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BRIEFING PAPER

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Pre-nuptial agreements

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Summary

This briefing paper deals with the law in England and Wales except where specifically stated.

What is a pre-nuptial agreement?

A pre-nuptial (or pre-marital) agreement is an agreement made by a couple before they marry or enter into a civil partnership, which sets out how they wish their assets to be divided if they should divorce or have their civil partnership dissolved.

What is the legal status of pre-nuptial agreements?

Pre-nuptial agreements are not automatically enforceable in courts in England and Wales.

Traditionally, pre-nuptial agreements were unenforceable as being against public policy. However, courts then became willing to attach weight to some pre-nuptial agreements, as one of the relevant circumstances to be taken into account when deciding the division of assets on divorce or dissolution.

In a landmark ruling in 2010, the Supreme Court held that courts should give effect to a pre-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. The ruling does not make pre-nuptial agreements binding in all cases; the fairness of upholding any particular agreement will be considered by the court on a case by case basis. However, some pre-nuptial agreements will now have effect in the absence of circumstances which would make this unfair.

Law Commission recommendation for enforceable agreements

In February 2014, following consultation, the Law Commission published its final report, Matrimonial Property, Needs and Agreements. Among other things, it recommended the introduction of "qualifying nuptial agreements" as enforceable contracts which would enable couples to make binding arrangements for the financial consequences of divorce or dissolution. These agreements, which would have to meet certain requirements, would not be subject to the court's assessment of fairness. Couples would not be able to contract out of meeting the financial needs of each other and of any children. The Law Commission's report includes a draft Bill.

In January 2017, the Government said that it was considering the Law Commission's recommendation on qualifying nuptial agreements as part of a wider consideration of private family law reforms and would respond in due course.

Private Member's Bill

In the 2016-17 Parliamentary session, Baroness Deech (Crossbench) introduced a Private Member's Bill intended to make provision, among other things, for binding pre-nuptial and post-nuptial agreements, subject to specified requirements. The Bill had its Second Reading but did not make any further progress.

The position in Scotland

In Scotland, pre-nuptial agreements are generally regarded as being enforceable and not contrary to public policy.

1. Division of assets on divorce

1.1 How assets are usually divided on divorce

A couple may agree between themselves how to divide their assets on divorce, often, with the help of legal advice, taking into account what they consider might be ordered if the matter were taken to court. Their agreement may be embodied in a "consent order" approved by the court.

When this is not possible, an application for a financial order may be decided by the court. Financial provision may be awarded to either party to the marriage, depending on the facts of the case. Under section 25 of the Matrimonial Causes Act 1973, the court has very wide discretion regarding the division of assets on divorce. The court must take into account all the relevant circumstances of the case (and particularly the matters set out in the section), priority being given to the welfare, while a minor, of any child of the family who has not attained the age of eighteen. The court must also consider whether it is possible to make a "clean break".[1]

The Civil Partnership Act 2004, Schedule 5 Part 5, sets out similar provisions in relation to financial provision applications on dissolution of a civil partnership.

Another Library briefing paper, Financial provision when a relationship ends provides more information.[2]

This briefing paper refers generally to spouses, marriage and divorce but similar considerations are relevant to civil partners, civil partnerships and dissolution.

1.2 What is a pre-nuptial agreement?

A pre-nuptial agreement (sometimes referred to as a pre-nup, a pre-marital agreement or an ante-nuptial agreement) is an agreement made by a couple before they marry, or enter into a civil partnership, which sets out how they wish their assets to be divided if they should divorce or have their civil partnership dissolved. The agreement may be updated after the marriage or civil partnership as the couple's circumstances change.

Pre-nuptial agreements are one type of marital property agreement. Other types include:

- post-nuptial agreements: these might be similar to pre-nuptial agreements but would be made after marriage or civil partnership;
- separation agreements: these might be made after separation and in anticipation of an imminent divorce or dissolution.

