

Is modern marriage a bargain? Exploring perceptions of pre-nuptial agreements in England and Wales

Is modern marriage a bargain?

By Anne Barlow* and Janet Smithson**

Drawing on data from a recent national and follow-up study exploring attitudes towards binding pre-nuptial agreements at a time when the Law Commission was considering law reform, this article considers what might be gained and lost in family law terms by their introduction. Looking at the tensions between providing autonomy to agree arrangements at the outset of a marriage and achieving fairness between the parties at the point of divorce, questions were framed in the study to consider views on the socio-legal and psychological issues surrounding a move towards making pre-nuptial agreements binding. In particular, it explored whether we are ready culturally to use pre-nuptial agreements and any perceived limit, to their acceptability. In addition, were there situations where pre-nuptial agreements were considered more or less appropriate for those entering marriage? How might they affect the commitment involved in marriage? More generally, in the light of the study's findings, the article examines the implications of a legal and moral shift away from a paternalistic court redistribution of assets at the point of divorce towards an approach based on enforcement of a pre-maritally determined private contract, and concludes by considering what sort of a bargain it would be acceptable for modern marriage to become.

Introduction

While the Law Commission for England and Wales ('the Law Commission')¹ and the courts² were grappling with the future place of binding pre-marital (or pre-nuptial) agreements in the law of England and Wales, the first ever nationally representative empirical study was undertaken to capture public perceptions of the appropriate role for such agreements both in

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¹ See Law Commission, *Marital Property Agreements – A Consultation Paper*, Law Com No 198 (TSO, 2010).

² At the commencement of the project in April 2010, the appeal to the Supreme Court against the Court of Appeal decision in *Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 2 FLR 1181 had not been heard and the decision of the Court of Appeal sat uneasily with that of the Privy Council in *MacLoed v MacLoed* [2008] UKPC 64, [2009] 1 FLR 641.

married life and in family law, funded by the Nuffield Foundation.³ Although the Law Commission had previously funded research into the practitioner experience of pre-nuptial agreements,⁴ this project was focused on the views of the public. In particular, given the possibility of statutory reform, it was interested in attitudes to the legal and psychological implications of any decision to make pre-nuptial agreements binding in a culture where such agreements have, until very recently, been considered both unromantic⁵ and contrary to public policy.⁶

Our project commenced in April 2010 at an interesting legal juncture. The decision of the Court of Appeal in *Radmacher v Granatino*⁷ and that of the highly persuasive although not strictly binding authority of the Judicial Committee of the Privy Council in *MacLeod v MacLeod*⁸ were in conflict with each other as to the validity and potentially binding nature of pre-nuptial agreements. Whilst the appeal to the Supreme Court in *Radmacher (Formerly Granatino) v Granatino*⁹ (hereafter *Radmacher*) – involving an agreement whereby the French investment banker turned-academic husband agreed (without taking legal advice) not to make any claim on the considerable fortune of his German heiress wife in the event of divorce – had been heard, judgment was still awaited.

Furthermore, the debates among legal commentators had been well-aired by this time but had not reached any consensus. Academic views on the issue broadly divided between those, such as Ruth Deech,¹⁰ who thought pre-marital autonomy to decide a possible post-divorce future would avoid undue paternalism and unnecessary conflict in the event of relationship breakdown, and others, such as Jonathan Herring,¹¹ who argued family life required a post-hoc resolution of what is an appropriate financial settlement when the situation is actually known at the point of divorce. However, the public's view on enforcing pre-nuptial agreements had not been sought.

The aim of this project was therefore to gauge some general attitudes on pre-nuptial agreements (commonly called 'pre-nups') and then confront people, initially in a nationally representative survey, with the gains and losses that would follow on from making pre-nuptial agreements binding and contrast it with the position under the existing law at that time in key situations. In order to understand these views better, a follow-up study explored people's reactions to the legal and any psychological effects the proposed reform might have on the perceived commitment to marriage itself. Using the methods set out below, the research interrogated the implications of the legal and moral shift away from a paternalistic

³ We are very grateful to the Nuffield Foundation for funding this project 'Exploring Pre-Nuptial Perceptions' and for the assistance of the Law Commission for England and Wales in commenting on the questions and scenarios for the structured questionnaire used in the national survey first phase of the project.

⁴ See E Hitchings, 'From pre-nups to post-nups: dealing with marital property agreements' [2009] Fam Law 1056.

⁵ See M Hibbs, C Barton, and J Beswick, 'Why marry? Perceptions of the affianced' [2001] Fam Law 197.

⁶ In *MacLeod v MacLeod* [2008] UKPC 64, [2009] 1 FLR 641, at para [31], Baroness Hale indicated this in the leading judgment: 'The Board takes the view that it is not open to them to reverse the long standing rule that ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense.'

⁷ [2009] EWCA Civ 649, [2009] 2 FLR 1181.

⁸ [2008] UKPC 64, [2009] 1 FLR 641. This decision involved a post-nuptial agreement entered into in the Isle of Man, but also considered the legal status of pre-nuptial agreements in a jurisdiction identical in this respect to that of England and Wales.

⁹ [2010] UKSC 42, [2010] 2 FLR 1900.

¹⁰ R Deech, 'What's a woman worth?' [2009] Fam Law 1140.

