. property that a spouse has received a gift from someone other than the other spouse with the understanding that the property will be the recipient's individual, 3. property that a spouse has acquired by will with the understanding that it would be the recipient's individual, 4. property that a spouse has inherited and which, in testament of the deceased shall be the recipient's individual, 5. property that a spouse obtained by beneficiary of life insurance- ring, olycksfallsförsäkring, health insurance or pension under the Act (1993:931) of personal pensions taken out by someone other than the other spouse with the understanding that the property will be the recipient's individual, 6. what has taken the place of property referred to in a-5, unless otherwise provided by the transaction because of which the property is single.' Translation from <[http://www.ijuridik.se/en/aktenskapsbalken/#high\\_4](http://www.ijuridik.se/en/aktenskapsbalken/#high_4)>

become co-owners of certain items. There are also the circumstances where a contribution to the purchase price will render co-ownership of the asset; this can be seen in Sweden as well as our own jurisdiction.<sup>134</sup>

### **The Use of Private Agreements**

In many jurisdictions a couple can opt for a different system other than the normal statutory system.<sup>135</sup> An agreement is used to make this choice; and so it is crucial to appreciate that marital property agreements as we understand them in England and Wales are commonly used by a couple making a choice over the system they wish their finances to be regulated by. The desirability of changing to an alternative system becomes apparent when considering the notion of shared liabilities in an immediate community of property regime. Those running their own businesses in France, for example, may well opt out of the immediate community of property regime so as to protect their spouse from any debts. This use of contract is not limited to an immediate community of property regime or the selecting of an alternative regime. Sweden operates a deferred community of property regime, yet the family home may be placed into the other spouses name through contract so as to protect this asset should the couple divorce at some point in the future. Here the use of contract is not to protect assets against the wide ranging discretionary powers held by the courts, but to protect assets against the harshness of equal division. Rather than attempting to reduce the financial award a spouse could receive upon divorce, there is also the use of such agreements to safeguard assets.

The introduction of such a regime would undoubtedly give England and Wales increased certainty, this level of certainty would arguably provide a better base for enforceable marital property agreements,<sup>136</sup> and in some instances may even remove the desire for private ordering. As noted above, the Law Commission comments in the Consultation Paper that if the difficulty for some couples with the law of financial relief is uncertainty then marital property agreements could provide one solution to this issue.<sup>137</sup>

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<sup>134</sup> K Boele-Woelki *Matrimonial Property Law from a Comparative Perspective* (n 32) 14.

<sup>135</sup> For example, this option is available in France (see footnote above) Italy and Germany; yet in Denmark and Sweden there is no option.

<sup>136</sup> For example, such agreements could be used to simply change regimes as used in other jurisdictions.

<sup>137</sup> The Law Commission, *Marital Property Agreements* (n 2) para 2.69. See also *Charman v Charman* [2007] EWCA Civ 503, [124]: Sir Mark Potter expressed, 'If, unlike the rest of Europe...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?' Quotation set out in Chapter Three above at p 104. This notion can be compared to the words of Thorpe LJ in *Crossley v Crossley* [2008] 1 FLR 1467, [329]: 'There is an obvious divide between the provisions of the civil law jurisdictions and the absence of any marital property tradition in the common law

## The Reasoning behind Previous Rejections: Purely the Effect of Status?

It is important therefore to question whether the rejection of a community of property regime for England and Wales is purely based on the upholding of marriage as a legal status, or whether this rejection is based on a range of factors. The arguments raised against the adoption of such regime will be examined.

### Owner Occupation

The issue of owner occupation in this jurisdiction was mentioned earlier in the Chapter with regard to the elements which are currently present in assessing and meeting 'needs' of the separating couple and also the concerns raised with regard to transplanting the formulaic approaches considered in the supplementary consultation paper. The Law Commission commented that this was the second element that the court considered, stating that, 'We live in a society where owner-occupation is highly valued, and where the market for private rented accommodation is nowhere near so plentiful or so acceptable as it is, for the most part in continental Europe.'<sup>138</sup> The desire for ownership in this jurisdiction is strong; this is upheld and respected by the courts using the discretionary system currently used. The aspiration to own the family home in this jurisdiction can certainly be contrasted with the position in the rest of Europe.<sup>139</sup>

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systems. Undoubtedly there would be some narrowing between this European divide if greater opportunity were given within our justice system for parties to contract in advance of marriage, to make provision for the possibility of dissolution.'

<sup>138</sup> The Law Commission, *Marital Property Agreements* (n 2) 25.

<sup>139</sup> The aspiration to own the family home in this jurisdiction can certainly be contrasted with the position in the rest of Europe. *The Guardian* reported in 2007 that 70% of housing in Britain was owner occupied; this can be compared to 40% in Germany and less than half in other comparable countries. The private rented sector amounted to 12% in Britain; against 53% in Germany and 23% in France. S Jenkins, 'Home ownership mania is behind this mass hysteria' *The Guardian* (19 September 2007) Available electronically <<http://www.guardian.co.uk/commentisfree/2007/sep/19/comment.business>> Last Accessed 20 August 2011. In 2009 *The Times* reported on the effect of the economic climate on the aspiration on buying property; in 2003 70.9% of households owned their own home, this figure fell to 68.3% in 2008. Steele commented on these figures, 'Home ownership was in decline even before the housing crash...People's expectations have changed. They still aspire to buying eventually but they no longer expect to do so in their twenties.' F Steele 'Landlords Return to the Property Market' *The Times* (3 April 2009) Available electronically <[http://property.timesonline.co.uk/tol/life\\_and\\_style/property/investment/article6021226.ece](http://property.timesonline.co.uk/tol/life_and_style/property/investment/article6021226.ece)> Last accessed 20 August 2011. The Office for National Statistics shows that in 2009, 17.5 million homes in the UK were owner occupied; this can be contrasted with the 3.8 million homes which made up the private rental sector. In addition, there were 4.5 million homes in the social sector. The Office for National Statistics <<http://www.statistics.gov.uk/cci/nugget.asp?id=1105>>The desire for owner occupation has influenced politics and the housing available in the social sector, with the Conservative Party introducing the 'right to buy scheme' in 1979. This idea is still a concept supported by the present Conservative -led coalition government. Directgov, 'Buying your Council Home- The Right to Buy Scheme.'

In 1956 the Royal Commission identified the notion of ownership of property as being one of the foreseeable problems with adopting a community of property regime: '...it takes no account of what we hold to be a natural and normal desire in people to acquire property of their own...there is no general desire for community of property.'<sup>140</sup> It is possible that this argument regarding separate ownership of property is more relevant to the introduction of an immediate community of property regime, and even more so in relation to the system currently used in the Netherlands. Research does suggest however that owner occupation is becoming simply unattainable for a generation.<sup>141</sup> In terms of the issue of owner occupation, it is extremely likely that the family home would be accounted for within needs, prior to looking at any form of sharing.

### **Fixed Principles and Equality**

Returning to the Law Commission's comment in 1973 with regard to 'a system of sharing on fixed principles,'<sup>142</sup> it is certainly arguable that this idea of equality could be represented by the equal sharing contained in a community of property regime. The concept of equal sharing under the formulaic systems can be linked to the way in which marriage is viewed. The law has moved towards the idea of equality within marriage. In this jurisdiction Lord Denning has described marriage as an equal partnership, 'Nowadays, both in law and in fact, husband and wife are two persons, not one. They are partners – equal partners – in a joint enterprise, the enterprise of maintaining a home and bringing up children.'<sup>143</sup> This is how Cretney views the recent move towards equal sharing:

It becomes clear that what the courts in *Lambert* and *White* have really done is to interpret the terms of the marriage partnership. You will today have to find a very traditional wedding to hear the bridegroom utter the words 'with all my worldly goods I thee endow.' But the notion that for most couples marriage is intended to be

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<[http://www.direct.gov.uk/en/HomeAndCommunity/BuyingAndSellingYourHome/HomeBuyingSchemes/DG\\_4001398](http://www.direct.gov.uk/en/HomeAndCommunity/BuyingAndSellingYourHome/HomeBuyingSchemes/DG_4001398)> Last accessed 15 August 2011.

<sup>140</sup> *Royal Commission on Marriage and Divorce Report 1951 – 1955* (n 122) para 651.

<sup>141</sup> Between 1 and 10 April 2011 an online survey was conducted by the National Centre for Social Research taking in the views of eight thousand people between the ages of twenty and forty five assessing their opinions towards buying or renting their homes. The research is available online at <<http://www.natcen.ac.uk/study/the-reality-of-generation-rent->>> Last accessed 20 August 2011. The research identified that 55% of those questioned did not own their home; this figure represents 85% of those questioned aged between 20 and 24, and 70% of respondents aged between 25 and 29. Furthermore, 64% of non-homeowners in this survey believed that they had no prospect of ever buying property; the report labels them 'Generation Rent.' The report also scrutinises the differences in the quality of rental property available in other European countries, and the emphasis placed on long-term rentals which makes renting an appealing prospective. This could be a factor which would need to be rectified here if the private rental sector is to become ever more popular.

<sup>142</sup> The Law Commission, *First Report in Family Property: A New Approach* (Law Com. No. 52, 1973) 42.

<sup>143</sup> *Midland Bank Trust Co Ltd v Green* [1980] Ch 496.

an equal partnership can I believe be supported, not least evidenced from the social sciences, and so accordingly can the Court of Appeal's interpretation of the marriage contract.<sup>144</sup>

McGlynn has set out that within the European Union the traditional roles of husband and wife is still very much supported; the male breadwinner and the female homemaker. The reasoning behind equal sharing for these couples would be in order to give non-financial contributions equal importance.<sup>145</sup> Rešetar has explored this link between the notion of an equal partnership within marriage and the mechanism for the division of assets upon divorce.<sup>146</sup> This article argues that the notion of the partnership model within a marriage is simply not the reality of how the majority of couples split household tasks, the raising of children and paid employment. The conclusion to this is that the community of property regime is still the most suitable system; Rešetar evidences this statement with the fact that it is the most common system in Europe. The widespread nature of community of property across Europe also prompts the future possibility of pressure for a reform in this jurisdiction in a move towards European harmonisation of family law. Whether this formulaic system of equal sharing of matrimonial property is based on the premise of the partnership model or to protect the financially weaker spouse it would seem that this is currently considered the most appropriate system for the many jurisdictions.

### **Examples of Equal Sharing**

*Foster v Foster*<sup>147</sup> reached the Court of Appeal in 2003, providing an opportunity to explore the level of contributions during a short marriage and equal division.<sup>148</sup> The couple had married in 1997, and separated in 2000; both had employment throughout the marriage and they had no children. The wife had earned around £67,000 per annum and the husband around £30,000; the couple had accumulated around £400,000 through various property deals. The District Judge returned to each what they had brought into the marriage, and divided the profit equally.

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<sup>144</sup> S Cretney, 'The Family and The Law – Status Or Contract?' (n 13).

<sup>145</sup> C McGlynn, *Families and the European Union: Law Politics and Pluralism* (Cambridge University Press, Cambridge 2006) 23.

<sup>146</sup> B Rešetar, 'Matrimonial Property in Europe: A Link Between Sociology and Family Law' *Electronic Journal of Comparative Law*, (December 2008).

<sup>147</sup> [2003] EWCA Civ 565.

<sup>148</sup> Both are factors under s.25 (2) MCA 1973, (f) and (d).

This approach demonstrates the distinction being drawn between property owned prior to marriage and that acquired afterwards. The result of this meant that the wife was awarded 61% of the assets, with the husband taking the remaining 39%. The wife appealed against this decision on the basis that it did not take into account her greater contribution. The Circuit Judge adjusted the award so that the division was 70:30 in favour of the wife. The husband appealed against this decision stating that the profit should be split equally. The Court of Appeal upheld the initial decision of equal sharing. Neither the short marriage nor contribution level meant a departure from equality:

The duration of the marriage will obviously be relevant in cases where one party's earning capacity may have been seriously affected by a long period devoted to homemaking and childrearing, but...where a substantial surplus had been generated by their joint efforts, it could not matter whether they had taken a short or a long time to do so.<sup>149</sup>

This approach fits in with the arguments put forward by Rešetar.<sup>150</sup> Equal sharing is the most appropriate step to take even when the reality is that the partnership is not entirely equal.

The factor of the length of the marriage was also considered in *GW v RW (Financial Provision: Departure from Equality)*,<sup>151</sup> Nicholas Mostyn QC discussed the effect of length of a marriage on equal division:

I do not shrink from saying that this is a difficult issue...it seems to me that to adopt it requires me to put a blue pencil straight through the statutory criterion of the duration of the marriage... It seems to me that the assumption of equal value of contribution is very obvious where the marriage is over 20 years. For shorter periods the assumption seems to me to be more problematic. I am not attracted to a formulaic solution, as suggested by John Eekelaar, but I do in essence accept his proposition that the entitlement to an equal division must reflect not only the parties' respective contributions but also an accrual over time.<sup>152</sup>

The marriage in this particular case had been twelve years; the £12 million had been created entirely by the husband's employment. This suggests that the departure from the yardstick of equality could be done so on the combined factors of contributions and accrual over time. Bailey-Harris is critical of this approach, stating that this would mean that the spouse providing domestic contributions would be required to earn their equality over a period of

<sup>149</sup> Hale, B, *Foster v Foster* [2003] EWCA Civ 565, [19].

<sup>150</sup> B Rešetar, 'Matrimonial Property in Europe' (n 146).

<sup>151</sup> [2003] EWHC 611.

<sup>152</sup> *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611, [40].

time, yet there is no such requirement for the breadwinner.<sup>153</sup> The equality granted to direct and indirect contributions introduced by *White* would be lost. Eekelaar has suggested that the contributions aspect should be overridden by more emphasis being placed on the length of the marriage; using the notion of incremental increases building up to equal sharing.<sup>154</sup> This idea has been inspired by the 2002 American Law Institute's Report which 're-characterises' separate property as marital property over a period of time using an incremental scale.<sup>155</sup> The basis for this incremental concept is based on the fact that *White* did not introduce the 'rule' of equal sharing.

Fixed principles would introduce more certainty into the system, yet it may still seem preferable to apply the durational element at the last stages of the application of s.25. Eekelaar puts forward the strong argument that this deduction could be viewed as a penalty for a short marriage and does not have the clarity of the incremental approach.<sup>156</sup> Yet, the move against discrimination demonstrated by *White* and upholding the idea of an equal partnership is very powerful. Legislative reform introducing a deferred community of property, limited to acquests, and only being considered once needs have been met would uphold the current view of marriage as being an equal partnership.

### **Formulas and Unique Families**

A complete shift to a formulaic approach has previously been rejected. In 2003 the Law Society considered such a reform:

Theoretically, one possibility would be to try to draw up some type of mathematical formula to be applied to the assets of any divorcing couple. However the individual circumstances of each marriage and divorce are so uniquely different that the working party's view was that it would be an impossible task to devise such a formula...To draw up a formula to deal with all aspects of financial division on divorce would be impossible and any attempt would result in unacceptable injustice and difficulties.<sup>157</sup>

The Law Society based this conclusion on their experience with the previous system used by the Child Support Agency. The detailed formula used created many injustices, and the

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<sup>153</sup> R Bailey-Harris, 'Ancillary Relief' [2003] Fam Law 386.

