

PRENUPS AND THE INHERITANCE ACT

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1. INTRODUCTION

1.1. The question which this part of the seminar aims to address is as follows:

Can the existence of a pre-nuptial agreement influence the outcome of an application brought under the Inheritance (Provision for Family and Dependents) Act 1975 by a surviving spouse?

1.2. To some that might seem a rather curious question.

(a) The common perception of a “prenup” is that it is essentially *divorce* planning - a means by which a wealthy individual can prevent their spouse-to-be from being unjustly enriched (as they would see it) if the two of them should fall out of love, and their intended marriage should be dissolved.

(b) A pre-nuptial agreement is not typically regarded as having a function in the event of a marriage coming to a premature end in consequence of the death of one of the spouses, at time when the parties were still very much in love.

1.3. But a moment’s thought will confirm that some of the factors which motivate divorce planning can apply with no less force when it comes to planning for the inevitability of death. For example:

(a) A desire to preserve provision intended for a first family - to protect the interests of children from a first marriage against the possibility of claims from a wicked stepmother - is unlikely to be less keenly felt when death rather than divorce is being contemplated.

(b) The strength of a desire to ensure the preservation of a long-standing family business if the marriage should come to an end, is unlikely to be dependent

on whether the ending of the marriage should come about because of death rather than dissolution.

- 1.4. Indeed, as has been observed by the Law Commission in its Consultation Paper relating to Marital Property Agreements¹, there may be some who enter a prenuptial agreement purely for the purpose of avoiding or limiting the damage of an Inheritance Act claim.

There may well be couples, perhaps in advanced years, whose concern is to safeguard their children's inheritance, and who may wish to include *only* provision about applications under the Inheritance (Provision for Family and Dependents) Act 1975. They may not wish to contemplate divorce, and indeed may feel very confident that they will not need to, but they may appreciate that it is difficult to predict what may happen after a bereavement

- 1.5. Accordingly, in this talk consideration will be given to 3 aspects of prenuptial death planning:
- (a) First, to some ways in which pre-nuptial agreements presently go beyond divorce planning and try to regulate how property is distributed on death;
 - (b) Secondly, to some reasons why the outcome of an Inheritance Act application might be different in consequence of a pre-nuptial agreement;
 - (c) Thirdly, to the possibility of a change in the law in the future.
- 1.6. Before addressing those matters it would be useful briefly to consider two other matters, namely:
- (a) The significance now afforded to pre-nuptial agreements on divorce since the Supreme Court's decision in *Radmacher v. Granatino*.²
 - (b) Some of the ways in which pre-nuptial agreements make divorce provision for the weaker party in circumstances where there is significant disparity in the extent of the parties' resources.

2. SIGNIFICANCE OF PRE-NUPTIAL AGREEMENTS ON DIVORCE

- 2.1. Engaged couples who read the newspapers on 21st October 2010 would have been forgiven for thinking that the Supreme Court's decision in *Radmacher v.*

¹ Consultation Paper No 198, published on 11th January 2011, at paragraph 7.85

² [2011] AC 534

Granatino made pre-nuptial agreements binding in the courts of England and Wales.

2.2. The Daily Mail ran the headline:

Judges back prenups for Britain: Traditional marriage laws are swept aside in landmark decision by Supreme Court

and the article beneath started with the following:

Judges yesterday tore up England's marriage laws to offer couples binding prenuptial contracts.

2.3. Those who were sufficiently interested to read the judgments would have appreciated that even the eight judges who made up the majority did **not** presume to take away the court's discretion, let alone rule that henceforth a pre-nuptial agreement could be determinative of the distribution of resources following the breakdown of the marriage. Said Lords Phillips, Hope, Rodger, Walker, Brown, Collins and Kerr³

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. **What the court can do is to attempt to give some assistance in relation to the approach that a court considering ancillary relief should adopt** towards an ante-nuptial agreement between the parties.