¹¹ J Herring, 'Relational autonomy and family law', in J Wallbank et al (eds), *Rights, gender and family law* (Routledge, 2009). See also R George, P Harris and J Herring, 'Pre-nuptial agreements: for better or for worse?' [2009] Fam Law 934.

court redistribution of assets at the point of divorce towards a pre-maritally determined private contract enforcement approach, favouring autonomy over post-separation need. We therefore set out to discover the public's views on these positions and our study was timed to feed into the Law Commission's Consultation paper on marital property agreements.¹² Our general research questions were framed to reflect the socio-legal and psychological issues surrounding a move towards binding pre-nuptial agreements. How important was it to allow couples autonomy in deciding their own arrangements? How satisfactory would it be seen to be to hold people to an agreement which the courts would not otherwise have perceived as achieving 'fairness' between the two parties at the point of divorce? Were people ready culturally to use pre-nuptial agreements? If so, what were the limits, if any, to their acceptability? In sum, what sort of a bargain should modern marriage become?

Methods

In order to assess public attitudes and the thinking behind them, the research was conducted in two phases. The first phase comprised a nationally representative survey using structured questionnaires as part of two waves of the National Centre for Social Research's Omnibus Survey (the NatCen Omnibus) in England and Wales in 2010, in which 2,827 respondents participated. This phase of the research was undertaken prior to the handing down of the Supreme Court's judgment in *Radmacher*. For this, we devised a mixture of attitudinal statements and scenarios, drawn up in consultation with the Law Commission. The aim was first to test general attitudes to binding pre-nuptial agreements and then probe changing reactions to their possible consequences in scenarios where key variables changed, as contrasted with the principles and uncertainty governing the existing law prior to the *Radmacher* decisions. In the second phase begun just after the Supreme Court decision in *Radmacher* was handed down at the end of October 2010, a follow-up study was undertaken with a purposive sample of 26 people (12 men and 14 women) selected from the Omnibus survey who had expressed a range of views about pre-nups.¹³ It aimed to probe the thinking behind these attitudes more deeply and to gauge any limits that people felt ought to be placed on this kind of private ordering of financial family responsibilities. All participants in the follow-up study were asked whether they had heard of the *Radmacher* decision, but surprisingly, given the vast media coverage, only one person had. Whilst aiming for equal numbers of men and women, we did selectively sample for experience of divorce and remarriage, for people who said they would have liked a pre-nup, and for some high income and high asset participants, thought more likely to consider such an agreement. Although not known at the point of inclusion into the sample, one participant had in fact signed a pre-nup and another was contemplating one, going into a third marriage. The fieldwork was concluded by the end of January 2011 prior to any further reported decisions concerning pre-nuptial agreements and the interviews were analysed using a grounded theory approach.¹⁴ As is good practice within such analysis, themes relating to our research questions were

¹² Law Commission, *Marital Property Agreements – A Consultation Paper*, Law Com No 198 (TSO, 2010) and see further <http://www.justice.gov.uk/lawcommission/areas/marital-property-agreements.htm> (last accessed 13 August 2012).

¹³ The sample was purposively selected for a balance of gender, age, income, relationship history and current relationship status, with 7–10 participants being selected from each of our study areas (North West England, South West England and South Wales, and Greater London) to reflect a range of views on the advantages and disadvantages of binding pre-nuptial agreements. In line with Grounded Theory, we continued until we had sufficient participants in each category to consider we had reached theoretical saturation.

¹⁴ B Glaser and A Strauss, *The Discovery of Grounded Theory* (De Gruyter, 1967); K Charmaz, 'Grounded Theory', in P Alesautti and J Brannen (eds), *Sage Handbook of Social Research Methods* (Sage, 2009).

investigated, their occurrence and context noted, and emerging themes not originally anticipated were considered in a process of constant comparative analysis. Our intention was to gain a nationally representative picture of general attitudes to binding pre-nuptial agreements and their likely effects, alongside a more in-depth exploration of the perceived advantages and disadvantages of changing the legal status of pre-nuptial agreements.

General attitudes to pre-nuptial agreements – exploring autonomy and fairness

Whereas previous qualitative research in this jurisdiction had found pre-nuptial agreements almost universally viewed as ‘unromantic’ among engaged couples,¹⁵ we did find that the landscape was shifting with regard to the acceptability of pre-nuptial agreements in general. In academic debates, the issues are often characterised as whether law should promote the principle of ‘autonomy’, whereby modern, ostensibly more equal couples are free to agree their binding divorce settlement at the outset of the marriage when they are not in conflict, yet cannot know their future situation at the point of a hypothetical divorce; or whether ‘fairness’ as decided by the court at the point of divorce is a more appropriate and realistic, if paternalistic, principle for the law to pursue.¹⁶ Our questions were aimed at teasing out attitudes to this dilemma.