<sup>154</sup> J Eekelaar, 'Asset Distribution on Divorce – the Durational Element' (2001) 117 LQR 552.

<sup>155</sup> See J Eekelaar, '*Miller v Miller*: The Decent into Chaos' (n 40).

<sup>156</sup> J Eekelaar, 'Asset Distribution on Divorce and Property' (n 60).

<sup>157</sup> The Law Society *Financial Provision on Divorce: Clarity and Fairness - Proposals for Reform* (May 2003) paras 72 and 73.

introduction of amendments to try and rectify the system resulted in an unwieldy system.<sup>158</sup> This rejection is based on the notion of a holistic formulaic approach. The Law Society also rejected the concept of equal sharing:

In many cases where the only asset is the equity in the matrimonial home and there are young children it is essential in all fairness for the parent with care to retain the house as a home for the children. To start with the presumption that assets should all be equally divided would not be helpful.<sup>159</sup>

The rejections of adopting a formulaic approach to financial relief does rest upon the idea of each and every family being unique and therefore injustice can certainly be caused by applying an all-inclusive framework based on a mathematical formula. These issues can be overcome by retaining the requirement of meeting needs.

The current law and the interpretation of status which influence it leaves a strange position that on one hand the law recognises the individuality and uniqueness of each marriage;<sup>160</sup> yet fails to grant autonomy to couples in order to decipher the best route forward. A balance has to be found between discretion and certainty which encompasses these concerns and provides the clarity many are now craving. It is clear the enforceable marital property agreements would provide this certainty to some. Barton contrasts such agreements to the current financial relief system:

...what is unfair about informed (i.e. legally advised) agreements in lieu of the hopeless shifting, uncertainty of s.25 of the Matrimonial Causes Act 1973?...Do people really need to be, if I may coin a word, 'matromised' by judges determined to know better what is right for them than they do themselves.<sup>161</sup>

The desire for such agreements does raise profound questions regarding the role of the court in the division of assets upon divorce.<sup>162</sup> This underlying weakness could be addressed by granting more recognition towards private autonomy.

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<sup>158</sup> The Law Society *Financial Provision on Divorce* (n 157) para 73.

<sup>159</sup> The Law Society *Financial Provision on Divorce* (n 157) para 74.

<sup>160</sup> See for example J Eekelaar, 'Legal Events and Social Behaviour' Oct [2010] *Fam Law*: When discussing marriage Eekelaar states, 'It clearly therefore has great social value as a vehicle on which people confer their own meanings, and which in turn can have significance for them. But it seems that its essential character comes from the people marrying, rather than the law.'

<sup>161</sup> C Barton, Letter, 'The Lords and Pre-nups' [2009] *Fam Law* 265.

<sup>162</sup> Lady Hale, *Radmacher v Granatino* (n 4) [132].

### 8.3 THE POTENTIAL INFLUENCE OF CONTRACT ON THE LAW OF FINANCIAL RELIEF

It can be seen that the current financial relief system is influenced by the notion of marriage creating a legal status;<sup>163</sup> thus the couple must currently be 'matromised' in order for the final result to reflect this public commitment. Enforceable marital property agreements begin the move away from this idea of status by introducing certainty and autonomy. This thesis argues that marriage is neither completely status or contract, thus the use of a continuum can most effectively demonstrate the existence and overlap of these two concepts. It follows therefore that our financial relief system could be reformed to reflect the position of marriage on this status-contract continuum.

#### **Proposals for Reform: Curing the Problem before Treating the Symptom**

It is proposed that the uncertainty inherent in our current system is causing an element of desire for private ordering. This symptom should be treated in the near future, but moreover, the cause of the symptom should be cured initially. It is suggested that a reform should introduce the following model. Firstly needs should be met, but the way in which this is done should be given greater clarity. The concluding remarks of Cooke, Barlow and Callus with regard to needs would do just this: 'Deferred community with equal division after needs have been met may have much to offer us if it is combined both with structured application of discretion to assess needs and with contracting out.'<sup>164</sup> Many of the objections to equal splitting and formulaic approaches analysed in this Chapter would be overcome by retaining some discretion at this point in financial division. Therefore fixed principles should be disregarded and instead the focus should be on creating guidelines or providing the judiciary with an overriding objective. Either of these models would allow for the retention of discretion when assessing needs.

Once needs have been met the court will possibly be faced with a surplus of assets. If the property or asset is classified as matrimonial property, that is to say, property acquired during the marriage, then this should be subject to the default rule of equal splitting. If the property

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<sup>163</sup> As discussed above at p 242 with reference to M Harding, 'The Harmonisation of Private International Law in Europe' (n 103) 203 and 223: The quotation used above can be repeated for clarity at this point: '...the difficulties encountered in making the common law systems fit the mould are actually substantive problems linked to the common law understanding of marriage as a publicly recognised and enforceable commitment' and that 'sticking a round pin into a square hole...ignores the policy concerns behind "package solutions" to the consequences of divorce.'

<sup>164</sup> E Cooke, A Barlow, T Callus, *Community of Property* (n 121) 41.

or asset is deemed to be non-matrimonial property as its source is not attributable to the marriage, then it should be returned to the relevant spouse.

### **The Matrimonial Home: Special Treatment in its Classification?**

In most cases the matrimonial home would have been dealt with when meeting needs. If it has not been allocated however then there is a strong argument to suggest that this should be treated as matrimonial property, regardless of its source. For example the system in place in Scotland defines matrimonial property as the matrimonial home and any property acquired during the marriage not by gift or inheritance.<sup>165</sup> Lord Nicholls has also included the matrimonial home into matrimonial property: 'The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose.'<sup>166</sup> The objections with regard to owner occupation would also be addressed by providing that the default rule is that the matrimonial home is matrimonial property.

### **Classifying Property, Murky Water and Agreements**

In cases involving a long marriage the division between non-marital property and marital property would become harder to distinguish between in the majority of cases. It is suggested that provisions akin to the Swedish Marriage Code and the Italian Civil Code with regard to what property should fall into the community pot could be one route to certainty. However, the drafting of such guidelines for this jurisdiction will never produce an exhaustive list which will be able to be consulted for every case. It may be possible to include some factors within the provisions which would compel a move away from equal sharing, for example the retention of s.25 (2)(b), the conduct of the parties, legislatively defined as extreme conduct as largely interpreted by the judiciary.<sup>167</sup>

It would seem therefore that it is at this point where marital property agreements would come into play. If the court is unable to establish that the property or asset has no link to the marriage whatsoever, then it should fall to be split equally as matrimonial property. In most cases the distinction will be murky, and it is foreseeable therefore that this is another area for litigation with spouses trying to demonstrate a link between the asset and the marriage. The

<sup>165</sup> Family Law (Scotland) Act 1985, ss 9 and 10.

<sup>166</sup> Lord Nicholls, *Miller; McFarlane* (n 32) [22].

<sup>167</sup> For example, *K v K (Financial Provision: Conduct)* [1990] 2 FLR 225 [1990] FCR 372, and *H v H (Financial Relief: Attempted Murder as Conduct)* [1990] 2 FLR, [1990] FCR 372, see further details above at p 173.

default rules could be overcome by private agreement. This proposal is similar to the community of acquests model used in France, Barlow *et al* report that over 80% of the population in France do not contract out of the default regime, despite the contractual freedom which is available to a couple.<sup>168</sup> The percentage of couples who do not contract out of the regime perhaps is indicative of their acceptance and approval of the default regime in place; as Dewar comments, ‘...the whole point of such an agreement is to escape the default rules.’<sup>169</sup> Having default rules in place however provides a firm basis upon which to contract away from.

This proposal seems to meet many of the objectives set out in this Chapter in finding an appropriate balance between certainty and discretion. This reform would retain the concept that marriage does create relationship-based needs which should be addressed; it provides a solution for keeping the matrimonial home; it takes into account the possibility of pressure for European harmonisation; and introduces the desired element of certainty being demonstrated by the movement towards contract.

#### 8.4 CONCLUSION

The combination of meeting needs with a deferred community of property regime would seem a logical and beneficial reform to the current financial relief system. This hybrid system can be supported by viewing a small shift along the status-contract continuum; combining discretion and certainty. The meeting of ‘needs,’ even if narrowly defined, would still mean that the certainty of equal sharing would only cut in for wealthier couples. This element could, and should, be mitigated by the introduction of enforceable marital property agreements which are regulated in such a way so that they become an option for all couples wishing to assert autonomy. The desire for certainty which is potentially propelling movement along the status-contract continuum could be partially quenched if this reform were to occur in advance of a reform to create binding marital property agreements. Such reform would also bring the potential use of such agreements in line with the way in which they are used across continental Europe, as discussed above. The desire for enforceable marital property agreements in this jurisdiction is partly a symptom of the lack of certainty in

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<sup>168</sup> E Cooke, A Barlow, T Callus *Community of Property* (n 121) 5. This research project did also set out to question the level of awareness with regard to what the default system entailed. If people were to have the ability to contract out of a community of property regime in this jurisdiction then they would need to be well informed, regarding both the formation of a contract and also the nature of the default system.

<sup>169</sup> J Dewar, ‘Family Law and its Discontents’ 14 *Int'l J.L. Pol. & Fam.* 59 (2000), 71.

our ancillary relief system; creating enforceable marital property agreements only provides a partial remedy to an overall problem.

## CHAPTER NINE

### PROPOSALS FOR REFORM: PINPOINTING MARRIAGE ON THE CONTINUUM

The Law Commission's consultation on Marital Property Agreements suggests five possible models for reform.<sup>1</sup> The proposals range from a 'cast-iron' model through to the somewhat vaguer 'unless unjust' model. It has been suggested that the concepts of status and contract can be best understood as forming the ends of a continuum. This Chapter demonstrates that the model selected would more precisely pinpoint where marriage is on this continuum, although as set out in the Introduction this can never be carried out with mathematical precision.<sup>2</sup> The models discussed can be placed on the status-contract continuum depending on the extent that they would allow for contractual freedom and autonomy, or demonstrate a reliance on the concept of marriage creating a legal status that the parties should be barred from amending. This position is inherently linked to the potential level of involvement of the judiciary and thus the role of the court.<sup>3</sup> It is suggested that if reform in this area should occur at all then future legislation concerning marital property agreements should be capable of being pinpointed towards the contract end of the continuum in order to fulfil the true nature and expectations of such provisions, that is to say certainty<sup>4</sup> and autonomy. This Chapter therefore brings the thesis full circle, the thesis has moved from the gradual movements towards contract as discussed in Part One to the idea that this movement could be pinpointed more accurately by analysing the prospective models for reform.

#### 9.1 THE CURRENT RELEVANCE OF THE *HYMAN* JUDGMENT

The 1929 case of *Hyman v Hyman*<sup>5</sup> clarified that the significance of the division of assets upon divorce was not confined to the interests of the spouses, but that the decision impacted upon the public as a whole.<sup>6</sup> Hence, a private agreement cannot oust the jurisdiction of the court. Lord Halisham LC commented:

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<sup>1</sup> The Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) the proposed models are summarised at para 7.65.

<sup>2</sup> See p 15.

<sup>3</sup> Lady Hale stated when discussing enforceable marital property agreements in the Supreme Court, 'The issue may be simple, but underlying it are some profound questions about the nature of marriage in the modern law and the role of the courts in determining it.' *Radmacher v Granatino* [2010] UKSC 42, [132].

<sup>4</sup> More specifically, 'judge-proof certainty' as suggested by C Barton, 'The Lords and Pre-Nups' [2009] Fam Law 265.

<sup>5</sup> *Hyman v Hyman* [1929] All ER Rep 245.

<sup>6</sup> This case was discussed in detail in Chapter Two, the discussion begins at p 39.

... the power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction.<sup>7</sup>

This principle, or rule of public policy, is still extremely pertinent to the enforceability of marital property agreements. It is possible to analyse whether we have reached the position where the division of assets upon divorce can now be considered as a strictly private matter between the spouses, or whether there are still consequences which flow from the division of assets rendering financial ordering beyond the realms of private agreement. The previous rule of public policy, that such contracts undermine the lifelong nature of marriage, was discussed in further detail in Part One, with regard to the judiciary seemingly evading the issue.<sup>8</sup> The current stance is set out by the Law Commission: whilst some still regard these agreements as capable of undermining marriage, many see them as supporting the institution of marriage. The argument that private ordering may support marriage is evidenced by the fact that more people may take the step to marry with this financial certainty in mind.<sup>9</sup>

## 9.2 INFLUENCES ON THE CONTINUUM

Part of the legal aspiration of marriage is currently linked to the position set out in *Hyde*.<sup>10</sup> In 1866, the aspiration and reality of marriage would have been much closer than they are presently. Many factors have contributed to this shift, namely the availability and growing social acceptance of divorce in society. It is possible that the law needs to react to the situation where reality and aspiration have grown further apart so as to require some sort of reassurance against the reality. This gap can be filled by a contract. In addition to being able to reflect the social reality surrounding each facet of family law lying on the status-contract continuum, it can also be used to bring in discussion from other influential elements and perspectives which are tightly woven into this broad term of social reality.

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<sup>7</sup> *Hyman v Hyman* (n 5) 251. Originally included above at p 41, this quotation has been repeated for clarity.

<sup>8</sup> See Chapter Three.

<sup>9</sup> The Law Commission, *Marital Property Agreements* (n 1) para 5.20: Quotation included in Chapter Six, but repeated here for clarity: 'Indeed, we have heard from a number of solicitors who have been obliged to point out to their clients that the only way to achieve their objective of preserving certain assets is to cohabit rather than to marry. Some have told us of clients who, as a result, did not marry. The availability of qualifying nuptial agreements could encourage marriage in such cases.'

<sup>10</sup> (1866) LR 1 P&D 130.

## Religion and the Law

Christianity has undoubtedly influenced the regulation of marriage in England and Wales, moreover this can be directly seen when considering the position of marital property agreements. It has been stated that in, 'the Western world influenced by the Christian religious tradition, premarital contracts were viewed as contradictory to the ideals of sanctity and indissolubility of marriage.'<sup>11</sup> In response to the Law Commission's Consultation Paper, *Marital Property Agreements*, the Christian Concern and The Christian Legal Centre state, 'The law should encourage marriage as a life-long, permanent union which creates the ideal and most stable environment for the raising of children. Introducing Nuptial Agreements will undermine marriage by redefining it as a *temporary* commitment akin to a business or commercial contract.'<sup>12</sup>

### Christianity and Marital Property Agreements

The 2001 census shows that Christianity remains the largest religious group in Great Britain.<sup>13</sup> It is apparent that there are still strong feelings towards reforming this area of the law from a Christian perspective. The Church of England states:

...it is the Church's belief that marriage is central to the stability and health of human society and continues to provide the best context for the raising of children. For that reason it warrants a special position within the social and legislative framework of our society. We remain committed to this principle of marriage. Since marriage contributes to the common good there is a very strong case for pursuing public policies that promote and encourage marriage. It would be of concern to us if the more general acceptance of such marital agreements were to undermine marriage itself...we are concerned about the principle of marital agreements and the implications for marriage should they be more widely accepted. In a Christian understanding of marriage agreements of this kind would weaken and dilute our marriage vows of lifelong commitment.<sup>14</sup>

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<sup>11</sup> J U Franck 'So Hedge Therefore, Who Join Forever'; Understanding the Interrelation of No-Fault Divorce and Premarital Agreements.' IJLP&F 2009 23 (235).