1 Matrimonial Causes Act 1925 section 25A and Civil Partnership Act 2004 Schedule 5, part 5, para 23(2)
2 Number 05655, 12 April 2016

2. Are pre-nuptial agreements legally binding?

Summary

Pre-nuptial agreements are legally binding in various countries, but they are not automatically enforceable in courts in England and Wales. In a landmark ruling in October 2010, the Supreme Court held, by a majority of eight to one, that courts should give effect to a pre-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. The fairness of upholding any particular agreement will therefore be considered by the court on a case by case basis.

2.1 The development of case law pre-2010

Pre-nuptial agreements used to be regarded as unenforceable in courts

Traditionally, pre-nuptial agreements were unenforceable as being against public policy. It was considered that they might undermine the institution of marriage and attempt to fetter the discretion of the courts to award property on divorce. In a 1995 case, Thorpe J. (as he was then) spoke of the very limited significance of pre-nuptial agreements:

> 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.[3]

Courts then became willing to attach weight to some pre-nuptial agreements

However, in subsequent years, courts sometimes (but not always) attached weight to pre-nuptial agreements. For example:

- In a case decided in 2001, (where the agreement was made after the marriage and in anticipation of divorce), the judge held that the fact that the parties had made their own agreement was a 'very important' factor in considering what was the just and fair outcome. He said that the amount of importance would vary from case to case and indicated how the court might treat such an agreement:

  > The court will not lightly permit parties who have made an agreement between themselves to depart from it. The court should be slow to invade the contractual territory, for as a matter of general policy what the parties have themselves agreed should, unless on the face of it or in fact contrary to public policy or subject to some vitiating feature ... be upheld by the courts.[4]

- In a case reported in 2003, a court largely upheld a pre-nuptial agreement on the basis that the wife (who was seeking a capital settlement above that set out in the agreement) understood the pre-nuptial agreement, was properly advised as to its terms, and signed it willingly without pressure. There had been no

[3] F v. F (Ancillary Relief: Substantial Assets) [1995] 2 F.L.R. 45 at 66
[4] X v X (FD) [2001] EWHC 11 (Fam) (09 November 2001) paragraph 103 (Munby J)

unforeseen circumstances arising since the agreement which would make it unjust to hold the parties to it. It was held, therefore, that the agreement should be considered by the court as one of the circumstances of the case under section 25 of the Matrimonial Causes Act 1973 and that entry into the agreement constituted conduct which it would be unfair to disregard (this is one of the matters specified in section 25).[5]

- Conversely, in a case reported in 2004, a pre-nuptial agreement was disregarded on the particular facts involved. The judge set out the reasons for this decision:

  > Nowadays [the existence of a prenuptial agreement] can be of some significance but not in this case. This contract was signed on the very eve of the marriage, without full legal advice, without proper disclosure and it made no allowance for the arrival of children. It must, in my judgment, fall at every fence, quite apart from the fact that the terms were obviously unfair, preventing the wife from claiming against the husband's assets.[6]

- In a 2008 case, MacLeod v MacLeod, the Privy Council considered whether a pre-nuptial agreement was binding.[7] Two nationals of the US, who were resident in the Isle of Man, had entered into a pre-nuptial agreement. Several years later, after they were married, they made a further agreement which confirmed the earlier agreement but made substantial variations to it. When the marriage broke down, the wife claimed that the agreements should be disregarded and the husband claimed that the wife should be bound by their terms. The Privy Council held that it was not open to them to reverse the long standing rule that pre-nuptial agreements were contrary to public policy and thus not valid or binding in the contractual sense, and said that the issue was more appropriate to legislative than judicial development. However, the courts could give effect to post-nuptial agreements (agreements entered into after marriage) which provided for a future separation, in the same way and under the same principles as separation agreements.

2.2 Radmacher v Granatino

In a landmark ruling in October 2010, in the case of Radmacher v Granatino, the Supreme Court set out the circumstances in which a pre-nuptial agreement should be binding.[8]

Some pre-nuptial agreements will have effect in the absence of circumstances which would make this unfair.

