MacLeod v. MacLeod (Isle of Man) [2008] UKPC 64 (17 December 2008)

*Privy Council Appeal No 89 of 2007*
**Roderick Alexander MacLeod** *Appellant*
*v.*
**Marcia Renee Kalb MacLeod** *Respondent*
FROM
**THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN**
**(STAFF OF GOVERNMENT DIVISION)**

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JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL
Delivered the 17th December 2008

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*Present at the hearing:-*

Lord Scott of Foscote
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Sir Henry Brooke
Sir Jonathan Parker

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*[Delivered by **Baroness Hale of Richmond**]*

1. This case is about the validity and effect of a post-nuptial agreement made between a husband and wife while they were still living together. It dealt with their financial arrangements both while they stayed together and in the event of a divorce. It so happens that that agreement was an affirmation with important variations of an ante-nuptial agreement which the parties had made on their wedding day. But the case is not about the validity and effect of ante-nuptial agreements as such.

*The facts*

2. The husband and wife were both born and brought up in the United States. They married in Florida on 14 February 1994. It was a second marriage for both of them. There is a 22 year age difference between them. When they married the husband was aged 49 and the wife 27. There is also a considerable wealth difference between them. When they married the husband had amassed substantial wealth as a result of business and property development. The wife had been studying for a degree in business administration funded by the husband.

3. In June the following year they moved to the Isle of Man and have lived there ever since. The husband effectively retired from business when they moved but his investments have increased in value since then. They made their matrimonial home at Ravensdale Castle, Ballaugh Glen, bought in the name of a company solely owned by the husband. In 2001, the couple also bought in their joint names a house called Dove's Hill, close to Ravensdale Castle. This was said in the agreement to be "the house [the wife] said she would want in the event of divorce or [the husband's] death in her old age".

4. The couple have five sons, now ranging in age from 13 down to seven, having been born on 19 September 1995, 8 October 1996, 23 July 1998, 20 September 1999, and 1 September 2001. The youngest will therefore reach the age of 23 in 2024 when the wife will be 58 years old and the husband nearly 80. The significance of this will become apparent later.

5. The couple made three agreements in the course of their relationship, each of them intended to create legal relations between them. The first was made before their marriage but on their wedding day. Each was separately advised by lawyers and each disclosed their resources. Deputy Deemster Williamson found that there had been adequate legal advice and disclosure and that the wife was acting voluntarily and under no pressure. He "simply [did] not accept that this lady was a tyro" (para 29).

6. The husband's net worth at marriage, according to the schedule of his assets and liabilities annexed to this ante-nuptial agreement, was $10,349,000. The Deputy Deemster took this to be the

equivalent of £7,000,000 at the time. The Board does not have any schedule of the wife's assets then. The agreement provided for each spouse to retain the separate property which they brought into the marriage and for the ownership of after-acquired property to depend upon legal title. In the event of divorce each party waived their right to claim any sort of maintenance. Properties owned jointly were to be divided equally between them. In addition the husband would pay the wife a lump sum calculated as $25,000 for each full year that the couple had been married. He could pay that as they went along. The same would apply in the event of the husband pre-deceasing the wife, when she would also receive $300,000 if they had been married for less than five years or $1,000,000 if they had been married for longer. The couple agreed that, regardless of where they might later live, the agreement should be construed in accordance with the laws of the State of Florida.

7. There was unchallenged evidence that the Florida Supreme Court had declared ante- and post-nuptial agreements valid and generally binding in the case of *Posner v Posner*, 233 So 2d 381 (Fla 1970) and that the courts had repeatedly recognised that the mere fact that an agreement might be a bad bargain was not enough to have it set aside. The first agreement did not deal with support for any children the couple might later have as this is dealt with separately under Florida law and the parents are not allowed to contract out of that.

8. The second agreement was made in 1997. It made a temporary variation in the terms of the 1994 agreement. This lapsed at the end of 1998. We know nothing more about it.

9. The third agreement is the one with which the Board is concerned. It was made by deed on 25 July 2002. This confirmed the 1994 agreement but made substantial variations to it. The Deputy Deemster, at para 33, was "satisfied that the wife made the agreement because she wanted to". She was an able and intelligent woman. She had later given a police officer "the impression [that] she was used to getting her own way". Each party was separately represented during the negotiations which began some 14 months before the agreement was executed. The Deputy Deemster, at para 38, was "satisfied too that the wife agreed to the 2002 variation freely, voluntarily and with a full understanding thereof and having had proper legal advice, which she chose not to follow".