Overall, people nationally were in favour of couples being able to make binding pre-nuptial agreements. Thus 58% of our national questionnaire sample agreed that ‘binding pre-nuptial agreements are a good way of allowing couples to decide privately what should happen in the event of divorce’, with 21% disagreeing and the remaining 21% taking a neutral stance. There were no significant gender differences in responses to this question, although interestingly, younger respondents tended to agree more, with 73% of 16–24 year olds agreeing in contrast with 46% of those over 75. Surprisingly perhaps, of those who had ‘ever divorced’, fewer (55%) were in agreement, indicating slightly lower endorsement of this approach by those who had experienced divorce. However, whilst some people thought of them as appropriate only to the wealthy, we gained the view overall in the study that public attitudes to pre-nuptial agreements have shifted. They are increasingly seen by people as a possibility – for others, if not for themselves – and are likely to be considered in a wider range of situations, no longer restricted just to an elite band of people in ‘big money’ cases. This public perception tallies with the increase in this type of business Emma Hitchings’ reports (albeit with some caveats) in her study of practitioners¹⁷ and is also in line with other recent studies undertaken by practitioners themselves.¹⁸

¹⁵ See M Hibbs, C Barton, and J Beswick, ‘Why marry? Perceptions of the affianced’ [2001] Fam Law 197.

¹⁶ See for example the post-*Radmacher* discussion in J Scherpe, ‘Marital Agreements, Private Autonomy and Fairness’ [2011] *Cambridge Law Journal* 29; B Hale, ‘Equality and Autonomy in Family Law’ (2011) 33(1) *Journal of Social Welfare and Family Law* 3.

¹⁷ E Hitchings, ‘From pre-nups to post-nups: dealing with marital property agreements’ [2009] Fam Law 1056. Practitioners in this study reported drawing pre-nups relating to assets between £50,000 and £250 million the demand for agreements in respect of second or subsequent marriages per se, although it existed, was perhaps lower than might have been expected, with the need to protect third party assets a more powerful indicator of the likelihood of seeking an agreement. Some practitioners did report heavy increase in demand for agreements, with geographical variations noted. The caveats for her findings link to the qualitative design of a study of 39 practitioners which was not claimed to be nationally representative.

¹⁸ See statement by Resolution (formerly the Solicitors Family Law Association), reported at BBC News, ‘More Couples signing pre-nuptials’, 25 September 2009, <http://news.bbc.co.uk/1/hi/8276018.stm> (last accessed 13 August 2012). See also the survey undertaken by the firm Mishcon de Reya which reports this trend seems particularly

However, what seemed, at first sight, to be a call for autonomy was far from the whole story. Whilst we did find a generally positive attitude towards having the freedom to make such private agreements, when we put the issues differently, pointing to the potential difficulties of predicting on marriage ‘fair outcomes’ on divorce, the majority were alert to these issues. The autonomy to make such agreements was not then seen as necessarily the most appropriate solution or the factor which should override other considerations. Almost 2/3 nationally (65%) and 66% of the ‘ever divorced’ agreed with the statement that ‘binding pre-nuptial agreements are a bad idea because it is too difficult to predict what will be fair at the end of a marriage’. Only 18% disagreed with such a view, with agreement generally increasing with age rising from 59% of the 16–24 year olds and peaking at 73% among 55–64 year olds. Similarly, there were reservations about their suitability in longer marriages. Here, two thirds of the national sample agreed that ‘the longer the marriage, the less influence pre-nuptial agreements should have on a divorce court’, with again less than a fifth (19%) disagreeing with this view, the remainder being neutral. Again agreement generally rose with age, here ranging from 53% of 16–24 year olds reaching a peak of 82% among 65–74 year olds.

Thus whilst autonomy is attractive to most people in principle, practical difficulties linked to the nature of family life are acknowledged in people’s thinking and pre-nuptial agreements were not regarded as a panacea for current problems commonly experienced on divorce. Rather, fairness dominated most people’s perceptions and this was judged by most (although not all) at the time of divorce. When we probed people on the advantages and disadvantages of resolving potential disputes and agreeing issues in advance in the follow-up study, there was far from unreserved support in favour of binding pre-nuptial agreements. Whilst some like Kevin, a cohabitant in his 30s with a daughter, thought it was potentially a good way to proceed, seeing such advance planning as ‘a good way of thinking’, others like Frances (married mother, 50s), thought the courts were inherently fairer because ‘the courts can look at the whole picture’. Another participant, Jilly, who was a married mother in her 40s, was aware of power imbalances. Although she agreed with the right to make such agreements, she also had reservations about the balance of power at the time of making the pre-nup. As she explained, ‘I think if you have a bullying partner, it would go on the side of the bully.’

Thus issues of power were a perceived problem and this was underlined by the finding that 94% of the national sample thought it was very or fairly important for both partners making a binding pre-nuptial agreement to take legal advice, leaving just 6% with a view that this was not important. This finding must be seen as a significant caveat to the popular support for the right to make an agreement. Given that in the *Radmacher* case itself, the husband had signed the agreement, drawn up in German, a language he did not understand, without taking legal advice, the Supreme Court’s decision may not sit well with ordinary perceptions on this point. However, given Mr Radmacher was advised to take legal advice but chose not to, despite the urgings of the German notary who drew up the agreement, the case does highlight the practical difficulty of compelling people who are about to marry to act in a legally rational way at a time of heightened emotions.

