

**A study of the views and approaches of family
practitioners concerning marital property
agreements**

(Research report for the Law Commission)

by

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2011

Originally published by the Law Commission at
<http://www.lawcom.gov.uk/docs/hitchings-report.pdf>

Copies of this report available at:
www.bristol.ac.uk/research/researchpublications/

ACKNOWLEDGEMENTS

The research was funded by the Law Commission and conducted between 2008 and 2009.

A study like this depends on the goodwill of many individuals who are willing to give their time in order to assist with the focus groups and interviews. Due to reasons of confidentiality these individuals cannot be named but I am most grateful to the many practitioners who agreed to participate in this project.

At Bristol University I would like to thank Matthijs Punt from the School of Law for providing valuable administrative support during the course of the study.

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Law Commission Report

A study of the views and approaches of family practitioners concerning marital property agreements

A) Introduction

The debate surrounding marital property agreements has come to the fore in recent years in this jurisdiction.¹ Since the landmark ‘big money’ decisions of *White v White*² and *Miller v Miller; McFarlane v McFarlane*³ there has been an array of commentary focussing on the problems with and the issues left open by the case law in ancillary relief.⁴ This has had the effect of opening the door to various and varying lines of argument as the means by which lawyers might seek to obtain a larger proportion of the ‘pot’ for their client. One of the main criticisms of the law in this regard is that it has resulted in a lack of clarity and certainty for practitioners and their clients.⁵ After

¹ For two interesting and useful articles about the chronological development of marital property agreements, see C Barton, ‘Domestic Partnership Contracts: Sliced Bread or A Slice of Bread?’ [2008] Fam Law 900 and R Todd, ‘The Inevitable Triumph of the Ante-Nuptial Contract’ [2006] Fam Law 539.

² [2000] 2 FLR 981 (hereafter referred to as *White*)

³ [2006] 1 FLR 1186 (hereafter referred to as *Miller;McFarlane*)

⁴ Rebecca Bailey-Harris has argued that the law lacks ‘predictability in practice or policy coherence’ R Bailey-Harris, ‘The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales’ (2005) 19 *International Journal of Law, Policy and the Family* 229 whilst Jo Miles has highlighted the difficulties of juggling sharing, compensation and need in the wake of *Miller; McFarlane*, ‘*Charman v Charman (No 4)* – Making sense of need, compensation and equal sharing after *Miller; McFarlane*’ (2008) 20 *Child and Family Law Quarterly* 378. See also, for example, P Moor and V LeGrice, ‘Periodical Payments Orders following *Miller* and *McFarlane*: a Series of Unfortunate Events’ [2006] Fam Law 655 and E Hess, ‘Assessing the Quantum of Periodical Payments after *McFarlane*’ [2006] Fam Law 780

⁵ For proponents of this view, see J Eekelaar, *Miller v Miller: the Descent into Chaos*’ [2005] Fam Law 870 and Nicholas Francis, ‘If It’s Broken – Fix It’ [2006] Fam Law 104. However, based on the findings from a recent small study, I have suggested that in the ‘everyday’ case – where needs dominate, the advice solicitors give to their clients is pretty consistent, subject to local court culture and the practicalities of the individual case. See E Hitchings, ‘Everyday Cases in the Post-*White* Era’ [2008] Fam Law 873 and E Hitchings, ‘Chaos or Consistency?’

White it was suggested that one of the mechanisms that practitioners and their clients would embrace in order to attempt to regain some element of certainty was to draft an agreement, normally prior to the marriage, in an attempt to regulate the differing asset pools and incomes prior to and after the marriage.⁶ However, despite a great deal of interest among legal professionals and a recent flurry of reported decisions,⁷ there has been an almost complete dearth of empirical research evidence on marital property agreements in practice.⁸ The Law Commission therefore commissioned this study as a prelude to its 10th Programme of Law Reform, which includes a commitment to undertake a project on marital property agreements.

The purpose of this study is to provide much needed research from a qualitative perspective into how legal professionals draft such agreements, advise clients and deal with existing agreements, as well as to provide a perspective on their views and opinions of law reform in this area. This research report seeks to present the law as at 31st March 2009.

Methods

The first stage of the project was to undertake two focus groups with practitioners from two areas of the country.⁹ The aims of the focus groups were threefold: to explore the practitioners' experiences of pre-nuptial and marital agreements; to capture the viewpoints of practitioners from two areas of the country and to develop

Ancillary Relief in the 'Everyday' Case' in Jo Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets* (Oxford: Hart 2009) 185-206.

⁶ S Bruce, 'Premarital Agreements following *White v White*' [2001] Fam Law 304.

⁷ *Macleod v Macleod* [2008] UKPC 64; *NG v KR (Pre-nuptial contract)* [2009] 1 FCR 35; *Crossley v Crossley* [2008] 1 FLR 1467; *NA v MA* [2007] 1 FLR 1760

⁸ Work in other jurisdictions aside; see C Barton (note 1 above) at 906 for reference to two quantitative surveys, although one relates to incidence of cohabitation contracts rather the marital property agreements.

⁹ A regional city in the south and the London area were chosen. London was chosen due to the perception that this is the location where most marital property agreement work takes place. The other city allows for a comparison from a regional perspective.

the vignettes which formed part of the interviews. It was felt that the dynamics of group discussion would generate an initial insight into this emerging area, from which significant issues raised as a result of practitioner experience could be added to the interview schedule.¹⁰ Invitations were issued to practitioners from a range of firms, in line with the methodology outlined below. The aim was to achieve a sample of approximately 16 practitioners from the focus groups. Two focus groups took place in November 2008 with 10 participants taking part.¹¹ However the response rate was a little disappointing and the final participation figures for the focus groups were not as large as originally anticipated.¹² Nevertheless, a good mixture of practitioners were present at the focus groups ranging from partners in leading firms to a legal executive in a smaller practice.

The main phase of the project was face-to-face interviewing. Interviews combined questions aimed at establishing experience with vignettes to explore how solicitors think clients should be advised. Vignettes make it possible to identify the range of views a group of respondents hold by standardising the factual matrix which they have to consider. The scenarios were developed to reflect two pre-nuptial agreement cases and the Law Commission was given time to comment on these.¹³

¹⁰ An important issue that was raised in both focus groups and was subsequently entered as a question within the interview schedule was the insurance/risk element of undertaking marital property agreements. (See p.65 below for full discussion)

¹¹ Four practitioners agreed to take part at the regional focus group with six participants at the London focus group. Within this report, these practitioners are referred to as Practitioners FGA-FGJ.

¹² For the regional focus group, 15 written invitations were sent out in order to achieve a target number of between six to eight participants. Six practitioners originally confirmed that they would be able to take part, but on the day itself, two practitioners had to cancel (both due to meetings) – leading to a response rate of invitations to participation ratio of 27%. The London focus group response rate was a little better with six practitioners taking part out of 13 invitations/letters sent – a response rate of 46%.

¹³ The scenarios used in the interview stage of the research can be found within the interview schedule at Appendix 1.

Respondents were asked in the opening phase of the interview to describe on an anonymous basis, their most recent case which concerned a marital property agreement. They were then asked to comment on whether this was atypical in any way. If the practitioner had not had any experience of advising in a situation where there was such an agreement, they were asked to consider why that might be the case.¹⁴ Finally, more general questions were asked as to the sort of circumstances in which practitioners currently find themselves being called upon to advise clients, the advice given to clients, the nature and structure of agreements that they currently draft, the cost of such agreements, how they deal with separations/divorces which involve earlier agreements and how existing agreements are approached and to what extent they are followed. A semi-structured schedule was used to interview practitioners in order to ensure that the key research questions were addressed, whilst leaving scope for unforeseen themes and issues to emerge.¹⁵

Solicitors practising in two areas of the country¹⁶ were purposively selected with the objective of achieving a diverse a sample as possible of 16 practitioners from London and 10 from the northern city. This allowed for a heavier London weighting as desired by the Law Commission. The aim was to achieve a sample of 26 interviewees *plus* approximately 16 practitioners from the focus groups. Ultimately, due to the lower numbers of focus group participants, a slightly increased number of practitioners were interviewed; 11 northern practitioners and 18 from London. The solicitors were purposively selected from the Resolution Directory, the Law Society website, the Queerpod website (in order to obtain a sample of practitioners who had

¹⁴ Only one practitioner in the sample of 39 had not had any experience of advising in a marital agreement case that had come to fruition (INJ).

¹⁵ The interview schedule can be found at Appendix 1.

