HOW CAN YOU FREE YOUR CLIENT FROM

(OR SET ABOUT LIMITING THE RESTRICTIONS OF)

A PRE-NUPTIAL AGREEMENT?

A RENEGER'S CHARTER

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1. INTRODUCTION

1.1. Less than two weeks ago, on 15th February 2014, the Bishop of Shrewsbury, Rt Rev. Mark Davies, gave a stark warning about the potential damage of pre-nuptial agreements to the institution of marriage[1].

> Prenuptial agreements may soon become enshrined in civil law … Our society would be proposing to couples seeking marriage that they prepare their own divorce settlement before making the life-long promises of marriage.
>
> "It is a **legal provision which would surely empty the words of the marriage promise** for 'better for worse … to love and to cherish till death do we part' **of all meaning**.
>
> Prenuptial agreements would **render these promises provisional** by the legal preparations which anticipate divorce. We must ask ourselves today, what message does this send to couples considering marriage?

[1] In a homily at the annual diocesan Mass in celebration of marriage and family life

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> "What message does this send to the young at a moment when the institution of marriage stands at such a historically, low ebb? Should we not be putting our efforts into guarding and building-up the institution of marriage rather than steadily undermining it?"

1.2. Rage as he might against their effect on the institution of marriage, pre-nuptial agreements have already become an established part of the matrimonial finance landscape. Since 20th October 2010, when the judgment of the majority in the Supreme Court was handed down in *Radmacher v. Granatino*, matrimonial lawyers ought to have been advising that the existence of properly drafted pre-nuptial agreement will not just be highly influential - it is likely to be determinative of an application for ancillary relief (or of an application for 'financial order following a decree' to use the abbreviated version).

1.3. On Thursday 27 February 2014 the Law Commission is due to publish its long-awaited report on matrimonial property, needs and agreements. It is expected that it will recommend that 'Qualifying Nuptial Agreements' will become enforceable[2], providing certain conditions are met, without the need for such agreements to be scrutinised by the court exercising its discretionary jurisdiction.

1.4. In that context it is timely to consider:

(a) The courses that *might* be open to those wishing to escape the rigours of a pre-nuptial agreement;

(b) How the effects of a pre-nuptial agreement might be mitigated.

(c) The steps that should be taken on behalf of those minded to renounce an agreement.

1.5. At the risk of appearing sexist, for simplicity's sake I will refer to the party with the fortune to protect as the husband and to the "economically weaker spouse" as the wife. In so doing it might appear that I agree with Baroness Hale's perception that it is usually, although by no means invariably, the woman who is the object of the agreement's curtailment of rights (leading her famously to

[2] See its Supplementary Consultation Paper, "Matrimonial Property, Needs and Agreements, paragraph 1.11

observe that 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"). A number of recent instructions involving wealthy fathers keen to protect their daughters from the potential claims of feckless, ne'r do well sons-in-law, not to mention instructions involving successful business women, would indicate that there are many wives-to-be who are or will be the prime movers behind pre-nuptial agreements.

2. THE SCALE OF THE PROBLEM

2.1. In the three years since *Radmacher* the reported cases would suggest that attempts to avoid the consequences of pre-nuptial and post-nuptial agreements have met with varying degrees of success. Including a case reported at the end of January, and another reported at the end of last week, the list of the most significant cases is as follows:

(a) *V v V* [2011] EWHC 3230 (Fam) - 21/12/2011 - Charles J

(b) *Z v Z* [2011] EWHC 2878 (Fam) - 3/11/11 - Moor J

(c) *GS v L* [2013] 1 FLR 300 - 6/07/11 - Eleanor King J

(d) *Kremen v. Agrest (No. 11) (Post-Nuptial Agreement)* [2012] 2 FLR 414 (Fam) - 19/01/2012 - Mostyn J

(e) *B v S (Financial Remedy_Marital Property Regime)* [2012] EWHC 265 (Fam) - 17/02/12 - Mostyn J