10. The schedule to the agreement listed the husband's assets at a total of £13,810,000 and the wife's at £184,000 (mostly consisting of her half share in Dove's Hill). The parties confirmed that they still intended to be bound by the 1994 agreement, as varied, and that in any proceedings they would request the court to adhere to its provisions. The variation made certain provisions for the wife "in order to help secure [her] financial future, whilst continuing with the marriage". These included a lump sum of £250,000 for her to invest; a monthly allowance of £2083.33 (£25,000 a year) adjusted annually for inflation; a monthly allowance of $3000 similarly adjusted for the wife's grandmother living in the United States; all the expenses of the wife obtaining another degree, up to £100,000; conveying to her the husband's half share in Dove's Hill (on certain terms as to what she would do with it); and paying for the planned improvements to that house. The agreement also expressly provided that the wife would not be called upon to pay any household expenses out of these sums during the term of the marriage.

11. The agreement also provided that, in the event of divorce or the husband's death, the wife should receive £1,000,000 sterling, adjusted for inflation since February 2002. As far as the children were concerned, payment for their expenses was to be the responsibility of the parent with whom they lived from time to time. But the husband agreed to pay for their educational expenses. If the wife was to be the primary residential parent, Dove's Hill was planned to be their home and the parties would ask the court for any payments from the father for the support of the children to be made as periodical payments rather than as an increase in the mother's lump sum. Apart from this the parties "are not attempting to make provision for child support for any child adopted or born of the marriage".

12. Each party acknowledged that the agreement was "the full and fair settlement of the rights of both parties" to the marriage. In the event of separation or divorce or the husband's death, the wife agreed to ask for no more than the agreement allowed her and the husband agreed that he would "stipulate to the Court this Variation as the full and fair financial settlement between the parties".

13. The husband complied with his immediate obligations under the agreement: he transferred his interest in Dove's Hill; he paid the lump sum uprated to £266,000; and he paid the monthly allowances. However, the marriage was, as the Deputy Deemster put it, at para 38, already "on the

rocks". The wife had had one very close extra-marital relationship in 1997 and began another in November 2001 which became adulterous in April 2002. Nevertheless the marriage continued for another 13 months after the agreement was executed. But by August 2003 it had broken down and the husband issued divorce proceedings in September 2003. Both parties applied for residence orders in relation to the boys, but they all remained living under the same roof until April 2005. Then the wife moved out of Ravensdale Castle into a rented property in Glen Vine. The couple eventually agreed that the children should divide their time equally between them. That was reflected in a consent order made in July 2005.

*The proceedings*

14. These proceedings for ancillary relief were begun in February 2005, a provisional decree of divorce having been made on 26 October 2004. They were tried before Deputy Deemster Williamson over four days in June 2006 with judgment in October. The wife claimed full financial provision, which she put at 30% of the husband's wealth at marriage and 50% of its increase in value during the marriage. She asserted that the agreements should be disregarded altogether. The husband claimed that the third agreement should be upheld. He accepted that there should also be periodical payments for the children while they were living with their mother. He proposed £300 per month for each child while the wife proposed £600. He also accepted that, despite what was said in the agreement, Dove's Hill was not a suitable home for them. This was because of a comment made by the court welfare officer in the course of the residence proceedings. Hence the husband proposed that a further £750,000 be used to buy another house which would be held on trust until the youngest child had finished full time education when it would revert to him.

15. The Deputy Deemster went through all the factors relevant to the exercise of his discretion under section 32 of the Manx Matrimonial Proceedings Act 2003 (the equivalent of section 25 of the Matrimonial Causes Act 1973 in England and Wales). But his order was much closer to the husband's than to the wife's case. He saw in the 2002 agreement "a scenario as close to an *Edgar v Edgar* agreement as to a prenuptial agreement" (para 38). He only departed from the husband's case in relation to the home to be bought for the wife and boys. He considered that £1,250,000 would be required to buy a suitable house: it need not be the equivalent of Ravensdale Castle but the wife was "entitled not to have the boys thinking that when they come to her they are coming to a property that is merely adequate or second best" (para 42). He also, at para 43, rejected the husband's proposed trust:

    "It is totally unnecessary and undesirable. The wife's house must be hers. The boys must consider that when they are with their mother they are in her house; not merely that they and she are licensees. Nor must the boys have the risk of the responsibility for their mother's continued accommodation. The youngest child, or any of them, may not wish to go in to tertiary education. They must be free to follow their own stars. It should not be a consideration for them that by not going to college or university they are obliging their mother to uproot in her mid to late fifties".

    Hence he added a further £1,250,000 to the uprated £1,000,000 provided for the wife in the agreement, making a total lump sum of £2,525,000. But he did not require her to spend that extra on a house. He regarded it as her housing entitlement. He merely warned her that if she chose not to use it wisely she would not be able to return and ask for more. He also ordered periodical payments of £300 per month for each of the boys, uprated annually, until they reached 18 or finished tertiary education.

16. Both parties appealed. The wife repeated her claims for full provision amounting to £5,000,000 for herself and £600 per month for each child. The husband accepted that the housing fund should be £1,250,000. He also accepted, in order to meet the Deputy Deemster's concern, that the trust for the wife and children should continue until the youngest child had reached the age of 23. But he continued to insist upon the trust. The wife should be held to the terms of the bargain which she had freely entered into in the 2002 agreement.

