***Response to the Law Commission Consultation: Marital Property Agreements***

***Christian Concern***

***&***

***The Christian Legal Centre***

***April 2011***

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**Consultation**

# The Law Commission Consultation Paper No 198: Marital Property Agreements

**Closing date: 11 April 2011**

**E-mail response to:** [propertyandtrust@lawcommission.gsi.gov.uk](mailto:propertyandtrust@lawcommission.gsi.gov.uk)

**About Us**

Christian Concern is a policy and legal resource centre that identifies changes in policy and law that may affect the Judeo-Christian heritage of this nation. The team of lawyers and advisers at Christian Concern conduct research into, and campaign on, legislation and policy changes that may affect Christian freedoms or the moral values of the UK. Christian Concern reaches a mailing list of over 30,000 supporters. <http://www.christianconcern.com>

Christian Concern is linked to a sister and separate organisation, the Christian Legal Centre, which takes up cases affecting Christian freedoms. <http://www.christianlegalcentre.com>

Andrea Minichiello Williams CEO  
Christian Concern & the Christian Legal Centre  
020 7935 1488  
077 12 59 1164  
[andrea.williams@christianconcern.com](mailto:andrea.williams@christianconcern.com)

**CONSULTATION RESPONSE**

**Question: Should a new form of qualifying nuptial agreement be introduced, that provides for the financial consequences of separation, divorce or dissolution and excludes the jurisdiction of the court in ancillary relief?**

Executive Summary

We believe that a new form of qualifying nuptial agreement that provides for the financial consequences of separation, divorce or dissolution and excludes the jurisdiction of the court in ancillary relief (“**Nuptial Agreements**”) should not be introduced.

We submit that:

* The law should encourage marriage as a life-long, permanent union which creates the ideal and most stable environment for the raising of children. Introducing Nuptial Agreements will undermine marriage by redefining it as a *temporary* commitment akin to a business or commercial contract.
* The object of a Nuptial Agreement is primarily to deny the economically weaker party the provision that they would otherwise be due. Men are more likely to insist on a Nuptial Agreement as a prerequisite to marriage, and the losers under such a system will predominantly be women. The balance between equality and fairness that has been established in our current law would be seriously undermined by the introduction of Nuptial Agreements.
* The Law Commission’s claim that people may be put off marriage because of a fear of equal distribution following *White v White* is unfounded and not supported by any evidence. Following *White v White*, it remains the case that every award from the Court following a divorce will differ according to the facts of the case and will be based on the principle of fairness. Equal sharing is not a definitive result.
* There is a risk that immense pressure may be imposed on a party to sign a Nuptial Agreement, if this is presented as a condition for the marriage to go ahead.
* The Law Commission’s claim that reforms are needed for “certainty” as to the financial consequences of divorce has little weight in practice. The provisions of the Matrimonial Causes Act 1973 currently provide a significant level of certainty as to the impact of divorce for average earners, and therefore caters well for most spouses.
* For wealthy couples, certainty of outcome can only be achieved by ousting the court’s jurisdiction entirely. This is an unlikely reform to the law, and the Law Commission has already accepted that agreements constructed months or years prior to a marriage cannot cater adequately for changes in circumstances likely to take place after the marriage. For this reason, the Law Commission has suggested that safeguards should be enacted whereby one spouse is permitted to seek an order setting the Nuptial Agreement aside on the basis that it provides for an *unfair* distribution of the assets. This, however, significantly undermines the argument for certainty that is being used in order to justify reforming the law in this area.

Benefits and Permanent Union of Marriage

Marriage is entered into by two individuals who take vows to commit themselves to one another for life. Such a lifelong commitment provides the ideal conditions within which to raise children. The permanent nature of marriage remains the ideal, and offers the best conditions for children to prosper.

For this reason, marriage as a social institution must be upheld for the stability and well-being of society. As recognised by Jens-Uwe, marriage is a "cornerstone of a vital and stable society", and it is therefore in the public interest to promote and uphold the institution, together with the concept of "family" established and maintained by the institution over thousands of generations:

*“There can be no doubt that the institution of marriage is the foundation of the familial and social structure of our Nation and, as such, continues to be of vital interest to the State.”[[1]](#footnote-1)*

Evidence supports the proposition that individuals seek a life-long union through marriage as cohabitation does not offer the same degree of stability.