2.4. For the purpose of providing such assistance it uttered the following proposition⁴

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

2.5. In seeking to answer what it conceded was the "difficult" question, "in what circumstances will it not be fair to hold the parties to their agreement?" the Supreme court resorted to a familiar mantra⁵:

This will necessarily **depend upon the facts of the particular case**, and it would **not** be **desirable to lay down rules** that would fetter the flexibility that the court requires to reach a fair result

³ at paragraph 7

⁴ at paragraph 75

⁵ see paragraph 76

2.6. However the Supreme Court then felt itself able to give some “guidance” to apply where there were no tainting circumstances attending the conclusion of the agreement, saying⁶:

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**

2.7. With respect to needs giving rise to vitiating unfairness their Lordships stated thus⁷:

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.

2.8. As to what is meant by the term, “a predicament of real need”, the outcome in *Radmacher* would suggest that much will depend on whether or not there are minor children of the marriage to be taken into account.

2.9. Where there are such minor children, it seems that the financially weaker party will be in ‘a predicament of real need’ if he or she is unable to afford at least as much as would be provided to him or her by a claim brought by a parent under Schedule 1 of the Children Act 1989. It could hardly be otherwise, because if, on an application for a post divorce financial order, a married parent’s needs were assessed at any lower level he or she would simply make a claim under the Children Act⁸.

2.10. In a claim made by a parent under the Children Act the court has to have regard not simply to the financial resources of both parents but also to their standard of living⁹. Accordingly, where there are minor children the assessment of “real need” is still likely to require at least some consideration to be given to the:

⁶ at paragraph 81

⁷ at paragraph 81

⁸ where the child’s parents are married resort to the Children Act is not commonly made because of the availability of relief under the Matrimonial Causes Act 1973; however, the fact that the Children Act nonetheless applies is apparent from paragraph 16(2) of Schedule 1 and its applicability is confirmed in the Law Commission’s Consultation Paper in relation to Marital Property Agreements (see paragraph 2.24)

⁹ See the judgment of Hale J J v C (*Child: Financial Provision*) [1999] 1 FLR 152, endorsed by the Court of Appeal in *Re P (Child: Financial Provision)* [2003] 2 FLR 865

(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.

2.11. Absent minor children it would appear, at least from the outcome, that the Supreme Court considered that:

(a) whether or not the financially weaker party would be able to establish ‘real need’ would *not* be dependent on, or linked to factors such as the standard of living during the marriage, the extent of the resources available or any disparity in the parties’ respective standards of living going forward;

(b) “a predicament of real need” would be akin to an inability to meet the most basic of needs, an inability to fund life’s essentials¹⁰;

(c) “a predicament of real need” would therefore only be made out where the financially weaker party could show that he or she lacked the means to house and/or maintain him/herself, without the assistance of the State or some other benefactor.

2.12. That analysis has recently been affirmed by Mostyn J in *Kremen v. Agrest*¹¹. The judge (who happened to be Mr Granatino’s former counsel) observed that where there is a pre-nuptial agreement “(real) need may be interpreted as being that minimum amount required to keep a spouse from destitution”

2.13. Thus what can now be said with some confidence is that “leaving someone in a predicament of real need” is a long way removed from “failing to make reasonable financial provision”.

2.14. Put another way, in terms of providing for a spouse, what a contracting party can get away with, under a pre-nuptial agreement, to cover the possibility of divorce, is a long way removed from what a testator can get away with when making a will in anticipation of the inevitability of death.

¹⁰ A term used by Baron J in *Radmacher*, at first instance; [2009] 1 FLR 1478, at paragraph 137

¹¹ [2012] EWHC 45 (Fam), at paragraph 72(c)

3. DIVORCE PROVISION IN PRE-NUPTIAL AGREEMENTS

3.1. Where each of the parties to a marriage is independently wealthy - the *Crossley* scenario¹² - a fairly standard approach tends to be adopted. In such circumstances the pre-nuptial agreement will effectively seek to apply the marital property regime of ‘separate property’, both for the duration of the marriage and in the event of its breakdown, and at the same time exclude the right of either party to make any claim for maintenance.