¹⁶ A northern city and London; London was chosen for the same reasons as detailed in note 9. The northern city allows for a northern representation in the sample and gives an additional perspective to the southern regional city focus group.

experience of advising same-sex couples), direct contact with Resolution and the individual firms' websites. The firms ranged from regional 'premier' law firms, firms with several branches in a range of central, urban and rural locations, specialist family law firms, through to some high street practitioners. The interviewees were purposively selected to ensure both diversity of background and that the majority had familiarity with the subject matter of the research.¹⁷ Within this range, individual solicitors of varying experience and degree of specialisation were selected using information obtained from Resolution, the Law Society website and the individual firm's website. A letter was sent to each solicitor explaining the study and seeking their participation.¹⁸ The letter was followed with an email and/or scheduled telephone call, during which I answered any questions raised, confirmed consent to participate, and arranged a date and time for the interview. All interviews were

¹⁷ This proved to be quite difficult to achieve. Although many firms' websites advertised their employee's willingness or experience of dealing with pre-nuptial agreements (no websites used the term 'marital property agreements'), there were a number of occasions after contacting a practitioner that they would say that they didn't think they could be of any help due to the fact that they had not done any pre-nuptial agreements. This is not surprising and is consistent with as yet, unpublished findings from my 2007-8 'everyday' research, in which a random sample of practitioners were asked whether they had any experience of dealing with pre-nuptial agreements. In that research, 24 practitioners from 3 areas of the country were interviewed, ostensibly to discover the impact of the 'big-money' decisions on their 'everyday' case. As part of the interview schedule, practitioners were asked whether they had any experience of advising clients with respect to pre-nuptial agreements and their associated views and opinions. Out of the sample of 24 practitioners; 4 had frequent experience of advising clients; 13 had limited experience, whilst 7 practitioners had no experience. These categories are based partially on the practitioners own interpretations of the amount of agreements that they advise upon (i.e. self-classification as 'high' or 'low') as well as actual numbers given. For example, in the 'frequent' category, the experience varied from one practitioner having drafted 10 pre-nuptial agreements in the last 6 months (Practitioner O), to Practitioner N suggesting that they had drafted 5-10 in total. In the 'limited experience' category, this would normally encompass those practitioners having drafted less than a handful of agreements in total (with the standard comment being 'the odd one or two' – Practitioner F).

¹⁸ A copy of the letter and accompanying information which was sent to practitioners inviting them to take part in the research can be found at Appendix 2.

digitally-recorded and during the focus groups a full note was taken of the discussion.¹⁹

Clearly the study is limited both numerically and geographically; the sample is small and there is no rural or Welsh representation in the sample. Although the study cannot be claimed to be representative, its purpose is to shed light on an area that has been under researched and provide a perspective that helps us to evaluate what is happening in this increasingly debated area.

Terminology used within the report

When conducting the focus groups and interviews, in order to encourage practitioners to explore the full array of experiences that they had encountered, questions would always be asked in a general sense i.e. the researcher would always refer to ‘marital property agreements’ unless the question was specifically about a particular type of agreement. Furthermore, at the beginning of each interview/focus group, it would be explained that the term ‘marital property agreement’ encompasses both pre-nuptial and pre-registration agreements, as well as post-nuptial and post-registration agreements.

However, some practitioners expressed concern about the terminology itself and felt that the term ‘marital property agreement’ was not helpful and indeed could be confusing:

¹⁹ The response rate for the interviews was much better than that of the focus groups. Out of 27 letters/invitations sent to the London practitioners, 18 agreed to be interviewed (67% positive response rate), compared with 16 letters/invitations to the northern sample, with 11 agreeing to be interviewed (69% positive response rate). This improved response rate could be due to the fact that the advantage of interviews over focus groups is that the interviewer is able to schedule a date and time around the practitioners’ diaries whereas with a focus group, the date/time and meeting place is already (by necessity) pre-determined, which is more likely to be inconvenient for the practitioner.

“(Y)ou’ve got to stop calling them marital property agreements because people won’t understand what you mean.”

ILN

Consequently, for the purposes of this report, the accompanying discussion and analysis will refer to the type of agreement that the practitioner is specifically referring to. Occasionally, marital property agreements will be referred to in the generic sense, but this will be to convey an open question to the practitioner. Furthermore, due to the practitioners’ lack of general experience in dealing with post-nuptial and post-registration agreements,²⁰ the vast majority of this report relates to practitioners experiences and views of pre-nuptial (and occasionally pre-registration) agreements.

²⁰ See p.14 below for an analysis of the data relating to the practitioners’ lack of experience in dealing with post-nuptial and post-registration agreements.

B) Experience of practitioners

1. Practitioners' experience of agreements

As previously discussed, there is a dearth of empirical research and data on the subject matter of marital property agreements. Consequently, although this study was not concerned with any quantitative research or analysis, it was felt that a limited breakdown of data collected from this sample of practitioners concerning the number of agreements that they are dealing with, would at least give some preliminary indication of the number of agreements that are being drafted/advised upon. However, an early 'health warning' has to be given at this point; this data is neither authoritative nor representative of the number of agreements that are being advised upon on a national or even regional basis. It is merely a snapshot picture of a sample of practitioners and their experiences of dealing with marital property agreements. However, what is interesting, is that given that the sample of practitioners in this study were purposely selected for their expected experience of dealing with marital property agreements, it is noticeable that the numbers of marital property agreement cases that they are being called upon to advise are relatively small.

Furthermore, in a study like this it is impossible to gauge whether there has been an increase in the number of marital property agreements since *White* for a number of reasons: 1) this is a qualitative, not quantitative study; 2) there are no historical comparisons taking place; 3) the study was designed to investigate the views and experiences of practitioners in relation to marital property agreements in a general sense, rather than to address a specific question about whether the number of marital property agreements has increased. However, what does emerge from the data,

is that although a considerable proportion of the practitioners taking part in the research did not feel able to comment on whether they had experienced an increase in the number of agreements, by far the largest proportion of those who did respond to this question, took the view that they had experienced an increase since *White*.

i) Number of pre-nuptial agreements

Table 1: Numbers - individual practitioners

1-5 total	6-10 total	11-20 total	1-5 a year	6-10 a year	11+ a year	Didn't specify – large number	Didn't specify – small number	Others ILA (didn't specify) INJ (none)
FGE	FGB	FGF	FGH	FGI	ILD	FGD	FGA	
ILI	ILJ	FGG	ILB	ILP	ILH	FGJ	FGC	
ILL	ILR	ILM *	ILE	INE	ILN			
ILM	INB		ILF	INI				
ILO	IND		ING					
INF			INK					
INH								

* ILM has been involved with 12-13 in total, but only 1 in England. ILM practised law in a different jurisdiction (where pre-nuptial agreements are legally binding) before moving to the UK.

When discussing the number of pre-nuptial agreements that they have been involved with, some practitioners made reference to the firm generally, rather than, or in addition to themselves as an individual.

Table 2: Numbers - firms

1-5 total	6-10 total	11-20 total	1-5 a year	6-10 a year	11+ a year	Didn't specify – large	Didn't specify – small	Others
				ILK	ILC			
				ILQ	ILG			
				INA	ILH			
				INC	ILM			

Crucially, the numbers do not appear particularly large. As can be seen from Table 1, the most populated columns are those where the frequency of pre-nuptial agreement involvement is lower; 1-5 in total and 1-5 a year. However, the nuances within the figures are not appreciated until the practitioners' comments are examined. In particular, whether the practitioners have been aware of any increase in the number of pre-nuptial agreements over the past few years and secondly, whether the practitioners have noticed any discernible difference between the number of opposite-sex couples drafting pre-nuptial agreements and the number of same-sex couples drafting pre-registration agreements.

Any increase in number?

18 out of the 39 practitioners who took part in research made reference to the fact that they believed that there had been some form of increase in the number of enquiries or agreements drafted over the past few years. This is 46% of the sample. Of the remainder, four practitioners had not seen an increase (10%) and the remaining 17 practitioners (44%) made no comment on whether or not they had seen an increase in the number of agreements. The largest proportion therefore (although noticeably, *not* a majority of the sample) had witnessed an increase, with the majority of these (15 out of 18) suggesting there had been a noticeable as opposed to a limited increase in number.

“I did about 8 last year. I probably did about 5 the year before and I have to say that before that it was just one or two per year. I’ve already got 2 this year.”

ILP (Interview with ILP took place in February 2009)

“it’s certainly something that we’re doing in increasingly huge ...well, not huge numbers, but certainly a hell of a lot more than we used to do.”

ILD

“I’ve not had a huge number of them but I’ve noticed that I’ve got more instructions for them perhaps over the last 18 months to 2 years. I think word is getting around about them.”

FGC

“We’ve noticed certainly more interest from the public at large in relation to pre-nuptial agreements and more enquiries, although not necessarily, not so far has that turned into many more instructions but certainly there’s a lot more knowledge out there and a lot more initial enquiry about it.”