17. The Staff of Government Division rejected the wife's cross-appeal for herself. They considered that £300 per month for each child was too low and so remitted that matter to the trial judge. But they also rejected the husband's appeal. The agreement was not a comprehensive separation agreement, because it did not make detailed provision for the support of the children. It was not

appropriate to separate the roles of wife and mother. Provision for the children and wife by trust was undesirable. The terms would have to be agreed or determined by the court. The wife's independence in relation to her home would be restricted over a long period. She would be 58 and the husband 80 when it came to an end. This was a case for a clean break.

18. The husband now appeals to the Board. The wife does not. The sole issue between them is whether the housing needs of the wife and children should be catered for by the lump sum, as ordered by the judge, or by a trust fund, as proposed by the husband. Were it not for the existence of the 2002 agreement, the husband would have no cause to complain about the Deputy Deemster's exercise of his discretion under section 32 of the 2003 Act. The argument has therefore turned on the validity and effect of that agreement.

*The validity and effect of separation and maintenance agreements*

19. At common law, husband and wife had a duty to live together. This could originally be enforced by the husband by self help and by either party by a decree of restitution of conjugal rights. The Ecclesiastical Courts looked upon agreements to live separate and apart as contrary to public policy and void but the common law courts would enforce them. Equity took longer to decide upon its approach. According to Lord Atkin in *Hyman v Hyman* [1925] AC 601, at p 625, Lord Eldon "doubted but enforced them: cf *St John v St John* (1803) 11 Ves 525, 529 and *Bateman v Countess of Ross* (1813) 1 Dow 235". This was confirmed in *Jones v Waite* (1842) 9 Clark & F 101; 4 Man & G 1104 and in *Wilson v Wilson* (1848) 1 H of L Cas 538 . There Lord Cottenham concluded that the authorities in the House of Lords were against the husband, who wished to resile from the articles of separation agreed between himself, his wife and his wife's trustees, and a decree of specific performance was upheld. *Wilson* was regarded as binding on this point in *Hunt v Hunt* (1862) 4 de GF & J 221 As Lord Atkin commented in *Hyman v Hyman* [1929] AC 601, at p625-626:

"Full effect has therefore to be given in all Courts to these contracts as to all other contracts. It seems not out of place to make this obvious reflection, for a perusal of some of the cases in the matrimonial Courts seems to suggest that at times they are still looked at askance, and enforced grudgingly. But there is no caste in contracts. Agreements for separation are formed, construed and dissolved and to be enforced on precisely the same principles as any respectable commercial agreements, of whose nature indeed they sometimes partake. As in other contracts stipulations will not be enforced which are illegal either as being opposed to positive law or public policy. But this is a common attribute of all contracts, though we may recognize that the subject-matter of separation agreements may bring them more than others into relation with questions of public policy."

In *Westmeath v Westmeath* (1830) 1 Dow & Cl 519, however, a distinction was drawn between an agreement providing for the consequences of an existing separation and an agreement providing for the consequences of a future separation. The latter were null and void. That same principle was applied to agreements made before marriage which provided for the financial consequences of a future separation, in *Cocksedge v Cocksedge* (1844) 14 Sim 244 , *Cartwright v Cartwright* (1853) 3 de GM & G 982, and *H v W*(1857) 3 K & J 382. It was applied to a pre-nuptial agreement to live apart re-signed immediately after marriage in *Brodie v Brodie* [1917] P 271.

20. A different aspect of public policy in relation to separation agreements arose in *Hyman v Hyman* [1929] AC 601. The husband and wife had married in 1914. A deed of separation was executed in 1919 when the husband was living with another woman. He covenanted to pay two lump sums to the wife immediately and £20 per week for the rest of her life. She agreed not to institute any proceedings to compel him to pay more than that. The husband paid the sums due under the agreement. In 1923, wives were given the same right as husbands had had since the institution of judicial divorce in 1857 to obtain a divorce on the sole ground of their husbands' adultery. The wife duly obtained such a divorce and filed an application for permanent maintenance under the powers available to the court on granting a divorce. The husband objected that she had contracted not to do so. But his objection failed. Lord Hailsham LC held, at p 614, that:

". . . the power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction."

Lord Atkin made the same point, at p 629:

"In my opinion the statutory powers of the Court . . . were granted partly in the public interest to provide a substitute for this husband's duty of maintenance and to prevent the wife from being thrown upon the public for support. If this be true, the powers of the Court in this respect cannot be restricted by the private agreement of the parties. 'Quilibet potest renunciare juri pro se introducto.'"