(f) *Z v A (Financial Remedies_Overseas Divorce)* [2012] 2 FLR 667 - 6/03/12 - Coleridge J

(g) *T v T* [2013] EWHC B3 (Fam) - 28/01/13 - Parker J

(h) *AH v HP* [2013] EWHC 3873 (Fam) - 16/06/13 - Moor J

(i) *BN v MA* [2013] EWHC 4250 (Fam) - 10/12/13- Mostyn J

(j) *SA v PA (Pre-marital agreement: Compensation)* [2014] EWHC 392 (Fam) - 21/02/14 - Mostyn J

2.2. If *BN v MA*, is representative of mainstream judicial thinking, those wishing to renounce their pre-nuptial agreements made since *Radmacher* are going to have think twice.

(a) Whilst preceded by a number of years of on-off cohabitation, the marriage in *BN v MA* in fact lasted little more than a year; it was celebrated in June 2012 and came to an end in August 2013. The husband and wife were aged 55 and 40 respectively. They had an 8 year old son (born in 2005) and at the time of the hearing the wife was expecting a further child, due to be born in February 2014.

(b) Made on 30th May 2012 the 'pre-marital agreement in *BN v MA* bore on its front an "Important Notice":

> "This agreement is intended to create legal contractual relations between MA and BN. It is intended to confirm their separate property interests and to be determinative of the division of their assets in the event of the breakdown of their marriage, annulment, judicial separation or divorce. [And then in upper case] **DO NOT SIGN IT UNLESS YOU INTEND TO BE BOUND BY ITS TERMS**. [Again in upper case] **DO NOT SIGN IT UNLESS YOU HAVE INDEPENDENT LEGAL ADVICE WHICH YOU UNDERSTAND AND WITH WHICH YOU ARE SATISFIED**".

(c) The husband declared that he had net property assets worth £13.08 million and in addition had a share in a family business of unknown value, but which provided him with a net income of £350,000 per annum.

(d) The agreement provided that in the event of relationship breakdown (defined as divorce or annulment of the marriage, permanent separation or separation of the parties where one considers it to be permanent):

(i) Neither party would make any financial claim upon the other except in accordance with the agreement, which the parties agreed to incorporate into a consent order.

(ii) In the event of separation the husband would make financial provision for the wife and any children of the family in accordance with a tariff arrangement as follows:

a. If the relationship endured for less than two years he would procure the redemption of mortgages on the wife's two flats and procure the extension of the flats' leases to the maximum extent available;

b. If the marriage lasted between two and nine years he would make financial provision of X;

c. If the marriage lasted between ten and fifteen years he would make financial provision of Y;

d. If the marriage lasted more than fifteen years he would make financial provision of Z.

(iii) There would be a cap which limited the extent of the husband's liability to 30 per cent of the total value of assets to which he was legally or beneficially entitled.

(iv) There would be further provision in the wife's favour consisting of £2 million in trust for housing purposes.

(v) There would be periodical payments at the rate of £96,000 per annum in favour of the wife and at the rate of £24,000 for each of the children.

(e) Despite the pre-nuptial agreement the wife issued a Form A seeking the full range of financial remedies.

(f) In determining that he should endeavour to apply the terms of the pre-nuptial agreement as closely as possible to the wife's application for interim maintenance Mostyn J made certain trenchant observations:

> [17] …. given the important notice in its prominent font at the beginning of the document stating that it is intended to confirm separate property interests and to be determinative of the division of their assets it must be obvious that the principal object of the exercise in this case (as indeed in every case where a nuptial agreement is signed) is to avoid subsequent expensive and stressful litigation; and it is for this reason, as will be seen, that **the law adopts a strict policy of requiring the demonstration of something unfair before it will open the Pandora's Box of litigation where there has been an agreement of this nature**.

