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A Prenup for Prince William and Kate?: England Inches Toward Twentieth Century Law of Antenuptial Agreements; How Shall It Enter the Twenty-First?

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**A PRENUP FOR PRINCE WILLIAM AND KATE?
ENGLAND INCHES TOWARD TWENTIETH CENTURY LAW
OF ANTENUPTIAL AGREEMENTS;
HOW SHALL IT ENTER THE TWENTY-FIRST?**

*Robert E. Rains**

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INTRODUCTION

When Buckingham Palace announced in November 2010 the much anticipated news that His Royal Highness Prince William Arthur Philip Louis of Wales would finally marry his longtime girlfriend, Miss Catherine Elizabeth Middleton (dubbed in the popular press, “Waity Katie,” for her patience), the English-speaking world rejoiced.¹ But amidst the general media euphoria, at least one sour note was sounded.

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1. See *Royal Wedding: Profile of Kate Middleton*, TELEGRAPH (Apr. 29, 2011), <http://www.telegraph.co.uk/news/uknews/kate-middleton/8136685/Royal-wedding-profile-of-Kate-Middleton.html>.

The Bishop of Willesden, Peter Broadbent, wrote on his Facebook page, “I give the marriage seven years.”² He was, quite properly, quickly admonished and silenced.³

Sadly, it is hardly unthinkable that a British royal marriage might not stay the course. One only has to recall the six wives of Henry VIII to know that royal nuptials come with no guarantee.⁴ Indeed the Church of England itself is the enduring legacy of Henry’s marital disenchantment.⁵ Nor is royal dissolution, in both senses of the term, a relic of the past.⁶ The ineffably sad and very public unraveling of the union of Prince Charles and Lady Diana serves as a modern reminder that “‘til death do us part” is never a certainty, even in royal circles.⁷ It cannot be known whether Prince William’s marriage to Kate will survive like the marriage of his grandmother to Prince Philip⁸ or disintegrate like that of his mother and father.⁹

The stakes of marital instability among the royals are, of course, potentially enormous.¹⁰ Not only was the schism with the Catholic Church brought about because of Henry’s disappointment with Katherine of Aragon’s failure to produce a male heir,¹¹ but arguably the course of World War II was altered by King Edward VIII’s insistence on renouncing the throne in order to marry the woman he loved, a twice-divorced American commoner.¹²

If the scions of two wealthy American families were planning to wed, it is quite reasonable to believe that one or both of them—or their families—would insist upon an ante-nuptial (also known as pre-nuptial or pre-marital) agreement, spelling out their financial arrangements in the event of a divorce. Since the landmark decision of *Posner v. Posner*,¹³ such “prenups” have become commonplace in the United

2. *The World at a Glance...London: Bishop Predicts Royal Divorce*, WEEK, Dec. 3, 2010, at 10.

3. *See id.*

4. *See, e.g.*, ANTONIA FRASER, *THE WIVES OF HENRY VIII*, 1 (Vintage Books 1994) (1992).

5. *See* ALEC RYRIE, *THE AGE OF REFORMATION: THE TUDOR AND STEWART REALMS, 1485-1603* 110 (Pearson Educ. Ltd. 2009).

6. *See, e.g.*, MICHAEL LEVINE, *THE PRINCESS & THE PACKAGE* (Renaissance Books 1998).

7. *See id.*

8. *See, e.g.*, ELIZABETH LONGFORD, *ELIZABETH R.: A BIOGRAPHY* 119 (Mussion 1983). Elizabeth and Philip married November 20, 1947. *Id.*

9. *See* Sarah Lyall, *Charles and Diana Agree on Divorce Terms*, N.Y. TIMES (July 13, 1996), <http://www.nytimes.com/1996/07/13/world/charles-and-diana-agree-on-divorce-terms.html>.

10. *See, e.g., id.*

11. *See* RYRIE, *supra* note 5, at 112.

12. *See* PHILIP ZIEGLER, *KING EDWARD VIII* 270-345 (Alfred A. Knopf 1990).

13. *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970).

States among the middle-class and those contemplating a second marriage where there are assets and children from a prior marriage.¹⁴ In *Posner*, the Florida Supreme Court rejected the old paradigm that a prenup in contemplation of divorce was void as against public policy.¹⁵ In *Posner*, the Florida Court reasoned:

We have given careful consideration to the question of whether the change in public policy towards divorce requires a change in the rule respecting antenuptial agreements settling alimony and property rights of the parties upon divorce and have concluded that such agreements should no longer be held to be void ab initio as “contrary to public policy.” If such an agreement is valid when tested by the stringent rules prescribed in *Del Vecchio v. Del Vecchio* (citation omitted), for ante- and post-nuptial agreements settling the property rights of the spouses in the estate of the other upon death, and if, in addition, it is made to appear that the divorce was prosecuted in good faith, on proper grounds, so that, under the rules applicable to postnuptial alimony and property settlement agreements referred to above, it could not be said to facilitate or promote the procurement of a divorce, then it should be held valid as to conditions existing at the time the agreement was made.¹⁶

Although the 1970 *Posner* decision rather quickly led to recognition throughout the United States of the benefits of allowing marrying couples to set the financial terms (between themselves, but not vis-à-vis children of the marriage) upon divorce,¹⁷ and although European countries are generally in accord, England¹⁸ has been remarkably resistant to recognizing and enforcing prenups.¹⁹ With the much anticipated decision of the UK Supreme Court in the *Radmacher* case,²⁰

14. See ARLENE G. DUBIN, *PRENUPS FOR LOVERS* 8-9, 17 (Villard Books 2001).

15. *Posner*, 233 So. 2d at 385.

16. *Id.* (citing *Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962)). In *Del Vecchio*, the Florida Supreme Court ruled that an ante-nuptial agreement in contemplation of a spouse's death would be upheld if it was fair and reasonable, or a full and frank disclosure or general and approximate knowledge of the other party's worth. *Del Vecchio v. Del Vecchio*, 143 So. 2d 17, 20 (Fla. 1962).

17. See Andrew Blair-Stanek, *Defaults and Choices in the Marriage Contract: How to Increase Autonomy, Encourage Discussion, and Circumvent Constitutional Constraints*, 24 *TOURO L. REV.* 31, 40-41 (2008).

18. All references to England are meant to include Wales, which follows English law on prenuptial agreements. See, e.g., *Matrimonial Causes Act of 1973*, c. 18, § 23 (U.K.).

19. See, e.g., *Cocksedge v. Cocksedge* (1844) 60 Eng. Rep. 351-53, [244-45]; *H v. W*, (1857) 3 K. & J. 382 [387] (U.K.).

20. *Radmacher v. Granatino*, [2010] UKSC 42, [2011] 1 A.C. 534 (appeal taken from Eng.).

England has arguably inched closer to adopting a contemporary law of prenups by recognizing the right of adults to contract between themselves.²¹ However, many questions remain unanswered.

This Article will provide an overview of American law of prenuptial agreements, an analysis of the status of English law prior to the decision in *Radmacher*, an analysis of *Radmacher*, a review of calls for reform of the English law of prenups, and finally the author's suggestions as to the minimum issues that England needs to address statutorily.

THE AMERICAN LAW OF PRENUPTIAL AGREEMENTS

While the various American states generally recognize pre-nuptial agreements as between future spouses, but not *vis-à-vis* minor children, there is considerable disagreement concerning the rules for entering such an agreement and for avoiding its terms.²² The variations among the states are more than procedural niceties; they can lead to completely inconsistent results, with one state upholding a prenup that another state would vitiate.²³

Among the matters in dispute is the critical timeframe(s) to be examined. Should the court inquire into the circumstances of the parties at the time the agreement was entered into or at the time of the divorce litigation, or both? If fairness is to be judged, when is the critical time? If the financially weaker party to the marriage is now encumbered with the care of young children or has a disabling medical condition, does such a circumstance render a previously valid agreement invalid, or should adults be held to anticipate that there could be dramatic changes in their lives that could affect their ability to support themselves?

The National Conference of Commissioners on Uniform State Laws (NCCUSL) completed a Uniform Premarital Agreement Act (UPAA) in 1983.²⁴ Today, almost three decades later, only 22 states plus the District of Columbia have enacted some version of the UPAA.²⁵ Under

21. See *id.* at 540.

22. See generally Amberlynn Curry, *The Uniform Premarital Agreement Act and Its Variations Throughout the States*, 23 J. AM. ACAD. MATRIM. LAW 355 (2010) (analyzing how states that have adopted the Uniform Premarital Agreement Act have modified the original Act to address their own needs).

23. See *id.*

24. Uniform Premarital Agreement Act of 1983, 9C U.L.A. 1, available at <http://www.law.upenn.edu/bill/archives/ulc/fnact99/1980s/upaa83.htm> (drafted by the National Conference of Commissioners on Uniform State Laws and approved and recommended for all states to enact).