The facts

The wife was a German heiress, said to have a fortune of £100m. The husband, who was French, was a former investment banker who, during the course of the marriage, left banking and embarked on research studies at Oxford. They had two children. In 1988, four months before their marriage, the parties entered into a pre-nuptial agreement in Germany, in which each agreed not to make a claim

5 K v K (Ancillary relief: prenuptial agreement) [2003] 1 FLR 120
6 J v V (Disclosure: Offshore Corporations) [2004] 1 FLR 1042
7 MacLeod v MacLeod [2008] UKPC 64
8 Radmacher (formerly Granatino) v Granatino [2010] UKSC 427

against the other in the event of divorce. The agreement would have been enforceable in both Germany and France.

Despite the agreement, following their separation in 2006, the husband made a claim for financial provision and in the High Court was awarded a lump sum of £5,560,000.

Court of Appeal decision

In July 2009, the Court of Appeal allowed the wife's appeal and set out its views on the status of pre-nuptial agreements for the purposes of section 25 of the Matrimonial Causes Act 1973.[9] Lord Justice Thorpe referred to his own comments in the 1995 case, F v F.[10] He said that he "would not be so dismissive if such a case were now to come before this court on appeal", and indicated that, in some cases, courts should give "due weight" to pre-nuptial agreements:

> Thus, pending the report of the Law Commission, in future cases broadly in line with the present case on the facts, the judge should give due weight to the marital property regime into which the parties freely entered. This is not to apply foreign law, nor is it to give effect to a contract foreign to English tradition. It is, in my judgment, a legitimate exercise of the very wide discretion that is conferred on the judges to achieve fairness between the parties to the ancillary relief proceedings.[11]

Lord Justice Thorpe agreed with the conclusion in MacLeod v MacLeod that "wholesale reform is for Parliament and not the judges, particularly now the Law Commission is at work".[12]

Supreme Court decision

The husband's appeal to the Supreme Court was dismissed.[13] In October 2010, in a majority judgment (eight to one), the Supreme Court advanced a proposition, to be applied in the case of both pre- and post-nuptial agreements:

> **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**.[14]

This means that some pre-nuptial agreements will have effect in the absence of circumstances which would make this unfair. The ruling does not make pre-nuptial agreements binding in all cases but, in some cases, an agreement can have decisive weight.

A pre-nuptial agreement will not prevent a divorcing party from asking the court to decide how assets should be divided, but, depending on the circumstances, the court might make its decision in the light of the terms of that agreement.

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9 [2009] EWCA Civ 649
10 See section 2.1 of this paper above
11 [2009] EWCA Civ 649 paragraph 53. Financial orders used to be known as 'ancillary relief orders'
12 Ibid, paragraph 25. See section 3 below for information about the Law Commission consultation and report
13 [2010] UKSC 42
14 Ibid, paragraph 75

The fairness of upholding any particular agreement will be considered by the court on a case by case basis:

> There can be no question of this Court altering the principle that it is the Court, and not any prior agreement between the parties, that will determine the appropriate ancillary relief when a marriage comes to an end, for that principle is embodied in the legislation.[15]

The court will take into account all the circumstances of the case when deciding whether it is fair to uphold any particular agreement

The Supreme Court said that it would not be desirable to lay down rules that would fetter the flexibility that the court requires to reach a fair result. However, the Court considered that, in future, it would be natural to infer that parties who entered into a pre-nuptial agreement, to which English law was likely to be applied, intended that effect should be given to it.

In this case, the pre-nuptial agreement was freely entered into and both parties fully appreciated its implications.