> [22] … one has to ask on what possible basis the wife considered it appropriate to issue an application for the full range of financial remedies, she having signed the prenuptial agreement in the terms which I have mentioned but 15 months earlier …
>
> [28] The principle of autonomy is, in my view, extremely relevant. In many cases, and this case is an obvious one, the parties entering into the agreement are sophisticated, highly intelligent and have the benefit of the best legal advice that money can buy. **Where in those circumstances they have thrashed out an agreement, which they have both then freely signed, in my view, heavy respect should be accorded to that decision.** The question of autonomy is particularly relevant where the agreement seeks to protect premarital property

2.3. In *SA v PA (Pre-marital agreement: Compensation)* Mostyn J upheld another marriage contract, concluding that it would be fair to implement the capital division specified by an agreement concluded between H and W in Holland in May 1994.

3. THE GROUNDS FOR RENUNCIATION

3.1. At the risk of stating the obvious, it is the oft quoted statement of principle from *Radmacher* that in fact offers clues as to how a party might be able to get out of a pre-nuptial agreement.

> **"The court should give effect to a nuptial agreement that is <u>freely entered</u> into by each party <u>with a full appreciation of its implications unless</u> in the circumstances prevailing <u>it would not be fair</u> to hold the parties to their agreement."**[3]

3.2. In the light of that statement the party wishing to escape the rigours of a pre-nuptial agreement will need to establish:

(a) The existence of contract vitiating factors, thereby giving the lie to the impression that the agreement was freely entered into; or

(b) An absence on her part of a full appreciation of the agreement's implications; or

(c) That it would not be fair to hold her to the agreement.

[3] *Radmacher v. Granatino* [2011] 1 A.C. 534 paragraph 75

4. CONTRACT VITIATING FACTORS

4.1. Nothing that was said in the *Radmacher* majority judgment was intended to displace the standard grounds for challenging a contract, namely the presence at its formation of duress, fraud or misrepresentation. And so it was said that:

> [68] If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure, and informed of its implications.
>
> [71] … The first question will be whether any of the standard vitiating factors: duress, fraud or misrepresentation, is present. **Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have**. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it.

4.2. The reality, however, is that even when there may have been undue influence or exploitation of a dominant position, there will rarely be scope to rely on such factors as ground to repudiate the pre-nuptial bargain.

4.3. Typically the husband with a fortune to protect will have the sense to retain a suitably experienced legal team to draw up the agreement. Such a team will invariably insist on the inclusion of a clause in the Recital to the agreement along the following lines:

> H and W are **each entering into the agreement in this Deed freely and voluntarily, without coercion, undue influence or pressure** of any kind from the other, or from any other party, and without any promise or representation other than as set out in this Deed, and on the basis that the terms set out below represent the entire agreement of the two of them

4.4. More often than not that clause is in itself a misrepresentation, but it will not avail the weaker party to claim as much.

(a) Experience indicates that whenever one party is keener to have an agreement than the other, there is scope for pressure.

(b) Once arrangements for the wedding have been made and publicised there typically will be huge pressure on the weaker party, in the form of 'sign or the wedding is off'. The Law Commission did not accept that there is duress where a pre-nuptial agreement is, in effect, is the price of the

wedding[4]. It took comfort from the fact that a party unhappy with the terms of an agreement always retains the right to refuse to sign and to walk away. Experience tends to suggest that for many a wife-to-be that right is illusory

(c) In any event the demand will usually be expressed slightly more subtly, by the suggested incorporation of a paragraph in the recital along the following lines:

> W acknowledges and agrees that H would not be entering into the Marriage without the conclusion and execution by the parties of this Agreement

(d) An assertion of undue pressure that is first made many years after the event, and is not corroborated by contemporaneous evidence, can be expected to get short shrift (see, for example, Parker J's assessment of a wife's complaint of undue pressure - from both her husband and her solicitor - in *T v T*, a case involving a separation agreement).

5. LACK OF APPRECIATION OF THE AGREEMENT'S IMPLICATIONS

5.1. Reference to the case of *AH v PH*[5] is the easiest way to illustrate how the absence of a full appreciation of an agreement's implication can justify its renunciation.

