

## **Ante-nuptial agreements and Proper Provision : an Irish response to *Radmacher v Granatino***

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### **Introduction**

Irish law makes little reference to the principle of self-determination in relation to financial provision on matrimonial breakdown.<sup>1</sup> The Family Law Act 1995 and the Family Law (Divorce) Act 1996 place some emphasis on mediation;<sup>2</sup> settlement and consent orders are always possible,<sup>3</sup> and a prior separation agreement is a factor to be considered by the court in making financial provision on divorce.<sup>4</sup> However, Ireland has no system of binding ante-nuptial agreements<sup>5</sup> as these were traditionally regarded as being contrary to public policy insofar as they contemplated marital breakdown.<sup>6</sup> This lack has become particularly relevant since the introduction of divorce and judicial separation in Ireland. The discretionary nature of financial provision under the 1995 and 1996 Acts has stimulated interest in financial agreements, particularly in high net worth cases, where parties are entering second marriages or where inherited property is at stake.<sup>7</sup> To what extent might such agreements now be recognised by the courts? There are no recent Irish cases on this issue: should changes in public policy and the broader social context in recent decades lead to changes in the legal status of ante-nuptial agreements?

### **Enforceable marital agreements: the debate to date**

Traditionally, agreements contemplating marital breakdown were viewed as encouraging spouses to separate. There are still concerns in this regard: as Bridge summarises it, “It is easier to buy into divorce when the price is set in

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<sup>1</sup> Section 113 of the Succession Act 1965 permits spouses to renounce their statutory inheritance rights in respect of the other spouse’s estate, either before or during marriage, but this does not relate to marital breakdown.

<sup>2</sup> Sections 5-6 of the Judicial Separation and Family Law Reform Act 1989 and s.6-7 of the Family Law (Divorce) Act 1996 require family law practitioners to inform their clients of the possibility of mediation.

<sup>3</sup> Section 7(3) of the 1989 Act and s.8(1) of the 1996 Act permit the court to adjourn judicial separation and divorce proceedings to allow spouses time to try to reach agreement on the terms of the separation or divorce (although there is no statutory requirement that such an agreement must be implemented by the court).

<sup>4</sup> Section 20(3) of the 1996 Act.

<sup>5</sup> In this article, the terms “ante-nuptial agreement” and “pre-nuptial agreement” are interchangeable, but the former is generally preferred as this is the term adopted in *Radmacher*, the case at issue. Quotations from other sources use the terminology of those sources.

<sup>6</sup> *Brodie v Brodie* [1917] 33 T.L.R. 525.

<sup>7</sup> Hilary Coveney, “An Introduction to Pre-nuptial Agreements”. Conference paper, Law Society of Ireland CPD seminar ‘Divorce – Ten Years On’ (Dublin, February 27, 2007), pp.21-22).

advance”.<sup>8</sup> Marriage is a public good, which should be supported by the State. There are also issues relating to potential exploitation and the unforeseeability of future needs and events. It has been suggested that ante-nuptial agreements may be contractually ineffective due to a lack of intention to create legal relations,<sup>9</sup> particularly where parties were aware that the agreement was not in fact enforceable (a circular argument). This presumption could of course be overcome by evidence that the parties did desire the agreement to be legally binding. Public policy may also mandate that financial provision should be determined by the courts to ensure its adequacy; this may be criticised as paternalism but may be justified as protecting both children and the public purse.

Due to the increased availability of divorce on a no-fault basis, arguments that ante-nuptial agreements encourage marital breakdown have greatly lost their force: if divorce is publicly sanctioned and no longer connected with immorality, why should a couple not think ahead and cater for it? Lauerman argues that rational planning can actually foster marital stability and pre-empt hostility; agreement will also lead to a speedier and less costly resolution.<sup>10</sup> Eekelaar, however, disputes the potential utility of such agreements, arguing that they would not make any real difference in most cases<sup>11</sup> and would probably only give rise to further litigation on marital breakdown.<sup>12</sup> Wade emphasises the sense of “ownership” that may arise from an agreement, as compared with an imposed solution, and the opportunity for couples to impose their own values, which may differ from legislative ones.<sup>13</sup> Similarly, Schultz has argued that contractual flexibility permits parties to set the parameters for their relationship in accordance with their personalities and predispositions, though default legal rules may have a role in dispute resolution.<sup>14</sup> (Of course, personal preferences may be incompatible with the pre-eminent requirement in Irish law of making “proper” provision on divorce and separation, discussed below).<sup>15</sup> Yet how far should an agreement (including one which one party now wishes to avoid) impact on the determination of what is “proper”?

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<sup>8</sup> S. Bridge, “Marriage and divorce: the regulation of intimacy”, in: Jonathan Herring (ed.), *Family Law: Issues, Debates, Policy* (Devon: Willan Publishing, 2001), p. 27.

<sup>9</sup> *Balfour v Balfour* [1919] 2 K.B. 571.

<sup>10</sup> N.J. Lauerman, “Feminist Moral, Social and Legal Theory: a Step Toward Enhancing Equality, Choice, and Opportunity to Develop in Marriage and at Divorce” (1987-1988) 56 U. Cin. L. Rev. 493 at 514 (hereafter “Lauerman”).

<sup>11</sup> J. Eekelaar, “Should Section 25 be Reformed?” (1998) 28 Fam. Law 469 at 470 (hereafter “Eekelaar”).

<sup>12</sup> Eekelaar at 471.

<sup>13</sup> J. Wade, “Negotiating Family Settlements: Benefits and Barriers” (1983-1985) 4 Can. J. Fam. L. 49 at 50.

<sup>14</sup> M. Schultz, “Contractual ordering of marriage: a new model for State policy” (1982) 70 Cal. Law Rev. 204.

<sup>15</sup> Article 41.3.2° of the Constitution; s.20 of the 1996 Act and s.16 of the 1995 Act (as amended).

In practice, courts have been far more likely to enforce separation agreements than ante-nuptial ones, in the absence of factors such as fraud or duress.<sup>16</sup> Bix contends that this is because separation agreements are less likely to surprise the other party and are entered into when separation, rather than marriage, is uppermost in both parties' minds.<sup>17</sup> By contrast, Mnookin argues that separation often leads to turmoil and emotional distress, which may impede settlement or lead to a settlement that is later regretted; however, he emphasises that this does not negate the possibility of private ordering with due precautions.<sup>18</sup>

Most modern theorists focus on preventing exploitation and catering for unforeseen contingencies. For instance, if the parties' circumstances change significantly, should they be held to an earlier agreement that now seems unfair? To what extent should the courts guard against unequal bargaining power? For instance, a spouse who is desperate to obtain support may make a poor bargain: should the court intervene? Deviating from the statutory criteria for financial provision may also affect third parties (such as children) and social interests.<sup>19</sup> Should this be permitted? It may be argued that basic support obligations are state-imposed and should not be privately ordered, as inadequate support could result in dependent spouses or children becoming a social burden.<sup>20</sup> Bix also notes that attitudes to the enforceability (or otherwise) of agreements of this kind may impact on social views of marriage.<sup>21</sup>

Both individualism and gender power relations are central to the debate. Self-regulation is often supported on the basis of autonomy, and equally often rejected on the basis of exploitation. The traditional assumption that people act rationally and in their own interest is increasingly undermined.<sup>22</sup> Envisaging future contingencies when negotiating an ante-nuptial agreement may be difficult, particularly as the ante-nuptial period is likely to be one of hope rather than pessimism.<sup>23</sup> Bix therefore argues that the law should provide protection in situations where people are unlikely to act rationally.<sup>24</sup>

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<sup>16</sup> B. Bix, "Bargaining in the Shadow of Love: the Enforcement of Premarital Agreements and How We Think About Marriage" (1998-1999) 40 *Wm & Mary L. Rev.* 145 at 166 (hereafter "Bix").