<sup>12</sup> Response available at <<http://www.christianconcern.com/our-concerns/family>> Last Accessed 18 June 2011.

<sup>13</sup> 41 million people stated that they were the Church of England; Church of Scotland; Church of Wales; Catholic; Protestant or that they belonged to a further Christian denomination. In 2001 this equated to 72% of the population. The census revealed that the second largest group of people were those with no religion, this equating to 15% of the population of Great Britain. People belonging to other religions accounted for 5% of the population, Muslims were the largest religious group falling into this percentage. The census states that there are 1.6 million Muslims living in Britain in 2001, this figure relates to 52% of this group. Hindus, Sikhs, Jews and Buddhists made up the other religions represented by the group. All figures taken from National Statistics Online <[http://www.statistics.gov.uk/cci/nugget\\_print.asp?ID=954](http://www.statistics.gov.uk/cci/nugget_print.asp?ID=954)> Last accessed 25 May 2011.

<sup>14</sup> Quotation obtained from <<http://www.churchofengland.org/our-views/marriage,-family-and-sexuality-issues/marriage/pre-nuptial-and-post-nuptial-agreements.aspx>> Last accessed 26 April 2011.

A reform to provide legislative framework for enforceable marital property agreements would be seen by the Church of England as a clear step to move marriage to being merely a contract.

It is clear from the statements set out above that there would be some opposition held by certain denominations of Christianity to the creation of enforceable marital property agreements. It is therefore questionable as to how such agreements may be treated by the Church. Much can be gleaned from the regulation of remarriage in Church following a divorce. In the General Synod meeting in 2002 a discussion was held regarding the position of remarriage in Church, granting discretion to individual ministers to do so under the guidance of the principles set out in the meeting. The stance taken with regard to marriage is clear:

Marriage is created by God to be a lifelong relationship between a man and a woman. The church expects all couples seeking marriage to intend to live together “for better for worse...till death do us part.” It is not, then, a light matter to solemnise a marriage in which one partner has a previous partner still living.<sup>15</sup>

Given that the Church of England comment that the enforceability of such agreements would ‘weaken and dilute our marriage vows of lifelong commitment’<sup>16</sup> it is debatable whether some ministers would allow the existence of a pre-nuptial agreement when deciding whether or not to marry a couple. One of the principles stated towards remarriage in the General Synod was, ‘Would the effects of the proposed marriage on individuals, the wider community and the Church be such as to undermine the credibility of the Church’s witness to marriage?’<sup>17</sup> Of course it is not only Christians who believe in the life-long nature of marriage, but given the stance taken towards remarriage it would seem that there would need to be some guidance put in place for the possibility of a couple wishing to marry in the Christian faith, but who also want to have a pre-nuptial agreement regulating the division of assets should they later split up. Having a pre-nuptial agreement in place does not in any way guarantee that the couple are anticipating that the marriage will not be lifelong, but much will depend on the interpretation taken by the various Christian denominations as to whether there is place for a pre-nuptial agreement in a Christian marriage.

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<sup>15</sup> Quotation obtained from < <http://live.churchofengland.org/media/1273446/gsl449b.pdf> > 2.

<sup>16</sup> (n 14).

<sup>17</sup> (n 15) 4.

## Islam and Marital Property Agreements

Muslims accounted for the largest non-Christian religious group in Great Britain recorded in the 2001 census.<sup>18</sup> There is a marked difference in the approach taken towards marital property agreements in Islam. The *Muslim Marriage Contract* was published by the Muslim Institute in August 2008 and outlines the implications of having such a contract. The report describes, 'In the Sharia, marriage is a relationship of mutual love, mercy and kindness. In Islamic law marriage is a civil contract between parties which allows them mutually to agree upon the terms and conditions of their future together.'<sup>19</sup> The lifelong nature of marriage is also given consideration with regard to contracting for the future, 'As these matters can have lifelong effects upon both spouses and any children, it is important that they be properly discussed beforehand.'<sup>20</sup> As the marriage is viewed as a contract, consideration must be given from the bridegroom to the bride, this is known as the Mahr. This can be given as money, goods or property; it can be immediate or deferred. If an immediate Mahr is chosen then the transfer would take place at the signing of the marriage contract. In the case of a deferred Mahr, the amount can be payable to the wife at a selected point in the marriage, or upon the ending of the marriage through death of the husband or divorce.

The report discusses the possibility of divorce in Islam:

According to Islamic law, marriage is the most sacred commitment in life between two adults of opposite sex. It attempts to save it wherever possible. As a consequence divorce is regarded by Allah as the most 'hated thing.' However, breakdown in marriage does take place for a variety of reasons.<sup>21</sup>

There are four possible consequences for the Mahr upon divorce, this is dependent upon the background of the marital breakdown. If the husband initiates divorce then he is bound to pay any unpaid Mahr, the same will apply if it is the wife who initiates divorce and the husband is found to be the one at fault. If, however, fault on the husband's behalf cannot be established then the wife would have to return any Mahr which she has received at that point. The same will be true if the divorce is initiated by the wife without any fault being alleged.<sup>22</sup> The place

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<sup>18</sup> (n 13).

<sup>19</sup> Quotation obtained from *The Muslim Marriage Contract* (Published by the Muslim Institute, August 2008, London). Report available electronically  
<[www.muslimparliament.org.uk/.../Muslim%20Marriage%20Contract.pdf](http://www.muslimparliament.org.uk/.../Muslim%20Marriage%20Contract.pdf)> Last Accessed 2 April 2011.

<sup>20</sup> (n 19).

<sup>21</sup> (n 19).

<sup>22</sup> (n 19).

of a contract within a Muslim marriage demonstrates that the use of an agreement akin to a pre-nuptial agreement may appear to be a more accepted concept in some religions.

### **Judaism and Marital Property Agreements**

The Jewish Ketubah, or Ketubbah,<sup>23</sup> is a contract created prior to a marriage. A Ketubah sets out the amount to be paid to the wife upon divorce or upon her husband's death. It also contains the responsibilities of the husband to his wife. The property that is being brought by each party is also dealt with in this contract. The Ketubah is signed by the groom and two witnesses and it is presented to the bride during the ceremony.<sup>24</sup> It is thought that this originates from the notion that once a couple had formed a contract, a Rabbi could oversee any possible divorce.<sup>25</sup> Lamm comments:

In liberal communities the bride and groom often write more egalitarian ketubot that reflect their goals for the marriage - either in place of or in addition to the traditional ketubah. Both liberal and some traditional Jews may include a prenuptial agreement in their ketubah that would require the groom to give the bride a get, or Jewish bill of divorce, should the marriage end.<sup>26</sup>

Two of the pre-nuptial agreement cases analysed in Chapter Two are linked to Jewish marriages; *X v X (Y and Z intervening)*<sup>27</sup> and *N v N (Jurisdiction: Pre-Nuptial Agreement)*.<sup>28</sup> Comment has also made on the effect of the Divorce (Religious Marriages) Act 2002 with regard to the Act conferring the power to refuse a decree absolute where steps have not been taken towards dissolving a religious marriage.<sup>29</sup>

It is evident that Christianity remains influential in Great Britain, and the opposition to marital property agreements is clear. However, the use and acceptance of such agreements in religions widely practiced in this jurisdiction should not be overlooked.

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<sup>23</sup> Alternative spelling found at <<http://www.jewishencyclopedia.com/articles/9290-ketubah>> Last Accessed 2 April 2011.

<sup>24</sup> See for example, <[www.ketubah.com](http://www.ketubah.com)> This site contains many designs of Ketubah that can be chosen by the couple prior to their wedding.

<sup>25</sup> See, C Barton, 'Contract – A Justifiable Taboo?' in R Probert (ed) *Family Life and the Law Under One Roof* (Ashgate Publishing Limited, 2007, Hampshire) The Ketubah is explored at 88.

<sup>26</sup> M Lamm *The Jewish Way in Love and Marriage* (Jonathon David Publishers, New York 1991) 197.

<sup>27</sup> [2002] 1 FLR 508. See above at p 77 for further details.

<sup>28</sup> [1999] 2 FLR 745. See above at p 84 for further details.

<sup>29</sup> See above at p 85.

## A Feminist Perspective

The vast majority of cases surrounding marital property agreements involve a husband or future husband trying to reduce the maintenance to be awarded to his wife or future wife, and so the feminist perspective on such agreements is noteworthy at this point.<sup>30</sup> This issue was discussed by Lady Hale speaking in the Supreme Court decision in *Radmacher*:

Above all, perhaps, the court hearing a particular case can all too easily lose sight of the fact that, unlike a separation agreement, the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually although by no means invariably she – would otherwise be entitled.<sup>31</sup>

An alternative view point to this perspective has been put forward by Barton:

But this is, as they say, a 'false dichotomy': how many marriages would go ahead anyway (Granatino's would not have) were the profferee to decline the deal? And might not some profferors offer a deal above the default rate as an incentive, for example some rich old boy courting a lovely young lady who knows that he will leave everything elsewhere and that she would anyway be his ninth wife?<sup>32</sup>

Clearly this is not as straight forward as simply stating that it will always be the female party to the marriage who will suffer a detriment due to a marital property agreement, yet the origins of this perspective are notable. It is certainly a widely held view that enforceable agreements would uphold autonomy.<sup>33</sup> Clark raises the point that this is not a universally accepted view. From a feminist perspective it could be argued that there is too much emphasis placed on contractual issues within the family relationship, leading to the concept the family becomes a group of automatons, rather than an inter-dependant group of individuals.<sup>34</sup>

It is paramount to examine the history that lies behind this school of thought to fully appreciate this stance. In 1770 Blackstone's *Commentaries on the Laws of England*<sup>35</sup> described the common law theory of unity, 'the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the

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<sup>30</sup> This case law is examined in detail in Chapter Two, see in particular the case law discussed at pp. 82 – 88.

<sup>31</sup> [2010] UKSC 42, [137].

<sup>32</sup> C Barton, 'In Stoke-on-Trent, My Lord, They Speak of Little Else': *Radmacher v Granatino* [2011] Fam Law 67.

<sup>33</sup> J M Scherpe 'A Comparative View of Pre-Nuptial Agreements' March 2007 IFLJ 2007 (18). Scherpe comments, 'If an agreement is generally perceived to be binding, this will encourage the parties to come to an agreement and give them the feeling of being in charge of their own affairs.'

<sup>34</sup> B Clark, 'Should Greater Prominence Be Given To Pre-Nuptial Contracts In The Law Of Ancillary Relief?' [2004] CFLQ 399.

<sup>35</sup> Blackstone's *Commentaries on the Laws of England* (4<sup>th</sup> ed., 1770) Vol. 1, p.442.

husband: under whose wing, protection, and cover, she performs everything.’<sup>36</sup> The theory of unity possibly stems from a patriarchal interpretation of the Biblical teaching of ‘therefore man shall leave his father and his mother and shall cleave unto his wife, and they shall be one flesh’<sup>37</sup> As a result a married woman’s property belonged to her husband, the only exception being what family wealth had been tied up in a marriage settlement. The vast injustices caused by this led to a reform; Matrimonial Causes Act of 1857. This Act gave women the protection order, enabling a deserted woman to protect her earnings, savings and property. Later the Married Women’s Property Act 1870 was passed, providing a little more protection, meaning that married women now had legal rights over their inheritance, earnings and savings. Campaigners wanted the legal right to all their property upon marriage.

After much pressure the Married Women’s Property Act 1882 was passed, a married woman now had the legal right over all her own property that she had gained prior to and after the marriage as separate property. Shanley comments that this Act gave women ‘the legal capacity to act as autonomous economic agents.’<sup>38</sup> A move to legislate that a person would not gain an interest in their spouse’s property would have been a move too far towards equality of the sexes at this point in time. Cretney notes that the concept of unity remained until the late 1990s, upon the passing of the Finance Act 1998.<sup>39</sup>

We have now reached the position that within a marriage there is a certain amount of autonomy, interdependency and equality.<sup>40</sup> It is possible to appreciate the feminist view that the enforceability of such contracts would increase the private autonomy of the spouses, therefore disrupting this careful balance. However, it is possible that a marital property agreement would allow a couple to work as an equal partnership to determine their future should their relationship come to an end, their individual autonomy playing a secondary role in terms of the partnership. The alternative being that their finances would be divided using the wide-ranging discretion of the court, with the possibility of reaching an agreement that neither of them is entirely satisfied with. The equal partnership would simply be self-governing their own future. There is a fine balance to be struck between ensuring that this

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<sup>36</sup> S Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press, Oxford, 2005) 91.

<sup>37</sup> Genesis, 2.24.

<sup>38</sup> M Shanley, *Feminism, Marriage and the Law in Victorian England* (Princeton University Press, New Jersey 1989).

<sup>39</sup> (n 36) 113.

<sup>40</sup> Lord Denning articulates the position that has been reached through the efforts of the Victorian reformers, ‘Nowadays, both in law and in fact, husband and wife are two persons, not one. They are partners – equal partners – in a joint enterprise, the enterprise of maintaining a home and bringing up children.’ *Midland Bank Trust Co Ltd v Green* [1980] Ch 496. See above also at p 250.

theoretical equality relates to reality,<sup>41</sup> whilst avoiding the stance of treating females choosing to contract as a 'weak minded woman in love.'<sup>42</sup>

### 9.3 VIEWS FROM EITHER SIDE OF THE STATUS-CONTRACT CONTINUUM

The significance of enforceable marital property agreements on the underlying quandary between status and contract can be demonstrated by observing the various arguments which have been presented from either end of the continuum. Douglas summarises the balance in terms of autonomy and vulnerability:

One of the most enduring conundrums which remain to be resolved in family law is how to balance the competing interests of the parties when determining financial and property settlements on divorce. In particular there are two factors which may conflict with each other: autonomy and vulnerability...The conflicting issues of autonomy and vulnerability apply to divorce settlement across two separate dimensions – the relationship of the parties with the state, and their relationship with each other.<sup>43</sup>

Those in favour of the status end of the continuum view marriage as a public institution which requires 'standardisation' in order to retain the stability of the institution of marriage in society. The judicial division of assets is seen as the most suitable way in which to fulfil this view. In contrast, some regard marriage as a private relationship and therefore it is in the best interests of society that the consequences of these unique unions are dealt with by the parties themselves; thus viewing marriage from the contractual end of the continuum. The views from either end of the continuum can be compared.

#### Upholding Public Policy

Herring considers that the principles set out in *Hyman* have been somewhat forgotten,<sup>44</sup> suggesting that to seek fairness between parties during the division of assets is misguided and undesirable as it obscures the importance of the wider social interest. A series of scenarios which would encroach on the interests of the state or community are put forward. The possibility of one spouse becoming dependent on state benefits is undoubtedly an issue where there is a wider social concern. Leaving one spouse in the position where they are paying out

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<sup>41</sup> For example see, G F Brod, 'Premarital Agreements and Gender Justice' Yale Journal of Law and Feminism 1994 [Vol. 6: 229] 279.