5.2. The facts of *AH v PH*

(a) W's application for financial orders was brought after a short marriage; including a period of pre-marital cohabitation the parties were together for no more than 5½ years, from 2006 until 2011.

(b) Both parties came from the same country in Scandinavia and both were comparatively young - the husband 33 and the wife aged 30. There were also two young children, aged 5 and 4.

[4] (see paragraph 6.27 of its Consultation Paper, Marital Property Agreements)
[5] It will, of course, be appreciated that the identity of counsel in the case has no bearing on its selection as an example

(c) Although their wedding was in Scandinavia, for the duration of the marriage the parties lived in London, initially in Knightsbridge, latterly in Kensington and Chelsea.

(d) The husband admitted to being worth £76 million. He was a member of a very wealthy family and his fortune was derived from a gift that had been made to him by his uncle several years prior to the marriage.

(e) Given the source of H's wealth the claim that was advanced on behalf of W was a purely needs-based one. It could not realistically be contended that the sharing principle should apply. Nevertheless, the provision that was sought on behalf of W was still no less than £12.38 million, comprising

  (i) a sum of £7.5 million to fund the purchase of a property in Kensington, albeit on the basis that the wife would be obliged to repay the equivalent of £2 million of that sum on the children growing up (and with that obligation being secured by a charge on Mesher terms);

  (ii) a sum of c. £950,000 to fund the purchase of a second home in Scandinavia;

  (iii) a sum of £240,000 to fund the cost of furnishing the two properties and to meet the cost of a new car;

  (iv) A sum of £3.69 million to provide W with a net income of £270,000 per annum until the youngest child reached the age of [21] - 17 years thence.

(f) In response H sought to rely on a pre-nuptial agreement (albeit called a 'Marriage Settlement') that had been negotiated and executed in Scandinavia shortly before the wedding. The agreement stipulated that there should be a regime of partial separate property, with H retaining as his separate property all his fortune apart from 10,000,000 kroner (approximately £850,000) which sum would be gifted to the wife on separation, divorce or death, and in the meantime secured by her having an

interest worth 10,000,000 kroner in a designated property. Thus H contended that the award in W's favour should consist of:

(i) An outright lump sum equivalent to her entitlement under the agreement, which with index-linking he calculated to be worth £1.1 million;

(ii) The provision of £3.5 million to fund accommodation for W and the children in London to be held on trust on Mesher terms (thereby effectively proposing that W's claim should be dealt with as if it was being brought on behalf of the children under Schedule 1 of the Children Act);

(iii) Periodical payments for W at the rate of £110,000 per annum until the children completed their tertiary education.

5.3. A curious feature of the case was that the experts in the relevant Scandinavian law agreed that the pre-nuptial agreement was both invalid and would not be upheld in the Scandinavian country in which it had been executed. As Moor J acknowledged, there was a certain irony in the fact that he was being asked to implement an agreement which would not be given effect in the country in which it had been drawn up.

5.4. The award in *AH v PH*

(a) From the W's perspective the case was not without its challenges as H was able to demonstrate that at the time when she signed the agreement:

(i) W had been aware of, or at least had a very good idea of the scale of his wealth;

(ii) W had been in receipt of legal advice as to the effects of the agreement under Scandinavian law.

(b) Despite those factors Moor J concluded that it would unfair to hold W to the agreement and that instead there should be an award in her favour worth £7,775,000, comprising:

(i) A housing fund (including purchase costs) of £5,375,000;

(ii) A further lump sum of £150,000 to enable W to meet the cost of refurbishment, to buy furniture and to pay for a new car.

(iii) A further lump sum of £2,250,000 representing capitalised maintenance at £200,000 per annum for the period until the younger child completed full-time secondary education.

(c) In recognition of the source of the capital (i.e. inherited wealth) Moor J directed that the housing fund should be subject to a charge in H's favour of £2 million (expressed as such percentage of the purchase price as would give H £2 million) not to be exercisable until both children had completed their tertiary education (to the end of a first degree).