Despite extremely strong support for legal advice, some interview respondents believed that it could not resolve all their concerns about a once and for all binding agreement. Clarissa, a married mother, had particular concerns which related to the changing nature of married relationships over time –

‘The problem with making it binding is there’s no flexibility for change of

circumstances. So if you ask me the question again, I think life changes and so there ought to be that flexibility of interpretation in order to ensure that it's fair, and represents what's fair at the time a couple choose to split.' (Clarissa, married mother, 40s)

Roger, in his 50s and single himself, also thought that if made binding, such agreements might be inherently unfair –

'I'm a little bit suspicious of pre-nuptial agreements actually because it seems to me that there could easily be one side who have decided to put this contract out, knowing that if the worst does happen, that they can either get more than what they should perhaps be entitled to or cheat their wife or husband out of whatever. So at the end of day I've got a feeling it shouldn't perhaps be legally binding totally like that; that on the point of divorce that there should be considerations made on the circumstances at the time.'

Prior to *Radmacher*, following the decisions first in *K v K (Ancillary Relief: Pre-nuptial Agreement)*¹⁹ and then in *Crossley v Crossley*,²⁰ the existence of a pre-nuptial agreement had become 'one of the circumstances of the case' or 'conduct it is inequitable to disregard' which the court must weigh up against other factors in exercising its discretion in ancillary relief applications under s 25 of the Matrimonial Causes Act 1973. These authorities neatly side-stepped the issue of whether and in what circumstances such agreements should bind the court, as it was accepted that the statutory framework did not permit the court's discretion to be ousted in this way. This was instead to become a matter it was seen fit to refer to the Law Commission, a decision perhaps not unrelated to the sea-change begun in the House of Lords' decision in *White v White*²¹ and confirmed in *Miller; McFarlane*.²² These decisions changed practice and outcomes in deciding claims for ancillary relief, at least where assets exceed the post-divorce needs, by placing equal weight on financial and non-financial contributions to a marriage. This had the effect of removing the court-imposed ceiling on awards which had in practice been limited to providing for the needs of the non-financial contributor (judged in the context of the family's standard of living). Instead, a principle of equal sharing of matrimonial assets, in cases where assets exceeded the needs of the parties on divorce, alongside a new possibility of compensation for relationship-generated disadvantage was introduced. The new approach was considerably more generous to the spouse who had made non-financial contributions to the marriage at the expense of the financial contributor, and binding pre-nuptial agreements would be one way to avoid court-imposed sharing of the financial contributor's wealth, where parties to a marriage took the appropriate steps. As Sir Mark Potter P said in *Charman v Charman*:²³

'If unlike the rest of Europe, the property consequences of divorce are to be regulated by the principles of needs, compensation and sharing, should not the parties to the marriage, or the projected marriage, have at the least the opportunity to order their own affairs otherwise by a nuptial contract?'

Road-testing the idea of the binding pre-nup

In order to test how a move towards binding pre-nuptial agreements would be viewed by the

¹⁹ [2003] 1 FLR 120.

²⁰ [2007] EWCA Civ 1491, [2008] 1 FLR 1467.

²¹ [1999] Fam 304, [1998] 2 FLR 310.

²² [2006] UKHL 24, [2006] 1 FLR 1186.

²³ [2007] EWCA Civ 503, [2007] 1 FLR 1246, at para [124].

public, we identified factors which may affect attitudes and devised scenario questions to complement the attitudinal statements and explored these in both phases of the study. Key themes emerged from this approach. In particular, the length of the marriage, difficulties around accurately predicting future circumstances, the need to keep agreements under review, whether it is a first or subsequent marriage and the presence of children from previous relationships were all factors which emerged as capable of changing people's views on how binding the pre-nup should be. Interestingly, whilst there were no significant gender dimensions to the attitudinal statements, we did find that more men than women agreed that the pre-nuptial agreement should be binding across the scenarios, as circumstances changed. When different variables were introduced here, the men tended to stick to their guns, whereas women were more inclined to adjust their position according to the perceived 'fairness' of the situation at the point of divorce. From this, we found situations where pre-nuptial agreements seemed to be more or less acceptable in the public's mind.

Length of marriage and need for review

Having established length of the relationship as one such key factor affecting how acceptable a binding pre-nuptial agreement is in the attitudinal statements as discussed above, we probed this further, asking participants to consider the following scenario.

Imagine a couple, Alison and Ben, in their late 20s getting divorced after just 2 years of marriage. They have no children. Ben earns £80,000, Alison earns £30,000. Just before they married Ben inherited £500,000 from his father with which he bought the family home outright in his sole name. Under current law, if they had not made a pre-nuptial agreement, the court would impose its own solution and Alison would receive a share of the home – probably between a quarter and a half its value. However, in fact, after both taking legal advice, they did sign a pre-nuptial agreement agreeing that Ben should keep the inheritance in the event of divorce.

If they were to go to court, what do you think should happen?

After a 2 year marriage with no children and a home purchased with an inheritance, a clear majority in the national questionnaire study – 60% – thought the pre-nup should be binding on divorce. It is perhaps more surprising that quite a sizeable minority – 40% – believed that 'as under current law, the court should impose a solution which takes the pre-nuptial agreement into account'. Thus for a short marriage, there is strong support for the autonomy approach to marriage dissolution. However, those who agreed that the agreement should be binding if the same couple, still without children, were to divorce after 20 years dropped to a minority (46%), with most respondents (54%) taking the view that the court should impose a solution taking account of the agreement.