3.2. Where, however, there is a significant disparity in the extent of the parties’ respective resources, the provision made by the wealthy party can take a number of different forms, depending on a host of factors. To prevent the worst case scenario of the weaker party, by virtue of the sharing principle¹³, pursuing a claim for a 50/50 split of everything, two approaches are commonly followed.

(a) If the wealthy party can be confident that whatever the length of the marriage he/she will always be possessed of very substantial, readily realisable wealth, the provision to be made under the agreement to the economically weaker spouse might well be specified as a fixed amount, to be determined at the time of breakdown of the marriage by means of a formula reflecting (a) the length of the marriage and (b) whether or not there are children. Such a tariff-based approach might, for example, provide for the following in the event of the breakdown of the marriage:

(i) that the weaker party’s entitlement if there are no children should be calculated in the following manner:

Years of marriage elapsed	Lump sum	step change	Share of matrimonial home	Capital from matrimonial home	Total provision for weaker party
0			25%	750,000	750,000
1	250,000		30%	900,000	1,150,000
2	300,000	50,000	35%	1,050,000	1,350,000
3	375,000	75,000	40%	1,200,000	1,575,000
4	475,000	100,000	45%	1,350,000	1,825,000

¹² *Crossley v. Crossley* [2008] 1 FLR 1467: Husband’s declared wealth in the order of £45m, W’s fortune £18m

¹³ *Miller v. Miller, McFarlane v. McFarlane* [2006] UKHL 24, [2006] 2 AC 618, at paragraph 144 and *Charman v. Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 and paragraph 68

Years of marriage elapsed	Lump sum	<i>step change</i>	Share of matrimonial home	Capital from matrimonial home	Total provision for weaker party
5	600,000	<i>125,000</i>	50%	1,500,000	2,100,000
6	750,000	<i>150,000</i>	50%	1,500,000	2,250,000
7	950,000	<i>200,000</i>	50%	1,500,000	2,450,000
8	1,200,000	<i>250,000</i>	50%	1,500,000	2,700,000
9	1,500,000	<i>300,000</i>	50%	1,500,000	3,000,000
10	1,500,000	<i>0</i>	50%	1,500,000	3,000,000

- (ii) that if there should be children the amount in the “total provision” column should be increased by £x million, to reflect the fact that acquisition of a family home will increase the basic infrastructure costs.
 - (iii) that there should be index-linking of the amounts (both to a consumer price index and a house price index price);
 - (iv) that, save for the purpose of securing her/his entitlement under the agreement, the weaker party should be prohibited from making a claim for financial provision.
- (b) If the stronger party’s wealth is contingent on certain factors (perhaps the size of an inheritance, or the exercise of a trustee’s discretion or the performance of a business), the provision to be made under the agreement to the economically weaker spouse might specified as “not exceeding x%” of the stronger party’s assets. Alternatively, and more commonly in such circumstances, the weaker party’s provision might be limited “to such (unspecified) amount as might be required by the weaker party at the time of the breakdown of the marriage to meet her/his housing and income needs”, with the entitlement of the weaker party to claim a share of the wealthy party’s assets otherwise being barred. The application of such a needs-based approach would result in the weaker party receiving provision at a level equivalent to that which the courts used to award prior to 26th October 2000 -

i.e. in the discriminatory days that preceded the House of Lords' decision in *White v. White*¹⁴.