FGE

Reasons for the general perception that there has been an increase, not only in enquires, but in actual agreements themselves vary amongst practitioners. Some practitioners suggest that public awareness has increased, with people taking account of press reporting of “lots of these reported big money cases where it’s an equal division of a vast amount of wealth which one party hasn’t necessarily contributed to at all in one way or another.” (ILB) Other suggestions include an increase in cross-jurisdictional work; public awareness; press reporting of celebrity divorces; high profile divorces through to the impact of the case law itself.

However, as previously mentioned, four practitioners had not seen any increase in the number of agreements that they had been involved with, with some practitioners putting this down to the elements such as they are not legally binding and costs implications.²¹

“I haven’t seen an increase I must admit. I think it’s still quite steady. I think a lot of the time, as soon as you explain to clients that they’re not legally binding, people just think, ‘well, what’s the point of them?’ I could spend X amount in legal costs. Is it actually going to mean anything? ... I know some people say there’s a huge increase in the level of pre-nuptial agreements because of the way

²¹ See p.50 for a full discussion of the issues relating to costs and p.18 onwards for the variety of reasons associated with clients (not) following-through from initial enquiry through to final agreement.

that the law has worked but as I've said, unless it is a second marriage, or you've got foreign nationals or you've got some kind of international or jurisdictional issue, or inherited wealth, I don't think most people even think about it, to be honest with you."

ILF

One of the issues considered interesting to explore was whether practitioners' felt there had been any difference (in terms of number) between pre-nuptial and pre-registration agreements. One of the oft cited arguments is that due to the fact that individuals in same-sex relationships do not tend to rely on the preconceived roles associated with gender to construct the nature of their relationship and the more inter-dependent way in which they organise their lives compared with opposite-sex couples,²² it is more likely that same-sex couples will enter pre-registration agreements than opposite-sex couples. However, the findings from this sample are rather inconclusive on this point. The responses vary according to individual practitioners. For example, in one of the focus groups, three practitioners outlined their three differing experiences relating to pre-registration agreements:

"FGJ: ...I haven't to my knowledge done any pre-registration agreements. I would imagine that our level of enquiries for pre-nups probably is about a couple a month, if that.

FGH: ...the number of enquiries I've had in relation to civil partnership agreements in the last two years has been equivalent to the number of enquiries I've ever had in relation to pre-nuptial agreements over the past seven years. ...

FGE: I think personally I haven't noticed a huge difference but I can see why that would be the case."

²² Research which has examined same-sex families includes; G Dunne, *Lesbian Lifestyles: Women's Work and the Politics of Sexuality* (Macmillan, 1997); J Weeks et al, 'Everyday Experiments: Narratives of Non-heterosexual Relationships' in E Silva and C Smart (eds), *The New Family?* (Sage, 1999) and G Dunne, 'A Passion for "Sameness"? Sexuality and Gender Accountability' in E Silva and C Smart (eds) *The New Family?* (Sage, 1999).

Interestingly, out of the two practitioners in the sample who do the most pre-nuptial agreements (ILH; 15-18 individually per year and ILN; between 10-20 individually per year), ILH had not advised in any pre-registration agreements, although enquiries had been received, whilst ILN referred to only having completed a “small number.” It therefore appears that some firms/practitioners tended to get more pre-registration enquiries than others. This could be due to aspects such as queerpod affiliation, word-of-mouth amongst the gay and lesbian community, press reporting when there’s a recent legal development and consequent flurries of activity at certain times, such as just after the Civil Partnership Act 2004 was introduced:

“I’ve done an awful lot of civil partnership agreements as well. ...I did a lot of those at the beginning stages of civil partnerships.”

ILD

“I think it goes in waves in terms of pre-nuptial agreements. You’ll find something in the press that will spark everybody’s interest and you’ll do a wave of them. And indeed we did a lot, well 5 or 6 civil partnership agreements when that was in the press. I haven’t done any pre-partnership agreements for, I would say, at least 18 months. And I haven’t done as many pre-nups recently.”

INI

“I would say that I have not done a single one for civil partnerships and it’s something we as an office are looking to understand more why we’re not getting that. A lot of it goes to community, I think. I’ve not done one and I haven’t done a dissolution.”

INA

ii) Number of post-nuptial agreements²³

Given the increasing amount of commentary and discussion about post-nuptial agreements, it was quite surprising that such a large number of the participants had not had any experience of dealing with them.²⁴

“I would say that as a firm we are probably dealing with about 20-25 (marital property agreements) a year at the moment. I would say of those I’m probably involved in 15 to 18 of them. ... I would say it’s 100% pre-nup. I would say it’s 0% pre-registration agreements and 0% post-nups. I would say there have been enquiries about all of them but I think as a firm we’ve had fewer enquiries about post-nups.”

ILH

“I would say in terms of pre-nuptials I would have had a handful over my 10 years. In terms of during marriage, I’ve done none. The only thing that I have been asked to do is set out a schedule for the parties to witness about the assets they owned at the time.”

ILL

24 practitioners out of the sample of 39 indicated that they had not had any experience of dealing with post-nuptial agreements. Indeed, one northern practitioner suggested that they were more a London phenomenon: “I think life sometimes is different in London than the provinces.” (INI)

²³ During the interview stage of the research, the decision in *Macleod v Macleod* [2008] UKPC 64 was delivered by the Privy Council (17th December 2008) – hereafter referred to as *Macleod*. At that stage in the research, both focus groups had already taken place and 12 of the interviews had been completed. Two interviews were undertaken on the day of the *Macleod* judgment. This is of import as only three practitioners referred to the *Macleod* decision when discussing post-nuptial agreements - ILN, ILP and INK. NB: INA referred to the *Macleod* case, but in a general manner, not specifically in relation to post-nuptial agreements.

²⁴ For the purposes of this research, the practitioners’ experiences of separation agreements were not explored. Consequently, any reference to post-nuptial and post-registration agreements, excludes separation agreements.

The data collected in this research, indicates a very slight bias in favour of the London practitioners who appear to have experienced a slightly higher proportion of post-nuptial agreements as a cohort compared with the regional practitioners. Furthermore, the findings should be interpreted as indicative only. The purpose of the data collected is to illustrate the type of experience practitioners have when advising on post-nuptial agreements, rather than as a representative sample. With this in mind, the breakdown of the data collected appears to highlight the following in terms of the number in each dataset that has had experience of dealing with post-nuptial agreements:

- 2 out of 4 (50%) practitioners from focus group 1 (regional focus group)
- 3 out of 6 (50%) practitioners from focus group 2 (London focus group)
- 7 out of 18 (39%) practitioners from the London interview sample
- 3 out of 11 (27%) practitioners from the Northern interview sample

Out of the 15 practitioners who had some experience of dealing with post-nuptial agreements, very few had dealt with post-nuptial agreements in any large numbers or in terms of frequency.

“I’ve done a couple of post-nuptial settlements this year which has been the first time ever in the previous 12 months or so – never done those before.”

FGA

“In terms of numbers of enquiries, we’re probably averaging about two a month over that increase period. Of those enquiries, we’ve opened files for half a dozen a year. They include pre-marital and we’ve recently done two post-nuptial settlements, all in relation to heterosexual couples, none in relation to same-sex couples.”

INC

Consequently, only a handful of practitioners could be said to be dealing with post-nuptial agreements on anything resembling even an occasional basis, and even then, these agreements did not form a significant part of their overall caseload.

iii) The allocation of agreement cases within the firm

In certain firms (particularly the larger firms), only partners would be allowed to advise upon cases involving marital property agreements. This is because of the general feeling in those firms that agreement cases are extremely difficult to advise upon and therefore too risky for a junior/inexperienced member of the team.²⁵

“We do have a standing instruction that partners should advise”

ILA

“Because of the risk. You’ve got to get it right, or at least try to get it right. You’ve got to cover all those things and I wouldn’t leave it to a junior member of staff.”

ILE

Other practitioners emphasised the specialist nature of the advice that had to be given and that it’s not really a job for the generalist:

“It’s not a job for a newly qualified solicitor and I would say it’s not a job for someone who’s a general practitioner. It is specialist work. As far as contesting pre-nups as well, again, I would have expected a specialist family lawyer to

²⁵ This could also partially explain the problems that were experienced in getting non-partners to participate in the research. In the end, 17 solicitors and associate solicitors participated compared with 21 partners (one practitioner was a legal executive). Furthermore, partners were much more willing to take part than their junior colleagues. This could be due to a variety of reasons, including the fact that non-partners may feel that they did not have enough experience to contribute to the research and partners feeling more able to give their time voluntarily to a research project compared with their more junior colleagues.

grasp the concepts probably quicker than somebody who was not doing family law every day.”