Hence, Dr Hayward, in his article *Cohabitation in the 21st century[[2]](#footnote-2),* refers to the British Household Panel Survey (BHPS) which shows that of all cohabitations included in the study, 61% led to marriage whilst 39% ended in separation, demonstrating that *“*marriage is still the preferred outcome for most couples”[[3]](#footnote-3).The article also refersto BHPS statistics which found that the average length of cohabitation is just over three years, leading to the conclusion that“compared to marriage, cohabitation is a significantly more fragile and temporary form of family.... cohabitations are generally brief [and] a less stable form of relationship.”[[4]](#footnote-4)

As the law has a role in suggesting the accepted moral standards of behaviour, the introduction of Nuptial Agreements will promote and encourage the view that marriage is not necessarily a permanent union, as it will permit individuals to anticipate, and plan for the effects of, a divorce.

The introduction of Nuptial Agreements will undermine marriage by redefining it as a *temporary* commitment akin to a business or commercial contract, making the institution tantamount to cohabitation.

It is clear that those who attempt to introduce a Nuptial Agreement prior to a marriage are significantly qualifying their commitment to their partner on a permanent basis. We do not agree that the law should encourage this.

In fact, any attempt to introduce a Nuptial Agreement pre-marriage displays an absence of commitment to the other from the *outset* rendering a divorce to be a more likely occurrence in the future.

Radmacher

In *Radmacher* it was suggested by the Judge that the established rule that pre-nuptial agreements were against public policy did not apply any longer since marriage was no longer life-long following the introduction of no-fault divorce. The Law Commission agrees with this and states: “The policy was scarcely consistent with modern values; married couples no longer have an enforceable duty to live together, and the law makes provision for marriage and civil partnership to be brought to an end.”[[5]](#footnote-5)

We profoundly disagree with this approach. Provision for divorce in the law is a necessary evil. The negative impacts of divorce on the mental health and quality of life of the spouses concerned, and any children from the marriage, are well-recognised.

We concede that marriage has already been undermined by no-fault divorce. However, this does not justify it being further undermined by the introduction of Nuptial Agreements. Marriage as a permanent union is an ideal which the law should support as a matter of public policy.

Comments in *Radmacher* are contrary to the overwhelming majority of historic judicial reasoning. The concern that the introduction of pre-nuptial agreements is harmful to society and will lead to an erosion of marriage by removing essential features of the institution, namely its sanctity, longevity and stability, was continuously expressed by the courts prior to the Supreme Court’s decision in *Radmacher,* and has prevented pre-nuptial agreements from acquiring enforceable status until this time.[[6]](#footnote-6) The implications of White v White on the law of ancillary relief

It has been suggested by the Law Commission that individuals are now refraining from marriage over fears of an equal division of their assets on divorce after the decision taken by courts in *White* v *White[[7]](#footnote-7)* and that:

*“….those who make [the] argument [that pre-nuptial agreements encourage divorce] may be overlooking the fact that the decision in White v White changed the implications of marriage, dramatically, for a minority and may indeed be a serious disincentive to marriage for some.”[[8]](#footnote-8)*

We contend that this argument is flawed for a number of reasons. Equal sharing is not a legal rule or a presumption, and this was clearly emphasised by the courts in their decision. The extensive coverage of *White* in the press has possibly led some to believe that equal division on divorce is inevitable, although a closer observance of the case will reveal that this is not the case. The decisions taken by the courts in major cases subsequent to *White* demonstrate that every award will differ according to the facts of the case, and that equal sharing is not a definitive result[[9]](#footnote-9). The Law Commission therefore gives an erroneous interpretation of the current law, incorrectly stating that *“the overall effect of the change of approach since 2001 is that substantial assets are likely to be shared between a couple”[[10]](#footnote-10)*.

However, although the decision in *White* established the principle that judges must seek to achieve a fair outcome between the parties when approaching ancillary relief cases, the definition of the term “fair” would depend on the circumstances of the case[[11]](#footnote-11). When deciding what would amount to a “fair” distribution the courts emphasized that “*there should be no bias in favour of the money-earner and against the home-maker and the child-carer”[[12]](#footnote-12).* In other words, the role of an unemployed spouse who acts as a full-time homemaker must be given equal value to that of the breadwinning party, and neither role was to be regarded as superior to the other. The principle derives from the recognition of the fact that the hard work undertaken by a spouse in looking after the children and maintaining the home is what enables the other to earn a living, making the two contributions equally significant.

However, the courts clearly emphasized that “this is not to introduce a presumption of equal division under another guise”[[13]](#footnote-13) and that equal sharing of assets between the parties is not a principle of law established by the case. It was recognized that “a presumption of equal division would go beyond the permissible bounds of interpretation of section 25 [of the Matrimonial Causes Act 1973]”[[14]](#footnote-14) since this provision requires the courts to take a range of factors into account when deciding ancillary relief cases, with the welfare of any child being the paramount consideration. Lord Nicholls clarified that a recognition of the equality of a couples’ respective roles was designed to help the courts decide what a “fair” distribution of the assets would be and that “the yardstick of equality is to be applied as an aid, not a rule”[[15]](#footnote-15).