5.5. In essence the reason why Moor J determined that it would be unfair to hold W to the Marriage Settlement was because he was satisfied that at the time when she entered into it she did not have a full appreciation of its implications. His conclusion that she lacked the necessary appreciation of the agreement's implications was based on the following findings:

(a) That at the time when the agreement was made W had agreed to live in the UK for four years, and that she had expected the children would be educated in Scandinavia.

(b) That the sum of 10,000,000 Kroner which the agreement provided W should receive had been designed to enable her, in the event of the marriage breaking down, to purchase a property in Scandinavia roughly equivalent to the home owned by her parents.

(c) That at the time of the marriage H had led W to believe that he was agreeable to a return to Scandinavia for the children to be educated there, whilst at the same time he was indicating to his advisors that he wanted to be able to live in this country indefinitely (and thereby avoid a wealth tax in Scandinavia which would have cost him £800,000 per annum).

(d) That W thought the stay in the UK was intended to be temporary whereas H expected it to be permanent.

(e) That it had never crossed W's mind that she might be divorced in the UK.

(f) That it had crossed H's mind that a divorce might take place in the UK, but he had not shared that thought with W.

(g) That prior to the agreement being executed the wife was never advised to obtain advice as to her position and rights in this country, and therefore had no idea as to what she was giving up[6].

(h) That W could not have been expected to know that the agreement was intended to cover the position whenever and wherever they divorced and wherever she was being expected to live.

(i) That to be fully aware of the implications of the agreement W should have had, but had been denied all the information that was material to her decision whether or not to enter into the agreement.

(j) That where a party is not fully aware of the implications of the agreement because he or she lacks all the information that is material to his or her decision, it will invariably be unfair to hold the parties to the agreement.

5.6. It is also important to record that Moor J also was influenced by the fact that during the marriage H had not considered himself bound by agreement in that:

(a) he had never provided the expected security for W's 10 million Kroner;

(b) he had sold the only property that had been designated to provide security without telling W he had done so.

5.7. In those circumstances Moor J concluded that "in most respects" it would be appropriate for him to "consign the Settlement to history". It was only the agreement's function 'to protect H's inherited wealth' that Moor J considered needed to be reflected in his award, and that was accomplished by the requirement of the charge, which was designed to ensure W did not retain in the longer term more than she needed from the inheritance.

[6] In *BN v MA* Mostyn J concluded (at paragraph 30) that "usually … a full appreciation of the implications will normally carry with it a requirement of having at least enough legal advice to appreciate what one is giving up"

6. FACTORS RENDERING IT UNFAIR FOR AGREEMENT TO BE UPHELD

6.1. As the outcome in *Radmacher* demonstrated, persuading a court that upholding an agreement will result in unfairness is far from easy.

6.2. At paragraph 81 of the majority judgment in *Radmacher* guidance was given as to the circumstances which would render it unfair to hold a party to an agreement.

> [81] Of the three strands identified in *White v White* [2001] 1 AC 596 and *McFarlane v McFarlane* [2006] 2 AC 618 , it is the first two, **needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement**. The **parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need**, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally **if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned**.

6.3. Three years on, Mostyn J continues to be of the view that the term "need" within the phrase, 'a predicament of real need' is to be interpreted as being "the minimum amount required to keep a spouse from destitution". If that is right then a predicament of real need warranting departure from any agreement is only likely to be made out where the financially weaker party can show that he or she lacks the means to house and/or maintain him/herself, without the assistance of the state or some other benefactor."

7. MITIGATING THE EFFECTS OF A MARITAL CONTACT

7.1. Where a marital contract provides for a regime of separation of property and excludes community of acquest, it might be thought that a claim for capital on behalf of 'excluded' weaker party will have little prospect of success. However there will often still be scope for such a party to claim a substantial lump sum under the guise of a claim for maintenance.