IND

However, the position taken above was not by any means a majority view and the other firms (of which there was an assortment) took a variety of positions in relation to who would give advice in marital property agreement cases. In some firms, more junior solicitors will do them but always under instruction from partners; in other firms, the position that was taken was more a ‘whoever was free to take the case’ arrangement, whereas in some other firms, agreements were specifically done by more junior colleagues due to cost and because the agreements were not particularly complex (this was a specialist family firm in a relatively ‘middle-class’ area):

“(O)n the whole, the more senior people do not do the pre-nups – on the whole, unless it’s a specific referral from a specific person, in which case we will do them. And that’s because we’re not getting the über-wealthy. They’re not that complicated in terms of asset structure, and it doesn’t merit the three to four hours of our time that it might take, and most people don’t want to pay for it.”

ILC

“There’s roughly one family law solicitor per office so they effectively do what comes through their door, rightly or wrongly, so that’s effectively how it works. That’s a peculiarity of this firm as opposed to, I should think, a lot of other firms. I think if you’ve got a department all in one office, then it’s a lot easier to work out who should get which particular piece of work that comes through.”

ILR

One non-partner in a respected firm (senior solicitor) who received most of the pre-nuptial agreement referrals in that firm said:

“I sit in the hot seat! I did a few initially and therefore when new ones come in, some of the partners then pushed them in my direction, so either I’m left to get on with them myself or they say, ‘ILH, why don’t you get on with it but go to (partners) to supervise you on it?’ If they come to me, I tend to spread it around between the different partners as to who to use on that particular one but a lot of them get dumped on me because I’ve done quite a lot before, I suppose, and I’m cheaper than the partners.”

ILH

2. Rate of follow-through

The rate of follow-through discussed in this project is the amount of enquiries compared with the number of actual agreements eventually signed by the parties. Overall, the data highlighted a variable rate of follow-through, ranging from practitioners who reported a high rate (80% - ILP) to those who reported a low rate (10% - ILL and INH). However, the majority of those who expressed a view tended to experience a low rate of follow-through from original enquiry through to end result.²⁶ Consequently, if this data is analysed in conjunction with the general findings that a significant proportion of practitioners are experiencing an increase in the amount of advice that is being given, it appears that one possible trend is towards more enquiries, but in a number of cases, this is not necessarily turning into many more instructions:²⁷

“It’s a fairly topical kind of issue obviously, so lots of people have now heard of them and lots of people want them, but when it gets down to the nitty gritty, when they realise – I think lots of people have this kind of preconception that they can just come to a solicitor, the solicitor will print something and top and

²⁶ 21 practitioners identified a follow-through rate that was either self-classified as being ‘low’ or gave a percentage rate of follow-through below 50%. This can be compared with 10 practitioners who self-classified a higher rate of follow-through or gave a percentage rate of follow-through above 50%. Eight practitioners did not express a view or said that they didn’t know.

²⁷ Explicitly identified by the following practitioners: FGE/FGH/ILR/IND/INF.

tail it, they go off and sign it and it's all done within an hour – that seems to be the preconception that people have. So you do get a number of enquiries – not a huge amount, but from time to time you get enquiries and you explain what's involved and the cost, then that scares most of them off, if I can put it kind of like that.”

ILR

The reasons for the low rate of follow-through are wide-ranging and the following were all identified by practitioners as reasons for clients not following through with agreements:

- Costs
- No guaranteed outcome
- Not romantic
- Negotiating divorce before getting married
- Rigmarole involved in getting an agreement (i.e. lack of understanding as to the requirements of disclosure/independent legal advice)
- Can't raise the idea with their prospective spouse – embarrassment
- Timing of agreement – needs to be signed some time in advance of wedding/registration; clients come in too late
- Parental pressure at beginning translates into clients not wanting it themselves

This can be highlighted by the following quotes:

“They come in, get all the advice from us and they go back to their parents and they say ‘look, it's not binding, it may not have any effect, we don't want to do it anyway, and we think it will upset the apple-cart, it's expensive, the other side's got to get legal advice as well – you know, we feel like we're negotiating our divorce before we've even got married’.

ILQ

“The biggest obstacle, I would say, to people actually deciding whether to go ahead – well, there are two obstacles – I think, one is that they’re not actually binding, but the second is probably the cost factor, and as much as one can advise that it is a sensible thing to do in terms of a sort of insurance policy if you like, and very often when looked at in the context of the assets that they’re trying to protect, is a very small percentage – I think that the fact when people are planning for a wedding and the expense that they’ve got there, it’s just one of those things that they think, ‘oh my god, no’, it tips them over the edge. So I think that is something that puts a lot of people off. ... maybe I should say another category of case and that’s where you may have one of the parties, and it would be that party who comes to see you, I would say, who is maybe a little bit more savvy on these points, and doesn’t really know how they’re going to break it to the other party, who obviously is blissfully unaware that someone is taking legal advice about this. So I think there are those who find that they just don’t ... obviously it is one of the least romantic things that they’re ever going to do, and I just don’t feel that they can actually follow through with it. As much as you might tell them that it is a sensible thing to be thinking about, it’s very difficult for them to take the next step to put it into practice.”

INH

“I think a lot don’t follow through because they’ve left it too late. And I’d say the main problem then is when they realise what’s involved. Some people think that you’re just going to print a piece of paper, saying ‘what you bring in, you can keep. What I bring in, I will keep’ – end of. I think that’s it: they don’t appreciate that if they’re going to create hopefully a document that will carry some weight at a later time obviously and hope that they don’t have to rely on it, but if they are, there are a lot of safeguards that we really need to be following. And they also think that they can come in and see the one solicitor, both of them. So when they realise, it’s two solicitors involved, giving full disclosure of their financial positions and then the costs that are involved in doing that, puts a lot of people off, I think.”

INK

At the other end of the ‘follow-through’ rate scale, a smaller number of practitioners either suggested that they experienced a follow-through rate at above 50% or said that

they had a high rate of follow-through. The reasons associated with a higher-rate of follow-through according to these practitioners included:

- Clients are more insistent on having one
- Type of client influences rate of follow-through
- Practitioners in the past not selling the idea as hard as they do today
- A greater desire for certainty from the clients
- By the time they come to see a solicitor, most have decided that they want one
- Clients are pretty clued up in advance so know they are not legally binding (this point is a direct contradiction of the views of practitioners who experience a low rate of follow-through, who suggest that one of the reasons for the low rate of follow-through is that clients are unaware of the fact that they are not legally binding)
- Because wedding is planned and fiancé wants an agreement, the party who is not so keen goes through with it because they do not want to upset prospective spouse
- The way in which that firm handles intake

This can be highlighted by the following quotes:

“FGA: ... even where you may have said ‘extremely persuasive but not binding per se, actually the deal in this pre-nup is not in your interests’, I’m amazed by how many people go ahead and sign it in any event. Perhaps I don’t say it loudly enough.

Focus Group leader: What proportion would you say that is?

FGA: Recently I’ve had 3 or 4 of those where I’ve thought, I wouldn’t sign this if you paid me. And they’ve said, ‘well, you know, I’ve chosen a frock’ or ‘don’t want to upset him’.”

“I think they’ve been pretty well prepped in advance. Possibly if they’re internal referrals, then whoever’s been speaking to them about their private client work

has already had an initial conversation or sent them a booklet and so they're interested that way. We get referrals through Independent Financial Advisors who also have the basic information because we've given training to them so they know enough to be able to in a way sift out the people who aren't so interested."

ILH

"Every intake, every new call speaks to me – that is quite demanding on my time. I think our intake is good because we make that relationship immediately and we talk it through with the client. We also do first interviews for free for those that are recommended. We don't do it off the street. So therefore I think our intake is good. I think if you ring up and say 'how much is a pre-nup?' and they say £1000, you're not going to get it."

INI

One of the aims of the original proposal was to ascertain whether practitioners felt that the advice given to clients has deterred them from either making the agreement or marrying/entering into a civil partnership. The results from the sample of practitioners show a cross-section of experience when it comes to this issue, although the number of practitioners who have had experience of advising clients about pre-nuptial agreements who have subsequently not got married or entered into a civil partnership is actually very low; only two practitioners mentioned that they had had experience of that themselves, although three other practitioners were aware of colleagues who had experience of clients not going through with the marriage/civil partnership:

"...an American chap came in, had his civil partnership booked. One of his friends said, 'you must go and get yourself a civil partnership agreement.' He sat down and 'do you realise what a civil partnership is?' Before he could start talking about what the pre-registration was going to be, he was told, 'you are potentially looking at alimony from here on in'. And actually the upshot was, when he walked out, he didn't want a civil partnership agreement. What he wanted was a way to formalise his relationship and protect his wealth. He said

this was a relationship that did not turn into a civil partnership because of the advice I gave.”

FGH

Several practitioners suggested that they had had experience of clients who had not gone through with the agreement after advice, but had nevertheless got married/entered into a civil partnership. However, a number of these suggested that other reasons also played a part in their clients’ decisions not to go through with the agreement; these included aspects such as the cost of drafting the agreement (FGD/ILK); embarrassment of having to raise it with their fiancé (ILK) and the timing of the agreement – the fact that clients come to see the solicitor extremely late in the day (ILL).