21. That same principle was later held to apply to other statutory powers to award maintenance in the High Court and in the magistrates' courts: see *Morton v Morton* [1942] 1 All ER 273; *Tulip v Tulip* [1951] P 378; *Dowell v Dowell* [1952] 2 All ER 141. The wife's undertaking not to apply for maintenance was also held to be no answer to a claim by the National Assistance Board against her husband as "liable relative": *National Assistance Board v Parkes* [1955] 2 QB 506. This placed the wife in a difficulty if her promise not to go to court was the main consideration given for the husband's promise to pay and could not be severed: see *Bennett v Bennett* [1952] 1 KB 249.

22. Separation and maintenance agreements were considered by the *Royal Commission on Marriage and Divorce 1951 – 1955, Report*, 1956, Cmd 9678, at pp 192 – 195. The decision in *Bennett* was one criticism of the existing law; but another was that the husband might be strictly bound by the terms of a maintenance agreement whereas the wife could always go to court and ask for more. The Commission recommended that the wife should be bound by her covenant not to apply to the court for maintenance for herself unless there was a change in the circumstances and that the husband should also be able to go to court to ask for a variation if their circumstances changed. An undertaking not to apply to court for maintenance for the children would remain contrary to public policy.

23. In the event, the provision made by Parliament in the Maintenance Agreements Act 1957 was slightly different. The Law Commission recommended further changes in its Report on Financial Provision in Matrimonial Proceedings, 1969, Law Com No 25, paras 94 to 96. These were implemented in the Matrimonial Proceedings and Property Act 1970 and consolidated as sections 34 to 36 of the Matrimonial Causes Act 1973. The equivalent provision is contained in sections 49 to 51 of the Manx Matrimonial Proceedings Act 2003, the most important parts of which for present purposes are as follows:

"**49 Validity of maintenance agreements**

(1) If a maintenance agreement includes a provision purporting to restrict any right to apply to a court for an order containing financial arrangements, then–

(a) that provision shall be void; but

(b) any other financial arrangements contained in the agreement shall not thereby be rendered void or unenforceable and shall, unless they are void or unenforceable for any other reason (and subject to sections 50 and 51), be binding on the parties to the agreement.

(2) In this section and in sections 50 and 51–

**'maintenance agreement'** means any agreement in writing made at any time between the parties to a marriage, being–

(a) an agreement containing financial arrangements, whether made during the continuance or after the dissolution or annulment of the marriage; or

(b) a separation agreement which contains no financial arrangements in a case where no other agreement in writing between the same parties contains such arrangements;

**'financial arrangements'** means provisions governing the rights and liabilities towards one another, when living separately, of the parties to a marriage (including a marriage which has been dissolved or annulled) in respect of the making or securing of payments or the disposition or use of any

property, including such rights and liabilities with respect to the maintenance or education of any child, whether or not a child of the family.

50 **Alteration of agreements by court during lives of parties**

(1) Where a maintenance agreement is for the time being subsisting and each of the parties to the agreement is for the time being either domiciled or resident in the Island, then, subject to subsection (4), either party may apply to the Court or to a court of summary jurisdiction for an order under this section.

(2) The Court may make an order under this section if it is satisfied either–

(a) that by reason of a change in the circumstances in the light of which any financial arrangements contained in the agreement were made or, as the case may be, financial arrangements were omitted from it (including a change foreseen by the parties when making the agreement), the agreement should be altered so as to make different or, as the case may be so as to contain, financial arrangements; or

(b) that the agreement does not contain proper financial arrangements with respect to any child of the family.

(3) The order which that court (subject to subsection (4), (5) and (6)) may make under this section is an order making such alterations in the agreement–

(i) by varying or revoking any financial arrangements contained in it; or

(ii) by inserting in it financial arrangements for the benefit of one of the parties to the agreement or of a child of the family,

as appear to the court to be just having regard to all the circumstances, including, if relevant, the matters mentioned in section 32(4); and the agreement shall have effect afterwards as if any alteration made by the order had been made by agreement between the parties and for valuable consideration.

. . .

(9) For the avoidance of doubt, it is hereby declared that nothing in this section or in section 49 affects–

(a) any power of a court before which any proceedings between the parties to a maintenance agreement are brought under any other enactment (including a provision of this Part) to make an order containing financial arrangements, or

(b) any right of either party to apply for such an order in such proceedings."

24. It will be seen that this retains the rule in *Hyman v Hyman*, reverses the effect of *Bennett v Bennett*, in that the agreement is still valid and enforceable even if the only or main consideration is the invalid promise not to go to court, and provides a power of variation. Section 51 of the 2003 Act (section 36 of the 1973 Act) provides a similar power of variation after the death of one of the parties.

*The effect of separation and maintenance agreements in divorce and other matrimonial proceedings*

25. In *Hyman v Hyman*, their Lordships took pains to stress that it might well turn out that the maintenance agreed in the separation deed was reasonable. Lord Hailsham, at p 609, regarded the existence of the deed and its terms as "most relevant factors for consideration by the Court in reaching a decision". The leading English case on the weight to be given to such agreements in subsequent divorce proceedings is *Edgar v Edgar* [1980] 1 WLR 1410. The facts are remarkably similar to the facts of this case, save that the separation deed was made when the marriage had

already broken down and the wife was saying that she wanted a divorce. It provided for the wife to have a substantial house into which to move with the four children and periodical payments for herself and each of the children. She agreed not to ask for any capital or lump sum order on divorce. Ormrod LJ considered that the agreement should be taken into account as part of the conduct of the parties. As to its weight, he said this, at p 1417:

"To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties leading up to the prior agreement, and to their subsequent conduct in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; *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. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue."