25. *Legislative Fact Sheet – Premarital Agreement Act*, UNIF. LAW COMM'N, <http://www.nccusl.org/LegislativeFactSheet.aspx?title=Premarital%20Agreement%20Act> (last visited Sept. 2, 2011).

the UPAA, a premarital agreement is enforceable unless the party against whom enforcement is sought proves that:

- 1) that party did not execute the agreement voluntarily; or
- 2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
 - i. was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
 - ii. did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
 - iii. did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.²⁶

The UPAA contains a few additional protections. “The right of a child to support may not be adversely affected by a premarital agreement.”²⁷ If an agreement modifies or eliminates spousal support and the dependent spouse thereby becomes eligible for support under a program of public assistance, the court may require the other spouse to pay spousal support notwithstanding the agreement.²⁸

Otherwise, however, the UPAA takes a strongly pro-contract position. There is no requirement that an agreement must be entered into a minimum number of days before the marriage.²⁹ Even an unconscionable agreement will be enforced as long as the party seeking enforcement made a fair and reasonable disclosure of his or her property and financial obligations.³⁰ Where the other party would be eligible for public assistance, the court will only award spousal support “to the extent necessary to avoid that eligibility.”³¹ To put this in context, if the other spouse would be eligible for Supplemental Security Income (SSI) as an indigent disabled individual under Title XVI of the Social Security Act, the enforcing spouse, no matter how wealthy, would at most be ordered to pay \$692 per month in spousal support in 2011, as that amount would render the other spouse ineligible for federal SSI.³²

26. Uniform Premarital Agreement Act § 6.

27. *Id.* § 3(b).

28. *Id.* § 6(b).

29. *See id.* § 1. The UPAA does not state a time frame so long as the agreement is made “between prospective spouses made in contemplation of marriage and to be effective upon marriage.” *Id.*

30. *See id.* § 6.

31. *Id.*

32. The 2011 SSI federal payment standard is \$674 per month. *See* 2011 Social Security Changes: Facts Sheet, SOCIAL SECURITY ADMIN. (SSA), available at <http://www.socialsecurity.gov>.

Moreover, the UPAA contains no requirement that the waiving spouse receive independent legal advice or even have the opportunity to seek legal advice.³³ Finally, the burden of proof is placed on the party seeking to escape enforcement.³⁴

One of the difficulties with the UPAA, as well as with other “uniform” acts, is that it is not necessarily uniform from one adopting state to another. A recent article entitled, *The Uniform Premarital Agreement Act and Its Variations throughout the States*, takes twenty-nine pages to detail the variations from one adopting state to the next.³⁵

This point is well-illustrated by the 2008 decision of the Iowa Supreme Court in *In re Marriage of Shanks*.³⁶ As noted in *Shanks*, the Iowa version of the UPAA diverges from NCCUSL’s original version by disaggregating unconscionability and lack of financial disclosure as bases for voiding a prenup.³⁷ Furthermore, under the Iowa version of the UPAA, unlike the original NCCUSL version, a premarital agreement cannot adversely affect spousal support.³⁸

In *Shanks*, the wife sought to set aside the prenup on the grounds that: 1) she had not entered into it voluntarily, but was, rather, under duress or undue influence, 2) the agreement was unconscionable, and 3) the husband had failed to make a full and fair disclosure of his property and financial obligations.³⁹ Under the Iowa UPAA, had she proven any of these three grounds, the court would have invalidated the agreement.⁴⁰ As it turned out, although she persuaded the trial court that the agreement was entered into involuntarily, that conclusion was reversed on appeal, and all of her challenges to the agreement ultimately failed.⁴¹

It is a fair generalization, however, that the American paradigm is a

gov/pressoffice/colafacts.htm. Under Social Security’s rules, SSA disregards the first \$20 per month in unearned income. See 20 C.F.R. § 416.1124(c)(12) (2011). Therefore, if a spouse or ex-spouse received \$694 per month in alimony, SSA would disregard the first \$20 and the remaining \$674 would eliminate the federal benefit dollar for dollar. See *id.* In some states, such as Pennsylvania, there are state supplementary benefits, which could potentially raise somewhat the amount the supporting spouse would have to pay to eliminate all federal and state eligibility. See *Supplemental Security Income (SSI) in Pennsylvania*, SOCIAL SECURITY ADMIN. (Jan. 2011), <http://www.ssa.gov/pubs/11150.pdf> (last visited Jan. 2011).

33. See generally Uniform Premarital Agreement Act.

34. *Id.* § 6.

35. See Curry, *supra* note 21.

36. 758 N.W.2d 506 (Iowa 2008).

37. See *id.* at 511, 513 (citing IOWA CODE § 596.12 (1992)).

38. *Id.* at 513 (differentiating section 596.5(2) of the Iowa Code from the UPAA). California’s version of the UPAA likewise prohibits any waiver of spousal support. See *In re Marriage of Pendleton and Fireman*, 5 P.3d 839 (2000).

39. *Shanks*, 758 N.W.2d at 512, 516.

40. See *id.* at 511.

41. *Id.* at 510-13, 519.

contractual model, unlike the situation in England. Normally in the United States, when such an agreement is challenged, the question turns on its validity by considering whether the contract was entered into voluntarily or was the result of fraud or duress.⁴² Nevertheless difficult questions recur in applying these terms in the context of prenups, especially when the prenup is presented or signed shortly before the wedding, with no real opportunity for the other party to seek independent legal counsel.⁴³

Sometimes a prominent case addressing a prenup will prompt a state legislature to amend its statute. For example, in *In re Marriage of Bonds*, the California Supreme Court upheld, as voluntary, a prenuptial agreement signed between baseball superstar, Barry Bonds, and his wife, “Sun,” whose first language was Swedish, the day before their wedding.⁴⁴ In apparently direct response, the California legislature amended its version of the UPAA to provide that “it shall be deemed that a premarital agreement was not executed voluntarily unless the court finds in writing or on the record . . . [that] [t]he party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.”⁴⁵

In a similar vein, but without specific statutory guidance, the North Dakota Supreme Court recently vitiated a premarital agreement in large part because it had been first presented to the husband the morning of the wedding.⁴⁶

The majority of states in the United States have not enacted any version of the UPAA, and as it has been almost three decades since the UPAA was proposed, it seems unlikely that the Act will be adopted in a significant number of additional states.⁴⁷ This leaves the states with varying rules for addressing pre-marital agreements in light of the non-UPAA states which may either have individual statutes addressing prenups or look to their courts to adjudicate such agreements without statutory guidance.⁴⁸

Some states, such as Pennsylvania, which has no statute regarding prenups, take a quite rigid, pro-contract position.⁴⁹ In *Simeone v.*

42. See, e.g., *In re Marriage of Baltins*, 260 Cal. Rptr. 403, 413 (Cal. Ct. App. 1989).

43. See, e.g., *In re Marriage of Bonds*, 5 P.3d 815, 817-19, (Cal. 2000).

44. See *id.* at 817-19, 838.

45. CAL. FAM. CODE § 1615(c)(2) (West 2002).

46. *Pember v. Shapiro*, 794 N.W.2d 435, 439 (N.D. 2011).

47. See *Legislative Fact Sheet – Premarital Agreement Act*, *supra* note 14. Presently, twenty-nine states have not enacted any version of the UPAA. See *id.*

48. See, e.g., Gail Frommer Brod, *Premarital Agreements and Gender Injustice*, 6 YALE J.L. & FEMINISM 229, 236-37, 254-262 (Summer 1994).

49. See *Simeone v. Simeone*, 581 A.2d 162, 171 (Pa. 1990).

Simeone, the Pennsylvania Supreme Court enunciated the rule that, as long as there is a full and fair disclosure of assets, and basic contract rules are not otherwise breached, the prenup is binding.⁵⁰

In *Simeone*, the wife was a twenty-three year old unemployed nurse, and the husband was a thirty-nine year old neurosurgeon making \$90,000 per year and with assets of \$300,000.⁵¹ His attorney presented the wife with the prenup on the eve of the wedding, and she signed it without the benefit of counsel.⁵² The agreement limited the wife, in the event of the divorce, to support payments of \$200 per week, subject to a total of \$25,000.⁵³ When the marriage fell apart nine years later, the wife sought *alimony pendente lite* (APL), and the husband interposed the agreement as a full defense.⁵⁴ The wife attacked the prenup on the grounds that she had no opportunity to consult with counsel and that the agreement was inherently unreasonable.⁵⁵ Upholding the agreement, the Pennsylvania Supreme Court utilized a strict contract analysis.⁵⁶ “Absent fraud, misrepresentation, or duress, spouses should be bound by the terms of their agreements.”⁵⁷ The only requirement the court imposed beyond normal contract law is that, “a full and fair disclosure of the financial positions of the parties is required.”⁵⁸ As long as there is such disclosure, in the absence of fraud, misrepresentation, or duress, the agreement, as to the financial obligations of the spouses to each other, is a binding contract.⁵⁹ The courts in Pennsylvania are not to consider reasonableness of the contract either at the time it is entered or at the time it is enforced.⁶⁰ “[T]he reasonableness of a prenuptial bargain is not a proper subject for judicial review.”⁶¹ If the party against whom the contract is to be enforced is now ill, taking care of young children or a sick family member, or unemployed, that is not a valid matter for a court to consider:

[E]veryone who enters a long-term agreement knows that circumstances can change during its term, so that what initially appeared desirable might prove to be an unfavorable bargain.

50. *Id.* at 166-67.

51. *Id.* at 163.

52. *Id.*

53. *Id.* at 164.

54. *Id.* at 163-64.

55. *Id.* at 166.

56. *Id.* at 166-67.

57. *Id.* at 165.