The Law Commission asks that: “If equal division is not a principle, how did a “yardstick” apply?”[[16]](#footnote-16) . The answer is that the starting point must always be the factors outlined in s.25 of the Matrimonial Causes Act 1973, with the welfare of any children being the primary consideration. Once the courts have arrived at a sum on an application of these provisions, the courts must then apply the yardstick of equality and consider whether equal division would be a fairer option. In certain cases fairness may well necessitate that the assets are divided equally between the parties in light of the efforts put in by the homemaker; the courts are obliged to take this into consideration when making the order. On the other hand, a 50/50 split may not always be a *fair* distribution of the assets even where both parties worked equally hard in their individual roles. The judges therefore emphasised in *White* thatthe courts will refrain from equal sharing where there are “good reasons” to i.e. if fairness necessitates that assets should *not* be divided equally in the given circumstances. The crucial point made by the case is that although equal sharing is *not* necessary, the reason for a departure from a 50/50 split must not be based on the role played by each spouse during the marriage. In other words, the fact that one spouse (usually the wife) did not earn the family’s wealth can never justify giving her a smaller share of the assets; a departure based on other reasons, however, is acceptable.

Thus, former district judge, Robert Bird, emphasises how the courts have gone at length to curb the misunderstandings associated with the decision of the courts in *White*[[17]](#footnote-17), referring in particular to the comments of the judges in *H v H*[[18]](#footnote-18):

*“The speech of Lord Nicholls of Birkenhead in White v White clearly establishes that the watchword is fairness, not equality. Fairness does not necessarily dictate equality. What is essential is to give consideration to all the relevant factors, in particular those specifically referred to in Section 25...... to reach a conclusion that strikes a balance of fairness. That balance may be achieved by an equal division of the assets – hence the good sense of checking one’s provisional conclusions against the yardstick of equality – but each case must turn on its own facts and in many cases there will be clear identifiable reasons why an equal division of the assets does not strike the fair balance”[[19]](#footnote-19).*

As emphasised above, there have been many cases *post-White* where the courts did not provide for an equal split, finding “good” reasons for an unequal distribution[[20]](#footnote-20). The statements of the Law Commission to the effect that *“divorce now involves substantial sharing of property”[[21]](#footnote-21)* and that *“the law of England and Wales is now much closer to the European approach, where equal sharing is the norm”[[22]](#footnote-22)* are clearly incorrect.

We also disagree with the Law Commission’s assertions that *“it remains unclear how far a short marriage will justify a departure from equality”.* The shortness of a marriage has been clearly identified as a potentially “good” reason for making awards which depart from equal sharing to a fairly large extent, easing the concerns often raised that the principles established in *White* will produce unfair results in the case of short marriages, particularly where one party entered the marriage with substantial assets (commonly referred to as “pre-marital property” by the courts). Thus, Lord Nicholls stated in *Miller* that “.*..in the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property”[[23]](#footnote-23).* More significantly, Lord Nicholls goes on to say that *“in short marriage cases there will often be a good* *reason for departing substantially from equality with regard to non-matrimonial property”.* Accordingly,Ms Miller was awarded a share of approximately 16% after a marriage of two years and seven months i.e. a share of £5m from a total of £30m. Similarly in *McCartney v McCartney[[24]](#footnote-24),* another case involving a short marriage, Miss McCartney was awarded £16.5m of the total assets worth over £408 million (with an extra award for the single child of the marriage). The award amounted to approximately 4.125% of the family wealth - substantially less than 50%.

Furthermore, since the decision in *White* has removed the discriminatory effects of the pre-2001 rules governing ancillary relief, and offers greater protection for housewives in the event of divorce, it is erroneous to view the “yardstick of equality” introduced by the courts in *White* as unfair, the effects of which must therefore be negated by the introduction of Nuptial Agreements. The Law Commission has already addressed the effects of the post-*White* position, which indirectly favoured men through the rule that breadwinners were entitled to a majority of the family assets whilst their partners were only entitled to what was necessary to meet their reasonable requirements (usually the wife). This principle derived from a view that breadwinners were more deserving of the assets since their efforts towards the accumulation of the wealth were more significant than that of the homemaker. This rule, which left women facing separation at a huge disadvantage, has now been eliminated by the courts in *White,* with the courts acknowledging that the role played by a wife in looking after the children and the home was of equal value to that of the money earner and assisted the husband significantly in earning the family wealth. On a practical application of the principle, Ms White was awarded a share of £1.7m from assets totalling £4.6m - a fair division in light of her contributions both towards the home and the family business over a marriage of 33 years. The courts repeatedly emphasised the equality of each party’s contributions in their judgement:

*“…..each party contributed a great deal of effort to the marriage and the welfare of the family. Within the home it was the wife who primarily brought up the children, and she also worked hard in all sorts of ways on the farm. Mr White was a hardworking and active farmer”.*

This was also recognised by the judges in the Court of Appeal:

*“In truth this was a marital and also a business partnership in which, by their efforts and commitment, each contributed to the full for 33 years, and any attempt to weigh the respective contributions of their effort is idle and unreal.”[[25]](#footnote-25)*

Notwithstanding this, the courts still awarded Ms White a share of less that 50% to reflect the fact that her father-in-law had provided a loan to establish the family business, again demonstrating that assets will not be divided equally where fairness does not necessitate this. More importantly, the decision in *White* will now ensure that a woman will not be placed at any disadvantage on a redistribution of the assets where she has supported her husband in his career over a long period of time by maintaining the home and the children. The principles outlined in the case will also produce fairer outcomes for women who suffer a detriment by sacrificing their careers in order to become full-time homemakers, and consequently have little resources of their own. As stated by Lord Nicholls in *Miller*,

*“It is not a case of 'taking away' from one party and 'giving' to the other property which 'belongs' to the former…. Each party to a marriage is entitled to a fair share of the available property. The search is always for what are the requirements of fairness in the particular case*. *[White] is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income.”[[26]](#footnote-26)*

It is therefore evident that the concept of “needs, sharing and compensation” established by the courts in *White* is not as ambiguous as the Law Commission suggests. It is clear that “needs” is the primary factor to be considered under s.25 of the Matrimonial Causes Act 1973; “sharing” may be awarded to a wife as “compensation” for loss of earnings, resulting from a decision to leave employment to look after the children and the home.

*White v White* is a groundbreaking decision since it acts as a positive and significant step towards greater equality for women in the outcome of ancillary relief cases, guaranteeing that fairness for *both* parties will be at the heart of every decision which follows. Notwithstanding this, men who are high-earners are likely to disagree with the principles established in *White,* believing that their wives should not be entitled to a share in the family wealth,despite the hard work they have undertaken in supporting the husband in his career during a lengthy marriage. Such individuals will seek to retain their assets through the use of a Nuptial Agreement as far as possible, and will seek to oust jurisdiction to litigate on the matter under s.25 of the Matrimonial Causes Act 1975. As emphasised by Andrew Hayward in his article *“The Gender Dimension of Pre-nuptial Agreements:* *Radmacher v Granatino (2010)”,[[27]](#footnote-27)* most Nuptial Agreements are likely to derive from selfishness and an attempt by one party to escape a distribution by the courts based on the principles established in *White:*

“ ......the yardstick of equality’ created in White v White [2000] 1 AC 596... was likely to be displaced by the terms of the pre-nuptial agreement. Unsurprisingly this is the very essence and purpose of these types of agreement”.

This was previously emphasised by Lady Hale in her dissenting judgement in *Radmacher:*

*“...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 …”[[28]](#footnote-28).*

Lady Hale correctly recognises that the victims of Nuptial Agreements will predominantly be women due to their traditional role as housewives. This was also emphasised by Cahill*[[29]](#footnote-29)* who stresses that the “*the female role of child-rearing at the expense of career advancement is still very much the norm”* and that “*it is still men who are more likely to insist on [pre-nuptial agreements] as a prerequisite to marriage”.* We disagree with the assertions made by the Law Commission that the increase in demand for pre-nuptial agreements by wealthy individuals does not arise *“from a natural wish to hold on to one’s own, and perhaps a resistance to the ideas of equality expressed in White v White”[[30]](#footnote-30)* but a desire to have more clarity prior to the marriage as to the possible financial consequences of divorce. It is erroneous to presume that a selfish desire to avoid sharing wealth with one’s wife does not motivate high earning men to enter into such agreements. As Cahill recognises, this issue has already been subject to much public debate:

*“It is the gender construct of a wealthy male enforcing a pre-nuptial agreement against an economically weaker female that has typified the debate surrounding pre-nuptials.”[[31]](#footnote-31)*

Wearguethat the law should not be assisting wealthy spouses’ to accomplish such goals by introducing Nuptial Agreements, and that the enforcement of such agreements would seriously undermine the move towards equality for women initiated by the courts judgment in *White v White*. This was emphasised by Rupert Myers in the Guardian newspaper:

*“The courts of England and Wales have only latterly come to the point at which they attempt to uphold a principle of equality between husband and wife upon divorce, a position welcomed rightly by campaigners who long felt that the contributions of women who stayed at home were undermined by the divorce laws. Allowing pre-nuptials would provide a full proof circumvention of this slow process of development”.[[32]](#footnote-32)*

Furthermore, it is clear that the principles in *White* are only used to determine how excess wealth (if any) should be distributed once the parties have been awarded the sum they would each need in order to live. In most households, couples do not earn enough to have funds left over once each party’s needs are met, in which case a decision will be taken based on the s.25 factors in the Matrimonial Causes Act 1973, with the welfare of any children being the paramount consideration. We therefore argue strongly that since *White* applies only to cases where the parties have a substantial amount of wealth and has no relevance to most couples, introducing Nuptial Agreements to help wealthy individuals preserve their assets cannot be justified at the risk of undermining the unique status of marriage for so many.

The difficulties with the arguments surrounding “autonomy”

Although it has been suggested by the Law Commission that it should “*be possible for a couple to choose the financial consequences of the ending of their relationship, rather than having those consequences imposed upon them*”[[33]](#footnote-33), we contend that this argument is flawed for a number of reasons. Firstly, individuals may not fully understand the terms and implications of a Nuptial Agreement presented to them prior to a marriage owing to their respective ages and lack of knowledge[[34]](#footnote-34), particularly in light of the fact that most marriages are entered into during one’s youth. This may increase the likelihood of one party, who fully understands the terms of the Nuptial Agreement (and demands its use), taking undue advantage of the other’s ignorance. Research has suggested that individuals are less likely to pay serious regard to future risks connected with marriage since the relationship is primarily founded upon love and trust between the parties.[[35]](#footnote-35) Many individuals may not feel the need to explore the implications of any agreement presented to them by their partner since they do not expect the marriage to come to an end in the future. In a study conducted by Baker and Emery[[36]](#footnote-36), all young people questioned prior to their marriage stated that they believed there was a 0% chance of their marriage ending in a divorce.

Another widely recognised concern is that immense pressure may be imposed on one party to sign the agreement, if this is presented as a condition for the marriage to go ahead. As recognised by *Miller* “there is a danger that the pressure to sign a pre-nuptial will be heightened in the days immediately preceding the marriage”[[37]](#footnote-37), which may force a spouse to sign the agreement without fully understanding the implications of its terms. Lady Hale expressed this concern in Radmacher, stating that a pre-nuptial agreement could be “the prize which one party may extract for his or her willingness to marry”[[38]](#footnote-38) in which case there is likely to be a serious absence of freedom to contract. Furthermore, any pressure to sign an agreement is likely to be placed by the wealthier spouse who will usually be the husband, leaving women in a more detrimental position once again. Furthermore, the spouse demanding the use of the agreement may not be entirely honest as to the real extent of their assets. The position was well summarized by *Miller*:

*“A potential danger with a pre-nuptial agreement is that the parties may not have been in an equal bargaining position. There may have been unfair pressure on the weaker party--usually the wife--to enter into an agreement which will unreasonably limit the husband's future liabilities. The significance of the difference in the circumstances of the parties may be heightened to the extent that there has been a failure to make a full disclosure of assets, especially by the wealthier party*.”[[39]](#footnote-39)

As recognized by Sanders, some individuals on the other hand, may fully understand the implications of a Nuptial Agreement, but may not be in a position to negotiate effectively due to their circumstances. For example, a pregnant woman from a traditional family who feels the need to get married, or a fiancé without right of residence in the UK who fears deportation may be placed under immense pressure to sign the agreement. At this point, the problems discussed by Lady Hale concerning the ‘price for entering into a marriage’ come into play again.[[40]](#footnote-40) For this reason, it is dangerous to assume that both parties to an agreement had freedom to consider whether or not to enter into the agreement, and that all agreements signed by individuals are done so willingly. On the other hand, there is also a risk that one party may dishonestly allege undue influence to escape the enforcement of a binding agreement. We therefore disagree with the Law Commission’s assertions that “the autonomy argument is a strong one[[41]](#footnote-41)” since autonomy is likely to be compromised in many respects.

The call for “certainty”

We now turn towards the argument that Nuptial Agreements are needed in order to enable each party to know the exact financial consequence of divorce prior to the marriage, and that:

*“Many couples feel, that the outcomes of ancillary relief are so uncertain that it must be better, less stressful, and cheaper, to deal with the outcomes by agreement.”*[[42]](#footnote-42)

The arguments for certainty are weak for a number of reasons. Firstly, as recognised by the Law Commission[[43]](#footnote-43), certainty is only a cause for concern for significantly wealthy spouses i.e. a minority of couples. The provisions of the Matrimonial Causes Act 1973 provide a significant level of certainty as to the impact of divorce for average earners, and therefore the Act caters well for most spouses.