<sup>17</sup> Bix at 166.

<sup>18</sup> R. Mnookin, "Divorce Bargaining: the Limits on Private Ordering" (hereafter "Mnookin"). In: John Eekelaar & Sanford N. Katz (eds), *The Resolution of Family Conflict: Comparative Legal Perspectives* (Toronto: Butterworths, 1984), p.369.

<sup>19</sup> Mnookin at 376.

<sup>20</sup> Lauerma at 512. This point was made in *Radmacher*, paras 167, 190.

<sup>21</sup> Bix at 160.

<sup>22</sup> See, e.g., B. Bennett, "The Economics of Wifing Services: Law and Economics on the Family" (1991) 18 *J. Law & Soc.* 206 at 207-208; A.L. Estin, "Love and Obligation: Family Law and the Romance of Economics" (1995) 36 *Wm and Mary L. Rev.* 989 at 999.

<sup>23</sup> Bix at 193.

<sup>24</sup> Bix at 193. Citing Nozick's aphorism that one criterion for being in love is the belief that it will last forever (Robert Nozick, *The Examined Life* (New York: Simon and Schuster, 1989), p.70, cited in Bix at 194), Bix comments that being pragmatic on the possibility that

Feminists also face a dilemma regarding nuptial agreements. Economic vulnerability and social conditioning may undermine women's bargaining ability. Bedont argues that men are inclined to maximise their own interests while women focus on "interpersonal accommodation" due to their "ethic of care"; this places women at a disadvantage.<sup>25</sup> Bryan contends that because women are conditioned to value caring and nurturing they are likely to place more emphasis on custody than financial matters.<sup>26</sup> However, as Hadfield queries, can we protect women from the harm and oppression occasioned by restricted choices without also denying them independence and agency?<sup>27</sup> Lauerman contends that assuming that women cannot bargain effectively with men during their courtship is patronising,<sup>28</sup> but concedes that safeguards are required as the parties are not dealing at arms length. She therefore argues for a system of judicial review with appropriate standards such as fairness, reasonableness and unconscionability.<sup>29</sup> Mnookin advocates re-opening agreements if one spouse knowingly takes advantage of the other's diminished capacity, resulting in terms that fall outside acceptable parameters.<sup>30</sup> He also considers that full capacity should be presumed where a party had legal representation.<sup>31</sup> However, Bryan contends that women trying to get bargains set aside fail because doctrines such as duress and unconscionability mostly do not take proper account of the disadvantages many women face in negotiating financial settlements, with the result that unfairness may be affirmed rather than corrected.<sup>32</sup>

Martin argues that it is difficult to prove inherent gender disadvantage (if it exists at all), and it is therefore better to focus first on the structure of negotiation itself.<sup>33</sup> He contends that the principles and understandings of negotiation theory and cognitive psychology can help explain unequal bargains in a more credible manner than references to supposed gender differences, as well as offering insights into how the law might be reformed so as to prevent the inherent and systemic disadvantages that may apply

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the marriage may fail 'seems just the type of attitude that may make failure more likely' (Bix at 195).

<sup>25</sup> B.C. Bedont, "Gender Difference in Negotiations and the Doctrine of Unconscionability in Domestic Contracts" (1994-1995) 12 C.F.L.Q. 21 at 31, citing Carole Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982).

<sup>26</sup> P.E. Bryan, "The Coercion of Women in Divorce Settlement Negotiations" (1996-1997) 74 Denv. U.L. Rev. 931 at 933.

<sup>27</sup> B. Hadfield, "An Expressive Theory of Contract: from Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law" (1998) 146 U. Pa. L. Rev. 1235 at 1236-1237; cited in Bix at 202.

<sup>28</sup> Lauerman at 515.

<sup>29</sup> Lauerman at 516.

<sup>30</sup> Mnookin at 370.

<sup>31</sup> Mnookin at 370.

<sup>32</sup> Bryan at 931.

<sup>33</sup> C. Martin, "Unequal Shadows: Negotiation Theory and Spousal Support under Canadian Divorce Law" (1998) 56 U.T. Fac. L. Rev. 135 at 138 (hereafter "Martin").

during the bargaining process.<sup>34</sup> He suggests that women are disadvantaged in divorce negotiations, not because of inherent gender characteristics, but because women are generally positioned as supplicants in divorce negotiations, and the bargaining process favours those who are giving rather than those who are hoping to receive.<sup>35</sup> At the ante-nuptial stage, an intending spouse might be reluctant to be characterised as someone hoping to “take” the other spouse’s assets, and might well be anxious to demonstrate disinterested affection.

Martin emphasises the significance of the point at which doing without an agreement is better than having one. This is purely personal for each individual<sup>36</sup> but may be significantly affected by resources.<sup>37</sup> The crucial point is how risk-averse either party is, as a risk-averse party will not hold out further once reasonable terms have been agreed.<sup>38</sup> (At the ante-nuptial stage, the risk might of course include the potential loss of a future spouse). Martin also emphasises prospect theory, which holds that losses and gains are evaluated differently, and this affects behavioural patterns.<sup>39</sup> Thus, people are likely to hold out longer if they perceive themselves as “losing” something than if they see themselves as “gaining”.<sup>40</sup> Accordingly, the person who is “giving” is likely to come out of the settlement better.<sup>41</sup> The problem with divorce negotiations (and possibly most ante-nuptial negotiations) is that the (intending) husband is generally facing loss while the (intending) wife is trying to make a gain. (Other potential losses, such as the loss of earning capacity due to caring obligations, may not be fully appreciated at the ante-nuptial stage). Hence, men tend to do better in negotiated settlements, although this might change if women had clear legal entitlements rather than claims based on judicial discretion, as women being asked to abjure those entitlements would then also be facing loss.<sup>42</sup> This accords with Mnookin’s argument that law’s principal impact is not on the individual legal decisions affecting couples in contested cases but on the far higher proportion of couples who bargain “in the shadow of the law”.<sup>43</sup> Legal entitlements are therefore not only normative but may impact on bargaining outcomes, although, as Mnookin emphasises, they are just one factor that may influence the outcome.<sup>44</sup>

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<sup>34</sup> Martin at 138.

<sup>35</sup> Martin at 138.

<sup>36</sup> Martin at 144-145.

<sup>37</sup> Martin at 146. For instance, Bryan notes that wives’ lack of means may mean that they are unable to afford legal fees, and are therefore prevented from conducting their cases appropriately (Bryan at 932).

<sup>38</sup> Martin at 148.

<sup>39</sup> Martin at 149.

<sup>40</sup> Martin at 150.

<sup>41</sup> Martin at 151.

<sup>42</sup> Martin at 153.

<sup>43</sup> Mnookin at 364.

<sup>44</sup> Mnookin at 372.