58. *Id.* at 167.

59. *Id.* at 165. Matters regarding children are generally outside the scope of an enforceable contract. *See In re Marriage of Bonds*, 5 P.3d 815, 829-30, (Cal. 2000).

60. *Simeone*, 581 A.2d at 166.

61. *Id.*

Such are the risks that contracting parties routinely assume. Certainly, the possibilities of illness, birth of children, reliance upon a spouse, career change, financial gain or loss, and numerous other events that can occur in the course of a marriage cannot be regarded as unforeseeable. If parties choose not to address such matters in their prenuptial agreements, they must be regarded as having contracted to bear the risk of events that alter the value of their bargains.⁶²

This very strict contract analysis has not met with universal approval in the United States. In *In re Marriage of Bonds*, the California Supreme Court opined:

Furthermore, marriage itself is a highly regulated institution of undisputed social value, and there are many limitations on the ability of persons to contract with respect to it, or to vary its statutory terms, that have nothing to do with maximizing the satisfaction of the parties or carrying out their intent. Such limitations are inconsistent with the freedom-of-contract analysis espoused, for example, by the Pennsylvania Supreme Court.⁶³

Similarly, the Supreme Court of Indiana has rejected the view that courts should disregard the divorcing parties' current circumstances.⁶⁴ To the contrary, "a court may look to circumstances at the time of dissolution to determine unconscionability of an ante-nuptial agreement."⁶⁵

Therefore, while it is clear that significant differences persist among the states regarding the enforceability of premarital agreements, it is a fair generalization that the states consider them to be contracts, albeit special ones subject to special rules.⁶⁶ The same cannot be said regarding the law in England.

THE ENGLISH LAW OF PRENUPTIAL AGREEMENTS PRIOR TO *RADMACHER*

The English law of prenuptial agreements has remained remarkably impervious to change over the past century and a half. In 1844, a Court of Equity was confronted with an ante-nuptial agreement executed in

62. *Id.*

63. *Bonds*, 5 P.3d at 829.

64. *Rider v. Rider*, 669 N.E.2d 160, 163 (Ind. 1996).

65. *Id.*

66. *See* Uniform Premarital Agreement Act of 1983 § 2 cmt.

1837 between Thomas Cocksedge, Ann Whale, and William Whale, Ann's father.⁶⁷ The agreement set forth, *inter alia*, that Thomas would provide Ann an annual sum of £400 for her maintenance "in the event of any separation taking place between them."⁶⁸ The parties married shortly after the agreement was signed, and they cohabited until August 1843, when Thomas left, allegedly because of Ann's (unproven) adultery.⁶⁹ Ann and her father filed a bill to compel specific performance.⁷⁰ The Court of Equity denied relief based on the agreement.⁷¹ The Vice-Chancellor reasoned:

[W]here the contract is that, in the event of *any* separation taking place between the husband and the wife, the husband shall make a certain provision for his wife, the Court sees that it is an inducement to the wife to be guilty of the worst conduct. There may be innocent as well as guilty causes of separation between husband and wife; but where the covenant by which the provision is secured to the wife is expressed in general terms as it is in the present case, the Court cannot sever it, and say that it shall be good in one case and bad in another. If the bad conduct of the wife *may be* the contingency on which the husband will be bound to make the provision, the contract must fail altogether⁷²

In 1857, in *H v. W*, Vice-Chancellor Wood ruled in even more general terms:

[I]t seems to me to be decided that, by policy of our law, no state of future separation can ever be contemplated (during the existence of coverture) by agreement made either before or after 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.⁷³

To the extent that there is a "modern era" of English "nuptial law," it dates to the 1929 decision of the House of Lords in *Hyman v. Hyman*, a case involving not a prenuptial agreement but a postnuptial agreement.⁷⁴ The parties were married in September 1912 and had no children.⁷⁵ In

67. Cocksedge v. Cocksedge (1844) 60 Eng. Rep. 351-53, [244-45].

68. *Id.* at [244].

69. *Id.*

70. *Id.*

71. *Id.* at [246].

72. *Id.* at [246]-[47].

73. *H v. W*, (1857) 3 K. & J. 382 [387] (U.K.).

74. *Hyman v. Hyman* [1929] A.C. 601, 601 (H.L.) (appeal taken from Eng.).

75. *Id.* at 605.

September 1919, they executed a deed of voluntary separation.⁷⁶ By that time, the husband “was living in adultery with another woman, and he continued to live in adultery after the date of the deed.”⁷⁷ The husband agreed to pay his wife two sums, £200 and £2,000, plus a weekly sum of £20 “free of income tax for her separate use and benefit and for her maintenance during her life.”⁷⁸ In July 1923, the Matrimonial Causes Act 1923 became law, “whereby for the first time a wife was given the right to obtain a divorce solely on the ground of adultery by her husband.”⁷⁹ In January 1926, the wife filed for divorce based on the husband’s adultery, and, in January 1927, a decree nisi was pronounced.⁸⁰ Shortly thereafter, the wife filed a petition for permanent maintenance and the husband responded that she was bound by her agreement.⁸¹ Both the trial judge and the Court of Appeal ruled that the wife was not precluded from prosecuting her claim for maintenance by reason of the deed of separation.⁸² On appeal, the House of Lords affirmed.⁸³ Lord Hailsham LC reasoned:

[T]he 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...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.⁸⁴

Lord Atkin similarly opined:

[T]he statutory powers of the Court . . . 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. If this be true, the powers of the Court in this respect cannot be restricted by the private agreement of the parties.⁸⁵

Today, more than eight decades later, the *Hyman* rule applies not

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See id.* at 606.

82. *Id.*

83. *Id.*

84. *Id.* at 614.

85. *Id.* at 629.

only to postnuptial (marital settlement) agreements, but also to prenuptial agreements⁸⁶ based on the jurisdictional rationale: recognizing the binding effect of a prenuptial agreement would derogate from the courts' statutory jurisdiction to grant "ancillary relief" in a divorce action.⁸⁷

The current statutory framework for divorce in England and Wales, the Matrimonial Causes Act 1973 (MCA 1973),⁸⁸ as amended, provides little clarity for the judiciary. On a literal reading, it is a masterpiece of confusion and self-contradiction. Section 23 of the MCA 1973, gives a court explicit jurisdiction to issue financial provision orders in connection with divorce proceedings.⁸⁹ The MCA 1973 also grants courts authority to make "property adjustment orders," orders for the sale of property, and pension sharing orders.⁹⁰

Section 25 of the MCA 1973 provides a list of factors which courts must consider in exercising their powers of financial relief.⁹¹ The court must "have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen."⁹² As regards financial orders affecting the parties to the marriage (but not in relation to a child), Section 25 directs courts to consider:

- (a) each party's income, earning capacity, and property,
- (b) each party's financial needs, obligations and responsibilities,
- (c) the standard of living previously enjoyed by the family,
- (d) the age of each party and the duration of the marriage,
- (e) either party's mental or physical disabilities,
- (f) each party's past or foreseeable future contribution to the welfare of the family,
- (g) either party's conduct, if it would be inequitable to disregard it,
- (h) the value of any benefit that either party stands to lose as the result of the dissolution or annulment of the marriage.⁹³

Noticeably absent from the section 25 factors is any explicit reference to prenuptial agreements or consideration of foreign law.⁹⁴

86. See Alexander Chandler, *Pre-Nuptial Agreements After Crossley v. Crossley*, FAM. LAW WK. (2008), <http://www.familylawweek.co.uk/site.aspx?i=ed24924>.

87. See *Hyman*, [1929] A.C. at 614.

88. Matrimonial Causes Act 1973, c.18 § 23 (U.K.).

89. *Id.*

90. *Id.* § 24.

91. *Id.* § 25.

92. *Id.* § 25(1).

93. *Id.* § 25(2).

94. See *id.*

Section 34 governs “maintenance agreements,” but that term is given a very broad definition.⁹⁵ A “maintenance agreement” means any agreement in writing made between the parties to a marriage “containing financial arrangements,” which, in turn, “means provisions governing the rights and liabilities towards one another when living separately of the parties to a marriage . . . in respect of the making or securing of payments or the disposition or use of any property.”⁹⁶

Section 34(1)(a) provides that “[i]f a maintenance agreement includes a provision purporting to restrict any right to apply to a court for an order containing financial arrangements, then that provision shall be void.”⁹⁷ Hence, a provision such as that upheld in *Simeone*, barring the wife from seeking APL,⁹⁸ would presumably be void under the MCA 1973.⁹⁹

However, subsection 1(b) appears to negate 1(a). It provides that, “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. . . be binding on the parties to the agreement.”¹⁰⁰ Thus, the provision in the agreement at issue in *Simeone* for the wife to receive no APL¹⁰¹ would not, on its face, be void under the MCA 1973.¹⁰²

Moreover, section 35 gives the court explicit power to alter the terms of the agreement during the lives of the parties if the court is satisfied that:

[B]y 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.¹⁰³

Hence, if a prenuptial agreement called for the wife to receive no APL, barring her from seeking such relief in court, that provision might be found by an English court to be void or binding or alterable by the

95. *Id.* § 34.

96. *Id.* § 34(2).

97. *Id.* § 34(1)(a).

98. *Simeone*, 581 A.2d at 168.