<sup>42</sup> L Weitzman (n 32) 246.

<sup>43</sup> G Douglas 'Simple Quarrels? Autonomy vs. Vulnerability' in R Probert and C Barton (eds) *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia, Cambridge, 2012) pp. 217 and 218.

<sup>44</sup> J Herring, 'Why Financial Orders on Divorce Should be Unfair' 2005 IJLPF Vol. 19, No. 2, 218.

a large proportion of their income would also be unfavourable as they may eventually consider that becoming dependant on benefits to be a more appealing option. Herring argues that there are many status issues linked to the upbringing of children. It is in the interests of society that the care of children is carried out by the couple. Ensuring that a suitable financial award is given to the spouse carrying out such roles safeguards the position that these responsibilities are valued in society. It is highlighted that this role is usually taken by the wife and therefore this area of division touches upon supporting gender equality.

The level of spousal support can be viewed as a factor which will impact on the child, based upon factors such as whether or not the parent is employed, their level of self-respect, happiness and therefore their likelihood of finding a new partner. It is argued that if the financial awards are set at a certain level they may in fact discourage some spouses from initiating divorce proceedings, thus upholding potentially unhappy marriages. The way in which people live post-divorce is also considered. It is in society's interest that each spouse attains an appropriate level of independence and can therefore move on. The Law Commission comment that an agreement which left one spouse just above the level of state benefits, whilst the other had disposable income would not currently be upheld and so it is questionable as to whether a reform should occur to allow this. It is crucial to bear in mind that many of these issues would disappear depending on the model selected, as discussed below.<sup>45</sup>

Herring comments on the way in which the majority of married couples operate, 'The values of mutual sharing and co-operative interdependence predominate in the marriage of most people, not the working out of compensation, losses and benefits.'<sup>46</sup> Regan supports this view, '...marriage ideally involves the cultivation of a relational identity that infuses costs and benefits...individual acts take on meaning only against a background of shared commitments; to analyse them apart from this context fails to capture their full significance.'<sup>47</sup> Upon divorce the spouses take the position of two individuals. Herring concludes that financial orders should not be based on fairness or decided by private ordering because there are wider ramifications to the society which should be protected. This view supports the position that the principles set out in the *Hyman* judgement are still applicable today.

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<sup>45</sup> See The Law Commission, *Marital Property Agreements* (n 1) para 5.45: There is a discussion on 'Hardship and the social cost of reform.'

<sup>46</sup> J Herring 'Why Financial Orders on Divorce Should be Unfair' (n 44) 227.

<sup>47</sup> M Regan Jr, *Family Law and the Pursuit of Intimacy* (New York University Press, 1993) 147.

## Agreements about the Future

A great many of the arguments against enforceable marital property agreements have been rebutted by Weitzman,<sup>48</sup> by demonstrating the positive impact that these agreements could have in creating well informed and stable marriages. It is notable that much of the discussion in *The Marriage Contract* is based upon lifestyle contracts rather than the property agreements in discussion. The vast majority of the positive effects of contracting outlined in this work still stand; the arrangement or possible division of property and lifestyle choices are in no way independent of each other. Weitzman puts forward the argument that in creating an agreement the couple would engage in a discussion regarding future plans, possibly uncovering areas of incompatibility. She describes the scene, ‘the man who discovers unexpectedly that his “sweet little homebody” has plans for a career of her own, and the woman discovers that her gallant swain wouldn’t think of “helping” with housework, may decide to wait a while and reconsider the marriage.’<sup>49</sup> It is widely accepted that it is in the interests of society to uphold marriage, but moreover it should be considered that society should be supporting stable unions. Perry suggests that the reconsideration of entering marriage at this point is one of the most advantageous benefits enforceable marital property agreement can offer to society:

Dissolution planning at the beginning of a relationship could also have a positive effect on the marriage itself. Frank discussions about what the parties expect in the event of termination of the relationship would likely lead to wide-ranging discussions about what they expect during the relationship, and serious differences might be worked out before the marriage takes place. To the extent that any such discussions ultimately reveal differences that turn out to be irreconcilable, they arguably would serve a positive function even if the result is the couples who otherwise would have married do not do so.<sup>50</sup>

Focussing in on some parts of the future relationship which some couples may not have otherwise discussed could reveal that they are simply unsuited. This may come to light at some point in the future, possibly leading to divorce, or worse, a marriage in which the spouses are discontented and unfulfilled. Separation prior to marriage in such a case would be a positive outcome. However, this view does not take into account that people’s views and wishes may alter over the period of the marriage. In addition, this is certainly not to say that

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<sup>48</sup> L Weitzman, *The Marriage Contract: A Guide to Living with Lovers and Spouses* (Free Press, 1981).

<sup>49</sup> L Weitzman, *The Marriage Contract* (n 48) 250.

<sup>50</sup> T Perry, ‘Dissolution Planning in Family Law: A Critique of Current Analyses and a Look toward the Future’ 24 *Fam. L.Q.* 77 (1990-1991) pp. 84-85. See also N Sheresky and M Manners ‘A Radical Guide to Wedlock’ *Saturday Review*, 33 (July 29, 1972) who also make this point.

every couple should need to discover that they are entirely harmonious in their vision of the future prior to marriage, or that the prospect of a binding financial agreement would be required to prompt this conversation. It is feasible that pre-marital cohabitation would now provide a far more accurate indicator of a couple's compatibility.<sup>51</sup> In addition to the positive effects offered to the start of a marriage, such agreements could provide the possibility for a more amicable divorce. Weitzman describes the 'begin-in-bliss/end-in-enmity syndrome' and that a contract may, 'avert much of the emotional trauma and economic hardship that result from an unanticipated and untimely dissolution.'<sup>52</sup> The expectation that the end-in-enmity stage could be mitigated to some extent by having an enforceable marital property agreement in place does not take into account the strong likelihood of one spouse challenging the terms of the agreement in order to gain a larger settlement.

### Agreements and Equality

The point raised by Herring with regard to the recognition of equality within the financial order can be challenged by the point raised by Weitzman. This is the very basis for contractual relations: two equal parties consenting to be bound by a joint agreement.<sup>53</sup> Although, private ordering can of course simply be a reflection of the inequality present in the relationship, Barton comments, 'Equilibrium is likely to be a pipe dream in making deals of any kind of contract.'<sup>54</sup> The gender dimension to marital property agreements was specifically addressed by Lady Hale in the Supreme Court decision in *Radmacher v Granatino*:<sup>55</sup>

Would any self-respecting young woman sign up to an agreement which assumed that she would be the only one who might otherwise have a claim, thus placing no limit on the claims that might be made against her, and then limited her claim to a pre-determined sum for each year of marriage regardless of the circumstances, as if her wifely services were being bought by the year? ...In short, there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman.<sup>56</sup>

This view can be compared to that of Brod:

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<sup>51</sup> It should be noted that research suggests that pre-marital cohabitation leads to an increased chance of the dissolution of a subsequent marriage. See for example the work undertaken by H Kulu and P Boyle, *Premarital cohabitation and divorce: Support for the "Trial Marriage" Theory?* available at < <http://www.demographic-research.org/volumes/vol23/31/>> Last accessed 20 June 2012.

<sup>52</sup> L Weitzman, *The Marriage Contract* (n 48) 241.

<sup>53</sup> L Weitzman, *The Marriage Contract* (n 48) 231.

<sup>54</sup> C Barton, 'Marital Property Agreements: The Law Commission's Cut.' Sept [2011] Fam Law.

<sup>55</sup> (n 3)

<sup>56</sup> *Radmacher v Granatino* (n 3) [137].

By focusing on women's idealized de jure equality, lawmakers have ignored women's actual, continuing social and economic inequality. By ignoring women's de facto inequality, lawmakers reforming the law of premarital agreements have overlooked the adverse economic impact that premarital agreements have on women as a class. Lawmakers should recognize premarital agreements for what they are: contracts that violate social norms against gender discrimination.<sup>57</sup>

According weight to the issue of gender discrimination will undoubtedly determine the way in which marital property agreements would be regulated by the judiciary. Furthermore, gender inequality could be reinforced in the way in which agreements are scrutinised by the court. The starting point should not be the supposition that the agreement was made by a feeble-minded woman. This issue will be discussed further in relation to the possible models for reform in England and Wales.

### **Agreements and Emotions**

A common objection to enforceable marital property agreements is that they are inconsistent with the emotional elements of love, romance, and trust upon which a stable relationship is founded, the premise for this is that such agreements are more suited to the business world.<sup>58</sup> Yet, Weitzman makes the valid point that this assertion is entirely based on the assumption that no emotions come into play in a business contract, when in reality some cases may well rely upon the provision of trust, support and commitment from either side.<sup>59</sup> The dichotomy between future spouses and long standing business partners, or partners in a family business, is not entirely accurate. This viewpoint also presumes that the creation of an agreement would be a necessarily adversarial process for the couple to go through. In conclusion to the private agreement-public institution debate Weitzman is unequivocal, 'society only has to gain by encouraging couples to order their financial relationships by private contract.'<sup>60</sup>

Support for the contractual end of the continuum is given by Cretney, who states that the principle that marriage creates a legal status which the spouses are prohibited from amending is no longer acceptable and that legislation should amend this position.<sup>61</sup> The Law Commission pose the question, 'Those who enter into marital property agreements have the capacity for marriage or civil partnership, and indeed to enter into other contracts between

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<sup>57</sup> G F Brod, 'Premarital Agreements and Gender Justice' Yale Journal of Law and Feminism 1994 [Vol. 6: 229] 279.

<sup>58</sup> L Weitzman, *The Marriage Contract* (n 48) 239.

<sup>59</sup> L Weitzman, *The Marriage Contract* (n 48) 244.

<sup>60</sup> L Weitzman, *The Marriage Contract* (n 48) 254.

<sup>61</sup> S Cretney, 'The Family and The Law – Status Or Contract?' [2003] CFLQ 403.

themselves; why should they not have the capacity to enter into an agreement about their future financial status?’<sup>62</sup> The support for autonomy is however curtailed somewhat by the possibility of pressure and the potential to agree to something simply because of the nature of the relationship. Barton has acknowledged that pre-marital agreements will never be a general panacea;<sup>63</sup> but reform to provide enforceable marital property agreements should provide ‘judge-proof certainty.’<sup>64</sup> He describes the effect of creating provisions which leave scope for change upon divorce from both possible angles, ‘What is the point of a non-binding agreement, if it merely provides that promisee with the moral high ground and allows the promisor an ultimate escape route?’<sup>65</sup>

### **Agreements and Autonomy**

If the law is offering the autonomy to create such agreements then the opportunity to do so in error is inherent in this provision. Weitzman summarises ‘the freedom to contract must include the freedom to make a mistake.’<sup>66</sup> In selecting autonomy the parties have made a conscious decision to move away from the paternalism the law would otherwise offer. The use of ‘autonomy’ must be more finely pinpointed as there are current provisions to create an agreement upon separation, but the autonomy in question is the ability for a spouse to restrict the other party’s options prior to this point.<sup>67</sup> It is absolutely paramount that such agreements should not only be available to play a role in the division of assets of the very wealthy. Barton suggests that marital property agreements could be used to ring-fence specific assets where there is enough remaining elsewhere for children and to keep the other party above the level of being dependent on state benefits.<sup>68</sup> This view should play a role in determining how such agreements are regulated by the courts.

### **Agreements and Conflict**

Herring, George and Harris take the view that adopting the attitude that ‘something must be done’ could lead policy makers to underestimate the complexities of this area. In summary, they comment that enforceable marital property agreements, ‘might not only fail to increase

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<sup>62</sup> The Law Commission, *Marital Property Agreements (n 1)* para 5.25.

<sup>63</sup> C Barton, ‘Pre-Marital Contracts And Equal Shares On Divorce’ [1998] Fam Law 423.

<sup>64</sup> C Barton, ‘The Lords and Pre-Nups’ (n 4).

<sup>65</sup> C Barton, ‘Contract – A Justifiable Taboo?’ (n 25) 91.

<sup>66</sup> L Weitzman, *The Marriage Contract* (n 48) 248.

<sup>67</sup> This point recognised in The Law Commission, *Marital Property Agreements (n 1)* para 5.31, ‘It is freedom of contract, but it is therefore freedom to use a contract to restrict one’s partner’s choices.’

<sup>68</sup> C Barton, ‘In Stoke-On-Trent, My Lord, They Speak of Little Else’ (n 32).

the certainty and simplicity of the law, reduce conflict and litigation, and lower costs, but, on the contrary, might cause greater legal uncertainty and complexity, and /or increase opportunities and incentives to litigate.’<sup>69</sup> This view demonstrates that there are limitations to private ordering. The failings expressed are the precise opposites of the many benefits which recommend private ordering. Evidence from other jurisdictions can be gleaned in support of these fears.<sup>70</sup> For example, the way in which Financial Agreements are dealt with in Australia has been analysed in Chapter Six, where the comment was made that lawyers are reluctant to offer advice for dread of negligence claims.<sup>71</sup> Should reform occur, this view must be kept in mind, in order to act as a reminder that such agreements will never be the ultimate answer to such issues.

#### **9.4 CREATING A QUALIFYING MARITAL PROPERTY AGREEMENT: AN ANALYSIS**

The scope or content of a marital property agreement may in fact be dependent on the way in which financial orders are decided. The reform of this area was discussed in the previous Chapter. It was suggested that the desire for private ordering in this area could be a symptom of the dissatisfaction held towards the current system. The difficulty is whether reform of financial orders should occur first to establish precisely what a couple are contracting out of, or if a reform providing for enforceable marital property agreements would no longer render the current provisions as unsuitable. It has been suggested that limiting the scope of marital property agreements to come into play when deciphering a surplus of assets, once needs have been met, would strike a suitable balance between status and contract. This model would mean that it would be possible to consider two strands of surplus property through contract: matrimonial property and non-matrimonial property. This decision would be made against the default rule of splitting any surplus matrimonial property equally. This would have the benefit of creating a more straightforward and clear reform. The narrower the scope of an agreement, the fewer safeguards would be required in the provisions.

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<sup>69</sup> R George, P Harris, and J Herring, ‘Pre-Nuptial Agreements: For Better or for Worse?’ [2009] Fam Law 934.

<sup>70</sup> Studies have already been carried out in order to assess the usage of private agreements in other jurisdictions. See for example: J M Scherpe (ed), *Marital Agreements and Private Autonomy in a Comparative Perspective* (Hart Publishing, Oxford 2012). The volume contains details on the regulation of marital agreements in: Australia; Austria; France and Belgium; England and Wales; Germany; Ireland; The Netherlands; New Zealand; Scotland; Singapore; Spain; Sweden and United States. See also, D Salter, C Butruille-Cardew and S Grant (eds), *International Pre-Nuptial and Post-Nuptial Agreements* (Jordan Publishing Limited, Bristol, 2011). Details of the requirements to create a marital contract are included on: Australia; Austria; Canada; France; Russia; Switzerland; Ukraine; England and Wales and United States of America.