For the rich, certainty as to the exact consequences of divorce can only be achieved by allowing a couple to oust the courts’ jurisdiction entirely in any agreement made, and removing the ability of both spouses to obtain an ancillary relief order from the court. However, allowing couples to remove the courts’ power to intervene is dangerous and can have serious financial consequences for one of the parties to the agreement where its terms are unfair[[44]](#footnote-44).

This has already been recognised by the Law Commission, and it is unlikely that legislation allowing couples to oust the courts’ jurisdiction entirely would ever be approved for this reason. Therefore, the Law Commission has suggested that safeguards should be enacted whereby one spouse is permitted to seek an order setting the Nuptial Agreement aside on the basis that it provides for an *unfair* distribution of the assets. This, however, significantly undermines the argument for certainty that is being used in order to justify reforming the law in this area.

We submit that Nuptial Agreements should not be introduced. There is much evidence to support the argument that Nuptial Agreements constructed before a marriage cannot cater adequately for changes in the circumstances likely to take place after the marriage, such as the birth of any children or a sudden change in the role played by each party as breadwinner and homemaker. It is noticeable that even in *Radmacher v Granatino[[45]](#footnote-45),* where the courts expressed support for allowing pre-nuptial agreements to heavily influence the outcome of ancillary relief cases, the judges nevertheless made an order which differed from the terms of the pre-nuptial agreement originally made between the parties. Despite the couple agreeing not to seek a court order on divorce, Mr Granatino was still awarded a sum of £70,000 a year from Miss Radmacher for the next 14 years, on the basis that the terms of the pre-nuptial agreement were unfair in the given circumstances. The parties had both decided that Mr Granatino would terminate his employment at JP Morgan, through which he earned £120,000 per annum, in order to undertake further studies at Oxford University; the order made by the court was therefore intended to give Mr Granatino enough time to establish his career once again. Notably, Mr Granatino was also awarded permission to live in one of Miss Radmacher’s homes in London on a rent-free basis, and to stay in a holiday home in France without the need to pay for the use – neither provisions were included in the pre-nuptial agreement.

The courts took a similar approach in *K v K*[[46]](#footnote-46) and partially departed from the agreement made between the parties which provided that the wife would only be entitled to a lump sum of £120,000 without any ongoing maintenance in the event of divorce. Despite this, the courts awarded the wife maintenance of £15,000 per annum for a specified period, stating that to enforce the pre-nuptial agreement fully and deprive the wife of ongoing maintenance would be unfair in the given circumstances. Of particular importance was the fact that a variation of the terms of the agreement in this manner was required in order to ensure that the needs of the couples’ children were met.

Similarly in *McLeod v McLeod*[[47]](#footnote-47), the terms of the pre-nuptial agreement failed to cater for the needs of the couples’ five children, resulting in the courts varying the agreement to provide an extra sum to the wife, who was to act as their primary carer. It is noticeable that in both *K v K* and *McLeod*, the agreement entered into by each couples did not cater for the needs of any future children, highlighting the dangers of allowing spouses to restrict one another’s ability to obtain an ancillary relief order from the court. The Law Commission suggests that any legislation introduced would protect children by offering special safeguards, allowing either party to seek a court order for a child despite terms of in a pre-nuptial agreement ousting their jurisdiction; *Radmacher* however, is a clear example of how an agreement drawn prior to a marriage can still be unfair even where the needs of any children are not at issue. Although *Radmacher* was unusual on its facts, being the husband who had terminated his career for whatever reason, in most instances it is women who decide to leave full-time employment in order to maintain the home, leaving them with little financial resources of their own. Any Nuptial Agreement which removes the ability of either party to seek financial relief from the court could leave women in these circumstances at a significant disadvantage on divorce, particularly if the husband has sought to retain a majority of his assets through use of a pre-nuptial agreement.