4. DEATH PROVISION IN PRE-NUPTIAL AGREEMENTS

- 4.1. The fact that it is not currently possible for a spouse or soon-to-be spouse to contract out of her/his ability to make an application under the Inheritance Act should be a matter of trite law¹⁵. It should equally be a matter of trite law that the only circumstances in which *a court* may make an order prohibiting a party to a marriage from making an application under S.2 of the Inheritance Act are those specified in sections 15 and 15A, which will apply only on the breakdown of the marriage - i.e. on the grant of a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (S. 15) or on making an order under section 17 of the Matrimonial and Family Proceedings Act 1984 (orders for financial provision and property adjustment following overseas divorces, etc.) (S. 15A).
- 4.2. Even though those points may seem elementary, there are plenty of family practitioners who do not appear to have grasped them.
- (a) The following currently appears on the website of a home counties' firm of solicitors, in a section purporting to answer frequently asked questions a about pre-nuptial agreements.

“Accounting for Deaths in a prenuptial agreement

I do not want my partner to make any claims after my death

This depends if you are still married. In such cases this may be more difficult and you should seek advice from Mr X and Mrs Y at this firm.

This can be provided or (sic) in any pre-nuptial that such claims cannot be made. But if parties have children then such claims cannot be avoided under section 2 of the Inheritance (Provision for Family and Dependents) Act 1975.”

¹⁴ [2001] 1 A.C. 596

¹⁵ If confirmation of that proposition be required - see the Law Commission's Consultation Paper in relation to Marital Property Agreements, paragraph 7.84

- (b) More worryingly, even members of specialist family law departments who revel in the sobriquet “the magic circle” have been known to produce agreements incorporating clauses along the following lines:

“Each of H and W shall make testamentary provision for the other to ensure that in the event of his/her death the survivor will receive at least what she/he would have received under the terms of this agreement had the breakdown of the marriage occurred on the date of the death of the other party.

Save for the purposes of seeking to enforce the terms of this agreement, neither H nor W shall on the death of the other apply to any court for an order requiring provision to be made out of the other’s estate.

- 4.3. Happily there are other family practitioners who do duly recognise the inalienability of the rights of a surviving spouse to make an application under the Inheritance Act. Whilst such savvy practitioners will leave out clauses which would be void, because they purport to restrict such rights, they will nonetheless seek to limit claims against the estate of the wealthy party by other methods, both direct and indirect.

- (a) For the party seeking to influence the overall outcome of an application under the Inheritance Act by *direct* means (for example, for a wealthy man about to enter into a second marriage who has three children by his first marriage, and who wants each of those children and his second wife to receive an equal share of his estate) the following might be incorporated:

“Following the celebration of the marriage H shall maintain a will which shall provide that if he should die whilst married to W, then provided W shall have survived him by thirty days, W and each of his children shall receive by reason of his death 25% of his residuary estate.

H and W agree that the provision for W specified in [the preceding paragraph] shall be regarded as constituting reasonable financial provision for her benefit at all times and for all purposes hereafter, including any application made by or on behalf of W under the Inheritance (Provision for Family and Dependents) Act 1975.”

Of course, if a clause along the lines indicated above should be incorporated there will be a need to make clear to the client (assuming he is the wealthy

party) that a contract to leave by will has thereby been created, and that if breached his estate could be faced with a claim for damages¹⁶.

- (b) For the party seeking to influence the outcome of an Inheritance Act application by *indirect* means - that is to say, by influencing the required finding in relation to the divorce comparator (i.e. the finding which should be made by the court when it comes to carry out “the divorce cross-check” as required by S. 3(2)¹⁷), and only by such means influencing the overall outcome, the text to be included might simply read:

“If H should pre-decease W, and if at the date of his death the marriage should not have broken down (as defined above), then on any application which may be made by or on behalf of W against his estate, whether under the Inheritance (Provision for Family and Dependents) Act 1975 or otherwise, the fact and the terms of this agreement, and specifically the financial provision to be made for W’s benefit in the event of a divorce (agreed by her to be reasonable in all the circumstances), shall be brought to the attention to the court as being a relevant matter for the court to consider”