The longer the marriage, the harder it is for the lower or non-financial contributor to adjust and this did seem a powerful factor. Tamzin indicated her reasoning for changing her view on the same scenario due to the length of the relationship and suggested a sliding-scale approach –

'Over a different amount of years I would think my opinion would change. So sort of year one, I wouldn't expect to take anything out of a relationship. Um. Year five, maybe a bit of it. But by year 25, they're ... leaving you and they've had the best years of your life together and you were expecting to go into old age together then, um, yeah: I would ... [Laughs] I would go for half of it, definitely.'
(Tamzin, married with pre-nup, no children, 40s)

A number of participants spontaneously recommended a sunset clause approach whereby the agreement 'expired' or was reviewed and varied after a period of time and was endorsed by the majority of the follow-up sample.

'I think they should be binding but ... It depends when it's drafted and it has to be reviewed properly.' (Andrew, married father, 30s)

In some systems of deferred community of property such as Sweden, entitlement to share community of property is gradually increased by 10% a year over a 5 year period, at which point, equal sharing of community assets is enforced on relationship breakdown.²⁴

Unpredictability, fairness and children

Linked to the idea of the need to review was the inherent unfairness of an agreement where it was not possible to imagine how your life might change. Mothers, in particular, who had given up work for the benefit of the family, could see that they might have willingly signed a pre-nuptial agreement not realising what their future might hold. Clarissa and Leila were troubled by the unpredictability of life as against the certainty of a binding agreement.

'When I set out we were committed to having a family and having children, and therefore I think not knowing whether you can have children as you plan, and when you have children there are so many unknowns that signing anything that organises your... predicts your finances seems complete madness to me.'
(Clarissa, married mother, 40s)

'You're fixing something at a point in time that reflects that particular point in time. You don't know how circumstances are going to change.'
(Leila, twice divorced, getting pre-nup for 3rd marriage, 50s)

The next scenario captured this dilemma, where Alison, this time, had given up her job to care for their children.

Now imagine the same couple married for 20 years. This time they have two children aged 20 and 18 who have left home and are both working. Alison gave up her job to care for the children and has not gone back to work. They live in the home Ben bought with the inheritance. Ben is earning £80,000 a year. The home is now worth £800,000. Again they had made a pre-nuptial agreement following legal advice agreeing that Ben should keep the home in the event of divorce and pay no maintenance.

In this situation, when asked what should happen, only 16% agreed that the pre-nuptial agreement should be binding, despite the fact that Alison had taken legal advice and the home had been bought with Ben's inheritance. Rather, 84% took the view that the pre-nup should be taken into account, but the court should divide the value of the home between them in a way that aimed to meet all their needs. Even where the facts were altered so that their agreement provided Alison with accommodation for a 5 year period after divorce, but gave her no share in the property, less than 1/3 agreed the pre-nup should then be binding. Over 2/3 (68%) thought the court should divide the value of the home between them, aiming to meet their needs, despite the fact that the home had been purchased from Ben's inheritance. This chimes with the idea that over time, an asset such as the home can become a 'matrimonial asset', even though originally being clearly the property of just one of the

²⁴ See further E Cooke, A Barlow and T Callus, *Community of Property – A regime for England and Wales?* (The Policy Press, 2006), at p 35 on the Swedish Marriage Code.

spouses, especially in cases where non-financial contributions have been made through childcare.

In the follow-up study, the majority similarly agreed that Alison should not be held to the pre-nup in these circumstances. Jilly could relate to this situation herself:

‘if it’s something that you sign when you’re early/mid/late 20s, with no experience of what it’s like, you can’t even anticipate what it’s like, I don’t know, to have children for your role to change. I remember when I was working and I was pregnant for the first time, I think I was in denial for the whole nine months because I just couldn’t imagine what this little baby was... I did go back to work at first because that was just what you did, and it was only... and it took a while for the changes for me to actually see. In fact it was when my son came along two years later and I was working full time, and I was doing the lion’s share of looking after the children, and it was unsustainable. But I couldn’t have seen that seven or eight years previously, and I think that is the inherent problem, is you see something with such clarity one moment, and then with the passage of time it’s all changed completely.’ (Jilly, married mother, 40s)

Maureen also felt Alison had a raw deal:

‘You know, if it was equal, yeah. Fair enough. But if it’s like, um, “Right, you bring up the children. You stay at home. I’ll make all the money but the money’s mine” ... No, that’s not fair.’ (Maureen, single mother, ex-cohabitant, 30s)

However, a number of the men interviewed felt that a hard-line approach should be taken if pre-nups were to be a workable option:

‘Frankly if you’re stupid enough not to have covered the fact that you may have two children and be married for 25yrs, then well you haven’t covered the bases so that’s kind of your own fault I think.’ (Rod, married father, 40s)

‘Well if these things are in existence, and if in future years any future government brings them in, I personally think that if you’re going to have these things binding ... if you’re going to have these things put in place before a marriage, well they should be binding, quite frankly, otherwise just don’t bother with the things at all.’ (Shaun, married father, 30s)