He also referred, at p 1418, to the following two propositions of the trial judge:

"(4) Providing that there is equality stated-above, the mere fact that the wife would have done better by going to the court, would not generally be a ground for giving her more as, in addition to its duty under section 25, the court had a duty also to uphold agreements which do not offend public policy.

(5) If the court, on the evidence, takes the view that having regard to the disparity of bargaining power, it would be unjust not to exercise its powers under section 23 (having regard to the considerations under section 25), it should exercise such powers even if no fraud, misrepresentation or duress is established which, at common law, would entitle a wife to avoid the deed."

He commented as follows, at p 1418:

"I agree with these propositions, subject to two reservations. First, as to proposition (4), I am not sure that it is helpful to speak of the court having 'a duty' to uphold agreements, although I understand the sense in which the word was used. Secondly, the reference to 'disparity of bargaining power' in proposition (5) is incomplete. It is derived from a phrase taken from *Brockwell v Brockwell* [(unreported) November 5, 1975, Court of Appeal (Civil Division) Transcript No 468 of 1975] and for which I must accept ultimate responsibility. I used it as a shorthand way of describing a situation with which all experienced practitioners are familiar, where one spouse takes an unfair advantage of the other in the throes of marital breakdown, a time when emotional pressures are high, and judgment apt to be clouded. It is unfortunate, because Eastham J has based his decision solely on this notion of disparity of bargaining power as such, and not on the use, if any, made of it by the husband. The wife, herself, in her affidavit in support of her application, gave as her reasons for disregarding the advice of her counsel and solicitors and entering into the covenant not to claim a lump sum, the fact that she felt overpowered by her husband's enormous wealth and position, coupled with her fears of losing the children. There can be no doubt that in this case, as in so many, there is a disparity of bargaining power. The crucial question, however, for present purposes is not whether the husband had a superior bargaining power, but whether he exploited it in a way which was unfair to the wife, so as to induce her to act to her disadvantage."

Oliver LJ agreeing, made the following comment, at pp 1420-1421:

"If, however the judge meant that the court must engage in an exercise of dissecting the contract and weighing the relative advantages and bargaining position on each side in order to ascertain whether there is some precise or approximate equilibrium, then I respectfully disagree. Men and women of full age, education and understanding, acting with competent advice available to them, must be assumed to know and appreciate what they are doing and their actual respective bargaining strengths will in fact depend in every case upon a subjective evaluation of their motives for doing it.

One may, of course, find that some unfair advantage has been taken of a judgment impaired by emotion, or that one party is motivated by fear induced by some conduct of the other or by some misapprehension of a factual or legal position, but in the absence of some such consideration as that- and these are examples only- the mere strength of one party's desire for a particular result or the mere fact that one party has greater wealth than the other cannot, I think, affect the weight to be attributed to a freely negotiated bargain."

He later summed up his position in rather stronger terms than those used by Ormrod LJ, at p 1424:

"the court must, I think, start from the position that a solemn and freely negotiated bargain by which a party defines her own requirements ought to be adhered to unless some clear and compelling reason, such as, for instance, a drastic change of circumstances, is shown to the contrary."

26. In *Edgar*, of course, there had been a valid and enforceable separation deed. The same principles are, however, also applied to agreements to compromise a claim for ancillary relief, although it has been held that such agreements do not give rise to a contract enforceable in law and are not specifically enforceable: see *Xydhias v Xydhias* [1999] 2 All ER 386, 394. Unlike other court orders made by consent, a consent order in ancillary relief proceedings derives its authority from the court order and not from the preceding agreement: see *de Lasala v de Lasala* [1980] AC 546. A recent example of converting a freely negotiated agreement to compromise divorce proceedings into an order of the court is *X v X (Y and Z intervening)* [2002] 1 FLR 508. The *Edgar* principles have also been said to apply to a post-nuptial agreement made when the marriage was in great difficulties in *NA v MA* [2006] EWHC 2900 (Fam), [2007] 1 FLR 1760 (although in that case the agreement was set aside by the judge for undue influence).