99. *See* Matrimonial Causes Act 1973 § 34(1)(a).

100. *See id.* § 34(1)(b).

101. *Simeone*, 581 A.2d at 164.

102. *See* Matrimonial Causes Act 1973 § 34(1)(b).

103. *Id.* § 35(1)-(2).

court.¹⁰⁴ And, the court may alter such a provision for reasons including a change of circumstances explicitly foreseen by the parties!¹⁰⁵ As such, it is hardly surprising that English courts have continued to struggle with the law of prenuptial agreements, given the apparent contradictions in the MCA 1973.¹⁰⁶

Nor is it surprising that English courts appear to have a rather cavalier attitude toward prenups made in another jurisdiction which recite that they are to be construed under the law of that jurisdiction. In 1995, over a century and a half after the *Cocksedge* decision, Lord Justice Thorpe was confronted with *F v. F*, a case involving not one, but two prenups.¹⁰⁷ The bride-to-be was German, and the groom-to-be, who was also of German origin, owned extravagant homes in multiple jurisdictions.¹⁰⁸ The primary prenuptial agreement was in German and purported to regulate the couples' affairs in accordance with German and Swiss law.¹⁰⁹ The second prenup was in English and was intended to be governed by American law.¹¹⁰ The agreements basically provided that, in the event of divorce, the husband would provide the wife the equivalent of the pension of a German judge (she having given up a position in the German judicial civil service).¹¹¹

The marriage broke down after the parties had had three children.¹¹² The husband filed for divorce, based on the wife's alleged adultery, in March 1993.¹¹³ The wife sought ancillary financial relief.¹¹⁴ Although the husband sought to rely on their prenuptial agreement to contest the court's jurisdiction and to restrict the wife's claim to the equivalent of the pension of a Federal German judge, Lord Justice Thorpe summarily dismissed the relevance of the prenuptial agreements and of German law:

The other special condition which has to be considered in this case, albeit briefly, is the existence of the antenuptial contracts. It is not in dispute that contracts of this sort are commonplace in the society from which the parties come. They are much emphasised

104. See *id.* §§ 34-35.

105. *Id.* § 35(1)-(2).

106. See generally Matrimonial Causes Act.

107. Stewart Leech, "With All My Worldly Goods I Thee Endow?" *The Status of Prenuptial Agreements in England and Wales*, 34 FAM. L.Q. 193 (2001-2002) (addressing *F v. F* (Ancillary Relief: Substantial Assets) [1995] 2 FAM. L.R. 45 (Eng.)).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 194.

114. *Id.* at 193-94.

by the husband in his affidavits, since if strictly applied they would have the ridiculous result of confining the wife to the pension of a German judge, whatever that may be. Equally, in the affidavits the wife is urgent in protesting the circumstances in which they came to be signed. I regard the protestations of both in relation to these contracts as having an urgency that the documents themselves do not demand. In this jurisdiction they 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. It is said that these contracts would be strictly enforced against the wife in Germany. I have declined to enlarge the arena to allow evidence from German experts in that field. I cannot think that even in Germany the wife would not have the right to deploy a case either that there was some inequality of bargaining power, alternatively undue influence, or that they are inconsistent with social policy in Germany. For the purposes of my determination I do not attach any significant weight to those contracts.¹¹⁵

Thus, according to Judge Thorpe, it was simply irrelevant whether the (admittedly one-sided) agreements would have been binding under German law, so irrelevant that he would not even entertain evidence on the issue.¹¹⁶

Two years after *F v. F*, the Family Division was again confronted with an extra-territorial prenuptial agreement in a divorce case involving an extremely wealthy couple.¹¹⁷ In the 1997 case of *S v. S*, the parties had executed a prenup in New York, which purported to be governed by New York law.¹¹⁸ The wife was a Swedish citizen, living in England at the time of the divorce proceedings.¹¹⁹ The husband was born in Austria, and was a citizen of Austria, Turkey, and Israel.¹²⁰ At the time of the divorce, he was a non-resident alien in the United States.¹²¹

The prenup was negotiated between May and November of 1986.¹²² It provided, *inter alia*, that in the event that either party had commenced

115. *Id.* at 194.

116. *See id.*

117. *S v. S*, [1997] 1 W.L.R. 1200, 1205 (Eng.).

118. *Id.* at 1202.

119. *Id.* at 1205.

120. *Id.*

121. *Id.*

122. *See id.* at 1206.

an action in divorce prior to the husband's death, the wife would inherit a percentage of his gross estate equal to one percent for each year of the marriage, up to a ceiling of fifteen percent.¹²³ Additionally, the husband agreed to pay \$250,000 into a trust for his wife's benefit, the trustee of which was to be the Bank of New York, on the date of the marriage.¹²⁴ He would make additional quarterly payments of \$12,500 until either party commenced a divorce action.¹²⁵ If a divorce action were commenced, he would make a final payment of \$100,000 into the trust, whereupon the principal plus interest would be released to the wife.¹²⁶

The parties were married in England in March 1987.¹²⁷ Apparently no children were born of the marriage.¹²⁸ The wife filed for divorce in England on November 8, 1996, while the husband was out of the country.¹²⁹ She spoke to him by telephone, not informing him of her filing, and suggested that it might help to repair their difficulties if he came to London to talk things over.¹³⁰ When he arrived at their home in Chelsea, he was served with the divorce petition.¹³¹ The husband immediately returned to New York, where he filed for divorce on November 21 and sought a declaration as to the validity of the prenup.¹³² Each party applied for a stay of the other's divorce proceeding.¹³³

At issue before the Family Division was whether to stay the wife's divorce action in England, which would have the effect of subjecting her to the New York courts and, presumably, the New York prenuptial agreement.¹³⁴ The English judge recognized that the wife would probably be unable to set aside the New York prenup in a New York court.¹³⁵ Hence the decision on forum would, in turn, determine whether the wife would have a reasonable likelihood of avoiding the prenup¹³⁶ and attacking the husband's considerable wealth, which he admitted to include \$84,000,000 plus valuable real properties and chattel.¹³⁷

Judge Wilson acknowledged Judge Thorpe's statement in *F v. F*

123. *Id.* at 1206-07.

124. *Id.* at 1207.

125. *Id.*

126. *Id.*

127. *See id.* at 1208.

128. *Id.* at 1202.

129. *Id.* at 1209.

130. *Id.*

131. *Id.*

132. *Id.* at 1209-10.

133. *Id.* at 1210.

134. *Id.* at 1201-02.

135. *Id.* at 1202-03.

136. *See id.* at 1204.

137. *Id.* at 1205.

that:

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.¹³⁸

But Judge Wilson warned that, “[t]here is a danger that these wide words might be taken out of context.”¹³⁹ Here, unlike in *F v. F* where enforcement of the prenup would have led to a “ridiculous” result,¹⁴⁰ the prenup was fairly negotiated on behalf of “worldly people”¹⁴¹ and would leave the wife with assets of somewhat more than £1,000,000.¹⁴²

The judge recognized that if he did not grant the husband’s application for a stay and the English court were to determine the wife’s application for ancillary relief, the MCA 1973 would preclude “any choice of foreign law, however vividly the circumstances of the case might protest its relevance.”¹⁴³

Under the circumstances, the court was persuaded that New York was “clearly more appropriate than England as a forum for the proceedings for divorce and for the determination of financial issues between the parties,” notwithstanding the wife’s primary residence in England.¹⁴⁴ Thus, while an English court did not itself enforce a prenuptial agreement, by declining to exercise jurisdiction where it could have done so, it almost certainly bound the wife to her prenup.¹⁴⁵

In 2007, twelve years after his decision in *F v. F*, Judge Thorpe (by then Lord Justice Thorpe) back-tracked from his position that prenups “must be of very limited significance.”¹⁴⁶ In *Crossley v. Crossley*,¹⁴⁷ the parties were both independently wealthy, and both had children from prior marriages.¹⁴⁸ They met in June 2005, became engaged in September 2005, and signed a prenup in November 2005, which essentially provided that, in the case of a divorce, “both of them should

138. *Id.* at 1203 (citing *F v. F*, [1995] 2 FAM. L.R. 45, 66 (Eng.)).

139. *Id.*

140. *Id.*

141. *Id.* at 1213.

142. *See id.* at 1214.

143. *Id.* at 1203.

144. *Id.* at 1215.

145. *Id.*

146. *Id.* at 1203 (citing *F v. F*, [1995] 2 FAM. L.R. 45, 66 (Eng.)).