“I’ve certainly had enquiries from people who’ve said they want a pre-nup, and as soon as you explain to them it’s not legally binding, they’re not interested any more. I’ve had a number of cases in the last couple of years where the clients, I think, have still got married, even without a pre-nup.”

ILF

By far the largest proportion of those who expressed a view on this issue (14 practitioners), suggested that the clients that they had dealt with, were neither put off from marrying as a result of pre-nuptial agreements not being legally binding, nor (to a slightly lesser extent), put off from going through with the agreement. In relation to the latter point, for some clients, practitioners suggested it was the principle of the matter that was important, whereas for others, even though the agreement may not be completely binding, they suggested that at least by signing up to one, their clients were doing the most they could to protect their assets under the current law:

“I think they (clients) would much rather it were binding and it’s a frustration sometimes it’s not because they often feel, ‘god damn it, I’ve worked this hard to earn this amount or I’ve inherited this, I don’t want it disappearing out through the divorce courts, but at the same time they appreciate it’s better than nothing, so they’d rather have something than nothing, even if ultimately they get no benefit from it at all.”

ILH

In many cases of exceptional wealth, practitioners will actually advise clients that the only way to protect their wealth is not to get married.²⁸ According to practitioners in the sample, the rationale behind clients who decide to get married despite advice in many cases to the contrary is down to the simple fact that if they want to get married, they will get married:

“It has to be the first bit of advice you give, however cold-hearted that may seem. But no, I’ve never actually had anyone saying ‘that’s it, the wedding’s off’. People threaten it, but it’s never actually happened.”

INE

“I’m not aware that anybody’s not got married because of it. I have to say, I think as a nation we’re still quite into marriage and I think even people who have had quite acrimonious divorces or financially quite debilitating divorces are still keen to get remarried – I mean, Mr Miller got remarried.”

INF

²⁸ In scenario two, the following practitioners suggested that one of the first pieces of advice that they would give to Alan would be not to get married: ILA/ILE/ILN/INE.

3. Types of client wanting an agreement

Type of client wanting a pre-nuptial agreement

Not only were all the practitioners in the sample asked about the type of client that came to see them wanting a pre-nuptial agreement, but the interviewees comments on the ‘factual scenarios’ in the unseen vignettes were also revealing of the type of client that generally wants a pre-nuptial agreement. Scenario one was considered to be an ‘unusual’ scenario as far as many of the interviewees were concerned. A number mentioned that they had never advised people of this age:

“I can tell you right now, I’ve never had people of that particular age wanting a pre-nuptial agreement.”

ILL

Scenario 2 was more ‘usual’ for a large proportion of the interviewees, possibly due to the fact that this was the type of client and the sort of issues contained therein, with which the majority appeared to be most used to dealing with.

“This is obviously much more complicated than the previous (scenario). Lots of issues to be worked out. Pre-existing assets – classic – that’s what a lot of people want to protect which, in theory, yes, a pre-nup could do.”

ILP

“Actually, it’s very similar to one of the cases I’ve mentioned before.”

ILB

The practitioners’ familiarity with the sort of factual scenario raised by the second vignette is perhaps not overly surprising given that the firms and individuals in the sample were purposively selected in order to ensure that they had some experience of marital property agreements. Furthermore, it transpired that those practitioners who

were more willing to volunteer to take part in the research were generally from the mid to higher end firms.²⁹

In addition, the range of assets with which the sample of practitioners have dealt with is incredibly varied; ranging from the lower end of scale which comprises total capital assets in the range of £50,000 (ILE), £150,000 (ILC), £300,000 (INH), £350,000 (INC) to the upper end, which can be anything up to £250 million (INA).

According to the interview and focus group data, when asked about the types of client that wanted a pre-nuptial agreement, the most frequent responses were as follows:

- 18 practitioners referred to third party involvement as a frequent occurrence amongst clients who wanted a pre-nuptial agreement; this is usually where a family is anxious to protect a business or other assets, or from wealthy parents wanting to protect the inheritances or trust funds of their children. Some practitioners made express reference to ‘trust fund babies’ and parents pushing their offspring to protect their wealth upon marriage from an “avaricious spouse.”(FGJ)
- 16 practitioners made reference to the international dimension in terms of the type of client who wants a pre-nuptial agreement. This is not particularly surprising given the London weighting to the research sample and how London has been described as the ‘divorce capital of the world for aspiring wives.’³⁰ Of those practitioners that did make reference to this particular client characteristic, the international clientele made up a large proportion of their

²⁹ Although the research attempted to incorporate a variety of firms within the sample (with a range from the well-known national firms through to High Street practices), the majority of firms in the sample tended to be larger rather than smaller. 15 practitioners were employed in a national or regional firm, 13 in a medium sized firm, four in a specialist family law firm and seven in a small or High Street practice.

³⁰ *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246, per Sir Mark Potter P at para [116].

pre-nuptial agreement caseload, with some of these practitioners suggesting that they do not undertake a pre-nuptial agreement case without some form of international dimension:

“It’s very, very international work. I would go as far as saying that there’s not one case that we do that doesn’t have an international element. That might just be that they’ve got a holiday home in Spain but it’s incredibly international. I would say at least half the clients are not British as well.”

ILM

- The next most prevalent response (15 practitioners), which follows on from the issue of third party involvement, contains the group of individuals who approach practitioners because they want to protect family wealth or inheritances and legacies: “With all the pre-nups I’ve done that has been why the clients have come in, because one of them stands to inherit and either they or their families want them to enter into a pre-nup.” (ILJ)
- 13 practitioners highlighted preserving a client’s own ‘earned’ wealth as a further category of ‘type of client’ who would want a pre-nuptial agreement. This wealth could have been generated through a self-owned business, a profession, a property portfolio or even agricultural land for example:

“...they fall into two categories – and usually it is those where there is enormous wealth or substantial wealth with one party and they have something to protect; or very often, young professionals who are coming to the marriage with capital themselves and, you know, they’ve perhaps spent the last 5 years building it up since they qualified and got onto the career ladder and are conscious that they’re bringing it together and being a little more savvy about how they might protect it.”

INH

- 12 practitioners made reference to individuals who are getting married for the second or third time who want to protect their pre-existing assets, possibly for the benefit of children of their first relationship or because they have had their fingers burned on a previous occasion

“I would certainly echo the second marriage, third marriage situation. I think that’s because of the cliché ‘once bitten, twice shy’ and they don’t want to have to go through what they’ve been through before and obviously they’ve reached an age where they might have accumulated assets that they weren’t in a position to do first time round when they first married. So that’s definitely a theme that I’ve seen.”

FGB

- Of the remaining category of cases, three practitioners (ILA, ILL and INC) mentioned parties coming to them for advice on religious pre-marital contracts, particularly Islamic and Jewish contracts. One practitioner explained how this would work in relation to clients who had an Islamic marriage contract:

“The way that it would work is that people would refer to their marriage contract which is called a *nikah* contract, and essentially what they will be referring to is the woman’s right to divorce, if it’s been delegated into the contract, and also about the *mahr* (*mahr*) which is often referred to as the dowry. The relation to that is: at the time of marriage, it’s the duty of the husband to give property or a lump sum at the time the marriage takes place. The parties can, if by agreement, agree that the payment is made on a deferred basis or prompt. So if it’s deferred, it will be either upon divorce or death or you could get, say for example, a lump sum could be combinational, prompt payment or deferred payment. So what I may get is a woman, a wife who will come to me saying ‘in my *mahr* contract, he has to give me £50,000’, and it’s how that is dealt with by the English courts.”

ILL

This practitioner went on to give an example of how this works in practice:

“I did one where I was for (the) wife but it involved a couple from Bangladesh. The marriage took place in Bangladesh so when you looked at the *mahr*

payment in terms of Bangladeshi *takas*, it was an enormous number. Once you converted into Sterling, it's not very much. That's what you often find, especially when the marriage is taken abroad, once you convert it into Sterling, it's not so much. So the one case I did do, the judge was ... it was a very short marriage, a childless marriage, we were really told to go out and negotiate and we did, we negotiated a settlement on it."

Type of client wanting a post-nuptial agreement

Due to the limited number of practitioners within the sample who had had experience of dealing with post-nuptial agreements, any overview of the findings from the research in relation to this element needs to be treated with an element of caution in that the sample base is limited to 15 practitioners.

Of those practitioners who had experience of dealing with post-nuptial agreements, eight out of the 15 referred to the fact that the type of client wanting a post-nuptial agreement is generally the client who has ran out of time to sign the (originally intended) pre-nuptial agreement. This is because they either went to see the practitioner too late and/or the case was complex due to the assets/jurisdictional issues involved:

"The only ones I've had that tend to go into post-nups are where people have just left it too late really and I say to them, 'look, I'm not having you sign this the morning of the big day. You can do it afterwards.' I often say to clients and it seems to me an argument for saying it: 'a post-nuptial agreement is going to be more effective than a pre-nuptial agreement, insofar as you can't say you've got a gun to your head if you don't sign it'. They're the only ones I've done as post-nuptial agreements."