5. PRE-NUPTIAL AGREEMENT AND INHERITANCE ACT CLAIMS

- 5.1. Whether or not pre-nuptial agreements are already altering the outcomes of applications made by surviving spouses under the Inheritance Act is (at least for this speaker) impossible to say. There do not appear to be any reported cases on point, and there is a dearth of other evidence in the public domain, one way or the other.
- 5.2. On the other hand, whether pre-nuptial agreements *should*, or simply *might* affect the outcome of Inheritance Act applications are matters upon which views can and indeed should be expressed, not least because parties entering into pre-nuptial agreements typically need to be advised with respect to the same.
- 5.3. When forecasting the likely impact of a pre-nuptial agreement on an Inheritance Act claim, the following points might usefully be borne in mind:

¹⁶ For a helpful analysis of the relevant principles, see *Soulsbury v. Soulsbury* [2008] Fam 1, from paragraph 14 onwards

¹⁷ “... in the case of an application by the wife or husband of the deceased, the court shall also, ... have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce.”

- (a) In the lists of matters to which the court must have regard in order to determine whether reasonable financial provision has been made and, if not, to determine how it should exercise its powers¹⁸, “any agreement between the deceased and the applicant” does not actually feature. However, that is no different to the position on divorce; the list of matters set out in S.25 of the Matrimonial Causes Act 1973 to which the court must have regard similarly does not include “any agreement between the parties”. On divorce regard is nonetheless had to agreements because they are either viewed as “conduct” or one of the “circumstances of the case”¹⁹, and the position under an Inheritance Act claim should be no different.
- (b) By virtue of S. 3(5) of the Inheritance Act, the Court on an Inheritance Act claim, when considering the S. 3(1) matters “shall take into account the facts as known to the court *at the date of the hearing*”.
- (c) As different circumstances surround the termination of marriage by death rather than its termination by divorce (a truism emphasised by Briggs J in *Lilleyman*²⁰) provision that is appropriate for one of those eventualities will not necessarily be appropriate for the other (for example, a life insurance policy payable on death might obviate the need for the sort of maintenance which might be required on divorce).
- (d) The question whether reasonable financial provision has been made is not subjective but objective. That being the case, the wishes of one or both of the parties as to the distribution of the estate, whether expressed in a will or in a pre-nuptial agreement, are not determinative.
- (e) In deciding whether the provision is reasonable the judge does not exercise discretion, but instead is making a value judgment, or a qualitative decision (*In Re Coventry, Decd*²¹).
- (f) In determining whether financial provision is reasonable the court is likely to have regard to the legitimate expectation of the surviving spouse at the time when she entered into the marriage (*Cunliffe v Fielden*²²)

¹⁸ See S.3(1) and 3(2)

¹⁹ N.B.: Conduct under s.3 of the 1975 Act should not be understood any differently from that under s.25 of the 1973 Act (*Re Snoek (Dec'd)* (1983) 13 Fam. Law 19)

²⁰ At paragraph 45

²¹ [1980] Ch 461 at page 487

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- (g) The court will not embark upon a slavish and wholly artificial comprehensive enactment of the ancillary relief process (*P v G, P & P (Family Provision: relevance of divorce provision)*)
- (h) The divorce cross-check is neither a ceiling nor a floor. (*P v G, P & P (Family Provision: relevance of divorce provision)*) “(It is) ... a cross-check, no more and no less”²³.

5.4. Having regard to the points made above, the following predictions are ventured (albeit some of them might be considered rather obvious):

- (a) The values of the judge who should make the qualitative decision as to the reasonableness of the financial provision for the surviving spouse will have to move with the times. Those sitting in the Chancery Division will have to embrace pre-nuptial agreements no less enthusiastically than their colleagues in the Family Division.
- (b) Although the wishes of the parties may not be determinative, post *Radmacher* the new found respect for personal autonomy should mean that in Inheritance Act claims brought by surviving spouses, such wishes will be afforded more weight. Particularly pertinent is the following pronouncement of the Supreme Court²⁴:

“The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best

- (c) Given the bilateral character (at least notionally) of a pre-nuptial agreement, in contrast to the unilateral character of a will, the former should have greater impact on an Inheritance Act claim than the latter.
- (d) The *express* enjoinder at S.3(5) of the Inheritance Act for the court to have in mind *present* circumstances (which, incidentally, is not to be found in the Matrimonial Causes Act 1973) suggests, however, that in an Inheritance Act claim greater importance will have to be attached to changes in

²² [2006] Ch 361, - see paragraph 71

²³ per Briggs J in *Lilleyman* at paragraph 60

²⁴ At paragraph 78

circumstances since the pre-nuptial agreement was made than is likely to be the case, post *Radmacher*, in a claim post divorce.

- (e) Provisions in a pre-nuptial agreement which would result in a surviving spouse being left in a predicament of real need on either divorce or death are unlikely to be afforded any weight on an Inheritance Act claim.
- (f) With a pre-nuptial agreement incorporating a tariff-based approach, the earlier in the marriage that death occurs the less likely that the agreement will influence the Inheritance Act outcome.
- (g) Where the deceased was more than ordinarily wealthy, a pre-nuptial agreement which fails to leave the surviving spouse financially secure for the rest of her life is most unlikely to be determinative of the Inheritance Act application. Even in the presence of a pre-nuptial agreement, “reasonable financial provision, assessed objectively”, is likely, in such circumstances, to be set at lifetime financial security²⁵.
- (h) However, in circumstances where:
 - (i) on the death of the wealthy party the pre-nuptial agreement affords the surviving spouse lifetime financial security, enabling the continued enjoyment of a standard of living akin to that enjoyed during the marriage;
 - (ii) the surplus assets (i.e. those not required to provide such financial security) constitute non-matrimonial property (that is, property acquired by the wealthy party prior to the marriage, or received by gift or inheritance during it)

the pre-nuptial agreement which goes on to prohibit the widow/widower receiving any further provision from the surplus – which effectively prohibits the application of the sharing principle post death - ought to be given effect.

In that regard the following observation from the majority in *Radmacher*²⁶ should be telling:-

²⁵ See the views of Wall LJ *Cunliffe v Fielden* [2006] Ch 361

²⁶ At paragraph 79

Often parties to a marriage will be motivated in concluding a nuptial agreement by a wish to make provision for existing property owned by one or other, or property that one or other anticipates receiving from a third party. The House of Lords in *White v White* [2001] 1 AC 596 and *McFarlane v McFarlane* [2006] 2 AC 618 drew a distinction between such property and matrimonial property accumulated in the course of the marriage. That distinction is particularly significant where the parties make express agreement as to the disposal of such property in the event of the termination of the marriage. **There is nothing inherently unfair in such an agreement and there may be good objective justification for it**, such as obligations towards existing family members.

- 5.5. Given that different circumstances surround the termination of marriage by death rather than its termination by divorce, it may well be the case that pre-nuptial agreements will always be likely to have less impact in the event of the former than in the event of the latter. But provided they are seen as *reducing* rather than eliminating *the risk* of a surviving spouse bringing an unwelcome claim under the Inheritance Act, they have an important part to play in relation to asset protection after death.
- 5.6. If nothing else, pre-nuptial agreements can be expected to have a valuable evidential function in Inheritance Act claims. All too often in such claims there is an issue about the assets which is resolved against the estate because of the absence of evidence from the deceased. Where there is an issue as to the nature and value of the assets brought to the marriage by the wealthy party²⁷ - that is to say, as to the extent of the non-matrimonial property – a carefully prepared pre-nuptial agreement should prove conclusive.