27. Rather more variable have been the views expressed as to the relevance of ante-nuptial agreements, which are, in the current state of the law, not valid and enforceable as ordinary contracts. In *F v F (ancillary relief: substantial assets)* [1995] 2 FLR 45, Thorpe J expressed the view that very limited weight should be attached to ante-nuptial contracts made in Germany between a couple who were both German. Nevertheless, there are several cases in which they have been held relevant to the choice of forum in divorce proceedings: see, for example, *N v N (foreign divorce: financial relief)* [1997] 1 FLR 900, *S v S (divorce: staying proceedings)* [1997] 2 FLR 100, *C v C (divorce: stay of English proceedings)* [2001] 1 FLR 624, *Ella v Ella* [2007] EWCA Civ 99, [2007] 2 FLR 35. And there are other cases in which they have been held relevant to an ancillary relief claim but in rather less positive terms than *Edgar*. In *M v M (Pre-nuptial agreement)* [2002] 1 FLR 654, for example, Connell J said this, at para 44:

"The pre-nuptial agreement in my view is relevant as tending to guide the court to a more modest award than might have been made without it. I reject outright the suggestion that it should dictate the wife's entitlement; but I bear it in mind nevertheless."

A similar but even more cautious approach was adopted in *K v K (ancillary relief: pre-nuptial agreement)* [2003] 1 FLR 120, which unusually concerned a pre-nuptial agreement made in this country. Recently, in *NG v KR* [2008] EWHC 1532 (Fam), at paras 118 and 119, Baron J commented:

"This review shows that, over the years, Judges have become increasingly minded to look at the precise terms of agreements and will seek to implement their terms provided the circumstances reveal that the agreement is fair. . . Upon divorce, when a party is seeking quantification of a claim for financial relief, it is the Court that determines the result after applying the Act. The Court grants the award and formulates the order with the parties' agreement being but one factor in the process and perhaps, in the right case, it being the most compelling factor."

28. An example of the "right case" is *Crossley v Crossley* [2007] EWCA Civ 1491, where the Court of Appeal upheld an order for the wife to show cause why the terms of an ante-nuptial agreement should not be implemented without further ado (an order of the type made in *Dean v Dean* [1978] Fam 161). But Thorpe LJ observed, at para 15, that

"All these cases are fact-dependent and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of

the peripheral factors in the case but as a factor of magnetic importance, it seem to me that this is just such a case."

*Discussion*

29. Mr Martin Pointer QC, on behalf of the husband, has understandably drawn our attention to the *obiter dicta* of Hoffmann LJ in *Pounds v Pounds* [1994] 1 WLR 1535, 1550-1551:

"The result of the decision of this court in *Edgar v Edgar* [1980] 1 WLR 1410 and the cases which have followed it is that we have, as it seems to me, the worst of both worlds. The agreement may be held to be binding, but whether it will be can be determined only after litigation and may involve, as in this case, examining the quality of the advice which was given to the party who wishes to resile. It is then understandably a matter for surprise and resentment on the part of the other party that one should be able to repudiate an agreement on account of the inadequacy of one's own legal advisers, over whom the other party had no control and of whose advice he had no knowledge."

Either of the alternatives, that such agreements were always binding or that they were never so, might in his view be better.

30. Mr Pointer argues that all agreements, whether ante- or post-nuptial, should be valid and binding. He accepts that the rule of public policy laid down in *Hyman v Hyman* and confirmed in section 49(1)(a) of the 2003 Act (section 34(1)(a) of the 1973 Act) means that such agreements cannot oust the jurisdiction of the court to make orders containing financial arrangements. But he argues that such agreements should be "presumptively dispositive" of claims to such an order.

31. The Board takes the view that it is not open to them to reverse the long standing rule that ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense. The Board has been referred to the position in other parts of the common law world. It is clear that they all adopted the rule established in the 19th century cases. It is also clear that most of them have changed that rule, and provided for ante-nuptial agreements to be valid in certain circumstances. But with the exception of certain of the United States of America, including Florida, this has been done by legislation rather than judicial decision. There is an enormous difference in principle and in practice between an agreement providing for a present state of affairs which has developed between a married couple and an agreement made before the parties have committed themselves to the rights and responsibilities of the married state purporting to govern what may happen in an uncertain and unhoped for future. Hence where legislation does provide for such agreements to be valid, it gives careful thought to the necessary safeguards.

32. An illustration of some of the difficult policy questions involved in such legislation can be found in the response of all the Judges of the Family Division to the proposals in the Government's 1998 Green Paper, *Supporting Families: a consultation document*, published in [1999] Fam Law 159, at 162. They expressed their "unanimous lack of enthusiasm for the pre-nuptial agreement"; they pointed out that there would have to be full financial disclosure and separate legal advice for each side; they presumed that state-funded legal advice would in principle be available; that "it is the emotional moment when legal advice is easily brushed aside"; and that in their view the advent of a child, necessarily not a party to the agreement, "should deprive the nuptial agreement of much if not all of its effect".