<sup>71</sup> This issue is evidenced in B Fehlberg and B Smyth ‘Binding Pre-Nuptial Agreements in the First Year’ (2002) *International Journal of Law, Policy and the Family*.

The vast discretion vested in the courts in deciding financial relief upon divorce is a consequence of the upholding of marriage at the status end of the continuum, that is to say that the whole community has an interest in the financial circumstances of a divorcing couple. A move to limit or alter this discretion in some way through legislative reform of s.25 MCA 1973 would alter this dynamic and would therefore be a considerably larger task, and considered to be a 'major undertaking'<sup>72</sup> in comparison to the introduction of an element of optional contractual relations. It would seem logical for this reform to occur initially as it may alter the way in which marital property agreements are used.

### **Valid under the Law of Contract**

In order to create a qualifying marital property agreement it has been proposed by the Law Commission that they must firstly be valid under the law of contract. This element of validity could then be combined with further requirements in order for them to be capable of ousting the jurisdiction of the court.<sup>73</sup> If an agreement failed in some way based on these requirements there would of course be the possibility that they could be considered against the present s.25 discretion. The weight given to the agreement would presumably depend on the nature of the failure. Setting a high threshold for validity would not provide the ultimate and universal safeguard. The Law Commission comment on the limitations of this approach: 'No amount of pre-requisites can provide absolute protection against pressure, foolishness, carelessness or love, and there is no need for the law to provide absolute protection in facilitating agreement between adults.'<sup>74</sup> Barton comments, 'Why should these particular contracts be made even more difficult than that (already more stringent than almost any other private arrangement (particularly marriage itself) in English law) as a pre-requisite to enforcement?'<sup>75</sup> There is a balance to be struck between introducing a certain level of protective safeguards without creating agreements which present difficulties upon enforcement.

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<sup>72</sup> The Law Commission, *Marital Property Agreements* (n 1) para 5.64.

<sup>73</sup> The Law Commission, *Marital Property Agreements* (n 1) para 5.7.

<sup>74</sup> The Law Commission, *Marital Property Agreements* (n 1) para 6.5.

<sup>75</sup> C Barton, 'Marital Property Agreements' (n 54).

## 9.5 REQUIREMENTS FROM THE LAW OF CONTRACT

There are several requirements which would need to be overcome in order for a marital property agreement to comply with the law of contract. Morris feels strongly that the law of contract is not suitable to cover marital property agreements, 'The normal English couple enter into matrimony in a state of emotional duress and are mutually under undue influence. It is because of this that matrimony cannot find a basis in the law of contract....'<sup>76</sup> The courts have however been willing to negotiate such matters on the basis of contract law, the following three cases demonstrate the potential problems in creating contractual relations.

### Intention to Create Legal Relations

The wife's claim against her husband for maintenance during his stay in Sri Lanka failed in *Balfour v Balfour*<sup>77</sup> as she had not provided consideration. In addition the burden lay on her to rebut the presumption that there was no intention to create legal relations, it was decided that an enforceable contract had not been created. Atkin LJ stated, 'The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts.'<sup>78</sup> However 1970 saw a contract between spouses upheld, in the case of *Merritt v Merritt*.<sup>79</sup> The couple had separated and the husband had agreed to pay the mortgage and then later transfer the ownership to his wife, but he later refused to do so. The Court of Appeal held that the contract was binding, they were influenced by the fact that the agreement had been created upon the breakdown of a marriage.<sup>80</sup> Lord Denning commented on discovering the intention of the parties to create legal relations, 'In all these cases the court does not try to discover the intention by looking into the minds of the parties. It looks at the situation in which they were placed and asks itself: would reasonable people regard the agreements as intended to be binding?'<sup>81</sup> Lord

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<sup>76</sup> A Morris, Letter in the correspondence column, (1973) 123 New Law Journal 705). Quotation found in C Barton 'Domestic Partnership Contracts: Sliced Bread or a Slice of Bread?' [2008] Fam Law 900.

<sup>77</sup> [1919] 2 KB 571.

<sup>78</sup> *Balfour v Balfour* [1919] 2 KB 571, 579.

<sup>79</sup> [1970] 1 WLR 1121.

<sup>80</sup> See also *Gould v Gould* [1969] 3 All ER 730, [1970] 1 QB at 280, 'When ... husband and wife, at arm's length, decide to separate and the husband promises to pay a sum as maintenance to the wife during the separation, the court does, as a rule, impute to them an intention to create legal relations.'

<sup>81</sup> *Merritt v Merritt* [1970] 2 All ER 760, 762.

Diplock further enforced the possibility of finding the intention to create legal relations in *Pettit v Pettit*:<sup>82</sup>

It would, in my view, be erroneous to extend the presumption accepted in *Balfour v Balfour* that mutual promises between man and wife in relation to their domestic arrangements are prima facie not intended by either to be legally enforceable to a presumption of a common intention of both spouses that no legal consequences should flow from acts done by them in performance of mutual promises with respect to the acquisition, improvement or addition to real or personal property - for this would be to intend what is impossible in law.<sup>83</sup>

There does certainly seem to be a growing acceptance that a husband and wife could create a legally binding contract, so this could be extended to a couple due to be married. There is acceptance of the concept but further clarification would be needed.

More recently Baroness Hale gave a small mention to the requirements of the law of contract in contrast to executing a deed in *MacLeod*:<sup>84</sup>

There is a presumption that the parties do not intend to create legal relations... There may also be occasional problems in identifying consideration for the financial promises made (now is not the time to enter into debate about whether domestic services constitute good consideration for such promises). But both of these are readily soluble by executing a deed, as was done here.<sup>85</sup>

If the agreement is created in the form of a deed it escapes certain contractual requirements. The issue of the intention to create legal relations was discussed in 2010 by the Supreme Court in *Radmacher*. This case raised the point that when an agreement is thought to be binding there may be a shift in the inference of intention:

It is, of course, important that each party should intend that the agreement should be effective. In the past it may not have been right to infer from the fact of the conclusion of the agreement that the parties intended it to take effect, for they may have been advised that such agreements were void under English law and likely to carry little or no weight. That will no longer be the case. As we have shown the courts have recently been according weight, sometimes even decisive weight, to ante-nuptial agreements and this judgment will confirm that they are right to do so. Thus in future it will be natural to infer that parties who enter into an ante-nuptial agreement to which English law is likely to be applied intend that effect should be given to it.<sup>86</sup>

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<sup>82</sup> [1970] AC 777.

<sup>83</sup> (n 82) 822.

<sup>84</sup> [2010] 1 AC 298.

<sup>85</sup> *MacLeod v MacLeod* [2010] 1 AC 298, [36].

<sup>86</sup> (n 3) [70].

This idea could also be further supported by imposing requirements to create a qualifying marital property agreement, for example requiring legal advice. If the couple approach an agreement as an enforceable agreement this may have the advantage of giving much greater focus to the terms on which they are agreeing.

### **Consideration**

A contract also requires consideration. Richards comments that marriage holds a peculiar position in the law in that it can amount to consideration, this being historically linked to the transfer of interests in land.<sup>87</sup> This position would evidently be easier to justify for a marital property agreement made prior to the marriage. It would also be possible to frame provisions so the marital property agreements did not require the contractual element of consideration.<sup>88</sup> Guidance can potentially be taken from Muslim marriage contract and the Jewish Ketubah. There are therefore options for overcoming the contractual requirement of consideration.

### **Public Policy**

There is the possibility for the law of contract to play a role in deciphering which terms of the contract would be void for public policy, in the same way as marital property agreements have been regarded as void for public policy.<sup>89</sup> There is the possibility that a part of the agreement could be severed to leave an enforceable agreement. An example of this would be the inclusion on non-financial terms.<sup>90</sup> The Law Commission comment, 'A different issue is whether there should be any restriction upon the content of the agreement, beyond what is imposed by the general law of contract.... if included in a marital property agreement here under the current law they would simply be ignored when the agreement was considered within the ancillary relief exercise.'<sup>91</sup> The law of contract will fulfil the role of 'policing'<sup>92</sup> non-financial terms. Weitzman provides several examples of American marital property agreements, for example, 'Nancy promises to give a dinner party or to otherwise aid David's professional advancement by entertaining at least twice a week...David also agrees to

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<sup>87</sup> P Richards, *Law of Contract* (7<sup>th</sup> edn, Pearson Longman 2006) 283.

<sup>88</sup> The US Uniform Premarital Agreement Act 1983, s.2 states that marriage can be consideration for a premarital agreement and this provides a degree of mutuality of benefits to support the enforceability of the agreement. Yet, consideration is not required to reach the standard of enforceability. Provisions available at <[www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/upaa83.pdf](http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/upaa83.pdf)> Last accessed 13 September 2011.

<sup>89</sup> P Richards, *Law of Contract* (n 87) 282: This is explained in terms of contractual validity, marital property agreements are 'void as being inconsistent with the status and sanctity of marriage.'

<sup>90</sup> It was noted in the Introduction that this thesis has concentrated on financial agreements. See in particular p 12, footnote 63.

<sup>91</sup> The Law Commission, *Marital Property Agreements* (n 1) para 6.122.

<sup>92</sup> The Law Commission, *Marital Property Agreements* (n 1) para 6.124.

schedule at least two two-week vacations with her each year, at least one of them in Europe.<sup>93</sup> It is feasible that the inclusion of a non-financial term, contrary to public policy,<sup>94</sup> may render the entire contract to be void. The law of contract is acting both as a deterrent and monitor without the implementation of any provisions to exclude such terms.

### **Vitiating Factors from the Law of Contract**

There could be the, unlikely, possibility of one party not realising that the agreement was a marital property agreement. In this circumstance the doctrine of mistake could be called upon as a vitiating factor. Misrepresentation may be a slightly more difficult contractual concept in this area, touching upon the possible separate requirement of disclosure and also misrepresentations made regarding non-financial factors. This doctrine is one area which may require further provisions to be put into place to complement it and to provide more structure, as discussed below.

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### **Duress and Undue Influence**

The Law Commission have expressed the view that the courts would be unwilling to use duress as a vitiating factor in a marital property agreement due to the very nature of and the context of the agreement. It would be fairly straightforward to demonstrate some form of pressure and thus disregard the agreement. There will of course be exceptional cases where the factual matrix will establish duress. The proposal from the Law Commission limits the possibility of marital property agreements to only be considered against actual undue influence.<sup>95</sup> It has been suggested that the vitiating factors of duress and undue influence take on a gender issue when the judicial interpretation of these factors is examined,<sup>96</sup> for example:

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<sup>93</sup> L Weitzman, *The Marriage Contract* (n 48) Contract 2 at 298. See also the arguments put forward in Karl Fleischmann, 'Marriage by Contract: Defining the Terms of Relationship.' 8 Fam. L.Q. 27 (1974) pp. 27-50.

<sup>94</sup> Analogous examples are provided in C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8<sup>th</sup> edn, Sweet and Maxwell, 2012) 3-066: 'The condition must not be illegal, immoral or otherwise contrary to public policy. The condition most frequently encountered under this head is a condition on the restraint of marriage.' Richards also give the example of a contract which restricts a person's ability to marry as being void as contrary to public policy, the scope of such an agreement is only to oust the court's jurisdiction on ancillary relief. P Richards. *Law of Contract* (n 87) 283.

<sup>95</sup> The Law Commission, *Marital Property Agreements* (n 1) para 6.40.

<sup>96</sup> See for example C Barton, 'Marital Property Agreements' (n 54). Barton comment on these proposals, 'These are, perhaps untypically rare, displays of generosity to marital property agreements from CP198, which at this point might have looked more closely at the considerable feminist literature on the subject.' See for example D Thredy, in 'Feminists and Contract Doctrine' 32 Ind. L. Rev. 1247 (1998-1999): 'Many contract doctrines are paternalistic in the sense of protecting the "weaker" or disadvantaged party: concealment, misrepresentation, unilateral mistake, undue influence, duress, unconscionability...Feminists have just begun to question whether paternalistic doctrines like unconscionability help or harm women...feminists are searching for ways in which

A young woman engaged to be married is in a very different position. In most cases she does not interest herself in her future pecuniary position as between herself and her husband. In general, she reposes the greatest confidence in her future husband; otherwise she would not marry him. In many, if not most, cases she would sign almost anything he put before her.<sup>97</sup>

Whilst this influence may exist in some circumstances, it does take a very paternalistic,<sup>98</sup> even patriarchal, view of the issues surrounding private ordering in this context. Compare this to the account given by Granatino when the case facts were presented in the High Court:

...the wife stated that she would be disinherited if she married without a pre-nuptial agreement which protected her family wealth. Consequently, she presented the need for and driving force behind the pre-nuptial agreement as being her father. The husband told me that he was anxious to marry and did not want to cause a rift in the family. He was earning well, did not feel that he would want to make a claim and so he was agreeable to entering into a pre-nuptial contract. In any event, he did not perceive it to be an issue between him and his future wife because she did not seem to want the document for her own reasons as opposed to wishing to placate her father.<sup>99</sup>

This is not to say that he was indeed under duress or there was undue influence, but it does begin to demonstrate that these elements may not be unique to a female party.

The relationship of spouses, or couples in an intimate relationship, would have traditionally fallen under the classification of presumed undue influence,<sup>100</sup> Class 2B,<sup>101</sup> as it is not considered to be an influential relationship under Class 2A.<sup>102</sup> However, if one partner could show that the nature of their relationship was of a similar quality to those identified under

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contract doctrine could acknowledge that women have had less economic power than men.' See also above, G F Brod, 'Premarital Agreements and Gender Justice' Yale Journal of Law and Feminism 1994 [Vol. 6: 229].

<sup>97</sup> *Re Lloyds Bank, Limited. Bomze and Lederman v Bomze* [1931] 1 Ch. 289, 302.

<sup>98</sup> Worthington's explanation of the relationship between equity and undue influence demonstrates the thought behind this principle or doctrine and demonstrates the way in which it may be used, 'Equity's concern is with social pressure, not physical or economic pressure, and unacceptable social pressure is referred to as undue influence. At the outset Equity's motivation for intervention was a rather paternalistic desire to protect individuals from being victimised by others.' S Worthington *Equity* (2<sup>nd</sup> edition 2006 Oxford University Press, Oxford) 211.

<sup>99</sup> *NG v KR (Pre-nuptial contract)* [2008] EWHC 1532 (Fam), [22].

<sup>100</sup> The use of 'presumed' does seem slightly misleading, the presumption being made about the relationship is that one person has a certain amount of influence over the other, this presumption does not extend to this influence being in any way undue.

<sup>101</sup> Worthington explains that this distinction is not because this relationship is not influential, 'Indeed, when Equity was developing this jurisprudence it was probably widely accepted that wives would generally defer to their husbands. But Equity's target is not simply influence; it is *undue* influence. In these domestic relationships, gift-giving is natural. This means that there is no simple test that suggests that any acknowledged influence might have been unduly exercised.' S Worthington *Equity* (n 98) 212.