6. THE FUTURE

- 6.1. Trying to predict the way in which the law is going to develop is notoriously difficult; typically the forecaster finds himself in splendid isolation amongst his peers. Mercurial judges don't help.
- 6.2. With respect to pre-nuptial agreements and their impact on Inheritance Act claims, however, help is at hand - in the form of a view expressed by the Law Commission

²⁷ As was the case in *P v G, P & P (Family Provision: relevance of divorce provision)*

in its Consultation Paper on Marital Property Agreements²⁸. Ahead of the consultation process the Law Commission provisionally proposed²⁹ that:

“...if qualifying nuptial agreements were introduced, it should be possible for them to restrict or modify the ability of either party to apply to the court for family provision under the Inheritance (Provision for Family and Dependents) Act 1975, **save insofar as application is made for provision for maintenance** (as that term is used in the context of the Inheritance (Provision for Family and Dependents) Act 1975)

Stressing the fact that the same considerations of autonomy arise, whether the parties wish to contract out of ancillary relief or Inheritance Act claims, the authors of the Law Commission report express the view³⁰ that

“the arguments for allowing (the exclusion of the Court’s intervention under the Inheritance Act) are at least as strong as those that point to the introduction of qualifying nuptial agreements to exclude the court’s discretion in ancillary relief”

- 6.3. It will be appreciated that under the Inheritance Act a distinction is made as to what constitutes “reasonable financial provision”, depending on the status of the applicant.
- (a) For the *surviving* spouse or civil partner, reasonable financial provision “means such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance”³¹
 - (b) For the *former* spouse or civil partner, reasonable financial provision “means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance”³²
- 6.4. What, therefore, is proposed is that by virtue of an appropriate pre-nuptial agreement, it should be permissible to limit a claim brought by a widow or widower under the Inheritance Act to the lower level of provision. By confining the applicant to an award based on the maintenance standard, the pre-nuptial agreement would thereby prevent the surviving spouse or civil partner from obtaining by an Inheritance Act claim a share of the deceased’s assets beyond what he or she required to meet reasonable needs.

²⁸ Consultation Paper No 198, published on 11th January 2011

²⁹ At paragraph 7.89

³⁰ At paragraph 7.86

³¹ S.1(2)(a) and 1(2)(aa)

³² S.1(2)(b)

- 6.5. It is noteworthy that in addressing what might be the permissible impact of a pre-nuptial agreement on a claim under the Inheritance Act the Law Commission does not go anywhere near as far as the Supreme Court did in *Radmacher*, when addressing the appropriate impact of a pre-nuptial agreement on a claim for a financial order post divorce. It does not suggest that by virtue of a prenuptial agreement a widow or widowers should only be allowed to pursue an Inheritance Act claim ‘where there is a predicament of real need’.
- 6.6. In February 2012 the Law Commission’s project in relation to marital property agreements was extended to cover two further issues of financial provision arising on divorce or the dissolution of a civil partnership, namely:
- (a) the extent to which one spouse should be required to meet the other’s needs after their formal relationship has come to an end;
 - (b) how non-matrimonial property (acquired by either party prior to the marriage or civil partnership, or received by gift or inheritance during it) should be treated on divorce or dissolution.
- 6.7. Inevitably the enlargement of its brief has led the Law Commission to a revise its timetable. A detailed consultation paper addressing the two additional aspects is not going to be published until autumn 2012 and the aim is for final recommendations to be published in autumn 2013.
- 6.8. All things considered it is confidently predicted that:
- (a) there *will* be legislation to revise the law governing the distribution of assets on divorce;
 - (b) that such legislation will expressly provide for qualifying pre-nuptial agreements to be given effect on divorce;
 - (c) at the same time the opportunity will be taken to revise the Inheritance Act so as to permit limited contracting out of its provisions by a qualifying pre-nuptial agreement.

However, given that the current statutes dealing with those matters are only 39 and 37 years old, and given how little social customs and attitudes have changed since they were enacted, it is not thought that any urgency either should or will be

afforded to the task. Accordingly the final prediction for today is that any legislative change is unlikely to come to pass for at least another 10 years.

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