33. It is said that calls for the legislative recognition of ante-nuptial agreements appear to have increased with the development of more egalitarian principles of financial and property adjustment on divorce, following the decisions of the House of Lords in *White v White* [2001] 1 AC 596 and *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618. If such calls are motivated by a perception that equality within marriage is wrong in principle, the more logical solution would be to examine the principles applicable to ascertaining the fair result of a claim for ancillary relief, rather than the pre-marital attempt to predict what the fair result will be long before the event. If such calls are motivated by a fear that people who feel threatened by what might happen in the event of divorce will not get married at all, there is a need for serious research and consideration of the extent of and reasons for the reduction in marriage rates over recent decades. It certainly cannot be demonstrated that the lack of enforceable ante-nuptial agreements in this country is depressing the marriage rate here as compared with other countries where such agreements can be made.

34. The Board notes that the Law Commission for England and Wales, in their 10th programme of Law Reform, have declined to embark upon a review of the principles governing ancillary relief on divorce. But they have announced their intention to examine the status and enforceability of agreements made between spouses and civil partners (or those contemplating marriage or civil partnership) concerning their property and finances: see 2008, Law Com No 311, para 2.17.

35. In the Board's view the difficult issue of the validity and effect of ante-nuptial agreements is more appropriate to legislative rather than judicial development. It is worth noting, for example, that in the Florida case of *Posner v Posner*, where such agreements were recognised, attention was drawn to the statutory powers of the courts to vary such agreements. The Board is inclined to share the view expressed by Baron J in *NG v KR* [2008] EWHC 1532 (Fam), at para 130, that the variation power in section 50 of the 2003 Act (section 35 of the 1973 Act) does not apply to agreements made between people who are not yet parties to a marriage. Yet it would clearly be unfair to render such agreements enforceable if, unlike post-nuptial agreements, they could not be varied.

36. Post-nuptial agreements, however, are very different from pre-nuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry. There is nothing to stop a couple entering into contractual financial arrangements governing their life together, as this couple did as part of their 2002 agreement. There is a presumption that the parties do not intend to create legal relations: see *Balfour v Balfour* [1919] 2 KB 571. There may also be occasional problems in identifying consideration for the financial promises made (now is not the time to enter into debate about whether domestic services constitute good consideration for such promises). But both of these are readily soluble by executing a deed, as was done here.

37. There is also nothing to stop a married couple from entering into a separation agreement, which will then be governed by sections 49 to 51 of the 2003 Act (sections 34 to 36 of the 1973 Act). As already noted, section 49 applies to "any agreement in writing made at any time between the parties to a marriage". There is nothing to limit this to people who are already separated or on the point of separating. It is limited to agreements containing "financial arrangements" or to separation agreements which contain no financial arrangements. And "financial arrangements" are limited to those governing their rights and liabilities towards one another when living separately. But section 49(1)(b) provides that such financial arrangements shall be binding "unless they are void or unenforceable for any other reason".

38. Leaving aside the usual contractual reasons, such as misrepresentation or undue influence, the only other such reason might be the old rule that agreements providing for a future separation are contrary to public policy. But the reasons given for that rule were founded on the enforceable duty of husband and wife to live together. This meant that there should be no inducement to either of them to live apart: see, for example, *H v W* (1857) 3 K & J 382, 386. There is no longer an enforceable duty upon husband and wife to live together. The husband's right to use self-help to keep his wife at home has gone. He can now be guilty of the offences of kidnapping and false imprisonment if he tries to do so: see *R v Reid* [1973] QB 299. The decree of restitution of conjugal rights, disobedience to which did for a while involve penal sanctions, has not since the abolition of those sanctions been used to force the couple to live together: see *Nanda v Nanda* [1968] P 351. It was abolished by the Matrimonial Proceedings and Property Act 1970, at the same time as the Law Reform (Miscellaneous Provisions) Act 1970 abolished all the common law actions against third parties who interfered between husband and wife.

39. Hence the reasoning which led to the rule has now disappeared. It is now time for the rule itself to disappear. It has long been of uncertain scope, as some provisions which contemplate future marital separation have been upheld: see, for example, *Duchess of Marlborough v Duke of Marlborough* [1901] 1 Ch 165. This means that sections 49 to 51 of the 2003 Act (sections 34 to 36 of the 1973 Act) can apply to such agreements in just the same way as they do to any other. In particular, they can be varied in either of the circumstances provided for in section 50(2). The first is that there has been a change in the circumstances in the light of which any financial arrangements were made or omitted; following the amendment proposed by the Law Commission in 1969, this now includes a change which the parties had actually foreseen when making the agreement. The second is that the agreement does not contain proper financial arrangements with respect to any child of the family.

40. In the Board's view, therefore, the 2002 agreement was a valid and enforceable agreement, not only with respect to the arrangements made for the time when the parties were together, but also with respect to the arrangements made for them to live separately. However, the latter arrangements were subject to the court's powers of variation and the provisions which purported to oust the jurisdiction of the court, whether on divorce or during the marriage, were void. The existence of such powers does not deprive such agreements of their utility. Countless wives and mothers benefited from such agreements at a time when it was difficult for them to take their husbands to court to ask for maintenance. Enforcing an existing agreement still has many attractions over going to court for discretionary relief.