ILD

Based on the current interpretation of the law,³¹ practitioner ILD's (pre-*Macleod*) comments emerge as the correct approach, in that post-nuptial agreements appear to be more effective for the reason articulated. Therefore, the question for the Law Commission to consider is whether different weight should be attached to different types of agreement on the basis that there is presumably less pressure after the date of the wedding? Interestingly, the results from this sample of practitioners appear to suggest that a solid proportion of post-nuptial agreements are really pre-nuptial negotiations that have just run out of time. As a consequence, further research would be useful on the matter of whether any pressure is exerted (or felt by) the parties in a post-nuptial agreement.³² This was something that was not explored in this research and remains an issue that the Law Commission may want to consider, particularly in the light of *Macleod*.

In addition to the category of 'pre-nuptials that have run out of time', other types of client who want post-nuptial agreements include mid-marriage clients who need agreements for a range of tax and property reasons. This can include routine property work in relation to their assets, which is generally driven either by tax-

³¹ In *Macleod* (see note 7 above), the Privy Council suggested that whilst pre-nuptial agreements remain a factor to be taken into account upon divorce as part of the s.25 exercise, they are not legally binding - the question of whether they should be legally binding is not a matter for the courts, but for the legislature. However, the Privy Council decided that post-nuptial agreements are different to pre-nuptial agreements in that the same emotional pressure is not brought down to bear on the parties after the marriage has taken place:

"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. ... 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." (Per Baroness Hale at paras 35-36)

³² Note particularly the case of *NA v MA* (see note 7 above), where it was established that the post-nuptial agreement in dispute had been signed under some considerable duress.

planning or other generations getting involved (i.e. the desire to ring-fence potential/actual inheritances).

“Quite often they are people who have run out of time beforehand but we also get people who – perhaps they were divorced before, so they’re onto their second or third marriage and they’re kind of thinking, let’s be sensible about this, let’s put something in place, but they’ve already married that person, so ... I think also people get tax advice and then suddenly think, ‘ah, I’ve now married that person, maybe it would be sensible to have something in writing about what we would do’.”

ILG

“They were winding up a Trust and everybody was wanting to put their money into the daughter’s name as a beneficiary of the Trust. They wanted to have an agreement if there were a divorce that money would not be counted as part of the matrimonial assets. That was a relatively straightforward agreement to draw up – it was about £7000 at the end of the day to draw something like that up.”

FGJ

The final grouping of cases that fall within this category are where the parties are seeking a reconciliation. In this situation, the post-nuptial agreement can be used to cement the relationship after a rift between the parties. According to Practitioner FGA, a post-nuptial agreement was drafted where a husband wouldn’t take a wife back after her affair unless she signed an agreement which said that she wouldn’t touch his inheritance. In this type of scenario, where the ongoing status of a marriage is dependent on one party signing a post-nuptial agreement, the assumption raised by Baroness Hale in *Macleod* that a “pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry”³³ has altered, in that the post-nuptial agreement may well be the price that one party may extract from the

³³ See note 31 above.

other for their willingness *to remain within that marriage*, rather than their willingness *to marry*. Consequently, in certain post-nuptial situations, the ‘bargaining power’ argument may still hold some weight. However, one post-nuptial agreement in which there did not appear to be any inequality between the parties was in the most recent case of Practitioner INB. Here the resolution of marital problems led to a reconciliation post-nuptial agreement; the agreement was to ensure a 50/50 division of the assets after a long marriage:

“The one I’ve been dealing with today is the most recent. Total assets about £20million. Quite unusual. In fact, they are working towards a lasting reconciliation, hence it’s a mid-marital agreement rather than a pre-marital or a separation agreement. It is the only mid-marital agreement I’ve done actually. And they’re obviously not that common. ... The terms of the agreement are basically that there’s to be a joint pot of money going forward, or a joint pot of assets, and the balance is to be divided equally. So it’s an actual equal division.”

INB

A further *potential* category of client that might have a post-nuptial agreement, are individuals who have been advised to do so following the *Macleod* decision. Two practitioners, one of whom had yet to draft a post-nuptial agreement, but who were interviewed after the decision in *Macleod*, suggested that in the future, all of their clients will be advised that whilst drafting their pre-nuptial agreement, they should include a clause within the agreement to allow for a review within six months of the wedding in order to take into account the ramifications of *Macleod*.³⁴

³⁴ This issue is discussed in more detail at pages 94-96.

4. Advising clients

Generally practitioners found it difficult to advise clients in agreement cases. This was particularly the case in pre-nuptial as opposed to post-nuptial agreements, where the process was described by more than one practitioner as attempting to gaze into a crystal-ball:

“I do find it quite difficult because you can’t crystal ball gaze, so you’ve got to go through this whole range of different scenarios with them and talk about ... it’s bad enough dealing with a breakdown of marriage and being vague because of the circumstances of the case, discretion of the court, reasonableness, it’s bad enough then, but when you’re dealing with this, when it’s absolutely vague.”

ILC

However, there were a small number who felt that giving advice to clients, whilst not exactly easy, was not too difficult due to the fact that not only are they used to giving advice in a discretionary regime (i.e. upon divorce), but also because most pre-nuptial agreements tend to follow a general pattern. They are, as a consequence “relatively straightforward because ... apart from the actual quantum and putting the figure in, the general formula of them tends to start to follow a certain pattern after a while, in negotiating.” INE

Consequently, the majority of practitioners expressed some unease about advising clients in agreement cases because of a variety of differing and potentially problematic elements, including;

- The problems of dealing with clients and drafting agreements in, what is usually, a very short amount of time.³⁵ The difference between the English and continental jurisdictions and the consequent difficulties in advising clients

³⁵ See page 56 onwards for full discussion of issues relating to timing

both in relation to their perception of the law and the consequent legal complications.

- The emotion involved in advising clients and the consequent difficulties from a professional practice perspective: the couple are supposed to be in love and yet according to practitioners, the advice given has to be quite hard and in contemplation of a potential divorce. Practitioners suggest that sometimes the advice that they have to give to clients can sometimes make them doubt the strength of their own relationship with their fiancé:

“I find in practice, it is the level of emotional upheaval that is caused by the fact that the negotiation of the agreement causes the parties to behave as though they were divorcing. That’s the most negative aspect of it. And as a Resolution based lawyer, one of the things that we are supposed to be doing is to avoid inflaming emotions and the way things ... it does inflame emotions at a very negative time.”

ILK

- Incorrect client assumptions: according to the practitioners in the sample, they felt that the incorrect assumptions of clients about the ease in which you can put together a pre-nuptial agreement, was one of the elements that added to the difficulties in advising in agreement cases: “So actually, one of the biggest challenges is the assumptions about their slipping in for a quick document and you’re just making it complicated.” (FGA)
- The difficulties in advising clients because of the uncertainty of outcomes in ancillary relief between different courts.³⁶ As will be discussed below,³⁷

³⁶ See E Hitchings, ‘Everyday Cases in the Post-*White* Era’ [2008] Fam Law 873 and E Hitchings, ‘Chaos or Consistency? Ancillary Relief in the ‘Everyday’ Case’ in Jo Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets* (Oxford: Hart 2009) (forthcoming) for a discussion of the findings from a qualitative study which identified some diversity of

practitioners negotiate agreements within the context of the current law. However, if the outcome is dependent on judicial determination in an ancillary relief hearing, it can, as a consequence be problematic to advise in a pre-nuptial agreement case:

“certainly my experience in (local area) here, it depends on which judge you go before as to what a judge will see as fair, whether it’s a case capable of having a clean break, whether there should be ongoing provision. So the maintenance clause can be quite complex. Do you not put a maintenance provision in for the first couple of years, or will that then be seen to be unfair if you then have to go before the court? So that can be quite hard advising clients.”

INK

- The underlying awareness that advising in pre-nuptial agreement cases carries with it a higher potential risk factor.³⁸

“But they are something I am actually quite nervous about doing. That is because they can easily be challenged. If you do get it wrong, it could be serious negligence problems and for the cost of doing a pre-nup, is it actually worth it? I don’t know. I am quite wary about them but I do them, but we have to do them very, very carefully.”

ILE

- Some practitioners find advising in pre-nuptial agreement cases difficult because of the changing nature of the law in this area:

“It’s very hard to advise a client because we don’t know what’s going to happen in the future as regards the law changing. We’ve had cases where the judges have been very quick to say ‘it’s a marvellous idea. A pre-nup would be perfect

approach between different courts. See also Law Society (2003). *Financial Provision on Divorce: clarity and fairness*.

³⁷ See page 75 onwards for discussion.