In order to prevent this, and as mentioned previously, the Law Commission has suggested that safeguards should be enacted whereby one spouse is permitted to seek an order setting the Nuptial Agreement aside on the basis that it provides for an *unfair* distribution of the assets even where’s it’s terms attempt to oust the courts’ jurisdiction. However, it is evident that such an exception will defeat the very purpose of the agreement, namely certainty as to the financial position of each spouse on divorce. Furthermore, there is likely to be a flood of spouses seeking to rely on the safeguard, thereby defeating a further argument that Nuptial Agreements are needed to avoid the distress and cost of litigation. As highlighted by Robert George in his article *“Pre-nuptial agreements: for better or for worse?”,* the arguments for certainty may seem logical at first but;

*“ ...such common sense arguments should not blind us to the possibility that giving pre-nuptial agreements greater recognition might not only fail to increase the certainty and simplicity of the law....but might cause greater legal uncertainty and complexity and/or increase opportunities to litigate...”[[48]](#footnote-48)*

For this reason, we again argue that there is little point in pre-nuptial agreements that don’t legally oust the courts’ powers to intervene entirely. However, the law must not permit this kind of Nuptial Agreement, as agreements concluded months or years before separation are unlikely to provide for a fair distribution of assets in light of the changes likely to take place during the marriage. We do not agree that certainty should be achieved at the cost of fairness. We argue again, that any inclusion of a term to oust the courts’ jurisdiction will simply be an attempt by one party to prevent their homemaking spouse (usually the wife) from receiving a share of their wealth and to avoid a distribution based on the principles in *White*; the law should not assist or encourage such behaviour.

In relation to the rich, we argue that as an alternative to introducing Nuptial Agreements, certainty should be achieved by reforming the Matrimonial Causes Act 1973 further to provide clear guidelines as to the likely financial consequences of divorce in cases where assets exceed the couples’ needs. The provisions of the act should be detailed enough to enable the parties to understand the impact of divorce on their assets, regardless of whether they are average or high-earners. This would also eliminate the problems divorce lawyers are allegedly facing in advising a minority of rich couples as to the impact of divorce on their finances[[49]](#footnote-49), and will also encourage such couples to marry, if indeed they are refraining from marriage due to uncertainty, as suggested by the Law Commission[[50]](#footnote-50). However, it is doubtful whether couples are avoiding marriage simply for this reason since there is no conclusive evidence to this effect, and cohabiting couples have long argued for obtaining equivalent rights to married couples.

In conclusion we submit that Nuptial Agreements should not be enforced, and must remain as only one factor to be taken into account by s.25 of the Matrimonial Causes Act 1973.

1. Jens-Uwe., Franck *"So hedge therefore, who join forever": understanding the interrelation of no-fault divorce and premarital contracts”*International Journal of Law, Policy and the Family (2009) [↑](#footnote-ref-1)
2. Dr John Hayward & Dr Guy Brandon *“Cohabitation in the 21st Century”* Jubilee Centre (2010) pg 1 [↑](#footnote-ref-2)
3. Dr John Hayward & Dr Guy Brandon *“Cohabitation in the 21st Century”* Jubilee Centre (2010) pg 1 [↑](#footnote-ref-3)
4. Dr John Hayward & Dr Guy Brandon *“Cohabitation in the 21st Century”* Jubilee Centre (2010) pg 1 [↑](#footnote-ref-4)
5. The Law Commission’s consultation paper on Marital Property Agreements, page 2, paragraph 1.8 [↑](#footnote-ref-5)
6. See for example *Mulford v Mulford,* 211 Neb. 747, 320 N.W.2d 470, 471 (1982) and comments of Myers, R. *“Prenups undermine marriage”* The Guardian newspaper (23rd March 2010)

   <http://www.guardian.co.uk/commentisfree/2010/mar/23/prenuptual-agreements-supreme-court>:

   “allowing parties to contract in a way which undermines the construct of marriage begin to make the institution redundant”. [↑](#footnote-ref-6)
7. Lord Nicholls in White v. White [2000] UKHL 54 [↑](#footnote-ref-7)
8. The Law Commission’s consultation paper on Marital Property Agreements, pg. 74 at paragraph 5.23 [↑](#footnote-ref-8)
9. See cases where homemakers received a share of 16% of the total assets (*Miller v Miller [2006] UKHL 24*), 4% (*McCartney v McCartney* [2008] 1 FLR 1508) and 37.5% (*White v White [2002] UKHL 54*) discussed below. [↑](#footnote-ref-9)
10. The Law Commission’s consultation paper on Marital Property Agreements, pg. 6 at paragraph 1.23 [↑](#footnote-ref-10)
11. See comments of Lord Nicholls: “*the outcome ought to be as fair as is possible in all the circumstances. But everyone's life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder”* White v. White [2000] UKHL 54 [↑](#footnote-ref-11)
12. Lord Nicholls in White v. White [2000] UKHL 54 [↑](#footnote-ref-12)
13. Lord Nicholls in White v. White [2000] UKHL 54 [↑](#footnote-ref-13)
14. Lord Nicholls in White v. White [2000] UKHL 54 [↑](#footnote-ref-14)
15. White v. White [2000] UKHL 54 [↑](#footnote-ref-15)
16. Pg. 30 paragraph 2.51 [↑](#footnote-ref-16)
17. Bird, Roger., The Ancillary Relief Handbook (Jordan Publishing Limited) 7th edition, pg 11 [↑](#footnote-ref-17)
18. [2002] FLR 1021 [↑](#footnote-ref-18)
19. Peter Hughes QC in H v H [2002] 2 FLR 1021 para 21 [↑](#footnote-ref-19)
20. E.g *Miller v Miller* *[2006] UKHL 24* and *White v White [2000] UKHL 54*  discussed below. [↑](#footnote-ref-20)
21. Pg. 52 at paragraph 3.58 [↑](#footnote-ref-21)
22. Pg. 7 at paragraph 1.23 [↑](#footnote-ref-22)
23. Miller v Miller [2006] UKHL 24 [↑](#footnote-ref-23)
24. [2008] 1 FLR 1508 [↑](#footnote-ref-24)
25. [2000] UKHL 54 [↑](#footnote-ref-25)
26. [2006] UKHL 24 [↑](#footnote-ref-26)
27. Hayward, A. “*The Gender Dimension of Prenuptial Agreements: Radmacher v Granatino”* Inherently Human: Critical perspectives on Law, Gender & Sexuality (November 22nd 2010)