41. The question remains of the weight to be given to such an agreement if an application is made to the court for ancillary relief. In *Edgar v Edgar*, the solution might have been more obvious if mention had been made of the statutory provisions relating to the validity and variation of maintenance agreements. One would expect these to be the starting point. Parliament had laid down the circumstances in which a valid and binding agreement relating to arrangements for the couple's property and finances, not only while the marriage still existed but also after it had been dissolved or annulled, could be varied by the court. At the same time, Parliament had preserved the parties' rights to go to court for an order containing financial arrangements. It would be odd if Parliament had intended the approach to such agreements in an ancillary relief claim to be different from, and less generous than, the approach to a variation application. The same principles should be the starting point in both. In other words, the court is looking for a change in the circumstances in the light of which the financial arrangements were made, the sort of change which would make those arrangements manifestly unjust, or for a failure to make proper provision for any child of the family. On top of that, of course, even if there is no change in the circumstances, it is contrary to public policy to cast onto the public purse an obligation which ought properly to be shouldered within the family.

42. The Board would also agree that the circumstances in which the agreement was made may be relevant in an ancillary relief claim. They would, with respect, endorse the oft-cited passage from the judgment of Ormrod LJ in *Edgar v Edgar*, at p 1417, in preference to the passages from the judgment of Oliver LJ, both quoted above at paragraph 25. In particular the Board endorses the observation that "it is not necessary in this connection to think in formal legal terms, such as mispresentation or estoppel". Family relationships are not like straightforward commercial relationships. They are often characterised by inequality of bargaining power, but the inequalities may be different in relation to different issues. The husband may be in the stronger position financially but the wife may be in the stronger position in relation to the children and to the home in which they live. One may care more about getting or preserving as much money as possible, while the other may care more about the living arrangements for the children. One may want to get out of the relationship as quickly as possible, while the other may be in no hurry to separate or divorce. All of these may shift over time. 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.

*Is there a case for variation of the 2002 agreement?*

43. The Deputy Deemster clearly found that there was nothing about the circumstances in which the agreement was made to cast doubt upon its validity or the weight which it should be given by the court. The wife may have been under pressure, but not from her husband: "any pressure which the wife felt was occasioned in the main at least by her own circumstances, by the life which she, over 20 years her husband's junior, was choosing to follow" (para 38). The agreement was negotiated over a long period with every eventuality in mind. It was concluded just over a year before the couple finally separated. They foresaw that separation while hoping against hope that it would not happen. If anything, the change which took place was one which might be thought to favour the husband, in that the agreement contemplated that the wife might become the primary carer for the children, whereas the eventual order was for equally shared care. There was a change in the circumstances at the time of the agreement in that the couple did separate. But that was fully contemplated and provided for at the time, which was not long beforehand. There was not such a change in their circumstances as should lead a court to vary the financial arrangements made for the wife.

44. The agreement did not contain, or even purport to contain, proper financial arrangements for the children. Clearly the court had to intervene to provide for them. The general view taken in English law is that children are entitled to a suitable home, to an upbringing, and to an education which is appropriate to their family's circumstances and standard of living. But they are not entitled to long term provision into adulthood unless they have some special need: see *Lilford (Lord) v Glynn* [1979] 1 WLR 78. It is agreed that Dove's Hill is not a suitable home for the children while they are living with their mother. They need something better. The only question is whether the Deputy Deemster was right to provide for such a home by way of a lump sum for the mother, without any obligation upon her to spend it for that purpose, or whether he should have acceded to the father's proposal for a trust.

45. Any appeal court should be very slow to interfere with the exercise of discretion by a trial judge who has seen the parties in person and heard all the evidence: see *Piglowska v Piglowski* [1999] 1 WLR 1360, at p 1372. The Deputy Deemster had clearly got the measure of this family. But the Board has reached the conclusion that he went wrong in principle. The only principled basis for interfering with this particular agreement was in order to make proper provision for the children. However lacking in generosity the provision made for the wife, and of course it was much less than she could have expected had there been no agreement, there was no basis for interfering with it. Rightly or wrongly, the law has taken the view that provision for children is to give them the best possible start in life, rather than to endow them for ever. It has also taken the view that, while the needs of the caring parent can be taken into account as part of the children's needs, the object of providing for the children is not to provide for her. While the ante-nuptial agreement did not make adequate provision for her as a mother, the 2002 agreement did so. The effect of the Deputy Deemster's order was to make further provision for her rather than to make proper provision for the children.

46. Accordingly the Board will humbly advise Her Majesty that this appeal should be allowed and the matter remitted to the High Court for an appropriate trust deed to be drafted if it cannot be agreed. It would, of course, be appropriate for the mother to be a beneficiary of the trust while it subsists. It is fervently to be hoped that the parties can agree both this and the monthly support for the children without further costly contested litigation between them. The parties are invited to make submissions on costs within 14 days.