³⁸ See page 65 onwards for full discussion of risk issues when advising in agreement cases.

here', but clearly the reality is it's only one of the factors within S.25. So I think there's a huge amount of uncertainty."

IND

- Crystal-ball gazing: The problems associated with the uncertainty of potential assets that the parties might earn or inherit and the likewise, sacrifices that either or one of the parties might make for the relationship, such giving up work in the future to look after children or an elderly relative.

"They really are the cases that we all struggle with because it's easy to an extent if you've got a couple who are self supporting. But if you've got a couple who are saying 'well, we're very keen to have children soon', you've got to run through all sorts of factual scenarios with them and say 'well, what if this happens or what if this happens'"

ILD

- However, some practitioners made a distinction in terms of the difficulty of advising clients, in that it depends on the complexity of the case. For example, Practitioner ILF had done a fair amount of pre-nuptial agreements, ranging from "fairly basic ones to the most hideously complex one ever". Likewise, Practitioner ILM made the connection between difficulty and predictability:

"The easier case and the more successful pre-nups involve older people with second marriages and assets independently. Those cases are much easier because you can predict with more certainty what the future is and you can give a greater outcome, whereas when you have younger people, you can't."

ILM

As a closing point to this section, when practitioner INA was asked about his marital property cases in order to assess whether he felt they were easy or difficult to advise

upon, he suggested that the major problem is that there haven't been enough of them to really have a bank of cases in the background to compare ease or difficulty:

“I don't think we've had enough to say what's a run of the mill one. I don't think we've built up a bank of cases to say 'this is a run of the mill one and this one isn't' because, to make them worthwhile, they tend to have reasonable issues in them, whether it's wealth or jurisdiction.”

INA

5. Trying to enforce or challenge existing agreements.

One of the aims of the research was to attempt to find out how the courts are dealing with agreements in non-reported cases. This is essential as FDRs are not reported and there is a complete lack of empirical data as to how district judges deal with marital property agreements in the unreported case. This is particularly significant in relation to pre-nuptial as opposed to post-nuptial agreements given the recent comments in *Macleod* when comparing their enforceability. There is also no data as to how many pre-nuptial agreements have been headed off at FDRs. Unfortunately, due to the limited number of practitioners in the sample who had experience of dealing with existing agreements in a divorce context, only a small proportion of that number had any experience of how the courts are handling existing agreements on a divorce.

The number of practitioners in the sample who had experience of attempting to enforce or argue against an existing agreement was extremely low; 24 out of the 39 practitioners (62%) had not had any experience of dealing with an existing agreement on a divorce. When asked about the reasons why, a number suggested that it was just a matter of time; practitioners have only recently started to do them in any numbers and consequently, none of their existing clients have separated or divorced:

“I have never yet had a challenged pre-nup. I haven’t been in practice long enough for the people signing up to the pre-nups to get married have kids and then get divorced, and I’m hoping to retire before that happens!”

FGA

Of the remaining 15 practitioners (38%) who did have some experience of trying to enforce or argue against an existing agreement, the range and amount of experience varied dramatically. At one end of the sample, were those practitioners whose experience was extremely limited. Practitioner INH for example acted in a divorce case with an existing pre-nuptial agreement, however the case was a long time ago (pre-*White*):

“it was a shortish marriage but there was a child and in some respects I think we had to advise him that actually he may have been prejudiced by the terms of the agreement but he nevertheless wanted us to put it before the court. I can’t remember why but the court said ‘thank you very much, but we’re not going to pay one iota of (trailed off).’ I’m just trying to think. It’s a long time ago. ... Since then, I haven’t had to argue one. And of course, what you don’t know, is how many clients actually have divorced – they don’t always necessarily come back to you – they have divorced and divided everything up in accordance with the terms of the agreement without ever getting into a court situation.”

INH

At the other end of the range, practitioners who had more experience of dealing with existing agreements cited badly drafted foreign agreements as a grouping that made up a significant proportion of those cases in which they had had familiarity of dealing with upon a divorce:

“I’ve had a load of South African ones where it’s par for the course, no independent advice at the time, entered into 20/30 years ago and you sort of say, thanks very much, put it on the file and don’t even attach it. I did have one where

the other side – this was a few years ago now – asked me to show cause as to why it shouldn't be bound by the agreement but they backed off at the very first whiff of it. I issued a Form A and off he went.”

ILA

Consequently, out of all the interviewees, only four practitioners discussed in any detail their experiences of how a recent court in a non-reported case had actually dealt with an existing agreement (ILE, IND, ILM (in another jurisdiction) and ILN), although in addition to this, a small number of other practitioners were able to talk about the courts in a much more broad brush manner. The general feeling here is the suggestion that what happens in terms of taking the pre-nuptial agreement into account will depend on the “particular judge you get on a particular day as well as to what that judge will think about the particular agreement that's been negotiated.” (ILB). An interesting comment made at one of the focus groups reiterated this variable approach amongst the judiciary, but also the inherent difficulties for practitioners who are unable to get a feel for what a court will do with an agreement in a divorce – and of course the consequent difficulties this has for the practitioner when advising a client:

“I find it a very difficult area because I don't get a feel for how District Judges are dealing with pre-nuptial agreements. The High Court Judges who deal with bigger money cases tend to vary in their positions and those who are of a modernistic approach that intelligent adults properly advised should be able to enter into agreements on all of their affairs on the one hand to the more paternalistic who feel, well, we'll look at it and if it tells us the result we'd have got to in any case, we'll enforce it, but if it doesn't, we're not going to have our hands tied by it. And there is that broad spread in the Family Division at the moment.”

FGI

Of those practitioners who detailed a previous non-reported case that they had that had gone before a court, practitioners ILE and IND gave two very interesting examples, not so much at opposite ends of the scale but within certain parameters. As an analogy, if both were placed on a sliding scale, with '1' = completely binding, and '10' = not taken into account at all, then IND's case would be a 1 (in which the pre-nuptial agreement was followed completely), whilst ILE's case would be placed at 8 on the scale (limited weight). What is particularly interesting, is that in the latter case, the agreement, although on the face of it falling foul of all the procedural requirements (including duress, limited/no disclosure, lack of independent legal advice and being signed the day of the wedding) as well as being substantively unfair, was still given some weight at the FDR (albeit minimal – and possibly as a means to get the parties to negotiate).

In this case, the parties were from different jurisdictions but had lived in England for many years and had been married for 17 years. They had three children. Both had worked throughout the marriage and had earned good money. The husband had insisted on having a pre-nuptial agreement prior to the marriage and it was signed on the morning of the wedding. The wife said that she didn't have any opportunity to have any legal advice (disputed by the husband). The wife said she felt very pressurised that morning because the wedding arrangements had gone horribly wrong; flowers and caterers hadn't turned up and she was in a real state, so she just signed the agreement. The agreement said that she wouldn't get anything on a divorce and there was no review for any children. The practitioner says she dismissed the agreement and felt that the courts would not take it into account at all because they had been married for 17 years with three children and she had given as much to the marriage financially as he had. The husband was relying on the pre-nuptial agreement. The

assets were about eight to 10 million pounds of which two million was the matrimonial home. The wife's assets were some shares and some savings and the rest of the assets were in the husband's name because he took control of the finances. His offer prior to the FDR was extremely low given the amount of assets - £1 million – in effect half the matrimonial home:

“I thought (the judge) would just say ‘well, that’s just a nonsense’, and she said that if this went to Final Hearing, it would not be upheld but it would (be) one of the circumstances of the case, albeit that it was all that length of time ago, albeit that it ticked all the wrong boxes. (But) she said, I would say it would reduce, because she (the wife) was an intelligent person, etc etc, it would reduce her award by about five to 10% ... which I found really surprising. But I think she was doing that to make us all move and to try and negotiate. And we were in court all day on an FDR and it was about to be set down for a five-day hearing and then the husband came back and, from having offered a million throughout, gave us another four million. It was ridiculous, going from one million to five million, it was crazy, but that’s what happened. But the interesting thing ... this was a pre-nuptial agreement signed on the day of the marriage when somebody was under terrible stress, without legal advice, children had come along, and the Judge indicated that it would still be taken into account. So on the basis of that, I suddenly thought ‘gosh, I’m really surprised at that’ and after that I have been encouraging people to think about pre-nups a bit more because even if they’re not failsafe, they are something the court will take into account.”

ILE

At the other end of the scale, was the case where the pre-nuptial agreement was followed completely. In that case, a pre-nuptial agreement was signed by a couple, both on their second marriage. The husband had the proceeds of sale of his previous matrimonial home, which was about £250,000 in a bank account. The wife had her own home which was worth about £500,000. They had varying amounts of income. The pre-nuptial agreement allowed for the couple's pre-existing assets to be kept

separate, except there was a clause that if the parties dipped into the husband's money which represented the net proceeds of the sale of his previous home, provided that a receipt was signed by both parties, then he would get the credit back, so that the money would go into his bank account. The parties married and the relationship floundered within two years. The crucial issue was the interpretation of the pre-nuptial agreement. It was fully tested by the local court, and although the case settled at the door of the court before trial, the case had gone through a first hearing, FDR and a Directions appointment.