    http://inherentlyhuman.wordpress.com/2010/11/02/the-gender-dimension-of-prenuptial-agreements/ [↑](#footnote-ref-27)
28. [2010] UKSC 42 [↑](#footnote-ref-28)
29. Cahill, G. *“Prenups: a delicate balancing act”* The Guardian newspaper (October 22nd 2010) http://www.guardian.co.uk/commentisfree/2010/oct/22/prenups-delicate-balancing-act [↑](#footnote-ref-29)
30. Pg 5, paragraph 3.58 [↑](#footnote-ref-30)
31. Cahill, G. *“Prenups: a delicate balancing act”* The Guardian newspaper (October 22nd 2010) http://www.guardian.co.uk/commentisfree/2010/oct/22/prenups-delicate-balancing-act [↑](#footnote-ref-31)
32. Myers, R. *“Prenups undermine marriage”* The Guardian newspaper (23rd March 2010)

    http://www.guardian.co.uk/commentisfree/2010/mar/23/prenuptual-agreements-supreme-court [↑](#footnote-ref-32)
33. Consultation paper pg. 74 para 5.24 [↑](#footnote-ref-33)
34. Sanders., Anne *“Private autonomy and marital property agreements”* International & Comparative Law Quarterly (2010) [↑](#footnote-ref-34)
35. MA Eisenberg, ‘The Limits of Cognition and the Limits of Contract’ [1995] Stan L Rev 47 211. [↑](#footnote-ref-35)
36. L Baker and R Emery, ‘When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage’ (1993) Law & Human Behaviour 17 439. [↑](#footnote-ref-36)
37. Miller, Gareth., “*Pre nupt agreements in English law”* Private Client Business (2003) [↑](#footnote-ref-37)
38. [2010] UKSC 42 [↑](#footnote-ref-38)
39. Miller, Gareth., “*Pre nupt agreements in English law”* Private Client Business (2003) [↑](#footnote-ref-39)
40. Sanders., Anne *“Private autonomy and marital property agreements”* International & Comparative Law

    Quarterly (2010) [↑](#footnote-ref-40)
41. The Law Commission’s consultation paper on Marital Property Agreements, pg. 76 para 5.32 [↑](#footnote-ref-41)
42. The Law Commission’s consultation paper on Marital Property Agreements at pg. 76 para 5.33 [↑](#footnote-ref-42)
43. The Law Commission’s consultation paper on Marital Property Agreements at page 76, para 5.36 [↑](#footnote-ref-43)
44. The Law Commission’s consultation paper on Marital Property Agreements at pg. 77 para 5.36 [↑](#footnote-ref-44)
45. [2010] KSC 42 [↑](#footnote-ref-45)
46. [2003] 1 F.L.R. 120 [↑](#footnote-ref-46)
47. [2008] UKPC 64 [↑](#footnote-ref-47)
48. George, Roberts., Hams Peter., and Herring Jonathan “*Pre-Nuptial Agreements: For Better or for Worse?”*

    Family Law Journal [2009 Fam Law 934] [↑](#footnote-ref-48)
49. The Law Commission’s consultation paper on Marital Property Agreements pg. 76, para 5.35 [↑](#footnote-ref-49)
50. The Law Commission’s consultation paper on Marital Property Agreements pg 73 para 5.29 [↑](#footnote-ref-50)