A press summary set out three issues which arose in relation to the agreement for the court to consider:

> (i) Were there circumstances attending the making of the agreement which should detract from the weight which should be accorded to it? Parties must enter into an ante-nuptial agreement voluntarily, without undue pressure and be informed of its implications. The question is whether there is any material lack of disclosure, information or advice [69].
>
> (ii) Did the foreign elements of the case enhance the weight that should be accorded to the agreement? In 1998, when this agreement was signed, the fact that it was binding under German law was relevant to the question of whether the parties intended the agreement to be effective, at a time when it would not have been recognised in the English courts. After this judgment it will be natural to infer that parties entering into agreements governed by English law will intend that effect be given to them [74]
>
> (iii) Did the circumstances prevailing at the time the court made its order make it fair or just to depart from the agreement? An ante-nuptial agreement may make provisions that conflict with what a court would otherwise consider to be fair. The principle, however, to be applied is that a 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 [75]. A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family [77], but respect should be given to individual autonomy [78] and to the reasonable desire to make provision for existing property [79]. In the right case an ante-nuptial agreement can have decisive or compelling weight [83].[16]

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15 Ibid paragraph 7

16 Supreme Court press summary, Radmacher (formerly Granatino) (Respondent) v Granatino (Appellant) [2010] UKSC 42 On appeal from the Court of Appeal [2009] EWCA Civ 649, 20 October 2010 [accessed 21 June 2017]

Applying these principles to the facts, the Supreme Court held that the Court of Appeal had been correct to conclude that there were no factors which rendered it unfair to hold the husband to the agreement:

> He is extremely able and his own needs will in large measure be indirectly met from the generous relief given to cater for the needs of his two daughters until the younger reaches the age of 22 [120]. There is no compensation factor as the husband's decision to abandon his career in the city was not motivated by the demands of his family but reflected his own preference [121]. Fairness did not entitle him to a portion of his wife's wealth, received from her family independently of the marriage, when he had agreed he should not be so entitled when he married her [122].

Contrary to the decision in MacLeod v MacLeod,[17] the Supreme Court stated that pre-nuptial agreements should not be treated differently from post-nuptial agreements.

Dissenting judgment

Lady Hale gave the dissenting judgment. She considered the nature and status of marriage and its legal consequences:

> 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. This means two things. First, the parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and for the state. Nowadays there is considerable freedom and flexibility within the marital package but there is an irreducible minimum. This includes a couple's mutual duty to support one another and their children. We have now arrived at a position where the differing roles which either may adopt within the relationship are entitled to equal esteem. The question for us is how far individual couples should be free to re-write that essential feature of the marital relationship as they choose.[18]

Lady Hale said that the law of marital agreements was "in a mess and ripe for systematic review and reform", but that it was for Parliament to reform the law. Lady Hale considered that this particular case had "very unusual features" and that difficult issues could not be resolved in an individual case. She also considered the gender dimension:

> 137. 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... 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.

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17 See section 2.1 of this paper above

18 [2010] UKSC 42 paragraph 132

Lady Hale disagreed with the majority on a number of points,[19] and considered that important policy considerations justified a different approach for agreements made before and after a marriage.[20]

2.3 The current position

There is still some uncertainty about whether a court will uphold any particular agreement

Following the decision of the Supreme Court in Radmacher v Granatino, the enforceability of any particular pre-nuptial agreement will depend on the court's view of its fairness. Accordingly, there is still a degree of uncertainty as to whether a court would make an order which reflects the terms of the agreement.

Cases continue to be decided on their facts, and since the Supreme Court decision, weight has been given to marital property agreements in some cases,[21] but not in others.[22]

In a judgment delivered in 2014, Mr Justice Holman set out the law on nuptial agreements, stressing that it is the court, and not the parties, that decides the ultimate question of what provision is to be made. He said that the question of whether it would 'not be fair to hold the parties to the agreement' would 'necessarily depend on the facts', but provided some guidance:

> i) A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children;
>
> ii) Respect for autonomy, including a decision as to the manner in which their financial affairs should be regulated, may be particularly relevant where the agreement addresses the existing circumstances and not merely the contingencies of an uncertain future;
>
> iii) There is nothing inherently unfair in an agreement making provision dealing with existing non-marital property including anticipated future receipts, and there may be good objective justifications for it, such as obligations towards family members;
>
> iv) The longer the marriage has lasted the more likely it is that events have rendered what might have seemed fair at the time of the making of the agreement unfair now, particularly if the position is not as envisaged;
>
> v) It is unlikely to be fair that one party is left in a predicament of real need while the other has 'a sufficiency or more';
>
> vi) Where each party is able to meet his or her needs, fairness may well not require a departure from the agreement. [23]

Mr Justice Holman also referred to the need to avoid discrimination or bias based solely on gender, and stereotyping that a wife may be dependent upon her husband but not vice versa.