7.2. As Mostyn J has been at pains to point out, "maintenance" is not confined to regular payments to meet living costs. Citing the decision in *Van den Boogard v*

Laumen [1997] 2 FLR 399, ECJ he has sought to emphasise (in *Kremen v Agrest (Financial Remedy: Non-Disclosure: Postnuptial Agreement* and *SA v PA (Pre-marital agreement: Compensation)*) that maintenance extends not just to capitalised periodical payments - i.e. a Duxbury lump sum - but also to provision for housing and capitalised provision for school fees.

7.3. And so *in Kremen v Agrest* he ordered H to pay W a lump sum of £12.5 million, and certified that of that sum £8.3 million constituted 'maintenance'.

> *Assessment of W's award*
>
> **[76]** I apply first the distributive principle of need. W needs a reasonable home. Having regard to the scale and value of Whitecliff I assess that she needs a housing fund of £2m. In relation to her revenue needs, having regard to the marital standard of living and the scale of assets available to H, I judge that she needs an annual income of £200,000. This capitalises using the *Duxbury* formula at £5.481m. W needs to have her debts of £163,000 paid.
>
> [77] W is entitled to receive the maintenance needs of V and M on a capitalised basis as I judge there being no prospect of H paying these sums periodically. I judge their general maintenance needs to be £20,000 pa each. In addition school fees must be provided for.
>
> [78] My application of the needs principle is, therefore, as follows:

W housing	2,000,000
W Duxbury at £200,000 pa	5,481,000
W debts	163,000
V maintenance at £20,000 pa	80,000
V school fees	102,000
M maintenance at £20,000 pa	220,000
M school fees	254,000
Total	8,300,000

7.4. In *Traversa v Freddi*[7] Thorpe LJ put it thus

> *Van den Boogaard v Laumen* (Case C-220/95) [1997] QB 759 shows that **a transfer of property may be in the nature of maintenance if it is intended to ensure the support of a spouse**; but a transfer of property which serves only the purpose of a division of property is not in the nature of maintenance, and concerns rights in property arising out of a matrimonial relationship

[7] [2011] 2 FLR 272

7.5. Continental marital contracts or marriage settlements that provide for the application of a marital property regime will rarely address the question of maintenance. Typically maintenance will be left entirely at large. That that should be the case is hardly surprising because such entitlement as a spouse may have to claim maintenance generally is only for a limited period - typically no more than three years.

7.6. Unless the agreement specifically excludes a claim for maintenance (as was the case in *Radmacher*) consideration should therefore be given to pursuing a suitably imaginative claim for maintenance, applying principles to be derived from *Van den Boogaard v Laumen.*

8. TACTICAL TIPS WHEN ACTING FOR A RENOUNCER

8.1. Whilst it is dangerous to give guidance about strategy and tactics largely on the strength of one successful outcome, those instructed on behalf of prospective renouncers might usefully bear in mind the following points:

(a) As a first step to understanding the extent of the client's appreciation of the agreement's implications it is essential to obtain the complete file (files) of those who were giving her legal and other advice (accountancy, tax, property advice) at the time when the agreement was concluded. Reliance on the client's instructions alone, even if supported by the production of some of the correspondence with her lawyer, will rarely be insufficient, particularly if the relevant agreement was concluded many years ago.

(b) Such recital as the agreement may contain will not necessarily reveal the true intentions and motivations of the parties at the time when the agreement was concluded. Accordingly the need to seek disclosure of other contemporaneous material that might tend shed light on the true nature of plans at the relevant time (such as tax advice) should always be kept under review.

(c) The court will not be enthusiastic about upholding an agreement, where the party seeking its enforcement has felt free to disregard his own obligations

under the arrangement. The party who chooses both to approbate and reprobate is unlikely to receive a favourable reception. Accordingly it should always be established whether the husband has fully and properly fulfilled *his* side of the bargain and, if not, whether the wife has acquiesced in any non-compliance on his part.