Overall, there seems to be clear acceptance by 84% of the national survey that non-financial contributions to a marriage in the form of childcare over a long period of time should have a value which at the very least equates to meeting the caring spouse’s needs at the point of divorce where assets are available, even if a pre-nuptial agreement has been entered into. The commercial bargain struck within the pre-nuptial agreement even with the backing of legal advice is in the public mind easily trumped by the unfairness and vulnerability of Alison’s position, having seemingly sacrificed her earning capacity to the welfare of the children. Thus whilst the autonomy approach is superficially attractive to the majority of people, and some people feel those who do this have little cause for complaint, for the vast majority, the reality of holding Alison to the consequences of having exercised her own autonomy some 20 years earlier is not acceptable. This can be construed as a clear call for a paternalistic approach to curb the impact of pre-nuptial agreements where this strays outside parameters of fairness constructed around normative views of how family life might properly be conducted.

Pre-nuptial agreements, ill health and the public purse

In our final scenario, we introduced a more mature couple with no children.

Imagine another couple, Colin and Dawn, who are in their 40s, married for 10 years. Colin has run a successful small business for some years; Dawn works as a model and has a good income. The couple have an affluent lifestyle but have no savings or health insurance. They recently purchased a new home with a 100% mortgage. Colin has a serious heart attack and cannot work. As a result his business fails and becomes worthless. Shortly afterwards, the marriage breaks down.

They made a pre-nuptial agreement which agrees neither will claim against the other's income or business assets on divorce.

Here, perhaps surprisingly given the absence of any children and quite a cavalier attitude to the future, only 32% thought the pre-nup should be binding, with 68% agreeing that the pre-nup should be taken into account but Dawn should be required by the court to provide Colin with some income, at least for a period. In the follow-up sample, views on this situation were mixed. Some were sympathetic to Colin and thought pre-nups should not bind in such unforeseen circumstances.

'I don't think it should be binding. No- Cos it's through health issues.' (Michelle, widowed and divorced mother, 50s)

Whilst others thought any pre-nup should plan for ill health and old age –

'You didn't plan for illness, you didn't know that was going to happen, there should have been a clause in it for things like that do happen.' (Maureen, single mother, ex-cohabitant, 30s)

'I do think there needs to be something built in to protect you as you get older.' (Paula, divorced mother, 50s)

Whereas people were aware that upholding this particular agreement would mean there was a cost to the public purse, people were not in general overly concerned about this and did not see this as a reason not to uphold the agreement. The Law Commission, on the other hand, will always have to fully consider the ramifications for the state in such circumstances when recommending reform. More generally, most people did not balk at the idea that illness of this nature would trigger divorce. The idea that the marriage vow 'in sickness and in health' might make post-divorce financial support morally appropriate was an anathema to some, showing how the modern marriage bargain might be changing:

'Well they've only been married 10 years so what are you putting on the other party, a life sentence to look after a disabled party?' (Ellen, married, no children, 60s)

Binding pre-nups at their most and least useful

In the follow-up interviews, we attempted to identify situations where people thought binding pre-nuptial agreements were more or less acceptable. Some participants were clear that whilst they saw pre-nups as undermining the essential agreement of trust in a first marriage for both parties, pragmatic considerations could outweigh these emotional considerations.

Five participants thought they would consider pre-nups now, when they would not have done so before, for a future relationship, principally due to considerations relating to their children. For Anna, twice divorced with one child, and now indicating she would seriously consider a pre-nup, there was a progression towards acceptability or even necessity through bitter experience:

‘The first time I wouldn’t dare have thought of anything because that would have been admitting that we might not last forever. The second time I had to show that I was fully trusting so I would have felt awful to have done something legal right at the beginning, though in hindsight I should have.’ (Anna, twice divorced mother, 40s)

Rebecca and Jilly, both opposed to pre-nups in principle in many ways, conceded they would be pragmatic for the sake of their children from their current relationship if they were to divorce and marry again.

‘Yeah, I probably would look at it as a second relationship.’ (Rebecca, married mother, 30s)

‘Because I’ve got children I would, and it would very much depend on the circumstances of the next partner, then I would consider it. But that is purely because of my age and the children, but it would very much depend on the circumstances.’ (Jilly, married mother, 40s)

Thus Jilly felt it would be justified to want to retain separate control of her assets so that her children were not adversely affected financially by her decision to enter a second marriage, at least in a situation where she felt unlikely to have any further children within the new marriage.

Mark, though, thought he was less likely to make a pre-nup, after the interview and survey, having realised some of the implications about them being legally binding and the difficulties of anticipating life changes.

‘Because I think for me to try to make a pre-nuptial now would be horribly complicated, I think, to try and sit down and say, “Well, if this happened, if that happened ...” Um. I mean, the other thing you’ve got at the moment is massive redundancies, haven’t you?’ (Mark, married father, 40s)

The presence of children in the family unit or of a previous relationship could affect how appropriate or inappropriate a binding pre-nup might be viewed:

‘I think, um, a lot of my argument would change as soon as there was children into a relationship.’ (Tamzin, married, no children, 40s)

‘You have to look at it also from the perspective of, would children from a previous marriage be disadvantaged in that set of circumstances as well?’ (Leila, divorced mother, 50s)

Some of the respondents who were generally not at all keen on pre-nups did feel that inherited wealth should not necessarily be shared – so their qualms were to some extent overcome for this issue. Even Rod, married with children, who was generally expressing strong views against pre-nuptial agreements on the grounds that if you didn’t like it, you didn’t have to marry at all, conceded this point:

‘I hadn’t really thought about that until you said but I think that’s a very good point. You know that if my wife’s grandmother leaves her a million pounds then why should I have any right to it. She wasn’t leaving it to me she was leaving it to her. If she chooses to then pass it on to me then that’s up to my wife, it isn’t up to me.’