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19 Set out in paragraph 138 of the judgment
20 Ibid paragraph 162
21 See, for example, Z v Z [2011] EWHC 2878 (Fam)
22 See, for example, Kremen v Agrest (No 11) [2012] EWHC 45 (Fam)
23 Luckwell v Limata [2014] EWHC 502 (Fam) paragraphs 129 to 132

The Law Commission has summarised the uncertainty of the current effect of pre-nuptial and post-nuptial agreements, noting that they are being used with increasing frequency:

> [They] cannot be enforced as contracts and they cannot take away the parties' ability to ask the court to make financial orders nor the courts' powers to make orders. As a result, the only way to achieve legal finality is to ask the court to make orders that reflect the terms of the agreement; and the Supreme Court has said that this should be done unless the agreement is unfair.
>
> That means that people who want to make agreements in advance know that the agreement may not be enforced and that when they go to court financial orders will be made which may or may not follow the terms of the agreement, depending upon the court's views about fairness. That in turn will depend upon issues such as the availability to the parties of legal advice, the extent to which they entered into the agreement with full awareness of its implications, the level of provision made for need, and so on. Although advisers have over recent years become more used to drafting pre- and post-nups that they think the court will uphold, they cannot say for certain what the eventual outcome will be.[24]

[24] Law Commission, Matrimonial property, needs and agreements: the future of financial orders on divorce and dissolution. Executive Summary, 2014, paragraphs 1.26-1.27

3. Law Commission project

3.1 Law Commission consultation

In 2009, the Law Commission started a project to examine the status and enforceability of marital property agreements (pre-nuptial, post-nuptial and separation agreements). Its consultation paper, Marital Property Agreements, which was published on 11 January 2011, reviewed the current law and discussed options for reform.[25] The consultation closed on 11 April 2011. The consultation was subsequently extended in 2012 in order to cover two further issues of financial provision on divorce or dissolution of a civil partnership: financial needs and the definition and treatment of non-matrimonial property.

3.2 Law Commission report

On 27 February 2014, the Law Commission published its final report, Matrimonial Property, Needs and Agreements,[26] together with an Executive Summary.

The Law Commission proposed that, with some conditions, couples should be able to enter into binding agreements which would not be subject to the court's assessment of fairness

Among other things, the Law Commission recommended the introduction of "qualifying nuptial agreements" as enforceable contracts which would enable couples to make binding arrangements for the financial consequences of divorce or dissolution. These agreements would not be subject to the court's assessment of fairness.

Certain requirements would have to be met in order for the agreement to be a "qualifying nuptial agreement":

> The agreement must be contractually valid (and able to withstand challenge on the basis of undue influence or misrepresentation, for example).
>
> The agreement must have been made by deed and must contain a statement signed by both parties that he or she understands that the agreement is a qualifying nuptial agreement that will partially remove the court's discretion to make financial orders.
>
> The agreement must not have been made within the 28 days immediately before the wedding or the celebration of civil partnership.
>
> Both parties to the agreement must have received, at the time of the making of the agreement, disclosure of material information about the other party's financial situation.
>
> Both parties must have received legal advice at the time that the agreement was formed.[27]

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25 Law Commission Consultation Paper No 198, Marital Property Agreements, 11 January 2011

26 Law Commission, Law Com No 343, Matrimonial Property, Needs and Agreements, 27 February 2014

27 Law Commission, Matrimonial Property, Needs and Agreements: The Future of financial orders on divorce and dissolution, Executive Summary, February 2014, paragraph 1.35

The Law Commission recommended that it should not be possible for a party to waive their rights to disclosure and legal advice.