<sup>102</sup> Class 2A presumed undue influence arose in the existence of a certain type of relationship. The relationships that fell into the Class 2A classification of undue influence include doctors and patients, parents and children *Powell v Powell* [1900] 1 Ch 243, religious leaders and followers, *Allcard v Skinner* (1887) 36 ChD 145, trustee and beneficiary *Benningfield v Baxter* (1886) 12 App Cas 167, and solicitor and client, *Wright v Carter* [1903] 1 Ch 27.

Class 2A and the agreement was to their disadvantage then the rebuttable presumption of undue influence would be raised.<sup>103</sup> In proposing that a spouse must demonstrate actual undue influence has the advantage of limiting the vulnerability of agreements to this vitiating factor. Actual undue influence was established in the post-nuptial case of *NA v MA*,<sup>104</sup> Justice Baron set out her conclusions:

As the Husband knew that she wanted above all else to save the marriage, felt overwhelmingly guilty and did not want her affair to destroy her or children's lives, his ultimatum about the agreement being a pre-requisite to the marriage continuing put her under severe, undue and unacceptable pressure. I find that she was given no effective choice and her free will was overborne.<sup>105</sup>

The agreement played no part in the judgement due to the presence of actual undue influence.

## 9.6 FURTHER REQUIREMENTS

In addition to the requirements which would flow from the law of contract it would be possible to stipulate further requirements specific to the creation of a marital property agreement. Chapter Two charted the evolution of such agreements, notably the judiciary have compiled a set of questions in order to determine how much weight would be attached to an agreement as one of the s.25 factors. Notably, a culmination of such questions, coming from numerous cases, were included in the checklist compiled by Rodger Hayward Smith QC, sitting as a Deputy High Court Judge in *K v K*.<sup>106</sup> Moreover, it was noted that this process had occurred without any intervention from Parliament.<sup>107</sup> The Government's Green

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<sup>103</sup> It should be noted that the House of Lords in *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44 Lord Clyde showed considerable criticism over this division; Lord Clyde explained that he does not find this division particularly useful or accurate: 'Correspondingly the attempt to build up classes or categories may lead to confusion. The confusion is aggravated if the names used to identify the classes do not bear their actual meaning. Thus on the face of it a division into cases of "actual" and "presumed" undue influence appears illogical. It appears to confuse definition and proof. There is also room for uncertainty whether the presumption is of the existence of an influence or of its quality as being undue. I would also dispute the utility of the further sophistication of subdividing "presumed undue influence" into further categories. All these classifications to my mind add mystery rather than illumination.' *Royal Bank of Scotland v Etridge (No 2) and other appeals Barclays Bank plc v Coleman and another Bank of Scotland v Bennett Kenyon-Brown v Desmond Bankes & Company* [2001] UKHL 44, [91].

<sup>104</sup> [2006] EWHC 2900 (Fam).

<sup>105</sup> *NA v MA* [2006] EWHC 2900 (Fam) [128].

<sup>106</sup> [2003] 1 FLR 120, 131: see above at p 86: 'Did she understand the agreement? Was she properly advised as to its terms? Did the husband put her under any pressure to sign it? Was there full disclosure? Was the wife under any other pressure? Did she willingly sign the agreement? Did the husband exploit a dominant position, either financially or otherwise? Was the agreement entered into in the knowledge that there would be a child? Has any unforeseen circumstance arisen since the agreement was made that would make it unjust to hold the parties to it? What does the agreement mean? Does the agreement preclude an order for periodical payments for the wife? Are there any grounds for concluding that an injustice would be done by holding the parties to the terms of the agreement? Would it be unjust to hold the parties to that aspect of the agreement?'

<sup>107</sup> See J Posnansky, 'Talking Shop: A Time for Change: a Personal View' [2007] Fam Law 442.

Paper *Supporting Families*<sup>108</sup> was released in 1998, and proposed a number of elements to support the enforceability of marital property agreements.<sup>109</sup> It was suggested that an agreement would be unenforceable due to the existence of a child; if the agreement would be deemed to be unenforceable under law of contract; where there had been no independent legal advice prior to the creation of the agreement; where the agreement would lead to significant injustice; where there had been a failure to give full disclosure of assets; or where the agreement had been complete less than 21 days prior to the wedding ceremony. This list is a mixture of both requirements and safeguards. The view that an agreement would be a binding contract has been reinforced and upheld by the Law Commission. The other factors will now be examined against the Law Commission's consultation.

### Legal Advice

Imposing the requirement of legal advice has been examined by the Law Commission. Weitzman suggested that the creation of a marital property agreement would not be necessarily an adversarial process.<sup>110</sup> The Law Commission has however received evidence to demonstrate there is an element of discomfort felt by many couples during the drafting process, 'Many have told us about those negotiations and the tension that may be involved; the formation of an agreement is clearly not always a pleasant experience.'<sup>111</sup> It is possible therefore that a third party could be required so as to provide an objective view and offer legal advice. Regan's comment also highlights the advantage of this objective view, '...the blush of romance may introduce cognitive biases that undermine our confidence that contract terms are a product of clear-headed deliberation.'<sup>112</sup> Any provision requiring legal advice should follow this up with strict guidelines for the legal profession with regard to the advice to be provided and the drafting process.<sup>113</sup>

The Government's proposals from 1998 were clear that if one or both parties did not receive independent legal advice prior to entering the agreement this would render it unenforceable.<sup>114</sup> This requirement is clearly linked to cost. Yet, it would give a level of

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<sup>108</sup> The Home Office, *Supporting Families: A Consultation Document* (1998). Introduced above at p 81.

<sup>109</sup> The Home Office, *Supporting Families* (n 108) para 4.23.

<sup>110</sup> L Weitzman, *The Marriage Contract* (n 48) 254.

<sup>111</sup> The Law Commission, *Marital Property Agreements* (n 1) para 6.79.

<sup>112</sup> M Regan Jr, *Family Law and the Pursuit of Intimacy* (n 47) 150.

<sup>113</sup> An example of this advice has been considered by A Chandler, see 'Pre-Nuptial Agreements after *Crossley v Crossley*' Available electronically at <<http://www.familylawweek.co.uk/site.aspx?i=ed24924>> Last accessed 1 December 2011.

<sup>114</sup> The Home Office, *Supporting Families* (n 108) para 4.23.

protection to a weaker spouse, and provide an opportunity for further clarification of terms. The limitations of such a requirement were touched upon in Chapter Six<sup>115</sup> when discussing *Sutton v Mishcon de Reya and Gawor & Co*,<sup>116</sup> where Staal assured Sutton, 'I will not change my mind whatever [the lawyer] will tell me.'<sup>117</sup> This case shows that it would be possible to stipulate that independent advice is sought, but in no way guarantees that it will be acted upon.

The cost element could be avoided by requiring that only the chance to obtain legal advice was the pre-requisite;<sup>118</sup> this notion is supported by Resolution who promote the notion of, 'reasonable opportunity to receive independent legal advice...'<sup>119</sup> It would also be possible to lower costs by allowing for joint legal advice. Support for separate legal advice can be seen from The Centre of Social Justice, 'English law however has a fundamental criterion of separate representation, one lawyer cannot act for both parties...This is fundamental to the basic concepts in English culture of fairness and justice.'<sup>120</sup> The proposal from the Law Commission is that an agreement will not be deemed to be binding against a party who did not receive independent legal advice.<sup>121</sup> This stipulation should eradicate the possibility of an agreement failing on a point of law. Although this is a logical argument, it does seem to impose an unnecessary, potentially paternalistic, and costly requirement. This may well prevent some people from forming a binding agreement, yet provide a safeguard for many.

### Safeguarding Injustice

The safeguard of 'significant injustice' was earlier condemned by Barton on the basis that if reform should occur then it should strive for certainty.<sup>122</sup> The inclusion of such a safeguard

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<sup>115</sup> See above at p 163.

<sup>116</sup> [2004] 1 FLR 837.

<sup>117</sup> (n 116) [8].

<sup>118</sup> For example, compare the views from the High Court above at p 92 on legal advice in *Radmacher v Granatino*: Baron J stated, 'As I find the PNC is defective under English law for the following reasons: (a) The husband received no independent legal advice.' *NG v KR* (n 99) [137]. Yet in the Court of Appeal the opportunity alone was considered to be enough, see above at p 93: 'The husband clearly had the opportunity to seek independent advice during the development of the contract. The final draft may only have arrived a week before the trip to Dusseldorf to execute the contract but clearly the husband could have sought advice during the drafting process. *Radmacher v Granatino* [2009] EWCA Civ 649 [33].

<sup>119</sup> Resolution *Family Agreements: Seeking Certainty to Reduce Disputes* Available electronically at <[http://www.resolution.org.uk/site\\_content\\_files/files/family\\_agreements.pdf](http://www.resolution.org.uk/site_content_files/files/family_agreements.pdf)> Last accessed 17 September 2011. Reference at 3.

<sup>120</sup> The Centre for Social Justice, *Every Family Matters: An in-depth Review of Family Law in Britain* Available electronically at <[http://www.centreforsocialjustice.org.uk/client/downloads/WEB%20CSJ%20Every%20Family%20Matters\\_s mallres.pdf](http://www.centreforsocialjustice.org.uk/client/downloads/WEB%20CSJ%20Every%20Family%20Matters_s mallres.pdf)> Last Accessed 17 September 2011. Quotation at 196.

<sup>121</sup> The Law Commission, *Marital Property Agreements* (n 1) para 6.98.

<sup>122</sup> See above at p 272.

does certainly detract from the notion of autonomy and contractual freedom and the inherent freedom to make a mistake. The proposals from Resolution pose the issue of ‘substantial hardship’ rather than the use of the term ‘injustice.’ The basis for this choice is that it was thought that ‘injustice’ is more specific to other requirements such as disclosure, pressure, and legal advice. Resolution acknowledges that ‘substantial hardship’ is ‘clear and capable of determination by courts and parties, even though different opinions may exist.’<sup>123</sup> The Law Commission considered the inclusion of the notion of ‘injustice’:

We also wonder if the use of injustice, however “manifest” or “significant”, is really satisfactory as a reform model in terms of preventing litigation. If there is to be a reform, there has to be provision that places the parties clearly beyond the reach of discretion except in reasonably well-defined circumstances. There is a danger that if there is provision for the agreement to be modified or set aside on the grounds of fairness or justice there may be simply too much scope for the parties to litigate.<sup>124</sup>

If the desire behind creating a marital property agreement is to gain certainty, then reform should strive to make this a possibility. The Law Commission have focused on the requirement of a ‘fair process’<sup>125</sup> in addition to this safeguard. The conclusion being the same; such a requirement would leave too much scope for the undoing of an agreement and that it pays little respect towards adult autonomy.

## Disclosure

The issue of disclosure was briefly discussed in Chapter Three,<sup>126</sup> notably, Katrin Radmacher did not disclose the full extent of her wealth.<sup>127</sup> It was noted that under German law this lack of disclosure would have not presented any difficulties,<sup>128</sup> as it is thought that this standpoint gives protection to the economically stronger spouse in not giving their future spouse any further knowledge of their wealth. Nicolas Granatino had stated that he did not wish to claim anything from his partner and so it is questionable as to whether there should be a requirement for him to know the full extent of her wealth in England and Wales. Resolution has taken the stance that an enforceable agreement has to be made following, ‘full and frank financial disclosure.’<sup>129</sup> This is comparable to the ‘full disclosure’ advocated in *Supporting*

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<sup>123</sup> Resolution *Family Agreements* (n 119) para 5.13.

<sup>124</sup> The Law Commission, *Marital Property Agreements* (n 1) para 7.46.

<sup>125</sup> The Law Commission, *Marital Property Agreements* (n 1) paras 6.116 – 6.121.

<sup>126</sup> See above at p 92.

<sup>127</sup> *NG v KR* (n 99) [26].

<sup>128</sup> *NG v KR* (n 99) [77].

<sup>129</sup> Resolution *Family Agreements* (n 119) See (c) at p 4.

*Families*.<sup>130</sup> The Law Commission refine this notion to discuss the possibility of the requirement of 'material financial information,'<sup>131</sup> The Law Commission have provisionally set out that full and frank disclosure must have been made to the party who the agreement is being used against.<sup>132</sup> This may not be satisfactory to many and may provide an opportunity for one spouse to escape the agreement by raising the issue that this requirement has not been fulfilled.

### Timing

The issue of timing has been reconsidered by the Law Commission, concluding that no timing requirement between the signing of a pre-nuptial agreement and a ceremony would be imposed. This is not a universally held view. The Government's paper *Supporting Families* advocated 21 days,<sup>133</sup> Resolution support a 42 day limit<sup>134</sup> and the Centre for Social Justice have proposed 28 days.<sup>135</sup> The basis for all of these suggestions is to provide a safeguard against the pressure someone may be under to sign an agreement close to the ceremony, when refusal to do so would result in the cancellation of the wedding. Given that the average cost of a wedding was recently estimated to be £16,569<sup>136</sup> there is certainly the possibility of financial pressure, yet much of this expenditure would have been committed to prior to any of the above suggestions cutting in. There are also timing elements with regard to post-nuptial agreements, particularly if the agreement is formed against reconciliation.<sup>137</sup> The post-nuptial case of *NA v MA*<sup>138</sup> discussed above involved such circumstances, the agreement played no part in the judgement due to the presence of actual undue influence. Setting out that marital property agreements will have to be binding under the law of contract renders this safeguard redundant due to the doctrines of duress and undue influence. The element of timing is embedded within these doctrines.

<sup>130</sup> The Home Office, *Supporting Families* (n 108) para 4.23.

<sup>131</sup> The Law Commission, *Marital Property Agreements* (n 1) para 6.73.

<sup>132</sup> The Law Commission, *Marital Property Agreements* (n 1) para 6.74.

<sup>133</sup> Home Office, *Supporting Families* (n 108) para 4.23.

<sup>134</sup> Resolution *Family Agreements* (n 119) See (d) 4.

<sup>135</sup> The Centre for Social Justice, *Every Family Matters* (n 120) 195.

<sup>136</sup> K Gammell, 'Average couple spends £16,500 to marry - that's about 0.2pc of the cost of the royal wedding' *The Telegraph* (27 April 2011). Article available electronically at <<http://www.telegraph.co.uk/finance/personalfinance/8474480/Average-couple-spends-16500-to-marry-thats-about-0.2pc-of-the-cost-of-the-royal-wedding.html>> Last accessed 17 September 2011.

<sup>137</sup> See E Hitchings, 'From Pre-Nups to Post-Nups: Dealing with Marital Property Agreements' [2009] Fam Law 1056.

<sup>138</sup> [2006] EWHC 2900 (Fam).

## Made in Writing

In addition to the requirements set out in any future provisions there may be requirements imposed by other statutes depending on the content of the agreement. Any contract relating to land created on or after 27 September 1989 must be made in writing and signed by each party under s.2 of the Law of Property (Miscellaneous Provisions) Act 1989.<sup>139</sup> Lord Hoffman commented on the purpose of this provision in *Spiro v Glencrown Properties Ltd*,<sup>140</sup> 'Section 2...was intended to prevent disputes over whether the parties had entered into a binding agreement or over what terms they had agreed. It prescribes the formalities for recording their mutual consent.'<sup>141</sup> If the agreement sets out for the transfer of an interest in land there will be the automatic requirement for this to be made in writing and signed. The Law Commission have provisionally proposed that all marital property agreements should be made in writing and signed by the parties.<sup>142</sup> The basis for such requirement governing any contract relating to land described by Lord Hoffman can be transferred to justify this requirement in the context of all marital property agreements.