Overall, Bix notes that the debate is divided between those who believe that enforcing agreements will inevitably lead to injustice, and those who believe that enforcing them will inevitably enhance the public good.<sup>45</sup> He contends that neither side is fully right, and that while there are issues of consent and fairness, this should not preclude all possibility of enforceable ante-nuptial agreements.<sup>46</sup> As West puts it:

“The liberal insistence that these transactions are problem-free because consensual does little but assume away a set of harms, and the radical insistence that because they are harmful they must therefore be subtly coercive, even when seemingly consensual, does little but give offense to the worker or the woman whose competency is thereby challenged”.<sup>47</sup>

### **Ante-nuptial agreements in modern law**

Approaches vary regarding the enforcement of ante-nuptial settlements and the latitude given to spouses to deviate from the statutory rules regarding financial provision on marital breakdown. The traditional common law view that ante-nuptial settlements were a disincentive to remain married and promoted collusion<sup>48</sup> has been rejected in many jurisdictions, which now actively seek to promote settlement. Australia<sup>49</sup> and Ontario<sup>50</sup> permit binding financial agreements or domestic contracts, subject to conditions; Scotland actively encourages settlement, although the agreement can be varied or set aside on limited grounds.<sup>51</sup>

Although the Irish judiciary has not yet abandoned its traditional hostility to ante-nuptial agreements, recent cases in the United Kingdom have undermined the orthodox view and prepared the ground for a departure from the established rule. In *M v M (Pre-nuptial Agreement)*<sup>52</sup> it was held that it would be as unfair to the husband to ignore the ante-nuptial agreement as it would be to the wife to apply it strictly. The agreement therefore influenced the court in making a significantly lower award to the wife than might otherwise have been appropriate. In *MacLeod v MacLeod*,<sup>53</sup> the Privy Council considered the position of post-nuptial agreements. In that case the spouses had varied an ante-nuptial agreement some years after marriage, though prior to separation. The wife subsequently sought ancillary relief

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<sup>45</sup> Bix at 146.

<sup>46</sup> Bix at 150.

<sup>47</sup> R. West, “The Other Utilitarians”, in : Brian NAME Bix (ed.), *Analyzing Law: New Essays in Legal Theory* (Oxford: Oxford University Press, 1998), p.220, cited in Bix, at 171.

<sup>48</sup> See, e.g., *Cocksedge v Cocksedge* (1844) 14 Sim. 244; 13 L.J. Ch. 384.

<sup>49</sup> Section 90B-90D of the Family Law Act 1975 (Cth).

<sup>50</sup> Section 51 of the Family Law Act 1990 (as amended).

<sup>51</sup> Section 16, Family Law (Scotland) Act 1985.

<sup>52</sup> *M v M (Pre-nuptial Agreement)* [2002] 1 F.L.R. 654.

<sup>53</sup> *MacLeod v MacLeod* [2008] U.K.P.C. 64; [2010] 1 A.C. 298.

contrary to the deed of variation. The Board distinguished between separation agreements and agreements providing for possible future separation, holding that it could not reverse the established rule that ante-nuptial agreements were against public policy and contractually invalid. It was for the legislature to reverse this. However, it felt that post-nuptial agreements, even if contemplating future separation, were valid both because they were different in kind to ante-nuptial agreements and because it interpreted a statutory power of variation contained in s.35 of the Matrimonial Causes Act 1973 as applying to all spousal agreements rather than separation agreements only. Following the abolition of the marital duty to cohabit there was no longer any reason to justify the prohibition on agreements contemplating future separation provided the statutory power of variation applied. The Board therefore found the deed of variation broadly enforceable.

*MacLeod* explicitly applied to post-nuptial agreements only. However, its rejection of the public policy ground for denying such agreements legal effect clearly undermined the basis for invalidating ante-nuptial agreements as well. Could the public policy ground continue to apply to ante-nuptial settlements contemplating future separation if it did not also apply to post-nuptial agreements doing the same thing? As the majority of the United Kingdom Supreme Court held in the recent case of *Radmacher (formerly Granatino) v Granatino*,<sup>54</sup> it could not.

### ***Radmacher: a new departure?***

*Radmacher* was an unusual case for several reasons, not least because of the extreme wealth at stake: estimates placed the wife's fortune at in excess of £100 million. *Radmacher* was also unusual because the ante-nuptial agreement was signed at the behest of the (slightly older) wife to prevent her husband making any claim against the property she had received from her family. It thus subverted the common gender stereotype of a (younger) wife renouncing claims against her future husband's fortune. Superficially, at least, the gender stereotype was further confounded by the husband's abandonment of a lucrative career during the course of the marriage, though it appeared that was due to a personal preference to return to education rather than to caring responsibilities. It is possible that this deviation from the more common gender roles encouraged the majority of the UK Supreme Court to overlook gender issues in making its judgment.

The husband in *Radmacher* was French and the wife was German. At the urging of the wife's hugely wealthy family, the parties entered into an ante-nuptial agreement. While the family's motivation was to protect the family wealth (and particularly shares in the family company), the wife was also

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<sup>54</sup> *Radmacher (formerly Granatino)(Respondent) v Granatino (Appellant)* [2010] U.K.S.C. 42 (hereafter referred to as "*Radmacher*").

anxious for the husband to prove that he was marrying her purely for love. At the time of the marriage the husband was a high-earning and successful banker. Some years later, however, he became disenchanted with banking and resigned from his job to pursue doctoral studies.

The agreement was drawn up by a German notary and stated that German law would govern the effects of the marriage, including property and succession rights. A regime of separation of assets was to apply and each party waived any rights or interest in the other's property during or after marriage (including any right to maintenance). The agreement did not provide for what should happen if the couple had children; in the event they had two. The couple primarily resided in the UK and separated after eight years of marriage. Following divorce, the husband sought ancillary relief under the Matrimonial Causes Act 1973, as amended, including periodical payments and the payment of a lump sum; the wife contested this on the basis of the agreement.

The UK is not bound by European measures to give effect to applicable foreign law governing maintenance obligations.<sup>55</sup> Accordingly financial provision was governed by English law, notwithstanding the parties' express agreement to the contrary. Since it was established law that the court's statutory powers could not be excluded by the parties, several issues arose. First, was the traditional prohibition on ante-nuptial agreements still good law? Second, if ante-nuptial agreements were no longer void *per se*, was there anything in the circumstances of this case that invalidated the agreement in this case? Third, if the agreement was valid, what weight should the court accord it when considering the issue of ancillary relief?

### **1. Were ante-nuptial agreements still void on public policy grounds?**

The majority of the Supreme Court in *Radmacher* "wholeheartedly endorse[d]" the *MacLeod* view that the old rule that agreements providing for future separation are against public policy "is obsolete and should be swept away", but held that this "should not be restricted to post-nuptial agreements".<sup>56</sup> The majority disagreed with *MacLeod* that ante-nuptial and post-nuptial settlements were different in nature: both might cater for the "uncertain and unhoped for future"<sup>57</sup> and there was no material distinction between a contract signed a day before the wedding and one signed the day after.<sup>58</sup> It also felt that the statutory power of variation emphasised in *MacLeod* applied to separation agreements only, but that no such power was

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<sup>55</sup> The United Kingdom is not obliged to apply foreign law under Council Regulation (EC) 4/09 [2009] O.J. L7/1 on jurisdiction, applicable law and enforcement of decisions and cooperation in matters relating to maintenance obligations.

<sup>56</sup> Para. 52.

<sup>57</sup> Para. 59.

<sup>58</sup> Para. 57.

required to hold that a nuptial agreement had contractual effect. Indeed, a nuptial agreement need not be a binding contract, as this did not affect the weight the court would accord it:<sup>59</sup> the court had “always adopted a more nuanced approach to ante- and post-nuptial agreements” than pure contract law.<sup>60</sup> The court therefore concluded that the Board’s concern with the contractual status of nuptial agreements in *MacLeod* was “a red herring”,<sup>61</sup> as the same principles should be applied either way when considering how much weight to give to them when making ancillary orders.