147. [2008] 1 FAM. L.R. 1467. At the time of *Crossley*, Judge Thorpe was sitting on the Court of Appeal, and thus deemed “Lord Justice Thorpe.” *See id.*

148. *See id.* at [1]-[2].

walk away from the marriage with whatever they had brought into it.”¹⁴⁹ In apparently direct contravention of Section 34(1)(a) of the MCA 1973,¹⁵⁰ the prenup included a provision that “[n]either party shall apply to any court in any jurisdiction for any order for financial provision of any kind based on the marriage of Stuart and Susan. . . .”¹⁵¹

The parties were married in January 2006 and separated in March 2007.¹⁵² No children were born of the marriage.¹⁵³ The wife petitioned for divorce in August 2007, and in September 2007, she began proceedings for financial relief.¹⁵⁴ She hoped to demonstrate that the husband had undisclosed assets in Andorra and Monaco.¹⁵⁵ The husband sought an order directing the wife to show cause why her claims should not be barred by the terms of the prenuptial agreement, and the trial judge issued that order.¹⁵⁶

The Court of Appeal affirmed this disposition, given that “this was a childless marriage of very short duration, for a substantial portion of which the parties were living apart.”¹⁵⁷ Significantly, both parties were mature, previously married, and independently wealthy.¹⁵⁸ Rather than viewing the prenup as being of “very limited significance,”¹⁵⁹ Lord Justice Thorpe reasoned:

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 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.¹⁶⁰

Lord Justice Thorpe likened the prenup in this case to “a marital property regime into which parties enter in civil law jurisdictions in order to provide for the property consequences of a possible future divorce.”¹⁶¹ He added, “[i]t does seem to me that the role of contractual

149. *Id.* at [2]-[3].

150. Matrimonial Causes Act § 34(1)(a).

151. *Crossley*, 1 FAM. L.R. 1467 at [3].

152. *Id.*

153. *See id.* at [2].

154. *Id.* at [3]-[4].

155. *See id.* at [7].

156. *Id.* at [4], [19].

157. *Id.* at [14], [19].

158. *Id.* at [14].

159. *See S v. S*, [1997] 1 W.L.R. 1200, 1203 (Eng.) (quoting Lord Justice Thorpe in *F v. F*, [1995] 2 F.L.R. 45, 66 (Eng.)).

160. *Crossley*, 1 FAM. L.R. 1467 at [15].

161. *Id.* at [17].

dealing, the opportunity for the autonomy of the parties, is becoming increasingly important.”¹⁶² He cited calls in England for legislative reforms addressing prenuptial agreements, and noted the chasm between the law in England and the civil law countries of the European Union.¹⁶³ He concluded, “[u]ndoubtedly 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.”¹⁶⁴

In 2008, the Judicial Committee of the Privy Council (known as the “Board”)¹⁶⁵ considered the combined effects of a pre-nuptial and two post-nuptial agreements in the case of *MacLeod v. MacLeod*.¹⁶⁶ The parties were both born and raised in the United States.¹⁶⁷ When they married on Valentine’s Day 1994 in Florida, he was 49 and quite wealthy, and she was 27 and a student.¹⁶⁸ They entered into a pre-nuptial agreement in Florida on their wedding day, which the court recognized would be valid and generally binding under Florida law.¹⁶⁹ They moved to the Isle of Man in 1995 and made one post-nuptial agreement in 1997 which, by its terms, lapsed in 1998.¹⁷⁰ They made a second post-nuptial agreement by deed in 2002, which became the focus of their later litigation.¹⁷¹ The couple produced five sons before the husband commenced divorce proceedings in September 2003.¹⁷² The wife filed for ancillary relief, seeking financial provision in the amount of thirty percent of the husband’s wealth at marriage and fifty percent of its increase in value during the marriage.¹⁷³ She “asserted that the agreements should be disregarded altogether.”¹⁷⁴

As the case came to the Privy Council, the sole issue was whether and how the 2002 post-nuptial agreement should affect an order for the housing needs of the wife and children, and, more specifically, whether the husband’s payment should be made in a lump sum, as the wife wished, or into a trust fund, as the husband wished and as provided for

162. *Id.*

163. *See id.*

164. *Id.*

165. *See, e.g., MacLeod v. MacLeod*, [2008] UKPC 64, [2010] 1 A.C. 298.

166. *Id.* at [1], [5], [7]-[8]. The Privy Council had appellate jurisdiction because of the parties’ residence on the Isle of Man. *See id.* at [3].

167. *Id.* at [2].

168. *Id.*

169. *See id.* at [5], [7].

170. *Id.* at [3], [8].

171. *Id.* at [9].

172. *Id.* at [4], [13].

173. *Id.* at [14].

174. *Id.*

in the 2002 agreement.¹⁷⁵ Of relevance here, the Privy Council drew a sharp distinction between the effect of a pre-nuptial agreement and that of a post-nuptial agreement.¹⁷⁶ It felt itself to be without authority “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.”¹⁷⁷

Declining to enter the thicket of reform, it stated, perhaps wisely, that, “the difficult issue of the validity and effect of ante-nuptial agreements is more appropriate to legislative rather than judicial development.”¹⁷⁸ However, the Privy Council took an entirely different view of post-nuptial agreements:

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.¹⁷⁹

Accordingly, the Privy Council concluded that the lower court had erred in not finding the wife bound for herself by the 2002 agreement: “However lacking in generosity the provision made for the wife, and of course it was much less than she could have expected had there been no agreement, there was no basis for interfering with it.”¹⁸⁰

RADMACHER: THE UK SUPREME COURT SPEAKS

Given the unsatisfactory state of English law on pre-nuptial agreements, it is hardly surprising that English lawyers and legal scholars eagerly awaited the decision of the relatively newly formed UK Supreme Court in *Radmacher v. Granatino*.¹⁸¹ *Radmacher* involved something of a role reversal.¹⁸² It was the wife who came from an

175. *Id.* at [18].

176. *See id.* at [36].

177. *Id.* at [31].

178. *Id.* at [35].

179. *Id.* at [36].

180. *Id.* at [45].

181. *Radmacher*, [2011] 1 A.C. 534 at [45]; *see also* Martin Loxley et al., *Ancillary Relief Update: Winter 2009*, FAM. LAW 1079, 1082 (Nov. 2009).

182. *See Radmacher*, [2011] 1 A.C. 534 at [13].

extremely wealthy family.¹⁸³ She and her family wished to protect the family's wealth, and she wanted the assurance that her future husband "was marrying her for love and not for her money."¹⁸⁴

The parties signed a prenuptial agreement in Germany in August 1998, she being German and he being French.¹⁸⁵ "It contained a choice of law clause that provided that the effects of their marriage, including the laws of matrimonial property and succession, were to be subject to the law of the Federal Republic of Germany."¹⁸⁶

The agreement was drawn up at the request of the wife's parents by a German notary, who went over it with the wife and her future husband.¹⁸⁷ It was written in German and was not translated.¹⁸⁸ The future husband declined the notary's suggestion that he postpone signing it until he could take independent legal advice.¹⁸⁹ The future husband, however, was neither naive nor unsophisticated at the time he entered into the agreement.¹⁹⁰ He was 27 years old and was a banker at JP Morgan & Co., earning about £120,000 a year.¹⁹¹ The effect of the prenup "was that neither party was to derive any interest in or benefit from the property of the other during the marriage or on its termination."¹⁹²

The parties were married in London in late November 1998, almost three months after signing the agreement, and the marriage produced two children.¹⁹³ The husband continued as a high earner in the banking industry until sometime in 2002 when he "became disenchanted with banking and embarked on research studies at Oxford with the object of obtaining a D Phil¹⁹⁴ [Ph.D.] in biotechnology."¹⁹⁵ The parties separated in October 2006, and the wife filed for divorce that same month.¹⁹⁶

The divorce itself was granted on the parties' cross-petitions in July 2007, but there was ongoing litigation over the custody and location of the children and, of course, over the financial provisions of the

183. *Id.*

184. *Id.*

185. *Id.* at [9].

186. *Id.* at [12].

187. *Id.* at [87], [91].

188. *See id.* at [88].

189. *Id.* at [92].

190. *See id.* at [14].

191. *Id.* at [9], [14].

192. *Id.* at [12].

193. *Id.* at [9].

194. *See D Phil Definition*, MACMILLANDICTIONARY.COM, <http://www.macmillan.com/dictionary/british/Dphil> (last visited Sept. 19, 2011).

195. *Radmacher*, [2011] 1 A.C. 534 at [14].

196. *Id.* at [9], [10].

agreement.¹⁹⁷ Despite the terms of the prenup, the husband sought an order for both periodic payments and a lump sum.¹⁹⁸

The trial court concluded that the circumstances of the drafting and signing of the prenup were such that it should be accorded reduced weight.¹⁹⁹ The judge awarded the former husband a total of £5,560,000 plus £35,000 per year for each child (despite the fact that under the custody order the children were to live primarily with their mother) and €630,000 for housing in Germany.²⁰⁰ The Court of Appeal reversed, ruling that the agreement should have been given “decisive weight;” and the husband appealed to the UK Supreme Court.²⁰¹

The Supreme Court began its analysis by repeating the principle that when a party to a marriage seeks ancillary relief, a court is not obliged to give effect to either ante-nuptial or post-nuptial agreements.²⁰² Specifically, the Court stated that “[t]he parties cannot, by agreement, oust the jurisdiction of the court.”²⁰³ However, courts must give “appropriate weight” to such an agreement.²⁰⁴

The Court then acknowledged that the refusal of English courts to accord contractual status to such agreements puts English law at odds with the law of Scotland, the rest of Europe, and most other jurisdictions.²⁰⁵ Further, the Court noted that there have been calls for reform from both within and outside of the government, and that the Law Commission was expected to issue a report on the subject in 2012.²⁰⁶ Clearly, the Court felt itself constrained not to overstep its authority in reforming the law.²⁰⁷

Nevertheless, the Court did make one important, and long overdue, pronouncement. Agreeing in part with the Privy Council’s approach in *MacLeod*, the Court concluded that “the old rule that agreements providing for future separation are contrary to public policy is obsolete and should be swept away.”²⁰⁸ Indeed the Court went beyond the *MacLeod* position to apply this principle not just to post-nuptial agreements, but to pre-nuptial agreements as well.²⁰⁹ The Court rejected as a general proposition the Privy Council’s distinction between pre-

197. See *id.* at [10]–[11], 15.

198. *Id.* at [15].