## 9.7 MODELS FOR REFORM ON THE STATUS-CONTRACT CONTINUUM

Each model proposed by the Law Commission can be placed on the status-contract continuum. The model selected for reform would more accurately illustrate where marriage currently sits on the contract-status continuum.

### Inescapable Provisos

There are two areas which have been described by the Law Commission as 'inescapable provisos.'<sup>143</sup> Firstly, a marital property agreement would never be enforced if it meant that a parent escaped their financial responsibility to their children.<sup>144</sup> The agreement is only between the two spouses in the family unit and therefore should not prejudice the position of a child. In addition consideration must be given to the separate legislative provisions of

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<sup>139</sup> The requirement for writing is set out in s.2 (1) and the requirement for the contract to be signed by each party to the contract is set out in s.2 (3) of the Law of Property (Miscellaneous Provisions) Act 1989. Comment made regarding the requirement of a contract to be made in writing made by the The Law Commission *Marital Property Agreements* (n 1) para 6.16.

<sup>140</sup> [1991] Ch 537.

<sup>141</sup> *Spiro v Glencrown Properties Ltd* [1991] Ch 537, 541.

<sup>142</sup> The Law Commission, *Marital Property Agreements* (n 1) para 6.56.

<sup>143</sup> The Law Commission, *Marital Property Agreements* (n 1) The proposed models are summarised at para 7.10.

<sup>144</sup> This area of public policy was discussed in Chapter Two, see p 42.

Schedule 1 Children Act 1989. The second unavoidable safeguard is the dual purpose proviso that an agreement would not be enforced if left one spouse dependent on state benefits; delivering both a very basic financial safety net for the spouse as well as protecting the public purse.<sup>145</sup> This stipulation appears to be accepted by academics arguing from both the status<sup>146</sup> and also the contract end of the continuum,<sup>147</sup> and is a feature suggested by the judiciary.<sup>148</sup>

### **Cast-Iron Model**

The Law Commission describe the cast-iron model as, 'imposing no safeguards beyond those relating to children and to social security;'<sup>149</sup> that is to say the 'inescapable provisos.' Implementing the cast-iron model would mean that a qualifying marital property agreement would be enforced and the consequences of the agreement would not affect their enforceability. This would therefore be the model which would offer ultimate contractual freedom, and would undoubtedly place marriage towards the contractual end of the continuum. This would not be immune from litigation, but this would focus on the requirements to create a qualifying agreement. As set out in the previous Chapter, other European jurisdictions take the approach in the division of assets, in that property ownership and maintenance are separate issues,<sup>150</sup> and so the cast-iron model for marital property agreements is only applied to the ownership of property. In this situation maintenance can be used to mitigate problems such as compensation and hardship.

As set out earlier, the narrower the scope of the content, the fewer safeguards required. The Law Commission consider that this level of autonomy would be thought unacceptable, '...it is almost certainly unacceptable as a matter of public policy, and alien to the culture of family law...'<sup>151</sup> The cast-iron model may however have a place in England and Wales if the scope of marital property agreements is limited. Although, this model is unlikely to succeed over a model which takes needs into account.

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<sup>145</sup> This was an issue central to *Hyman*. Lord Aitkin stated 'In my opinion the statutory powers of the Court to which I have referred were granted partly in the public interest to provide a substitute for this husband's duty of maintenance and to prevent the wife from being thrown upon the public for support' *Hyman v Hyman* (n 5) 258.

<sup>146</sup> See J Herring, 'Why Financial Orders on Divorce Should be Unfair' (n 44) 218. Specific reference is made to 'The avoidance of costs on the public purse' and 'childcare and care for dependants' at p 220.

<sup>147</sup> See C Barton, 'In Stoke-On-Trent, My Lord, The Speak of Little Else' (n 68) Barton states, '...providing there is enough elsewhere in the kitty for children and to keep the other adult off benefits.'

<sup>148</sup> See for example *Radmacher v Granatino* (n 3) [77] Lord Philips, 'A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any child of the family.' Reasonable requirements would need to be given clearer boundaries as to what this includes.

<sup>149</sup> The Law Commission, *Marital Property Agreements* (n 1) para 7.65.

<sup>150</sup> See above, the discussion begins at p 240.

<sup>151</sup> The Law Commission, *Marital Property Agreements* (n 1) para 7.27.

## Specified Events

It would be possible to introduce a model so that a qualifying agreement would be binding unless a specified event had since occurred, or that the agreement became ineffective after the passing of a set amount of time. This model would escape the criticism that such agreements become less relevant or appropriate after the passage of time or a change of circumstance. An example of a specified event was given in *Supporting Families*, the paper proposed that an agreement should be set where there is a child of the family, regardless of whether the child had been born prior to or following the agreement.<sup>152</sup> The Law Commission do not consider this proposal to be acceptable; describing this provision as dramatic as it would mean the entire agreement is swept away.<sup>153</sup> Instead, the nature of this model would mean that a financial order would be made to replace only part of the agreement, where this event had not been planned for in advance. The creation of such a model however would be difficult to formulate, the list of set events cannot be exhaustive and the set amount of time would be indiscriminate.

## Significant Injustice

The third model for reform has been discussed above, the option to allow such agreements to be enforceable unless they would cause significant injustice; this is the model supported by Resolution. The implementation of this model would significantly move marriage away from the contractual end of the continuum and set it nearer to the status end. This provision is paternalistic and would not provide an effective and genuine reform. George, Harris and Herring are critical of this model, questioning whether it would be any more than merely cosmetic, 'In practice, all that might be achieved is shifting disputes about what is fair from the terms implicitly on offer from the respondent to an application for financial provision, to the terms of the pre-nuptial agreement on which the respondent is seeking to rely.'<sup>154</sup> The Law Commission agree with this sentiment, concluding that the implementation of this model would fail to provide any more certainty than the body of case law presently does.<sup>155</sup>

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<sup>152</sup> Home Office, *Supporting Families* (n 108) para 4.23.

<sup>153</sup> The Law Commission, *Marital Property Agreements* (n 1) para 7.31.

<sup>154</sup> R George, P Harris and J Herring, 'Pre-Nuptial Agreements: For Better or for Worse?' (n 69).

<sup>155</sup> The Law Commission, *Marital Property Agreements* (n 1) para 7.47.

## Needs

The basis for the division of assets was discussed in the previous Chapter, with regard to the rationale of needs, compensation and sharing.<sup>156</sup> It would be feasible to introduce a model which only allowed for couples to have contractual freedom over sharing; thus an agreement would not be enforced if it failed to meet the needs of the parties and compensation could be determined by the judiciary. Such a model would have the benefit of deterring a couple from creating an agreement which left one party with very little. This would build upon that inescapable proviso of preventing one party being left dependent on the state. The meeting of needs during the process of dividing assets is described in the consultation paper as the ‘bed-rock’ of the system, once people take the step to marry they cannot escape this responsibility.<sup>157</sup> This view is dependent upon the status end of the continuum; marriage is a publicly recognised commitment, thus carries a status which is in the interests of the public as a whole. The separate maintenance in other jurisdictions can be compared to some extent to the notion of meeting needs. Thus, introducing this model would bring England and Wales in line with the basis for enforceable marital property agreements in other jurisdictions. Yet, this model would render marital property agreements as being only a choice for the wealthy. The Law Commission comment, ‘Nor would there be any point in concluding an agreement in the general run of cases where there is barely enough to go round.’<sup>158</sup>

### **Proposed Model: Status and Contract**

The contractual option should be universal and not determined by wealth. This concept goes to the heart of our understanding of the law, the profound and concise explanation by Theodore Roosevelt can be used in this context, ‘No man is above the law and no man is below it.’ If enforceable marital property agreements become an option then it should follow that no man is below the option of private ordering. Of course, provisions requiring that needs must be met does introduce a concept to be applied universally, but this is outweighed by the inherent discrimination based on wealth which it would bring. One way of mitigating this result would be by providing more certainty to what is required to meet needs. It was suggested in the previous Chapter that this should be done through the provision of an objective or the drafting of guidelines. Either of these routes would still retain the necessary

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<sup>156</sup> See in particular p 234.

<sup>157</sup> The Law Commission, *Marital Property Agreements* (n 1) para 7.51.

<sup>158</sup> The Law Commission, *Marital Property Agreements* (n 1) para 7.55.

judicial discretion in order to appreciate that no two families are the same, whilst still granting further clarity than currently available.

Once needs had been met however, it is proposed that formulaic equal sharing of matrimonial property should be the default rule. The role of enforceable agreements would be to clarify the distinction between matrimonial property and non-matrimonial property, and move away from the default rules if required. A contract of this limited nature would always meet the threshold above the inescapable provisos, and would not have to be considered against notions of the occurrence of specified events or injustice, as these safeguards would be dealt with initially under needs.

Such agreements would however require legal advice in order to assess the meeting of needs at the point the contract is drafted. However, the details contained within the contract could be more supple in relation to the allocation of a surplus, for example it would be possible to set out that any remaining matrimonial property is to be split on a 70:30 basis. In addition, specific assets could be ring-fenced or protected within the agreement, for example a collection of jewellery acquired during the marriage. Ring-fencing through contract would open up the possibility of contractual freedom to all marriages, for example, it would be possible to protect items of sentimental value. If reform were to be carried out on this basis then these agreements would also be required to be enforceable under the law of contract, disclosure would undoubtedly be required and the details would have to be recorded in writing and signed by the parties.

## **9.8 CONCLUSION**

Reform in this area should strive to deliver a universal optional contractual element to marriage, increasing simplicity and certainty, whilst lowering cost and conflict and thus providing something more than a cosmetic reform. Many of the models for reform discussed would offer nothing more than a cosmetic reform and so should be disregarded. It is proposed that these aims would be more achievable if the scope of the agreements is limited. It is apparent that the notion of marriage creating a legal status which the parties are not allowed to amend is still a feature of family law, hence the suggestions of introducing a model which still upholds the meeting of needs. This Chapter demonstrates that the question of whether marriage is a status or contract can indeed be beneficially supplanted in England and Wales by considering the status-contract continuum. The use of the continuum means that it is

possible to amalgamate these two concepts to ascertain the correct position for marriage, that is to say, an institution largely based on status with the possibility of genuine contractual options.

## CHAPTER TEN

### CONCLUSION: MARITAL PROPERTY AGREEMENTS, THE FAMILY AND THE LAW: STATUS *AND* CONTRACT?

#### 10.1 INTRODUCTION

This thesis has demonstrated that the relationship between the family and the law is not one of status *or* contract, but one of status *and* contract. That is to say that both concepts can coexist, without the necessity for one concept to be heavily suppressed in favour of the other. Contract is currently stifled in favour of status in our family law system,<sup>1</sup> yet the theoretical status-contract continuum model supports a family law system which allows optional contractual elements whilst largely upholding the notion that marriage creates a legal status in this jurisdiction.

The basis for this thesis was the movement being demonstrated by the judiciary towards the contractual side of the continuum, in addition to the announcement of the work to be carried out by the Law Commission on marital property agreements in 2008.<sup>2</sup> Recent judicial decisions and the prospect of legislation to allow enforceable marital property agreements have provided a solid basis to consider the tension between contract and status. The rationale and structure for the thesis was formed by analysing the two main areas of public policy surrounding marital property agreements which prompted Lady Hale's comment in the Supreme Court, 'The issue may be simple, but underlying it are some profound questions about the nature of marriage in the modern law and the role of the courts in determining it.'<sup>3</sup> Similar queries can be found in the Law Commission's consultation paper, 'That is, at first sight, quite a narrow question. But it is a deep one and requires us to consider issues at the heart of family law...What is the place of autonomy in family law?'<sup>4</sup> The rationale of this work was to respond to these questions.

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<sup>1</sup> For example see above at p 8, where the following two quotations were discussed. Lord Penzance, 'Marriage has been well said to be something more than a contract, either religious or civil – to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status...' *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130. More recently, Lady Hale stated, 'Marriage is, of course, a contract, in the sense that each party must agree to enter into it and once entered both are bound by its legal consequences. But it is also a status.' *Radmacher v Granatino* [2010] UKSC 42.

<sup>2</sup> The Law Commission, *Tenth Programme of Law Reform* (Law Com No 311, 2008).

<sup>3</sup> *Radmacher v Granatino* [2010] UKSC 42, [132].

<sup>4</sup> The Law Commission, *Marital Property Agreements – A Consultation Paper* (Consultation Paper No 198, 2011) paras 1.11 and 1.12.

This thesis has examined the wider effects of adopting a more contractual approach to the regulation of marriage on other areas of family law. The influence of upholding the status of marriage provides the foundation for several areas in family law: divorce, cohabitation, civil partnership and financial relief have all been considered in this thesis. Three research questions were applied to each area. (I) What is the link between the area of law and the continuum model? (II) To what extent has that area been influenced by upholding status? (III) Is there a possibility of the current legal provisions being influenced by a more contractual approach being applied to marriage? Answering these research questions assessed the workability and usefulness of the theoretical continuum model in examining the tension between status and contract. The continuum model has created a tool upon which it is possible to identify and examine how status and contract coexist within the family law system in England and Wales

This concluding Chapter will bring together the proposals made at each stage of the research in response to these underlying quandaries and set out the recommendations which can be made as a result of undertaking this work.

## 10.2 SUMMARY OF RESEARCH FINDINGS

**1. Introduction:** Chapter One set out the background and rationale. The available literature was reviewed and the status-contract continuum model was introduced. This Chapter evaluated the body of literature produced by American academics on status and contract, which stimulated and shaped this work.<sup>5</sup> Several theoretical models were assessed in this Chapter. The status-continuum was considered to be the best theoretical model upon which to consider the relationship between status and contract in England and Wales.

### **Part One: Marital Property Agreements, Status and Public Policy**

Upholding marriage as creating a legal status, and the interpretation of status, has produced rules of public policy which have rendered marital property agreements to be considered to be void. Part One of the thesis evaluated the current relevance and use of the public policy issues surrounding marital property agreements and made suggestions as to how this present position could be developed and improved.

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<sup>5</sup> See in particular Halley at p 4.

**2. Analysing the Fragmented Evolution:** Chapter Two, 'From Status towards Contract: A Fragmented Evolution' traced the public policy issues to their source, with particular attention afforded to the notion of such agreements being void for contemplating a future separation. The Chapter illustrates that the concept that pre and post-nuptial agreements may undermine the life-long nature of marriage remains somewhat subjective and thus its application is largely dependant on the perspective of the judge. In contrast, the policy issue of ousting the court's jurisdiction and responsibility towards children have remained constant and unwavering. The Chapter analysed the gradual movement along the continuum model demonstrated by the judiciary in granting greater regard towards private autonomy. The Chapter brought the selection of cases through to 2008, the year in which the case between Katrin Radmacher and Nicholas Granatino reached the High Court, and *MacLeod* was heard by the Privy Council.