## **2. Was the force of this agreement undermined by the circumstances in which it was made?**

Judicial notice was taken at all stages of a 1998 Home Office consultation document, *Supporting Families*, which set out the protections that should apply in the event of legislation permitting ante-nuptial settlements.<sup>62</sup> These included provisions that an ante-nuptial agreement would not be legally binding where there were children of the family; where the court considered it would cause “significant injustice” to either spouse or any child of the marriage; or where there was inadequate disclosure of assets or a lack of independent legal advice. Although no legislative action was taken on foot of the consultation document, Baron J, at first instance, held that the safeguards it set out had been breached, thus reducing the weight that should be accorded to the agreement. She emphasized the husband’s lack of independent legal advice, the wife’s failure to make full disclosure of her assets and the lack of provision for the children. However, she still felt that the husband’s award should take account of the fact that he had signed the agreement. She awarded him over £5.5 million to provide him with a significant annual income for life and enable him to buy a home in London where the children could visit him. She also awarded him periodical payments of £35,000 per annum per child until they ceased full time education, and a sum to purchase a home in Germany (to be owned by the wife) where the children could stay with him.

The wife appealed successfully to the Court of Appeal, which held that Baron J was wrong to find that the circumstances surrounding the agreement reduced the weight to be attached to it. The Court of Appeal felt that it was unclear how far Baron J had reduced her award in light of her findings, but on the facts she should have given the agreement decisive weight and made provision for the husband only in his capacity as a father, rather than providing for his personal needs.

The Supreme Court considered that for any kind of nuptial agreement “to

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<sup>59</sup> Para. 62.

<sup>60</sup> Para. 62.

<sup>61</sup> Para. 63.

<sup>62</sup> Green Paper, *Supporting Families* (London: HMSO, 1998).

carry full weight”, both parties “must enter into it of their own free will, without undue influence or pressure, and informed of its implications”.<sup>63</sup> Although the safeguards in the Home Office consultation document were “likely to be highly relevant”,<sup>64</sup> the Court of Appeal was correct in focusing on whether there was “any *material* lack of disclosure, information or advice”,<sup>65</sup> that is, a lack of information that would have affected the party’s decision. Hence, a failure to disclose assets fully might not be important where full disclosure was not desired.

The parties must intend their agreement to be effective, which may not always have been the case in the past given the prevailing rules on ante-nuptial agreements, but would presumably apply following the new approach outlined in *Radmacher*. Factors such as duress, fraud and misrepresentation would completely negate any agreement, but even without these “unconscionable conduct such as undue pressure” would reduce the weight to be attached to agreement, as would other “unworthy conduct” such as abuse of a dominant position to obtain an “unfair advantage”.<sup>66</sup> It would also be appropriate to consider the parties’ age, maturity and previous relationships (as their previous marital history might clarify their expectations and their reasons for entering the agreement). The court could also consider a party’s emotional state and the degree of pressure he or she was under but must also look at what would have happened if those pressures had not applied. The court should therefore ask itself whether the marriage would have gone ahead without the agreement, or without certain terms; this might “cut either way”.<sup>67</sup>

### **3. How much weight should the court attach to an ante-nuptial agreement in making ancillary orders?**

Under s.25 of the Matrimonial Causes Act 1973, a court making ancillary orders on divorce must have regard to “all the circumstances of the case” and also to specified factors (which do not include nuptial agreements). The majority of the Supreme Court in *Radmacher* emphasised that the court does not have to give effect to any kind of nuptial agreement when considering ancillary relief, as the parties cannot oust the court’s jurisdiction to make the appropriate order. However, the court must give “appropriate weight” to any such agreement.<sup>68</sup>

The majority noted that, following *White v White*,<sup>69</sup> “fairness” required that there should be no bias against a home-maker spouse in favour of an earner,

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<sup>63</sup> Para. 68.

<sup>64</sup> Para. 69.

<sup>65</sup> Para. 69; emphasis in original.

<sup>66</sup> Para. 71.

<sup>67</sup> Para. 72.

<sup>68</sup> Para. 2.

<sup>69</sup> *White v White* [2001] 1 A.C. 596.

and that the court should generally depart from equal division only for good reason. However, the court also noted that Lord Nicholls in *White* had distinguished between “matrimonial property” and that which was inherited or brought to the marriage, and had commented that there could be a case for treating them differently in some circumstances (though not where it was essential to meet the needs of the other party). The majority also cited *Miller v Miller; McFarlane v McFarlane*<sup>70</sup> regarding the three strands that apply to provision (after the children’s welfare), namely fairness, compensation and sharing. Fairness could include meeting the needs of the parties, whether or not they were generated by the marriage. Compensation aimed at redressing future economic disparity arising from the marriage, e.g. where the marital role division affected one party’s earning capacity. Sharing is based on partnership, and in principle matrimonial property should be shared equally between both partners; however, there might be a reason why other property should be excluded from this. Following *Charman v Charman*,<sup>71</sup> a departure from equal division might more easily be justified where property was non-matrimonial (that is, not the fruit of the marital partnership).

In determining how much weight the court should accord an ante-nuptial agreement, the majority was particularly influenced by the comments of Ormrod LJ in *Edgar v Edgar*<sup>72</sup> regarding the weight to be given to a separation agreement. Ormrod LJ stated that the court must have regard to the parties’ conduct both before and after the agreement, not in a formal sense (such as the doctrine of estoppel) but in the sense that

“all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement.”<sup>73</sup>

The general position regarding separation agreements was that the parties should be held to their agreement unless there was a strong reason to the contrary, such as a material change in circumstances that would render it

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<sup>70</sup> *Miller v Miller; McFarlane v McFarlane* [2006] 2 A.C. 618.

<sup>71</sup> *Charman v Charman (No. 4)* [2007] 1 F.L.R. 1246.

<sup>72</sup> *Edgar v Edgar* [1980] 1 W.L.R. 1410.

<sup>73</sup> *Edgar v Edgar* [1980] 1 W.L.R. 1410 at 1417.

unjust to enforce the original bargain.<sup>74</sup> Ante-nuptial agreements, by contrast, were traditionally regarded as much less significant, though in *Crossley v Crossley*,<sup>75</sup> a case involving a short, childless second marriage, Thorpe LJ described the ante-nuptial agreement at issue as “a factor of magnetic importance” in the particular circumstances.<sup>76</sup> The Privy Council in *MacLeod* held that post-nuptial agreements should normally be given effect in the same way that separation agreements were, unless there was a failure to provide for a child of the marriage or a material change in circumstances that rendered the agreement manifestly unjust. Overall the Board concluded:

“We must assume that each party to a properly negotiated agreement is a grown up and able to look after him- or herself. At the same time we must be alive to the risk of unfair exploitation of superior strength. But the mere fact that the agreement is not what a court would have done cannot be enough to have it set aside”.

However, the majority of the Supreme Court in *Radmacher* held that the “manifest injustice” test in *MacLeod* was not necessarily as suitable for post-nuptial agreements as for separation agreements, as they were not always designed for immediate effect. Although the weight accorded to an unfair agreement would be reduced from the start, in practice the key question is whether the agreement is unfair in the circumstances applying at the time of the breakdown.<sup>77</sup> The majority stated that the agreement should be given effect if it was “freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement”.<sup>78</sup> This was because of the importance of “individual autonomy”.<sup>79</sup> the court considered that “[i]t would be paternalistic and patronizing to override their agreement simply... [on the grounds] that the court knows best”, especially where the agreement “addresses existing circumstances” rather than mere contingencies.<sup>80</sup>

Whether it would be unfair to enforce an agreement would depend on the facts, but in general the agreement could not prejudice the children of the marriage as their welfare is the “first consideration” under the 1973 Act. It might be quite reasonable and fair to distinguish between matrimonial and non-matrimonial property, particularly where this was done “up front”. However, the court noted that ante-nuptial agreements may often become unfair as “circumstances of the parties often change over time in ways or to

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<sup>74</sup> *Camm v Camm* (1982) 4 F.L.R. 577.

<sup>75</sup> *Crossley v. Crossley* [2008] 1 F.L.R. 1467.