199. *Id.*

200. *Id.* at [11], [15], [111].

201. *Id.* at [9], [16].

202. See *id.* at [2].

203. *Id.*

204. *Id.*

205. *Id.* at [3].

206. See *id.* at [4], [5], [6], [7].

207. See *id.* at [7].

208. *Id.* at [52]; cf. *MacLeod*, [2010] 1 A.C. 298 at [36].

209. *Radmacher*, [2011] 1 A.C. 534 at [52].

nuptial and post-nuptial agreements, while noting that individual cases might be treated differently depending on the circumstances, such as the presence of duress.²¹⁰

Accordingly, the Court directly held that, “[i]f 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.”²¹¹ However, one ought not read too much into this seemingly definitive pronouncement because the Court immediately undercut it by adding that:

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.²¹²

The Court proceeded to review the decisions of the lower courts, addressing the circumstances of the preparation and signing of the agreement, as well as the principles of need, compensation, and sharing.²¹³ It cited the “unchallenged evidence” that: “(a) the agreement was valid under Germany law; (b) the choice of German law was valid; (c) there was no duty of disclosure under German law; (d) the agreement would be recognised as valid under French conflict of law rules.”²¹⁴ Nevertheless, the Court reiterated that English courts will normally apply English law in making an order for financial relief “irrespective of the domicile of the parties, or any foreign connection.”²¹⁵ Indeed, “the issues in this case are governed exclusively by English law. The relevance of German law and the German choice of law clause is that they clearly demonstrate the intention of the parties that the ante-nuptial agreement should, if possible, be binding on them.”²¹⁶

Reviewing the making of the agreement, the Supreme Court affirmed the Court of Appeal’s conclusion that the trial judge had erred in finding a lack of appropriate safeguards.²¹⁷ The trial judge had based her conclusion on: the agreement being very one-sided, the husband having received no legal advice, the agreement depriving the husband of

210. *See id.* at [52]-[61].

211. *Id.* at [52].

212. *Id.*

213. *Id.* at [118]-[23].

214. *Id.* at [101].

215. *Id.* at [103].

216. *Id.* at [108].

217. *See id.* at [114]-[17].

all financial claims even in the event of want, the lack of financial disclosure by the wife, the lack of negotiations, and the subsequent births of the two children.²¹⁸ It is noteworthy that Lord Justice Thorpe, sitting on the Court of Appeal in *Radmacher*, had rejected all these concerns, despite the fact that in the 1995 case of *F v. F.*, he had summarily dismissed as irrelevant a less one-sided German prenuptial agreement where the wife was legally trained.²¹⁹

The Supreme Court concurred with the Court of Appeal's analysis that the husband had understood the agreement and had had the opportunity to take legal advice; that he knew that the wife had substantial wealth and showed no interest in ascertaining more detailed knowledge of it; that he would have signed the agreement even if he had had more knowledge of her wealth; and that the lack of negotiations was irrelevant and merely reflected the fact that such an agreement was commonplace among people of their socio-economic status.²²⁰ Further, the Supreme Court agreed with the Court of Appeal that it was unclear whether the trial judge had really taken the agreement into account at all in making financial provision for the husband.²²¹

Having concluded that the agreement had been fairly entered into, the Supreme Court addressed the merits of the agreement.²²² The Court looked to the circumstances of the parties prevailing at the time of the breakdown of the marriage.²²³ The husband had not become incapacitated during the marriage and was not in need.²²⁴ Under these circumstances, the agreement was not "manifestly unfair."²²⁵ Nor would the factor of compensation warrant vitiating the agreement.²²⁶ The husband had not abandoned his lucrative banking career for the "fields of academia" because of family demands, but rather of his own accord.²²⁷ Finally, because he had clearly renounced any intention to share in his wife's wealth, the factor of sharing was not of any significance.²²⁸ Accordingly, the Supreme Court found that, in regard to financial provision for the husband himself, he should be held to the ante-nuptial agreement.²²⁹

218. *Id.* at [110].

219. *Id.* at 112; *cf.* Leech, *supra* note 55, at 194 (discussing *F v. F.*, [1995] 2 F.L.R. 45 (Eng.)).

220. *Id.* [114]-[17].

221. *Id.* at [117].

222. *Id.* at [118]-[23].

223. *Id.* at [119].

224. *Id.*

225. *Id.* at [118]-[20].

226. *Id.* at [121].

227. *Id.*

228. *See id.* at [122].

229. *Id.* at [123].

Thus, the bottom line in England remains that prenuptial agreements *may* be binding agreements but, at the same time, they are not binding “in a contractual sense.” They can always be challenged in court.²³⁰ In short, courts *may* find prenuptial agreements to be binding, but are simply not required to do so under any circumstances.²³¹

CALLS FOR REFORM IN ENGLAND

As already mentioned, there have been numerous calls for reform of the law of nuptial agreements in England. In *Pounds v. Pounds* in 1994, a case involving a post-nuptial agreement,²³² Lord Justice Hoffman opined:

The result . . . is that we have, as it seems to me, the worst of both worlds. The agreement may be held to be binding, but whether it will be can be determined only after litigation and may involve, as in this case, examining the quality of the advice which was given to the party who wishes to resile. It is then understandably a matter for surprise and resentment on the part of the other party that one should be able to repudiate an agreement on account of the inadequacy of one’s own legal advisers, over whom the other party had no control and of whose advice he had no knowledge. . . . In our attempt to achieve finely ground justice by attributing weight but not too much weight to the agreement of the parties, we have created uncertainty and, in this case and no doubt others, added to the cost and pain of litigation.²³³

In 1998, the Home Office published a “Green Paper”²³⁴ entitled “Supporting Families” in which it announced that “[t]he Government is considering whether there would be advantage in allowing couples, either before or during their marriage, to make written agreements dealing with their financial affairs which would be legally binding on divorce.”²³⁵

However, the actual proposal contained many caveats. Such an

230. See, e.g., *id.* at [52].

231. See *id.* Baroness Hale dissented from much of the majority opinion in *Radmacher*. See *id.* at [138]. However, she would still have given the agreement some weight. *Id.* at [184]-[95].

232. *Pounds v. Pounds*, [1994] 1 W.L.R. 1535, 1537 (appeal taken from Eng.).

233. *Id.* at 1550-51 (Hoffman, L.J., concurring).

234. See, e.g., *What is Green Paper?*, GUARDIAN, <http://www.guardian.co.uk/careandsupportreform/what-green-paper> (last visited Sept. 21, 2011).

235. Home Office, *Supporting Families, A Consultation Document*, NAT’L ARCHIVES ¶ 4.21 (1998), <http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/acu/sfpages.pdf>.

agreement would not be legally binding:

[W]here there is a child of the family, whether or not that child was alive or a child of the family at the time the agreement was made; where under the general law of contract the agreement is unenforceable, including if the contract attempted to lay an obligation on a third party who had not agreed in advance; where one or both of the couple did not receive independent legal advice before entering into the agreement; where the court considers that the enforcement of the agreement would cause significant injustice (to one or both of the couple or a child of the marriage); where one or both of the couple have failed to give full disclosure of assets and property before the agreement was made; [or] where the agreement is made fewer than 21 days prior to the marriage (this would prevent a nuptial agreement being forced on people shortly before their wedding day, when they may not feel able to resist).²³⁶

Had this reform been implemented, it might have changed the result in *Radmacher*, since there were two children born of the marriage, the husband did not receive legal advice, and the wife did not make full disclosure of her assets and property.²³⁷

But even this extremely modest proposal met with disapproval from the family law bench.²³⁸ All the judges of the Family Division published a response which was far from supportive:

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.²³⁹

The family judges noted their “unanimous lack of enthusiasm for the pre-nuptial agreement.”²⁴⁰

When *Crossley* was decided in 2007, there was hope that it would provide an impetus to Parliament to address prenuptial agreements

236. *Id.* ¶ 4.23.

237. *Radmacher*, [2011] 1 A.C. 534 at [9], [92], [110].

238. See Nicholas Wilson, *Ancillary Relief Reform, Response of the Judges of the Family Division to Government Proposals* (made by way of submission to the Lord Chancellor's Ancillary Relief Advisory Group), FAM. LAW 159-63 (Mar. 1999).

239. *Id.* at 162.