**3. The Avoidance of Public Policy:** Chapter Three, 'Recent Decisions: Supporting Contract by Avoiding Status?' critically reviewed the *MacLeod* and *Radmacher* judgments on the basis that they had evaded the evolution traced in the previous Chapter. It is proposed that these decisions have avoided that historical evolution of private agreements. This analysis takes into account that the policy issue of contemplating future separation may well be outdated, however this has not been addressed in the recent case law, and has subsequently been dismissed by the Law Commission by stating that the rule is 'scarcely consistent with modern values.'<sup>6</sup> The Supreme Court stated that certain elements of public policy in this area could be 'swept away,' this Chapter suggests however that public policy has been swept under the carpet.

*Theoretical implications:* This Chapter highlights the need for the issue to be re-examined should legislative reform occur in the future, as the 'sweeping away' of this policy has ramifications for other areas of family law.

**4. Marital Property Agreements and Human Rights:** Chapter Four, 'Status and Contract: A Human Rights Issue?' analysed the Human Rights based arguments presented in *Radmacher* when the case was in the High Court.

*Theoretical implications:* The Chapter proposes that greater use could be made of Article One of the First Protocol in order to create a more secure link to the contract side of the

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<sup>6</sup> The Law Commission, *Marital Property Agreements* (n 4) para 1.8.

continuum. This hypothesis does not detract from the criticism made in the previous Chapter. A marital property agreement would need firstly to be recognised as a valid contract in this jurisdiction and so the evolution to reach this point remains important.

Part One of the thesis provides the framework and context for marital property agreements, the continuum model and the movement towards contract. It is this movement which is then applied to other areas of family law in order to investigate the usefulness of the model and to analyse the possible consequences of the application of a more contractual approach.

### **Part Two: Marital Property Agreements and the Nature of Marriage**

Part Two of the thesis has illustrated that the change in approach to marital property agreements could impact on other areas of family law. The legal understanding of marriage forms the foundation for divorce, cohabitation and the legal recognition of same-sex couples. This Part of the thesis evaluates Lady Hale's suggestion that such agreements raise a profound question regarding the nature of marriage. Hence, the rule of public policy stating that enforceable marital property agreements undermine the lifelong nature of marriage by contemplating a future separation was the basis for this Part. It is suggested that if marriage became more contractual in nature this could potentially impact on other areas of family law. It is not suggested that any of these changes should occur automatically as a result of this change, but logical proposals can be made at this point in time. This section synthesises the findings which answer the study's three research questions. These assessed the elements of status and contract within each area of law and evaluated the workability of the status-contract continuum.

**5. Divorce:** Chapter Five, 'A Departure from Status and the Relevance of Fault' examined the tension which lies between status and contract in the regulation of divorce. This section will consider the main findings and the theoretical implications of this Chapter.

*(1) The regulation of divorce on the continuum model:* Chapter Five has shown that there is a link between the importance placed upon fault in divorce and enforceable marital property agreements. The link on the continuum between the regulation of divorce and the public policy surrounding marital property agreements is the availability of legislative divorce illuminating recognition that marriage may not be life-long. A couple presently has the option of a no-fault based divorce, although the requirement of waiting is present. That is to say that

a couple must demonstrate something in order to validate to society that their relationship has irretrievably broken down in order to be granted a divorce, thus the notion of status is still the governing element. The introduction of legislation to govern marital property agreements would move marriage closer to the contractual side of the continuum. This assertion is however dependant upon whether these provisions allowed for the ousting of the court's jurisdiction.

***(II) The influence of status on the regulation of divorce:*** The way in which divorce has been regulated demonstrates the clear desire to raise marriage above being simply a private contract. The various reforms which have occurred since the introduction of judicial divorce in 1858 were analysed in order to ascertain the extent to which the desire to uphold status has shaped our divorce law. The rejection of many proposals also shed light on this research question. This research revealed that the fault-based facts still present in our divorce system are a result of upholding marriage as status, that is to say a public union.

***(III) The potential influence of contract on the regulation of divorce:*** It seems paradoxical that a couple could assert their autonomy with regard to the division of property prior to separation, and yet be required to allege fault in order to be granted a divorce, or else wait. The Chapter proposed that this paradox would prove to be stronger were future provisions to allow for marital property agreements to oust the jurisdiction of the court. Such a reform would move marriage further towards the contract side of the continuum than a reform which still allowed for intervention.

***Theoretical implications for the regulation of divorce:*** It is therefore suggested that the narrowing of the continuum suggests that a divorce system without the presence of fault would be coherent with the legal recognition of enforceable private agreements.

**6. Unmarried Cohabitants:** In Chapter Six, 'Unmarried Cohabitants on a Narrowing Continuum' research was carried out on the tension which lies between status and contract in the legal provisions, or rather the withholding of provisions, from unmarried cohabiting couples. The application of the research questions demonstrated a link between the legal provisions available to unmarried cohabitants upon separation and enforceable marital property agreements on the narrowing continuum. The main findings and the theoretical implications of this analysis are set out below.

**(I) Unmarried cohabitants on the proposed continuum:** Firstly, if autonomy is a concern then the availability of private ordering may encourage some cohabitants to take the step to marry. Secondly, if reform were to occur in this area it is possible to view this in terms of conferring status or contract to unmarried cohabitants. The granting of status has been withheld in order to uphold marriage, and there has been some reluctance to introduce a registration based reform which would pinpoint contract.

**(II) The influence of status on the provisions for unmarried cohabitants upon separation:** The main focus of this answer was the 2007 Law Commission Report, *Cohabitation: The Financial Consequences of Relationship Breakdown*. This was analysed in terms of contract and status, and the proposals were compared to the provisions available to separating married couples. The withholding of provisions for separating cohabitants is partly driven by the desire to avoid equivalence with married couples and thus uphold the status of marriage. This section brought this area of law up to 11 September 2011 when a further Ministerial Statement from Parliamentary Under-Secretary of State, Ministry of Justice, Jonathan Djanogly was made to state that there will not be a reform during this Parliament.

**(III) The potential influence of contract on the legal provisions for unmarried cohabitants upon separation:** Enforceable marital property agreements would demonstrate enthusiasm for a contractual solution within family law. A comparative view was taken with regard to the reforms which have occurred in Scotland, France and Australia. These reforms have been categorised in terms of whether they grant status, contract, rights or safeguards. Furthermore, this comparative research highlights the link between provisions for unmarried cohabitants and same-sex couples in other jurisdictions.

**Theoretical implications for the legal provisions available to unmarried cohabitants:** The placing of cohabitants towards the status end of the continuum should still be pursued in order to most adequately deliver a legal system that protects the more vulnerable in society. However, this paternalism could be overridden through private ordering. Thus, creating a system based on status and contract. It is accepted that a contractual option opens up a lacuna in the aim of protecting the vulnerable, but this would be a necessary step in order to guard self-governance. It is proposed that this could be rectified to some extent by stipulating certain requirements to be met, in a similar fashion to the requirement which may be formulated in order to create an enforceable marital property agreement. Any future

legislative reform should deal with both cohabitation agreements and marital property agreements.

**7. Same-sex couples:** In Chapter Seven, 'Same-sex Marriage and the Revival of Status' an analysis was carried out on the relationship between status and contract in the legal provisions available to same-sex couples. The main findings and proposals this Chapter makes are set out below.

*(I) Same-sex couples on the proposed continuum:* A link between the legal recognition of same-sex couples and enforceable marital property agreements has been demonstrated through utilising the continuum model. Property agreements made between both civil partners and married couples have been deemed unenforceable because of the status end of the continuum.<sup>7</sup> Yet, same-sex partners have been denied the equality of marriage because of the 'essential elements'<sup>8</sup> or 'definition'<sup>9</sup> of the public union of marriage, that is to say that the union must be between a man and a woman. The lifelong element of this definition has however been applied. This is not to say that civil partnerships should not be regarded as lifelong unions but rather that this approach is inconsistent and unsatisfactory.

*(II) The influence of status on the legal recognition of same-sex couples:* It was possible to trace the legislative changes that have occurred and to scrutinise the strength of the public policy arguments which were presented. Tracing the influence of status on this area of law demonstrates a remarkable move from criminalisation through to the current position on the status-contract continuum. The section brings the debate through to the present position of withholding the name of marriage, and thus upholding the understanding of marriage as being between one man and one woman.

*(III) The potential influence of contract on civil partnership:* A comparative study has been carried out using the reference points of status and contract. The system in place in the Netherlands can be categorised as offering both status and contractual options to same-sex couples. The recent reform in Spain has offered complete equality in the form of same-sex marriage, and thus can be categorised as status. Legislation dealing with property agreements may allow contractual freedom to same-sex couples, however this move would only exemplify the inconsistency of the interpretation of status in this area of law.

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<sup>7</sup> The Law Commission, *Marital Property Agreements* (n 4) iii.

<sup>8</sup> *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130.

<sup>9</sup> R Probert, 'Hyde v Hyde: defining or defending marriage?' [2007] CFLQ 322.

*Theoretical implications for the provisions available to same-sex couples:* The Chapter proposes therefore that a new legal definition of marriage should be devised in light of this balance between status and contract. The definition advanced by Thorpe LJ provides an example of this, ‘...I would now redefine marriage as a contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations.’<sup>10</sup> This definition makes no gender requirements, nor mention of the aspirational notion that marriage should be for life, yet upholds the public nature of status. A further break away from the requirements of *Hyde* indicates the steps being taken to create a new description of marriage, moving to a more neutral position on the continuum.

### **Part Three: Marital Property Agreements and the Role of the Court**

Part Three of the thesis scrutinised what enforceable marital property agreements suggest about the role of the court. The interrelation between the law of financial relief and enforceable marital property agreements can be more clearly established by adopting the continuum model. This Part calls for reform of financial relief to occur in advance of legislation dealing with marital property agreements. Furthermore, it is proposed that the scope of property to be dealt with marital property agreements should be curtailed. This model would reduce, albeit never eliminate, conflict and increase certainty.

**8. The Law on Financial Relief:** In Chapter Eight, ‘The court’s discretion: propelling movement towards contract?’ the research questions were applied to the law on financial relief in order to evaluate the tension between status and contract. The main findings of each question can be considered.

*(I) The law of financial relief on the proposed continuum:* It is suggested that the calls for enforceable marital property agreements in England and Wales is, in part, a symptom of the uncertainty currently present in financial relief. Legislative provisions to provide enforceable marital private property agreements would only deliver a limited remedy to the overall issue.

*(II) The influence of status on the law of financial relief:* The current position in England and Wales was compared to the community of property model used widely in continental Europe. Such a model offers more certainty. Consideration was given to the notion of equal sharing and the rejection of fixed principles and formulas in our system. The current law

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<sup>10</sup> *Bellinger v Bellinger* [2001] EWCA Civ 1140, [128].

interpretation of status produces a somewhat illogical position: the law recognises the individuality and uniqueness of each marriage and yet does not allow those unique relationships the power of autonomy in deciding the division of their assets upon divorce.

*(III) The potential influence of contract on the law of financial relief:* Greater certainty would be provided by a system which stipulates that needs are to be assessed prior to equal division of matrimonial property. Marital property agreements could then be used to distinguish between matrimonial and non-matrimonial property, and to escape the default rules on sharing a surplus. Although it is suggested that needs should be narrowly defined through the provision of an overriding objective or the creation of guidelines, it is likely that this would result in only wealthier couples reaching the point of equal division. It is proposed that enforceable marital property agreements should be an accessible mechanism for all couples who wish to assert autonomy. It is anticipated that this could be offered through the possibility of ring-fencing certain items.

*Theoretical implications:* It is therefore suggested that if the level of discretion held by the courts is propelling movement towards contract then a more fundamental reform of financial relief should occur before a reform concerning marital property agreements. The desire for marital property agreements could be considered to be merely a symptom of a much larger and more fundamental issue.

**9. Proposals for Reform:** The usefulness of the continuum is established when considering the models for reform suggested by the Law Commission.<sup>11</sup> It is possible to speculate the pinpoint where each model would potentially place marriage on the continuum by considering the extent to which the proposal allows for autonomy and contractual freedom, or show a dependency on the concept of the couple being barred from amending the status which marriage creates. This analysis is set out in Chapter Nine, 'The Proposals for Reform: Pinpointing Marriage on the Continuum.' It is suggested that if reform should occur then such agreements should allow autonomy. Limiting the scope of agreements was discussed in order to allow an acceptable level of contractual freedom. It is crucial that any reform in this area should provide the option of contractual ordering to all marriages. Furthermore, the promotion of simplicity and certainty, and the lowering of cost and conflict should be at the forefront of any reform. It is suggested that the tighter the scope of the agreement the more attainable these objectives would be.

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<sup>11</sup> The Law Commission, *Marital Property Agreements* (n 4) para 7.10.

*Theoretical implications:* The adoption of a system which limits the scope of agreements to dealing with a surplus of assets once needs have been met would be one way in which a balance could be struck between recognising both status *and* contract.

### 10.3 CONCLUSION AND RECOMMENDATIONS

The use of the continuum supports and explains an institution largely based on status with the possibility of contractual options. The findings of this thesis support the perception that there are profound questions underlying enforceable marital property agreements with regard to the nature of marriage and the role of the court. The thesis sets out several proposals in light of this perception. This research has analysed this notion to provide considerable understanding to the potential impact on family law from prospective legislation to allow for enforceable marital property agreements.

The limitations of this study were acknowledged at the outset. If specific areas of the thesis were to be scrutinised in isolation against the proven continuum model then the possibility of carrying out empirical research and further comparative study could be re-considered in the future. The use of the black-letter approach has tightened the scope of the thesis, yet this was necessary in order to examine and demonstrate the usefulness and workability of the proposed status-contract continuum. The undertaking of empirical or further comparative research in the near future would be a worthwhile exercise in order to add further strength to this model.<sup>12</sup> Moreover, if legislative reform of marital property agreements did occur then research could be undertaken in the future in order to retrospectively contemplate, and possibly fortify, the suggestions put forward in this work.

The idea behind this thesis was to provide a mechanism that would explain this movement being demonstrated towards marital property agreements in this jurisdiction. The thoughts of the Philosopher Gilles Deleuze were set out in the Introduction: ‘A theory is exactly like a box of tools. It has nothing to do with the signifier. It must be useful. It must function. And not for itself. If no one uses it, beginning with the theoretician himself (who then ceases to be a theoretician), then the theory is worthless or the moment is inappropriate.’<sup>13</sup> It is hoped and anticipated that the continuum model can be used by others in the future in order to examine and explain the balance between status and contract in English family law, and maybe further

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<sup>12</sup> Please see Methodology for further details, in particular see p 25.

<sup>13</sup> Quotation available at <<http://libcom.org/library/intellectuals-power-a-conversation-between-michel-foucault-and-gilles-deleuze>> accessed 26 July 2012.

afield. Legislative reform to allow for enforceable marital property agreements does raise profound and fundamental questions with regard to the nature of the relationship between the family and the law. This fundamental and core quandary is something which should be of concern to all policymakers considering this legislative reform. This thesis has endeavored to provide answers to these issues.

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