Older couples who have accumulated more wealth were thought by Andrew to be a classic situation where it might be wise to take advantage of a pre-nuptial agreement if they wanted other family members to inherit their estate.

‘You’ve got to go into these things with your eyes open and protect yourself if you’re a bit older.’

David, who had experience of other jurisdictions, indicated that we needed to change the culture and warned against underestimating the difficulties:

‘So on the continent there is a culture where people actually do think about these things when they get married, and it’s not regarded as being anti-romantic or anti – against the spirit of marriage. It’s regarded as being part of the marriage. In this country there’s no tradition. So you have to create ... And that will be a difficult thing to do, because it’s basically centuries of habit.’ (David, divorced and remarried father, 50s)

Confronting the psychological reality of pre-nuptial negotiations

Given the need to create a new culture, how ready did people feel to take advantage of a new law permitting binding pre-nuptial agreements? How easy would this be for those entering into a modern marriage bargain? In order to consider how changed the culture around entering into pre-nuptial agreements might already be, we asked all those in the national survey who had ever been married (n = 1,550):

Thinking of your own marriage (or most recent marriage), if the law permitted making binding prenuptial agreements, would you have wished to negotiate a binding agreement concerning the division of your money and property on divorce?

Whilst a large majority (80%) confirmed they would not, 20% indicated that they would like this opportunity, which indicated a shift away from traditional values, if not one of seismic proportions. We also asked all cohabitants taking part in the national survey (n = 249), whether they would be more likely to marry their current partner if pre-nuptial agreements were binding. Some 15% agreed with the biggest tranche (38%) disagreeing. Just under a third chose to sit on the fence. In terms of age, those in the 25–44 age bands were most likely to think this might well make a difference to their marriage plans. Thus it is possible that binding pre-nuptial agreements might prompt more cohabiting couples to consider marriage, although one striking finding was that women were far more likely to disagree with the statement – 76% of women as compared to 24% of men – showing that there is a gender dimension to this debate, an issue which Baroness Hale made plain as the only woman sitting in the Supreme Court in her dissenting judgment in *Radmacher*:

‘[t]he 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.’²⁵

Pursuing these themes in the follow-up study, we asked participants how they would have felt if their partner had asked them to enter into a pre-nuptial agreement. Here there were again relatively few who would not have taken offence, showing just how difficult these agreements must be to navigate psychologically. One participant, Leila, who was twice divorced and considering a pre-nup for her third marriage, thought it would be good for

²⁵ [2010] UKSC 42, [2010] 2 FLR 1900, at para [137].

relationships and likened the necessary mind set to that needed for will making:

‘It’s like when you write your will for the first time. I hate it. I absolutely hate it, because it makes me sit there and think about things I don’t want to think about. So I think that’s a very ... it’ll make them sit down and think about it and what they’re entering into. This isn’t just for fun.’ (Leila, divorced mother, 50s)

Rebecca saw it as an insurance transaction:

‘Again, to me it is just like an insurance and as long as you can talk about it openly and you’re quite happy to just discuss any aspect of it, it shouldn’t cause a problem.’ (Rebecca, married mother, 30s)

However, the majority did not see themselves as capable of such a culture shift:

‘I would have doubted her commitment to the marriage’ (Thomas, married, no children, 30s)

‘No, I think it would have been a bit of a deal breaker, I wouldn’t have gone for that.’ (Andrew, married father, 30s)

‘If Tony said to me about a Pre-Nup I would say, “Oh don’t you trust me?”’ (Lydia, divorced and cohabiting, no children, 40s)

‘I must admit I’d be a little bit suspicious why somebody is wanting to bring this sort of legal formality in at such a stage.’ (Roger, single, no children, 50s)

‘Yes, I’d just think, why do you want a pre-nup? They’re doubting me I think, like “Oh you’re going to take this away from me.”’ (Susie, single mother, long term relationship, 30s)

Generally, it made people suspect the motives behind such an agreement which were often seen as a threat to the working of the marriage itself. John suggested that it might be a way for the more powerful partner to assert inappropriate control, undermining the equal nature of such a partnership:

‘Especially the person who’s more financially sound, he’s made her sign that contract so he’s going to be in control all the time then ... you’re not sharing the whole of the relationship.’ (John, divorced and remarried father, 40s)

Others saw it as a threat to the trust and ideals of commitment in marriage.