240. See *id.*

legislatively.²⁴¹ In *Pre-nuptial Agreements: A Rethink Required*,²⁴² Christopher Sharp QC argued strenuously that Section 34 of the MCA 1973²⁴³ “now rests on principles not wholly in keeping with twenty-first century values.”²⁴⁴ He expressed the hope that the Law Commission would be able to draw up a draft Parliamentary Bill by 2012,²⁴⁵ directly addressing prenups, including provisions to ensure fairness, such as full disclosure of assets, independent competent legal counsel on both sides, and “a sensible gap between the agreement and the wedding (at least 21 days).”²⁴⁶

Even in the absence of legislative relief, other commentary viewed Lord Justice Thorpe’s opinion in *Crossley* as generally elevating the status of prenups in English law. In *Crossley v. Crossley: Are Pre-nuptial Agreements Now Binding in England?*,²⁴⁷ Mark Harper and Lucie Alhadeff argued that, while *Crossley* did not make prenups binding, it did make them “one of the factors to be taken into account in carrying out the s 25 exercise.”²⁴⁸

In 2005, the organization Resolution (formerly the Solicitors Family Law Association) published a proposal of its Law Reform Committee entitled, “A More Certain Future—Recognition of Pre-marital Agreements in England and Wales.”²⁴⁹ The Committee proposed that “pre-marital agreements become legally binding subject to an overriding safeguard of significant injustice” to either party or a minor child of the family.²⁵⁰

The Law Commission for England and Wales announced in May 2008 its project to review the law of marital property agreements:

This project will examine the status and enforceability of agreements made between spouses or civil partners (or those

241. *Crossley*, 1 FAM. L.R. 1467 at [17].

242. Christopher Sharp, *Pre-nuptial Agreements: A Rethink Required*, FAM. LAW 741 (Aug. 2008).

243. Matrimonial Causes Act § 34(1)(a). Section 34 of the MCA 1973 makes void agreements not to seek financial orders from the court. *Id.*

244. Sharp, *supra* note 146(b), at 741.

245. *Id.* at 750.

246. *Id.* at 748.

247. Mark Harper & Lucie Alhadeff, *Crossley v. Crossley: Are Pre-nuptial Agreements Now Binding in England?*, FAM. LAW 334 (April 2008).

248. *Id.* at 337.

249. *A More Certain Future – Recognition of Pre-Marital Agreements in England and Wales*, RESOLUTION, http://www.resolution.org.uk/site_content_files/files/a_more_certain_future_resolution.pdf [hereinafter *A More Certain Future*] (last visited Sept. 21, 2011). Resolution, formerly the Solicitors Family Law Association, is an organization of lawyers that believes in a “non-confrontational approach to family law matters.” *About Us*, RESOLUTION, http://www.resolution.org.uk/about_us/ (last visited Sept. 21, 2011).

250. *A More Certain Future*, *supra* note 249, ¶¶ 7.7, 7.8.

contemplating marriage or civil partnership) concerning their property and finances. Such agreements are not currently enforceable in the event of the spouses' divorce or the dissolution of the civil partnership. The court may, however, have regard to them in determining what ancillary relief is appropriate.²⁵¹

The Law Commission's provisional proposals and consultation questions were released in January 2011.²⁵² The Law Commission's most basic and profound provisional proposal would change the fundamental law on nuptial agreements in England:

Contractual Validity and Public Policy

We provisionally propose that for the future an agreement made between spouses, before or after marriage or civil partnership, shall not be regarded as void, or contrary to public policy, by virtue of the fact that it provides for the financial consequences of a future separation, divorce or dissolution.²⁵³

Contractual Validity

We provisionally propose that, in the event that qualifying nuptial agreements are introduced, a marital property agreement should not be treated as a qualifying nuptial agreement unless it was a valid contract.²⁵⁴

Moreover, the party against whom the agreement is sought to be enforced would have to have received "material full and frank disclosure of the other party's financial situation"²⁵⁵ and have received "legal advice at the time when it was formed."²⁵⁶ However, the Law Commission did not provisionally propose a timing requirement for prenuptial agreements.²⁵⁷ The Law Commission's final recommendations are expected in 2012.²⁵⁸

251. THE LAW COMM'N, LC311, TENTH PROGRAMME OF LAW REFORM, ¶ 1.17 (June 10, 2008), available at http://www.justice.gov.uk/lawcommission/docs/lc311_10th_Programme.pdf.

252. THE LAW COMM'N, CP198, MARITAL PROPERTY AGREEMENTS, A CONSULTATION PAPER, available at http://www.justice.gov.uk/lawcommission/docs/cp198_Marital_Property_Agreements_Consultation.pdf (last visited Sept. 21, 2011). See also Newsline, *Pre-nuptial Agreements in England and Wales*, INT'L FAM. LAW, 4, 5 (Mar. 2011).

253. MARITAL PROPERTY AGREEMENTS, A CONSULTATION PAPER, *supra* note 153, ¶ 8.3.

254. *Id.* ¶ 8.7.

255. *Id.* ¶ 8.10.

256. *Id.* ¶ 8.12.

257. *Id.* ¶ 8.15.

258. See, e.g., *Radmacher*, [2011] 1 A.C. 534 at [6].

In 2010, Resolution again called for reform in the law²⁵⁹ by noting that “English domestic law is out of line with most other jurisdictions of the world, in particular with those of Europe, in not recognising agreements. This can lead to ‘forum shopping’ where the spouse seeking a divorce will try to secure the jurisdiction most favorable to them.”²⁶⁰

This time, Resolution made a more detailed proposal than it had in 2005, suggesting that the following be added to the Matrimonial Causes Act 1973:

s. 25(2A) The court shall regard any agreement in writing entered into between the parties to the marriage in contemplation of or after the marriage for the purpose of regulating their affairs on the breakdown of their marriage as binding upon the parties and shall make an order in the terms of the agreement unless:

- (a) the agreement was entered into as a result of unfair pressure or unfair influence;
- (b) one or both parties did not have a reasonable opportunity to receive independent legal advice about the terms and effect of the agreement;
- (c) one or both parties failed to provide substantially full and frank financial disclosure before the agreement was made;
- (d) the agreement was made fewer than 42 days before the marriage;
- (e) enforcing the agreement would cause substantial hardship to either party or to any minor child of the family.

s. 25(2B) If one or more of the factors in paragraphs (a) to (e) of subsection 25(2A) applies, the Court shall give the agreement such weight as it thinks fit taking into account:

- (a) all the facts surrounding the agreement;
- (b) the matters in section 25(1) and (2).²⁶¹

Thus, under this proposal, the Radmachers’ agreement would not have been binding since Ms. Radmacher did not provide full and frank

259. *Family Agreements: Seeking Certainty to Reduce Disputes, The Recognition and Enforcement for Pre-nuptial and Post-nuptial Agreements in England and Wales*, RESOLUTION 1, http://www.resolution.org.uk/site_content_files/files/family_agreements.pdf [hereinafter *Family Agreements*] (last visited Sept. 21, 2011).

260. *Id.* at 2.

261. *Id.* at 3-4.

financial disclosure before the agreement was made.²⁶² However, as actually happened in the case at the appellate levels, the courts would give the agreement appropriate weight based on all the facts.²⁶³

Not all observers agree that there is a need to reform the English law of prenups.²⁶⁴ For example, Professors Nigel Lowe and Roger Kay delivered a paper to the 13th World Congress of the International Society of Family Law, which concluded:

Although this position on prenuptial agreements is out of line internationally, given that it is now well established that the existence of such agreements is a circumstance that must be taken into account even to the extent that it can be decisive, it is suggested that far from being a case of English eccentricity the current position provides a pragmatic solution that enables justice properly to be done. . . . The most we would concede is that there may be an advantage from the point of view of certainty in amending s 25 of the MCA 1973 to make it clear that the making of a prenuptial agreement is a factor that should be taken into account when determining the appropriate ancillary relief.²⁶⁵

Nevertheless, it is likely that calls to end, or at least temper, this “English eccentricity” are bound to increase. As noted by Resolution, the refusal of English law to give binding effect to prenups has extraterritorial consequences.²⁶⁶ Thus, unhappily married spouses desiring to escape both their marriages and their pre-nups may seek legal refuge in England.²⁶⁷ England’s combination of not giving binding contractual status to pre-nups²⁶⁸ and not applying foreign law to the dissolution of marriages, even when those marriages were entered into elsewhere and the couple signed a foreign prenup containing a provision that it is to be interpreted under the law of that jurisdiction,²⁶⁹ makes England a highly desirable jurisdiction for forum shopping.²⁷⁰ It is hardly surprising that Lord Justice Thorpe has proclaimed, “London—

262. See *Radmacher*, [2011] 1 A.C. 534 at [110].

263. *Id.* at [2].

264. See Nigel Lowe & Roger Kay, *The Status of Prenuptial Agreements in English Law — Eccentricity or Sensible Pragmatism?*, in *FAMILY FINANCES* 395-413 (Bea Verschraegen ed., Holzhausen Druck & Medien Ges.m.b.H, 2009).

265. *Id.* at 413.

266. See *Family Agreements*, *supra* note 259, at 2 (noting that the failure of English domestic law to recognize pre-nuptial and post-nuptial leads to forum shopping).

267. See *id.*

268. See e.g., *MacLeod*, [2010] 1 A.C. 298, [31].

269. See *Matrimonial Causes Act* § 25(2) (precluding the court from considering foreign law as a factors to consider in determining financial orders affecting parties to the marriage).

270. See *Family Agreements*, *supra* note 259, at 2.

the Divorce Capital of the World.”²⁷¹

For persons with significant assets, who want to preserve and protect those assets for themselves or their existing children, who are contemplating marriage or remarriage, this is indeed the “worst of both worlds.”²⁷² They cannot afford not to negotiate a pre-nuptial agreement because there remains the possibility that it will be enforced by an English court or at least taken into account in setting the amount of financial relief.²⁷³ However, they must also be aware that notwithstanding any terms to the contrary in the agreement, it may be challenged in an English court, and the court will not feel constrained to enforce it.²⁷⁴ And, obviously, the more money is at stake, the more likely it is that litigation will ensue. Can Prince William, heir once-removed to the British throne, afford not to have a pre-nuptial agreement with Kate, and what might such an agreement provide?