<sup>76</sup> *Crossley v. Crossley* [2008] 1 F.L.R. 1467 at 1472.

<sup>77</sup> Para. 73.

<sup>78</sup> Para. 75.

<sup>79</sup> Para. 78.

<sup>80</sup> Para. 78.

an extent which either cannot be or simply was not envisaged”,<sup>81</sup> particularly in longer marriages. Need and compensation might be more likely than sharing principles to make it unfair to enforce the agreement: even if the parties had agreed not to share non-matrimonial property, it was unlikely that they would have expected one of them to be left in real need while the other had plenty. Similarly, if one party’s earning capacity was diminished due to domestic and caring duties, it could be unfair to allow the other to retain his or her entire earnings on the basis of an agreement. Where these considerations did not apply fairness might not require the court to depart from the agreement. Hence, “it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made”.<sup>82</sup> Lady Hale, though dissenting in other respects, nevertheless concurred with this view, noting that the “sharing principle reflects the egalitarian and non-discriminatory view of marriage”, but “respecting... individual autonomy represents a different kind of equality”.<sup>83</sup>

On the facts, the Supreme Court upheld the view of the Court of Appeal that the agreement in *Radmacher* was not tainted by its circumstances. The husband understood what he was signing and had the opportunity to get independent advice, but did not do so. There was no suggestion that the husband would not have signed the agreement if he had known the full extent of the wife’s assets. The lack of real negotiations between the parties should not be a vitiating factor. Hence, the agreement should have been given decisive weight and the husband should have been granted relief solely in his capacity as a father, rather than as an ex-spouse.

The Supreme Court noted that the issue of the agreement’s fairness was often subsumed in the question of whether it was unfair to enforce it in the circumstances prevailing on the breakdown of the marriage, and this applied to *Radmacher* itself. If the husband was in need and unable to support himself it might be unfair to hold him to the (full) agreement. However, the husband was in fact both able and qualified, and would benefit indirectly from the award given in respect of the children’s needs. Hence, the Court of Appeal was correct in its view that that holding the husband to the agreement was not unfair on grounds of need, subject to providing for the children. There was also no compensation factor in this case as the husband had abandoned his banking career by choice rather than to care for his family. The majority concluded that it was fair, in the circumstances, to hold the husband to his agreement not to share in the wealth that the wife had received from her family, independently of the marriage.

### **Lady Hale’s dissent**

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<sup>81</sup> Para. 80.

<sup>82</sup> Para. 82.

<sup>83</sup> Para. 178.

The majority in *Radmacher* were clearly alive to the risk of abuse in the making of ante-nuptial agreements and to the potential effects of a change in circumstances after an agreement is made. Likewise, Lord Mance noted in a separate judgment that the obsolete ground of not encouraging separation is not the only policy objection to ante-nuptial agreements. He commented, “Parties who make such agreements are not necessarily on an equal standing, above all emotionally. They may not have a full appreciation of such an agreement’s significance and likely impact”, or of how circumstances can change over time, “very often as a direct or indirect result of their marriage”.<sup>84</sup> However, it was left to Lady Hale, in her dissenting judgment, to analyse the relevant policy considerations in any real depth.

Commenting on some of the literature on ante-nuptial agreements, she noted that, in the United States, “initial enthusiasm has been tempered by experience in practice”,<sup>85</sup> and that the issues were highly complex. Acknowledging that the legal rules on marital agreements were “in a mess”,<sup>86</sup> she nevertheless considered that such a major departure from established law as upholding ante-nuptial agreements was a matter for parliament to deal with on the advice of the Law Commission, as this alone could effect “comprehensive and principled reform”.<sup>87</sup> She emphasised that the Law Commission would be able to “examine critically” the economic consequences of enforcing such agreements, “in particular whether they can be expected to increase certainty and decrease cost, or whether in fact the reverse may happen, and in any event whether the suggested benefits will outweigh the suggested costs”.<sup>88</sup> Identifying many of the concerns raised in relation to ante-nuptial agreements (such as unequal bargaining powers, paternalism, autonomy, certainty, cost, flexibility, justice and so on), she noted that permitting spouses to contract out of equality principles within marriage might ultimately be “a retrograde step likely only to benefit the strong at the expense of the weak”.<sup>89</sup> She concluded that:

“Above all, perhaps, the court hearing a particular case can all too easily lose sight of the fact that, unlike a separation agreement, the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually though by no means invariably she – would otherwise be entitled”.<sup>90</sup>

Hence, “there is a gender dimension to the issue which some may think ill-

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<sup>84</sup> Para. 126-7.

<sup>85</sup> Para. 134.

<sup>86</sup> Para. 133.

<sup>87</sup> Para. 135. The Law Commission is due to report on this issue in 2012.

<sup>88</sup> Para. 134.

<sup>89</sup> Para. 135.

<sup>90</sup> Para. 137.

suited to decision by a court consisting of eight men and one woman”.<sup>91</sup>

Ironically, Lady Hale had given the judgment of the Privy Council in *MacLeod*, a decision which arguably equally permitted potential gender and other exploitation in the context of post-nuptial agreements. However, as Lady Hale emphasized in *Radmacher*, the *MacLeod* decision had been strongly based on the statutory power it found existed to vary such an agreement without necessarily having resort to the divorce courts. The adoption of the “manifest injustice” test obviously significantly restricted the scope of this provision, but Lady Hale accepted the majority view in *Radmacher* that this test was too strict.

Although Lady Hale agreed with many aspects of the majority decision, she identified key points where she disagreed.<sup>92</sup> Of these, the most significant were the majority’s view that there was no policy distinction between ante-nuptial agreements and post-nuptial agreements, and the test formulated by the majority regarding the weight to be given to ante-nuptial agreements in making ancillary orders.

Lady Hale reiterated the view in *MacLeod* that “there may be important policy considerations justifying a different approach as between agreements made before and after a marriage”,<sup>93</sup> and emphasized that such a distinction was common in jurisdictions that enforce ante-nuptial agreements. She considered that without a power of variation there are “serious policy objections, albeit different from the original ones”, to recognizing ante-nuptial agreements as valid and enforceable contracts.<sup>94</sup> Spouses should not be obliged to divorce to resolve the injustice that this might lead to.<sup>95</sup> She therefore emphasized that the Supreme Court in *Radmacher* was not deciding (and had no need to decide) whether ante-nuptial agreements are contractually binding; this was a matter for the Law Commission to address.

Lady Hale also disputed the majority’s approach to the weight of nuptial or ante-nuptial agreements in the making of ancillary orders. The majority’s view was that an agreement freely entered into by the parties should be implemented unless this would be unjust; this “came close” to introducing a presumption that the agreement should be upheld,<sup>96</sup> notwithstanding the majority’s insistence that agreements could never be dispositive. Lady Hale insisted that “it would be ‘an impermissible judicial gloss’ to introduce a presumption or a starting point or anything which suggested that there was a burden of proof upon either party”.<sup>97</sup> It is for the court to exercise its full

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<sup>91</sup> Para. 137.

<sup>92</sup> These are summarised at para. 138.

<sup>93</sup> Para. 162.

<sup>94</sup> Para. 158.

<sup>95</sup> Some spouses might also be unable to go to court in light of Brussels II.

<sup>96</sup> Para. 167.

<sup>97</sup> Para. 166.

statutory discretion. This followed the view of Lord Nicholls in *White* that any presumption of equal division would constitute a similar “impermissible judicial gloss”.<sup>98</sup>

Lady Hale concurred with the majority view that fairness must be assessed “in the light of the actual and foreseeable circumstances at the time when the court comes to make its order”.<sup>99</sup> However, she preferred to formulate the test as follows:

“Did each party freely enter into an agreement, intending it to have legal effect and with a full appreciation of its implications? If so, in the circumstances as they now are, would it be fair to hold them to their agreement?”<sup>100</sup>

This would avoid the “impermissible judicial gloss” of the majority test while mitigating the “manifest injustice” test adopted in *MacLeod*.