(d) When dealing with a foreign agreement, it will generally be important to establish (albeit not necessarily put in evidence) how the agreement would be treated, and what remedies the wife would be left with if the agreement's enforcement were to be sought in the country where it was made. Accordingly there will typically be a need to commission a report from an expert in the relevant country's matrimonial law.

(e) If (as in *AH v PH*) the husband should express a wish to make a payment in purported performance of his obligation under the agreement, it should be made absolutely clear on behalf the wife that the money will be accepted by her without prejudice to her contention that the agreement has no effect, and will therefore be treated by her as if it had been paid in satisfaction of her claims ignoring the agreement.

(f) Do not delay in notifying the other party of the client's intention not to be bound by the agreement, or in explaining the reasons being relied upon to justify her repudiation. Otherwise be prepared for the sort of criticism that came the way of counsel in *BN v MA.*

> [31] In this case what is surprising is that, having taken the opportunity to read the correspondence, which I did, and to read the wife's statement, which I did, there was nothing in either of them at all to explain to me what was her case as to why she should be allowed to discharge the burden stipulated by the Supreme Court as to why this agreement should not take effect. It was only on questioning Mr. Marshall that some light began to be shone on this. Mr. Marshall explained to me that the wife's case will be -- and it is perhaps a signification of one of the defects of our system that we do not have a system of pleading, so that until the husband heard it from Mr. Marshall's mouth, he actually had no idea at all what case he was facing in relation to the repudiation of the agreement -- that, first, the husband was guilty of material non-disclosure; and, second, that there were circumstances surrounding the signature of the agreement, particularly relating to the haste with which it was formed, which should lead the court to conclude, applying Lord Phillips' test, that it would be unfair to apply the agreement. In

> circumstances where the wife did not actually depose to anything in her affidavit, it was quite difficult to make sense of the way in which this case was being put.

(g) Unless the circumstances leading to the making of the agreement were manifestly unfair, when advocating that the agreement should not be upheld be careful not to suggest that it should be afforded no weight whatsoever. Even if not followed, a repudiated agreement is still likely to be regarded as 'one of the circumstances of the case'.

9. THE LAST RESORT

9.1. If, notwithstanding the most diligent of research and the most creative of thinking, a claim cannot be pursued by the wife in her own right it should always be remembered, where there are minor children, that a claim can always be brought under Schedule 1 of the Children Act 1989.

9.2. Resort to the Children Act is not commonly thought of where the child's parents have been married because of the availability of relief under the Matrimonial Causes Act 1973. The fact that the Children Act nonetheless applies is apparent from paragraph 16(2) of Schedule 1[8]; its applicability is confirmed in the Law Commission's Consultation Paper in relation to Marital Property Agreements. [9]

9.3. In a claim made under the Children Act statute[10] obliges the court to have regard to the financial resources of both parents, but not to their standard of living. However in *J v C (Child: Financial Provision)*[11], Hale J said

> "A child is entitled to be brought up in circumstances which bear some sort of relationship with the father's current resources and the father's present standard of living."

and the Court of Appeal in *Re P (Child: Financial Provision)*[12] said that her statement was "unquestionably sound and should be clearly endorsed".

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[8] 16(2) In this Schedule, except paragraphs 2 and 15, "parent" includes
(a) any party to a marriage (whether or not subsisting) in relation to whom the child concerned is a child of the family, and
(b)any civil partner in a civil partnership (whether or not subsisting) in relation to whom the child concerned is a child of the family;

[9] See paragraph 2.24

[10] Paragraph 4(1)(a) of Schedule 1

[11] [1999] 1 FLR 152

9.4. Accordingly, where there are minor children, the assessment of "real need" *is* still likely to require at least some consideration to be given to:

(a) the standard of living or lifestyle likely to be enjoyed by the wealthier party seeking to uphold the pre-nuptial agreement;

(b) the extent of the resources of that wealthier party.

9.5. As the Supreme Court put it[13]

> A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family.

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26TH FEBRUARY 2014

The matters set out the author's views, and do not constitute advice for any individual case

[12] [2003] 2 FLR 865
[13] at paragraph 77