A RECENT ROYAL PRECEDENT

The 1990s saw the very public, and often sordid, unraveling of the “fairytale” marriage of William’s parents, Charles, Prince of Wales, and Princess Diana, née Spencer.²⁷⁵ There is no indication in the all-too-public record of any prenuptial agreement between the two, prior to their marriage on July 29, 1981.²⁷⁶ Their marriage, of course, produced two sons, William, who was born in June of 1982, and Harry, who was born in September of 1984,²⁷⁷ as well as much fodder for British and American tabloids.²⁷⁸ Finally, on December 9, 1992, Prime Minister John Major formally announced their separation in the House of Commons.²⁷⁹

It was not, however, until July 1996, that the star-crossed couple were able to reach a divorce settlement.²⁸⁰ The actual terms of that settlement have not been made public, but reportedly Diana received a

271. Lord Justice Thorpe, *London — The Divorce Capital of the World*, FAM. LAW 21 (Jan. 2009).

272. *Pounds v. Pounds*, [1994] 1 W.L.R. 1535, 1550 (appeal taken from Eng.).

273. See *Family Agreements*, *supra* note 259, at 3–4.

274. See *id.* (proposing that an agreement may not necessarily be binding based upon the of circumstances surrounding the agreement and giving the court discretion on how much weight to afford the agreement).

275. See *Lyall*, *supra* note 9.

276. See SALLY BEDELL SMITH, *DIANA: THE LIFE OF A TROUBLED PRINCESS* 100 (Aurum Press Ltd. 2d ed. 1999).

277. *Id.* at 132.

278. See, e.g., *Lyall*, *supra* note 9.

279. *Id.* at 233, 245.

280. *Id.* at 304.

lump sum of £15 million, more than £400,000 a year to underwrite her office, and the “semi-royal” title of Diana, Princess of Wales.²⁸¹ She would live in Kensington Palace, where her office would also be located.²⁸² She would have access to royal aircraft and the state apartments at St. James Palace for entertaining.²⁸³ She would have possession of all her royal jewelry, which would eventually be passed on to the future wives of her sons.²⁸⁴

If, as predicted by the Bishop of Willesden, Kate and William’s marriage lasts but seven years (and assuming that, by then, William has become the Prince of Wales),²⁸⁵ can Kate be expected to be provided for as generously as was Diana before her? Can William protect royal assets, if not his own (if any)? Would there be any way for the two of them to avoid the very public kind of bickering engaged in by Charles and Diana?

One thing is clear: no royal prenup would carry any assurance of being enforced without amendments to the MCA 1973.²⁸⁶ Nevertheless, with due respect to Professors Lowe and Kay, as I hope this article has demonstrated, it is past time to end this eccentricity of English law.²⁸⁷ Although the judges of the Family Division argued in 1999 that giving weight to antenuptial agreements in contemplation of dissolution would undermine the institution of marriage,²⁸⁸ the failure to provide some assurance that marrying parties can agree to financial arrangements between themselves should their marriages fall apart can act as a strong deterrent to marriage or remarriage, especially among the rich and

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* at 304-05; see also Lyall, *supra* note 7(a).

285. See *The World at a Glance...London: Bishop Predicts Royal Divorce*, *supra* note 2. One can only hope that William does not have to wait in line for the throne as long as his father, Prince Charles, who set the record for being next in line, having waited 59 years, two months, and 14 days, eclipsing the previous record of his great-great grandfather, King Edward VII. David Batty, *Prince Charles Becomes Britain’s Longest-Serving Heir to Throne*, *GUARDIAN* (Apr. 20, 2011), <http://www.guardian.co.uk/2011/apr/20/prince-charles-longest-serving-heir-throne/print>. Edward VII acceded to the throne on the death of his mother, Queen Victoria. *Id.* Charles is the presumptive heir to his mother, Elizabeth II, who turned 85-years-old on April 21, 2011. See *id.* Charles is now 62 years of age. *Id.* Elizabeth II’s mother lived to be 101. *Id.* If Elizabeth II also lives to be 101, Charles would be 78-years-old when he accedes to the throne. See *id.*

286. See generally Matrimonial Causes Act. As such cases as that of Barry Bonds make clear, even in a jurisdiction, such as California, that makes statutory provision for premarital agreements, there is no guarantee that such an agreement will not be challenged, especially where one of the parties is extremely wealthy. See *supra* text accompanying notes 44 & 63. See also *In re Marriage of Bonds*, 5 P.3d 815, 817-19, 838 (Cal. 2000).

287. See Nigel Lowe & Roger Kay, *supra* note 264, at 395-413.

288. See *supra* text accompanying notes 238-40.

famous.²⁸⁹ Without such assurance, what solicitor could possibly have advised Sir Paul McCartney, for example, to marry again after the debacle of his divorce litigation with Heather Mills-McCartney?²⁹⁰ And, as famously demonstrated in the McCartney divorce action, the lack of a prenup may incline a divorcing spouse to make wildly extravagant financial claims.²⁹¹

MODEST PROPOSALS

With the *Radmacher* decision recognizing at long last that agreements providing for future separation are not against public policy, English law has advanced, almost, to the point in 1970 that the Florida Supreme Court revolutionized American law with the *Posner* decision.²⁹²

Acknowledging that the hodge-podge of American law on prenuptial agreements is hardly a model of consistency, and recognizing that an American law professor may well be accused of hubris in doing so, I suggest the following as minimal statutory reforms necessary to bring the English law of prenups forward into the 21st Century and provide some modicum of certainty to propertied marrying persons (and their counsel/solicitors).

At a minimum, the MCA 1973 needs to be amended to provide explicitly for prenuptial agreements, to set forth conditions for their validity and specify what are—and are not—proper subjects for bargaining. The MCA 1973 also needs to delineate what pre-conditions are waivable. Thus, if there must be, as I believe, full and frank financial disclosure on both sides, the statute needs to specify whether a party can waive such disclosure, as in *Radmacher*.²⁹³ If there must be, as I believe, some minimum time period between the presentation of the written agreement and the date of the wedding, the statute must specify

289. See, e.g., *McCartney v. Mills McCartney*, [2008] EWHC 401, [2008] 1 FAM. L.R. 1508.

290. See *id.* While this article was undergoing the editing process, Sir Paul did take the plunge for a third time, marrying heiress Nancy Shevell in London on October 9, 2011. See *Paul McCartney's Wedding*, PHILLY.COM (Oct. 10, 2011), http://www.philly.com/philly/entertainment/homepage/Paul_McCartney_Wedding.html.

291. See *id.* at [3]. Heather Mills-McCartney believed she should be entitled to £125,000,000 of Sir Paul's assets after less than four years of married life. *Id.* Infuriated at receiving a mere £24,300,000 award, she dumped water on Sir Paul's lawyer's head at the end of the court proceeding. *Id.*; see also Frances Gibb, *Heather Mills Throws Water over Paul McCartney Lawyer Over £24.3m Divorce*, THE TIMES (Mar. 18, 2008), [http://business/timesonline.co.uk/tol/business/law/article3572346.ece](http://business.timesonline.co.uk/tol/business/law/article3572346.ece).

292. See *supra* text accompanying notes 13-17.

293. See *Radmacher*, [2011] 1 A.C. 534 at [115], [117].

whether that is waivable. If there must be, as I believe, the realistic opportunity for the party who did not draft the agreement to take independent legal advice, the statute likewise must address waivability of that right.

Section 25 of the MCA 1973 needs to be amended to explicitly include as matters for consideration in fashioning financial relief both: a) valid written agreements between the parties on subjects appropriate for such agreements and b) foreign law, where applicable.

Section 34(1)(a) needs to be amended to provide that an agreement to oust the jurisdiction of the court shall only be invalid to the extent that it violates rules of contract law generally or the new rules on nuptial agreements, and only insofar as it violates such rules.

Section 35 needs to be amended to limit the authority of a court to alter the terms of an agreement to those situations where the agreement is inconsistent with general contract law or nuptial contract law or has become unconscionable and only to the extent of such inconsistency or unconscionability. The current language that an agreement may be altered because of a change foreseen by the parties when making the agreement²⁹⁴ should be deleted.

Finally and fundamentally, rather than starting out with a presumption that such agreements are void to the extent that they oust the jurisdiction of the court to order financial relief,²⁹⁵ the MCA 1973 should start out with an assumption that they are valid. If the agreement was executed between adults, regarding matters other than their children, and there was full and fair disclosure of both parties' financial circumstances, and it was presented in writing at least a statutorily required number of days before the wedding, and both parties were advised of their right to take independent counsel, then a heavy burden of proof should be placed on the party attacking the agreement.

Unless and until Parliament at long last addresses these issues statutorily, no one who might get divorced in England—whether a prince or a commoner—can ever be assured that a deal is a deal.

294. See Matrimonial Causes Act § 35(2)(a).

295. See *id.* § 34(1)(a).