The key difference was therefore one of emphasis. Lady Hale felt that the court should conduct a free enquiry into the fairness of applying an agreement rather than being fettered by a presumption that an agreement was enforceable. Lord Mance considered that the difference in approach would generally be insignificant in practice, but this is not necessarily the case. For instance, Lady Hale suggested later that the trial judge might have initially asked herself what a fair outcome would be without the agreement, and then asked what difference the agreement should make.<sup>101</sup> This is very different to asking whether there is a good reason why the agreement should not apply.

Lady Hale did not dissent from the principle that it might be appropriate and just to enforce a nuptial agreement, stating that “it can be entirely fair to hold the parties to their agreement even if the outcome is very different from what a court would order if they had not made it”.<sup>102</sup> Like the majority, she emphasized that the crucial question was whether it is fair to give effect to the agreement, noting that the longer since it was made, “the more likely it is that later events will have overtaken it”.<sup>103</sup> Lady Hale therefore suggested that the court would attach “much more weight” to a separation agreement than to a post-nuptial agreement made while parties are still together though catering for potential separation, and less again to an ante-nuptial agreement.<sup>104</sup> This was because marriage “is capable of influencing and

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<sup>98</sup> *White v White* [2001] 1 A.C. 596 at 605-606.

<sup>99</sup> Para. 169.

<sup>100</sup> Para. 169.

<sup>101</sup> Para. 186.

<sup>102</sup> Para. 175.

<sup>103</sup> Para. 175.

<sup>104</sup> Para. 171.

changing every aspect of a couple's lives".<sup>105</sup> Spouses "modify their plans and often compromise their individual best interests"<sup>106</sup> in the best interests of the family – this may not always be strictly voluntary, but may be necessary to adapt to events so that the marriage can survive, and "these are events which take place while it is still hoped that the marriage will survive".<sup>107</sup> Emphasising that there is "a public interest in the stability of marriage",<sup>108</sup> Lady Hale concluded that "there is also a public interest in encouraging the parties to make adjustments to their roles and life-styles for the sake of their relationship and the welfare of their families".<sup>109</sup> For all these reasons, and because events were so unforeseeable, it might be unfair (and wrong from a policy perspective) to enforce an ante-nuptial agreement or a post-nuptial agreement contemplating future separation. Overall, while spouses might be permitted to contract out of sharing, they could not contract out of compensation and support.<sup>110</sup> In this regard, "needs" must be broadly interpreted.

### **Analysis**

*Radmacher* is a highly significant decision in the UK as it abandons the long-held common law rule that ante-nuptial agreements are void on policy grounds. It also addresses the factors that may undermine or negate such an agreement, or that may require or justify a departure from the agreed terms. Nevertheless, the decision raises certain concerns, principally in the gender context. It is noteworthy that the very lengthy majority judgment fails completely to advert to the issue raised by Lady Hale (and commonly in the literature in this area) that enforcing ante-nuptial agreements is likely to impact primarily on women. It is therefore not a gender-neutral issue.

As suggested previously, this apparent gender blindness may be attributable to the reversal of the common gender roles in *Radmacher*: the court was simply not faced with the paradigm case. It would also be unfair to suggest that the majority entirely ignored equality issues. Explicit references were made to the need for fair sharing, without a gender bias, as outlined in *White*. The court also adverted to the possible impact of caring duties on earning capacity in the context of the need and compensatory principles. However, it did not explicitly make any link between upholding ante-nuptial agreements and the "feminisation of poverty" (the global phenomenon whereby the economic situation of women and children generally continues to decline following marital breakdown, whereas men generally tend to make an economic recovery).<sup>111</sup> It may be that the majority felt that any cause for

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<sup>105</sup> Para. 175.

<sup>106</sup> Para. 175.

<sup>107</sup> Para. 175.

<sup>108</sup> Para. 175.

<sup>109</sup> Para. 175.

<sup>110</sup> Para. 177.

<sup>111</sup> See, e.g., L. Weitzman, "The Economic Consequences of Divorce are Still Unequal:

concern was negated by its emphasis that need and compensation might render it unfair to enforce an agreement. It would, however, have been reassuring if the issue had been explicitly addressed. As it is, the majority appeared to focus exclusively on the “autonomy” side of the equality conundrum identified by Hadfield and West, among others, while ignoring the broader concerns.

The difficulties of this approach were compounded by the test adopted by the majority, which appears to implement a presumption that agreements should be enforced (subject to safeguards). Although great emphasis was placed on the need for fairness in the prevailing circumstances, the suggestion is that fairness will be assumed unless unfairness can be established. This is quite different from the inquisitorial approach of Lady Hale, and it is submitted that Lady Hale’s more open focus is preferable in this context as it appears to accord more with the legislation and may also help to mitigate any potential gender impact of upholding ante-nuptial agreements generally.

Is there, in fact, any reason to distinguish between ante-nuptial and post-nuptial agreements, as Lady Hale suggested? Perhaps one of the most interesting points made by Lady Hale was that spouses should not be discouraged from responding to change in the interests of their marriage, as this undermines marital stability, which is a public good. Clearly, an ante-nuptial agreement might have this effect (assuming that people are rational actors, a presumption that has proved somewhat dubious, as noted previously). However, a post-nuptial agreement might equally have this effect: hence the emphasis in all the *Radmacher* judgments that enforcing an agreement might be unfair in the light of changed circumstances. Lady Hale’s real argument appears to centre on the availability of a statutory power of variation, to ensure that spouses who do not wish to divorce are not compelled to do so in order to obtain relief from an agreement that has become unfair. This argument was disregarded by the majority in *Radmacher* but might prove more persuasive in the Irish context, where the family based on marriage has a constitutional status.

Could Ireland adopt a *Radmacher* approach and give effect to ante-nuptial agreements in making financial provision on marital breakdown, and should it do so? Several points must be addressed before these questions can be answered.

First, could and should the Irish courts abandon the traditional prohibition on ante-nuptial agreements? Given that this would entail a major change in the law, it is arguably a matter for the legislature, as Lady Hale emphasised in *Radmacher*. In fact the *Report of the Study Group on Pre-nuptial*

*Agreements*<sup>112</sup> in 2007 felt that limited legislative recognition of ante-nuptial agreements would be worthwhile and potentially beneficial, particularly in light of the considerable socio-economic changes in Ireland since the introduction of divorce had “substantially diminished” public policy objections to ante-nuptial agreements.<sup>113</sup> The Study Group therefore recommended adding a new section to both the 1995 and the 1996 Acts providing that the court should have regard to the terms of any ante-nuptial agreement entered into by the spouses, which was still in force, in making ancillary orders.<sup>114</sup> Appropriate procedural safeguards were also recommended.<sup>115</sup> However, no legislation has yet been enacted. Should the courts therefore fill the gap?