Couples would not be able to contract out of meeting the financial needs of each other and of any children. Agreements about financial needs would still be subject to the court's scrutiny for fairness. A qualifying nuptial agreement would not remove the parties' ability to apply for, and the courts' jurisdiction to make, financial orders to meet their financial needs.

The Report included a draft Nuptial Agreements Bill, which would introduce qualifying nuptial agreements in England and Wales.

3.3 Government response

In April 2014, the then Justice Minister, Simon Hughes, said that the Ministry of Justice was considering the Law Commission's report, including the next steps on pre-nuptial agreements.[28]

Simon Hughes also wrote to the Law Commission on 8 April 2014 and 18 September 2014 - the Law Commission has said that these two letters together formed the then Government's interim response to their recommendations.[29] In the second of the two letters, Simon Hughes said that Parliamentary experts had advised that there was unlikely to be time to pass the Nuptial Agreements Bill before Parliament was dissolved in March 2015. He therefore suggested that a final response to the Law Commission on nuptial agreements should be postponed until the next Parliament, rather than being published in February 2015 (as previously expected). He said that this was not a rejection of the Law Commission's recommendations and that the new Government would have time to consider the matter further:

> ...I hope you will agree that an interim response at this stage in which we are clear on the position, and a delayed final response, is preferable to providing a final response in February in which we could still not give a definitive view on legislative change. This is not a rejection of your recommendations; it is a delay to allow the new Government to consider freely a Bill and a policy on which we recognise you have publicly consulted, rather than risking this getting lost in the limited parliamentary time that remains in this session.[30]

In January 2017, the Government said that the matter was still being considered:

> The government is considering the Law Commission's recommendation on qualifying nuptial agreements as part of a wider consideration of private family law reforms and will respond in due course.[31]

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28 Gov.UK, Ministry of Justice press release, Divorce myths to be dispelled, 17 April 2014 [accessed 21 June 2017]

29 Law Commission, Matrimonial Property, Needs and Agreements [accessed 21 June 2017]

30 Letters dated 08/04/2014 and 18/09/2014 from Simon Hughes MP to Professor Elizabeth Cooke, Law Commission, regarding the Law Commission report on Matrimonial Property, Needs and Agreements, Ministry of Justice, DEP2014-1304

31 Ministry of Justice, Report on the implementation of Law Commission proposals, January 2017, paragraph 50

4. Public opinion

YouGov have conducted a number of polls on the public's opinion of pre-nuptial agreements.

- research conducted in 2010 found that 72% of those asked thought that pre-nuptial agreements should be recognised by law; support for legal recognition was similar among both men and women, and across different age-groups and social grades, but it was lower in the North of England and higher in London and the South of England;[32]
- research conducted in 2013 found that opinions were divided on whether to sign a pre-nuptial agreement, with results differing according to age: 18-39 year olds were more likely to say that they would sign a prenuptial agreement;[33]
- further research, conducted in 2014, found that 58% of those asked thought that knowing what would happen financially if a marriage ended made no difference to the likelihood of divorce.[34]

[32] YouGov UK, Public divided over prenups [accessed 21 June 2017]
[33] Ibid
[34] YouGov UK, Prenups don't increase chance of divorce, say public [accessed 21 June 2017]

5. Private Member's Bill

On 26 May 2016, Baroness Deech (Crossbench) introduced a Private Member's Bill, the Divorce (Financial Provision) Bill [HL] (the Bill), having introduced similar Private Member's Bills in the previous three sessions. The Bill was intended to make provision in connection with financial settlements following divorce, and to amend the Matrimonial Causes Act 1973.

Clause 3 would have provided for binding pre-nuptial and post-nuptial agreements, subject to specified requirements.