‘I think it would be a negative, because it’s already skipping to the end of a relationship and already making it more about money and materials, when it should be based on more emotional stuff, not financial stuff. My personal opinion it should be based on more whether that person can be trusted on a level of loyalty and security, and whether they can provide and just be a good person to you, not just for what money they’ve got.’ (Kerry, cohabiting mother, 30s)

Yet some, like Mark, thought that the notion of marriages ending is now part of the modern culture in which people are getting married:

‘I think society now generally accepts that, you know, most people – a lot of people would have more than one marriage, potentially. Certainly more than one sort of long-term relationship. So I don’t think it will affect people’s view of marriage.’ (Mark, married father, 40s)

Pre-nuptial agreement as a sign of commitment

However, perhaps the most illuminating example from the follow-up study exposing the potential dangers surrounding binding pre-nuptial agreements was that of Tamzin. She had recently married a man who had been through a difficult divorce. Although she was the financially weaker partner, she had out of her own sense of fairness suggested that they enter a pre-nuptial agreement:

‘When, um, Dan and I ... decided to actually marry after being together for quite a while, I volunteered that we’d sign a pre-nup agreement because I know from his first marriage that, he more or less had to start from square one again. He left the house, um, with all the equity with his wife and, um, you know, literally set up from scratch again. So, I deemed that that would be unfair should we separate after ... fairly soon, um, that he should lose all the equity he’d got and, um, his business and everything, for me to be able to say, “I want half” straight away.’
(Tamzin, married, no children, 40s)

This echoes reports of the discussions between Mr Granatino and Ms Radmacher alleging he had agreed to sign the pre-nuptial agreement ‘out of love’.²⁶ Like Mr Granatino, Tamzin, who unlike him had very limited resources of her own, had not taken legal advice on the pre-nup, nor, from what she reported, did it contain any sunset clause or review mechanism, despite her indicating that she thought taking legal advice was ‘crucial’. At the time of the interview, she felt that signing the pre-nup in her situation had increased the level of trust her partner had in her, yet she quite clearly did not expect to have to rely on the terms of that agreement, as she was happily married.

Thus ironically, for some, the signing of a pre-nuptial agreement denying oneself the right to apply for ancillary relief on divorce, is not a legally rational act, but the ultimate sign of commitment to your partner at a time of high emotional optimism. One is left wondering whether in circumstances where the motives for entering the agreement blind one to its consequences, paternalism leading to court-imposed fairness might not be the preferable option.

Conclusion

Our study has therefore identified some changing attitudes to marriage and to the place of binding pre-nuptial agreements as an option for those marrying (or divorcing) in this jurisdiction. There are definite signs that some people (albeit a minority) are taking a more pragmatic rather than romantic view about such issues. However, romanticism still has a very strong place in practices surrounding first marriages and is still the majority position.

Whilst some people see a pre-nuptial agreement for themselves as undermining the very essence of marriage, there are also clear situations where the majority think binding pre-nuptial agreements are quite an appropriate bargain to strike. Short marriages without children present least difficulty, although how can one know how long or short any marriage will be at the outset? Even the presence or absence of children cannot always be predicted with any certainty, yet this radically affects views on how appropriate a pre-nup is. Where there are children of previous relationships, though, there was almost unanimous acceptance among participants in the follow-up study that a pre-nuptial agreement would be quite a normal and sensible thing to contemplate, with similar views expressed in relation to pre-nuptial agreements for second or subsequent marriages. With the possible exception of the

²⁶ See <http://www.telegraph.co.uk/news/uknews/7520703/Marry-me-not-my-millions-said-wife-in-prenuptial-court-battle.html> (last accessed 13 August 2012).

family home, a pre-nuptial agreement designed to protect inherited wealth was also viewed positively.

In terms of the dangers, exercising one's autonomy to enter such a binding agreement was recognised as being double-edged, particularly for a spouse who becomes the non-financial contributor such as the primary carer. Here the 'fairness' approach developed in recent case law better reflects the bargain which people feel ought to be struck within a marriage. We did find some indications that attitudes to the consequences of pre-nuptial agreements probed in more detail in the scenarios were gendered, with some age variation. People have clear reservations about the appropriateness of pre-nuptial agreements where circumstances change in an unanticipated way or where after time bargaining power and autonomy have become unequal. We gained a view that what best reflects consensus would be agreements which, unless renewed, expired after a period of time or where the courts had power to adjust the agreement on divorce where there had been unforeseen supervening circumstances.

What is more, the psychological and practical difficulties of negotiating or renegotiating a pre-nuptial agreement after marriage were recognised both in terms of inequality of bargaining power and in terms of people actually actioning joint intentions within the normal pressures of family life.

Whilst there was no groundswell of opinion that pre-nuptial agreements should continue to be contrary to public policy, there was, though, a feeling that they may be best left out of the vast majority of marriages. The strongly articulated concerns over how far in reality even broaching the subject can undermine the trust between the parties illustrate this quite forcefully. Whilst autonomy was a permissible value to embed within the law in this context, safeguarding fairness at the point of divorce was a more predominant concern overall across the age groups. There were certainly few advocates of what might be termed a free-market approach to marriage bargaining.

It is to be hoped that the Law Commission can arrive at a solution which both falls within the bounds of public acceptability and promotes a culture where pre-nuptial agreements in and of themselves aim to achieve a fair outcome, rather than merely ringfence the assets of the wealthier spouse. The character of modern marriage has undoubtedly changed, yet we might want to take stock of what we lose as a society if we allow those non-financial contributions to a marriage – the family business of caring – to hold too little legal value or bargaining power.