On the one hand, Ireland, like the UK, now permits divorce on a “no fault” basis, thus suggesting that the rationale for prohibiting ante-nuptial agreements no longer applies. On the other hand, unlike the UK, marriage in Ireland has a constitutional status, suggesting that the courts should be reluctant to recognise agreements that may encourage spouses to separate. This point echoes the concerns of Lady Hale regarding the status of marriage and the contribution of marital stability to the public good. However, it is suggested that since the constitution now also permits divorce, the constitutional status of marriage should not necessarily prevent the courts from abandoning the traditional rule. This was also the view of the Study Group,<sup>116</sup> which emphasised that any recognition of ante-nuptial agreements would be subject to the ultimate discretion of the court to determine “proper provision” (discussed below). A further policy concern relates to the potential gender impact of ante-nuptial agreements, as discussed above. This concern was also noted by the Study Group, which adverted to the risk that ante-nuptial agreements could fail to compensate dependent spouses adequately for their contributions to the marriage, thus potentially impoverishing women.<sup>117</sup> While this concern might be catered for by the

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<sup>112</sup> Department of Justice, Equality and Law Reform, *Report of the Study Group on Pre-nuptial Agreements* (Dublin: Government Publications, 2007) (hereafter “the Study Group”); available online at [http://www.justice.ie/en/JELR/Pages/Pre-nuptial\\_agreements\\_report](http://www.justice.ie/en/JELR/Pages/Pre-nuptial_agreements_report) (accessed on November 19, 2010).

<sup>113</sup> The Study Group, p.41. Such changes included “the rise in the average age of marriage, the greater wealth of many at the time of marriage, second marriages, and the increase in cohabitation” (p. 41).

<sup>114</sup> The Study Group, pp.69-71. The Study Group considered that pre-nuptial agreements should not simply be added to the list of statutory factors as this “would not represent a sufficiently transparent way of showing whether or what weight had been attached to the agreement” (p.75).

<sup>115</sup> The Study Group, p.85.

<sup>116</sup> The Study Group, p.20.

<sup>117</sup> The Study Group, p.62. The Study Group considered that dependent spouses could be protected by retaining [CHECK?] judicial discretion to vary the terms of the agreement or to give it only such weight as the court felt proper (p.63). They should also be protected by permitting the court to make provision out of the other spouse’s estate in the context of death, where a surviving spouse was unfairly affected by the terms of a pre-nuptial

overriding criterion of “proper provision”, and by the emphasis in *Radmacher* itself that the court should be less ready to permit a departure from the needs and compensation basis of provision, it is clear that the courts would need to proceed cautiously in this regard.

Second, there is a significant contextual difference between Ireland and England and Wales with regard to financial provision. Although the courts in each jurisdiction have similar powers to make discretionary awards in the light of statutory criteria, the overall objective is (apparently) not the same. Unlike England and Wales, Ireland has both a statutory and a constitutional objective in this context, that of making “proper provision”. In *T v T*,<sup>118</sup> the Irish Supreme Court was at pains to emphasise that “proper” provision did not mean “equal” provision, and that there was no “yardstick of equality” as propounded by the House of Lords in *White*. However, having rejected “equal” division, the court nevertheless emphasised fairness and equality: for instance, Fennelly J commented that “proper” provision is “synonymous with what is ‘fair’ or ‘just’”,<sup>119</sup> and Murray J felt that it “should seek to reflect the equal partnership of the spouses” as well as meeting their needs.<sup>120</sup> The relevance of equality considerations was subsequently confirmed by O’Neill J in *K v K (No. 2)*.<sup>121</sup> Needs and compensation are also both emphasised in the legislation.<sup>122</sup> Hence, the Irish approach may not be as far from the English one as might have been thought, with the strands of fairness and sharing, compensation and need all having a role to play in proper provision, and repeated judicial emphasis that proper provision may not mean equal provision. This is compatible with the emphasis in *Radmacher* that fairness and sharing are the most likely principles to be modified by a nuptial agreement. Nevertheless, it must be emphasised that “proper provision” (however quantified) is more than a mere standard for relief in Irish matrimonial law. As emphasised by Abbott J. in *JC v MC*,<sup>123</sup> the making of proper provision is a mandatory pre-condition of the granting of a divorce decree. Indeed, Abbott J. went so far as to say that referring to “ancillary relief” in the Irish context was “somewhat of a misnomer”, as provision here was the master of divorce, rather than the slave.<sup>124</sup>

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agreement (p.79)).

<sup>118</sup> *T v T* [2002] 3 I.R. 334.

<sup>119</sup> *T v T* [2002] 3 IR 334 at 413.

<sup>120</sup> *T v T* [2002] 3 IR 334 at 408.

<sup>121</sup> *MK v JK (otherwise SK) (No. 2)* [2003] 1 I.R. 326 at 349.

<sup>122</sup> Section 20(2)(b) of the 1996 Act also requires the courts to have regard to actual and potential ‘financial needs, obligations and responsibilities’ of each spouse, including needs arising in the case of remarriage (s.16(2)(b), 1995). Section 20(2)(f) of the 1996 Act requires the court to consider the effect of marital responsibilities on each spouse’s earning capacity as well as the degree to which a spouse’s future earning capacity was impaired by foregoing remunerative opportunities in order to care for the family (s. 16(2)(g), 1995).

<sup>123</sup> *JC v MC*, unreported, High Court, Abbott J., January 22, 2007; *Irish Times*, February 19, 2007).

<sup>124</sup> *JC v MC*, unreported, High Court, Abbott J., January 22, 2007; *Irish Times*, February 19, 2007), discussed in Inge Clissman, “Trends in divorce: a review of recent case law”.

Third, Ireland has no concept of “matrimonial property” to restrict the appropriate level of provision. It is clear from decisions such as *T v T* that assets acquired before or after the parties cohabited may be used to make proper provision. The appropriate date for the assessment of assets is the date of the trial and the courts are not restricted to the assets acquired during the marriage; indeed, such matters as potential legacies or income from trust funds may also be taken into account.<sup>125</sup> Nevertheless, the Supreme Court’s emphasis on fairness in *T v T* suggests that the source of assets may be taken into account in the making of ancillary orders – a point explicitly made by Denham J<sup>126</sup> and Fennelly J.<sup>127</sup> The case law suggests that where the primary concern is meeting the basic needs of the parties, the fact that assets were inherited would not be particularly significant. However, where resources are ample, the source of the assets may be of great importance, once needs have been met.<sup>128</sup> Contribution may also reduce the significance of the asset source to some extent.<sup>129</sup> Since all of this suggests that it might be quite “proper” in some circumstances for the court to exclude some assets from the “marital pot”, it follows that an agreement by the parties to make a similar exclusion might not *per se* be contrary to policy, provided that such an agreement could not exclude the overriding power of the court to determine what provision is “proper” overall. This again is compatible with *Radmacher*.

Fourth, Ireland has recognised the relevance of separation agreements in determining “proper” provision,<sup>130</sup> though (as in England and Wales) such agreements are not dispositive. In *SN v PO’D*,<sup>131</sup> the Supreme Court emphasised that the 1996 Act merely requires the court to “have regard” to the terms of a separation agreement, and that this was a “very broad discretion”.<sup>132</sup> As emphasised in *Radmacher*, the relevance of a separation agreement may vary, depending on when it was concluded, whether adequate disclosure was made and whether it was put into effect.<sup>133</sup> In *K v K (No. 2)*,<sup>134</sup> O’Neill J. considered that older separation agreements are likely

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Conference paper, Law Society of Ireland CPD Seminar: “Divorce – Ten Years On” (Dublin, February 27, 2007) (hereafter “Clissman”), p.64.

<sup>125</sup> See, e.g., *JD v DD* [1997] 3 I.R. 64.

<sup>126</sup> *T v T* [2002] 3 I.R. 334 at 383.

<sup>127</sup> *T v T* [2002] 3 I.R. 334 at 416.

<sup>128</sup> See, e.g., *W v W* (unreported *ex tempore*, High Court, McKechnie J., December 17, 2001), cited in Rosemary Horgan, “Financial ancillary relief applications in separation and divorce papers”. Conference paper, Law Society of Ireland CPD seminar: “Divorce – Ten Years On”, February 27, 2007) (hereafter “Horgan”), p.51.