At Second Reading, on 27 January 2017,[35] Baroness Deech said that this would improve the current position:

> At the moment, we have the worst of both worlds. Judges have said that prenups can be binding, but they have applied so many conditions to their validity that couples now spend hundreds of thousands of pounds litigating over whether the prenup is binding, which defeats the purpose. Prenups will not undermine marriage. Those countries which have binding prenups have lower divorce rates than ours. Many a widowed or divorced older person has told me that they would like to marry their companion but fear to do so because if the second marriage ends in death or divorce, the assets from the first marriage which they wish to hand down to their children would end up in the ownership of the second spouse. Binding prenups would give them peace of mind and could also deal with the vexed issue of maintenance.[36]

Baroness Buscombe replied for the Government and said that the Government was considering the Law Commission's recommendation for qualifying nuptial agreements, and had concerns about how the Bill would deal with marital property agreements:

> The first of the main provisions in the noble Baroness's Bill is that prenuptial and post-nuptial matrimonial property agreements should be binding upon couples on divorce, except in very limited circumstances. The Government are concerned that this does not take adequate account of the needs of parties following divorce, which may have changed since the agreement was made. For example, if the matrimonial property agreement was a valid contract but left one party destitute, we believe it would nevertheless be binding under the Bill. We are currently considering proposals from the Law Commission on binding nuptial agreements with safeguards not present in the Bill. We would wish to consider these more fully within the context of the broader private family law reforms before committing to legislate to make agreements enforceable.[37]

Baroness Buscombe stated that the Government would respond formally to the Law Commission's report on matrimonial property agreements and other financial arrangements on divorce "in due course in the context of our wider plans for family law and system reform".

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35 HL Deb 27 January 2017 cc945-966
36 HL Deb 27 January 2017 c947
37 HL Deb 27 January 2017 c962

She said that the Government would not oppose the Bill receiving its Second Reading but had concerns about its approach:

> that it could cause hardship to many families; and that its proposals, which would radically change the law in this area, have not been subject to public consultation.

The Bill was read for a second time and was committed to a Committee of the whole House, but did not make any further progress.

6. The position in Scotland[38]

The law in Scotland on pre-nuptial agreements is different from in England and Wales. Whilst pre-nuptial agreements have not been the subject of extensive case law, they are generally regarded as being enforceable and not contrary to public policy.[39]

Specifically, section 10 of the *Family Law (Scotland) Act 1985* makes provision for 'matrimonial property' in Scotland to be shared fairly on divorce. Fair sharing is usually equal sharing unless 'special circumstances' justify different proportions. Special circumstances include an agreement between the parties as to the division of matrimonial property on divorce (1985 Act, section 10(6)(a)).

In practice, pre-nuptial agreements are typically used to ring fence certain assets, in order to exclude them from the statutory definition of 'matrimonial property'. Pre-nuptial agreements making comprehensive provision to override the legislative principles otherwise governing the division of matrimonial property on divorce are relatively unusual, although this may change in the future.

By virtue of section 16 of the 1985 Act, the court has power to set aside a pre-nuptial agreement when it was not "fair and reasonable" at the time it was entered into, and subsequent case law has developed this test with reference to a number of individual principles.[40] Significantly, the fact that the terms of an agreement led to an inequitable outcome is not itself enough to justify varying it or setting it aside. Furthermore, in practice, the power contained in section 16 is a safety net, rarely used by the courts.

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38 Information provided by Sarah Harvie-Clark, Scottish Parliament Information Centre (SPICe) on 14 June 2017

39 See, for example, *Thomson v Thomson* 1981 SC 344, a case relating to the terms of a pre-nuptial agreement, where the validity and enforceability of such an agreement was assumed by the parties and the judge in the case

40 The case of *Kibble v Kibble* 2010 SLT (Sh Ct) 5 clarified that section 16 could apply to pre-nuptial agreements as well as to agreements made on the separation of the parties, as previously there had been uncertainty associated with this point. The leading case of *Gillon v Gillon* (*Number 3)* 1995 SLT 678 sets out the individual principles to be applied in determining whether or not to set aside an agreement under section 16

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