<sup>129</sup> See, e.g., *N v N* (unreported, High Court, Abbott J., December 18, 2003, at 13); this decision may be contrasted with *C v C* [2005] I.E.H.C. 276.

<sup>130</sup> Section 20(3) of the 1996 Act.

<sup>131</sup> *SN v. PO’D* [2009] I.E.S.C. 61.

<sup>132</sup> *SN v. PO’D* [2009] I.E.S.C. 61, at para. 38 (*per* Fennelly J.).

<sup>133</sup> *SN v. PO’D* [2009] I.E.S.C. 61, at para. 38 (*per* Fennelly J.).

<sup>134</sup> *K v K (No. 2)* [2003] I.R. 326.

to carry less weight than more recent settlements unless there has been a manifest change in circumstances by the time of trial. This is because proper provision must exist or be made at the time of divorce, and this is less likely to be the case if the separation deed is very old. In *McM v McM*,<sup>135</sup> Abbott J. stated that the test was whether the circumstances of the provider (in this case, the husband) had “altered substantially and dramatically for the better since the making of the settlement a relatively long time ago”,<sup>136</sup> and that the older the separation agreement, the less likely it was to be relevant in assessing proper provision at the time of divorce. On the facts, Abbott J. held that the court could revisit the issue of provision, but that the agreement constituted “a very solid centre of gravity restraining the court from going too far beyond the parameters thereof”.<sup>137</sup>

Fifth, unlike the English legislation, Irish legislation makes no reference to the desirability or otherwise of a “clean break”, and neither divorce nor judicial separation necessarily provides financial closure. In *T v T* the Supreme Court held that certainty and finality are desirable goals which should be facilitated where the circumstances of the case permit. Despite the repeated emphasis in recent decisions that “full and final settlement” clauses should be accorded significant weight,<sup>138</sup> it appears that courts are generally willing to overlook them in appropriate circumstances and make additional provision.<sup>139</sup> Thus, where an ante-nuptial agreement effectively tries to provide for a “clean break”, the compatibility of the agreement with “proper provision” will very much depend on the facts of the case. This militates against the presumption that ante-nuptial agreements should be enforced suggested by the majority approach in *Radmacher*, though of course the caveat that the agreement must not lead to injustice may be a saving feature.

Sixth, although the 1996 Act makes no reference to ante-nuptial agreements as a matter for the court to consider, it does not follow that they *cannot* be considered. The terms of a judicial separation order are likewise not specifically mentioned as a statutory factor yet in *RG v CG*<sup>140</sup> Finlay Geoghegan J. had regard to a consent separation order, stating that this was not prohibited by the 1996 Act. Similarly, in *B v B*,<sup>141</sup> O’Higgins J. held that while the terms of a consent judicial separation order were not binding on the court, “it would be unrealistic not to take them into consideration and it is appropriate that ‘very considerable weight’ be attached to the agreement and the intention of the parties”.<sup>142</sup>

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<sup>135</sup> *McM v McM* (unreported, High Court, Abbott J., November 29, 2006).

<sup>136</sup> Cited in Clissman, p.35.

<sup>137</sup> Cited in Clissman, p.34.

<sup>138</sup> *WA v MA* [2004] 2 I.R. 1; *JC v MC*, unreported, High Court, Abbott J., January 22, 2007.

<sup>139</sup> See, e.g., *RG v CG* [2005] 2 I.R. 418.

<sup>140</sup> *RG v CG* [2005] 2 I.R. 418.

<sup>141</sup> *B v B* (unreported, High Court, O’Higgins J., December 8, 2005).

<sup>142</sup> *B v B* (unreported, High Court, O’Higgins J., December 8, 2005), cited in Mary Griffin, “Separation Agreements and Divorce”. Conference paper, Law Society of Ireland CPD

Seventh, Ireland does not have a statutory power of variation in respect of nuptial agreements other than in the context of marital breakdown proceedings or post-divorce.<sup>143</sup> Although the importance of this was dismissed by the majority in *Radmacher*, its significance was stressed by Lady Hale in the interests of upholding marriage. It is suggested that this view might be more persuasive in Ireland, given the constitutional status of marriage.

Eighth, unlike the UK, Ireland is party to the Hague Protocol on the Law Applicable to Maintenance Obligations,<sup>144</sup> Art. 8 of which permits parties to designate, in writing, the law of a particular jurisdiction as governing maintenance obligations between them. Consequently, Ireland is obliged to implement an ante-nuptial settlement regarding maintenance issues, where such an agreement is valid under the applicable law.<sup>145</sup> However, the larger issue of whether the Irish court would enforce an ante-nuptial agreement under Irish law is unaffected by this.

Ninth, if the Irish courts were to recognise ante-nuptial agreements, what safeguards would apply? In *Radmacher* judicial notice was taken of safeguards that had been recommended but not enacted; a similar approach might be taken in Ireland. However, *Radmacher* also demonstrated that legislative (and recommended) safeguards were not required, as the court in fact applied principles that were already well-established in the case law to prevent abuse.

Taken as a whole, the above suggests that it would be open to the Irish courts to follow the *Radmacher* approach and accord ante-nuptial agreements at least some weight in making financial provision orders. This assumes, of course, that the courts are persuaded that the public policy basis for prohibiting such agreements is now obsolete and that it is within the judicial competence to abolish such a long-standing rule, particularly given the many concerns emphasised by Lady Hale and in the literature generally. While the first of these issues is likely to receive an affirmative response

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Seminar: Divorce – Ten Years On (February 27, 2007), p.22.

<sup>143</sup> Section 9(1) of the 1995 Act provides that the court may vary an ante- or post-nuptial settlement when making a judicial separation order, while s.14(1) provides a similar power of variation on granting divorce or at any time thereafter. Note, however, that an ante-nuptial “settlement” is not the same as an ante-nuptial “agreement”, though the case law clearly indicates that an “agreement” may amount to a “settlement” once it confers a financial benefit on either spouse in his or her marital capacity: see *FJWT v CNRT & by Order Trust Corps Services Ltd* [2005] 2 I.R. 247 at 33.

<sup>144</sup>

<sup>145</sup> Article 15, Council Regulation (EC) 4/09 [2009] O.J. L7/1 on jurisdiction, applicable law and enforcement of decisions and cooperation in matters relating to maintenance obligations. Article 4 of the Regulation also permits the parties to choose the national court in which the case is to be heard, but this does not apply to maintenance in respect of a child aged under 18 years.

(given that Ireland now provides for divorce on a “no fault” basis), the second may prove more of a hurdle.

Assuming, however, that the court felt such a course was open to it, what approach might it adopt? It is submitted that the majority test in *Radmacher* is unsuited to the Irish context, and that the minority approach of Lady Hale is to be preferred. It is clear from the case law that the court’s discretion in determining “proper provision” may not be excluded, and that the constitutional requirements in this regard are imperative. It would therefore be inappropriate to have anything approaching a presumption that ante-nuptial agreements should be dispositive unless injustice would ensue, particularly since the legislation is utterly silent on this point. A more open-ended inquiry as to whether “proper provision” requires the court to implement the terms of the agreement, taking all the circumstances into account, would therefore be more apposite. This accords with the views of the Study Group, which emphasised that judicial scrutiny of the agreement would always be necessary to ensure that the provision made was (still) “proper”, especially since circumstances would almost inevitably have changed since the agreement was signed.<sup>146</sup> Hence, an ante-nuptial agreement “would rarely, if ever, determine all ancillary relief matters”.<sup>147</sup>

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<sup>146</sup> The Study Group, p.19.

<sup>147</sup> The Study Group, p.19.