“The judge said that because the breakdown of the marriage was so soon after the drafting of the agreement and the marriage, there was no reason why the pre-nuptial shouldn't be followed. And because the parties had not signed receipts when money had been taken out of the husband's bank account, then he shouldn't have it back. So they did follow it to the letter of the law. There was a lot of huffing and puffing and at the FDR there was much discussion but nevertheless it was followed. ... I was concerned actually, even to FDR stage, as to which way it was going to go. I think that was my worry when I was advising the client was the uncertainty. She came into the office, expecting it to be followed to the letter of the law, or to the letter of the agreement, and was mightily disappointed and hacked off when I said, ‘well, it doesn't necessarily mean that you've got this agreement, that it's so recently drafted and therefore it would have to be followed.’ I think that really did increase a lot of the stress that my client felt because she'd spent money, obviously, on this document being drafted, was clutching it when she came in, and it seemed somewhat unfair that it wasn't followed as a matter of course, bearing in mind no children, nothing had changed since the date of the agreement, and there hadn't been too much of a muddling of the parties' assets, so it was quite clear who brought what and what we were talking about. Where I think we would have had more of a difficulty – and this was the advice that I gave – was if the marriage had been for a much longer period of time and maybe there had been a muddling of assets, the matrimonial acquest had been built up, in which case then obviously you would have had an argument when you should deviate from the pre-nup because things have changed.”

IND

Although these two ‘most recent’ cases are useful examples of how two courts, in two different areas of the country dealt with existing pre-nuptial agreements on a divorce, it can tell us little more than that, due to the fact that they are really nothing more than isolated examples. Therefore, perhaps the only conclusions that can be drawn from the preceding section are:

- a) That there is a complete lack of empirical data about how local courts are dealing with pre-nuptial agreements in the unreported case.
- b) Practitioner experience in this area appears to be rather limited, with 62% of practitioners not having had any experience of having to enforce or argue against an existing agreement in a divorce case.
- c) In terms of why practitioner experience is limited, the following options should be considered:
 - Perhaps divorces/dissolutions involving existing agreements are being decided according to the terms of the agreement without the need to utilise the services of a solicitor or the court;
 - Perhaps, bearing in mind the apparent increase in the number of agreements being drawn up in the post-*White* era, there has not yet been enough time for those marriages involving a potentially disputed pre-nuptial agreement to come before the divorce lawyers; i.e. the parties remain married/registered. This is particularly pertinent in relation to potentially disputed pre-registration agreements.

However, these tentative conclusions to this section merely serve to underline how limited the data is on this area of legal practice.

On a related issue, a further area of concern for practitioners advising clients who have an existing agreement in place, is the ongoing unease surrounding Florence

Baron's comments in *NA v MA*³⁹ where she suggested that practitioners who advised a client in relation to their pre-nuptial agreement should not be advising the same client when it comes to their divorce. The practitioners in the sample who made reference to this case were generally of the view that there shouldn't be an absolute bar to advising a client upon a divorce where they had drawn up the agreement because the solicitor will have a prior knowledge and awareness of the parties, although if there is some allegation of negligence, then that should be different. (INE)

The potential problem with following strictly the Baron approach to giving advice in agreement cases, is that it might have the rather perverse implication that there could be the potential of preventing firms from being willing to draw up marital property agreements because there'll be more money in arguing against the agreement upon a potential divorce than acting for one of the parties at the time of the agreement. Practitioner ILN was aware of this potential consequence, particularly if pre-nuptial agreements become legally binding in this jurisdiction:

“That's why many US divorce lawyers refuse to do pre-nups a) because they don't want to be sued and b) because there's unlimited liability there, and they don't want to be conflicted out of any possible divorce. And frankly, what's £5-10,000 when a fairly moderate ancillary relief case might generate fees of £50,000.”

ILN

³⁹ See note 7. For comment on the case, see M Hatwood, 'When is an Agreement not an Agreement?' [2007] Fam Law 1020.

C) Current practice - Procedure

1. Disclosure

In order to determine practitioners' 'usual disclosure' two aspects of the research data were examined: Questions relating to the disclosure undertaken in their 'most recent case' and practitioners' comments about their usual form of disclosure.

In the interviewees 'most recent case', the approach to disclosure varied dramatically, from the extremely limited 'back of envelope' tactic to the full Form E approach. An example of one of the most minimal approaches to disclosure came from Practitioner INH where the reason behind their client's reluctance to press for a greater amount of disclosure was due to the parties' unequal bargaining positions:

“INH: Oh gosh, it was comical really ... it was a very, very, very short statement of his financial circumstances. Bearing in mind that he had interests in various companies and there'd been no valuations of these, everything had to be taken at face value, and interests in trusts, and again no trust accounts were produced.”

Interviewer: Did you enter into negotiation with the other side's solicitors as to the disclosure?

INH: Yes. But I have to say, not with any force, because my client wouldn't instruct me to do so. And this comes back to the unequal bargaining position that they were in.”

At the other end of the disclosure scale, were practitioners who used the ancillary relief disclosure documentation; i.e. the Form E method:

“What I was keen to do on that was to get as much disclosure in a nice synopsis way and what we did was send them the financial statement Form E. ... I suppose I just find the Form E to be a good document. And when you go into a schedule of documents, you're more or less dictating the Form E and because certainly the guy that I was representing, he did have ... owned a house in (London area), owned the house in (another London area) which he rented, had 2

cottages in (another county), one he owned outright and rented, the other one he had a small mortgage on, and was going to buy somewhere else and had this massive pension in the NHS. So I think it applies even if it's the middle or the end. The clearer it is, and I was saying that to his partner – this is what you're turning your back on.”

ILI

However, neither of these positions reflected the majority's approach to disclosure in their most recent case. The majority (54%) employed a Schedule of Assets approach towards disclosure. Although this again varied, encompassing at the one end, a schedule with documentary evidence, to a bare schedule of assets at the other. In terms of the former approach, Practitioner INE detailed the sort of elements that were included in their most recent case:

“We had a schedule of assets but with documentary disclosure. I don't think it was quite the kitchen sink but we had bank statements, pay slips, tax returns, pension statements. It's interesting you ask that because in many, they're often willing to rely just on schedules which I find a little surprising.”

INE

This comprehensive approach to documenting a schedule of assets can be contrasted with other practitioners, such as ILN who opted for a more limited schedule of assets with no detailed documentary evidence in his most recent case. The reason being that that level of detail in his opinion is not needed:

“You don't need to send into that level of detail. Obviously if someone is found out as lying later, there may be a problem but it's just not – certainly in the larger asset cases – whether someone's worth £10m or £12m, it doesn't really matter.”

ILN

Consequently, whilst the majority of practitioners in their ‘most recent case’ appear to opt for a schedule of assets approach, even within this method of disclosure, the approaches of practitioners vary as to whether and what type of documentary evidence is provided. Crucially, this variability in the type of disclosure does not appear to be due to a variable understanding of what is meant by ‘full and frank’ disclosure on the part of the sample, but it is much more a case of what would be most appropriate with regard to the case in front of them. As a result, disclosure will seemingly vary depending on a number of factors. These include:

- The assets involved: the amount and whether the assets are complex or straightforward:

“At the level, at which I’m usually doing it, where someone has got ... we’re talking about say a house worth £150,000 and they might have a small private pension and a five year old Ford Mondeo, I’d be disinclined to say, ‘go to the level of disclosure you have with the Form E’, which then would simply not be cost effective, or if I did, they’d run a mile. What I normally do say is something along the lines of ‘well, we’ve got a house – have you got a recent valuation of it? If not, get the local estate agent to do a drive by’ or something like that.’ ... If however you’ve got something more, some business information, I would regard it as reasonable to have a higher level of disclosure.”

FGC

- Cost of disclosure: “it’s very difficult to persuade somebody to spend money on a full-blown disclosure exercise when they’re trusting each other and hoping it will never happen.” (INA)
- Agreement between the parties to limit their disclosure: some parties agree to limit their respective disclosures for a number of reasons including cost (as above); prior knowledge of each other’s finances and trust:

“I think they both knew each other’s finances. There was a trust element between them so there would have been schedules, maybe balances confirmed, and obviously a referral in the pre-nuptial about them both being happy with the amount of disclosure. They were both independent, they were both separately represented.”

ILL

- The wishes of the client, or, what their client (or other party) is willing to allow in terms of disclosure. This can be incredibly difficult, if not frustrating for the practitioner who is attempting to act in their client’s best interests. In Practitioner INA’s most recent case, they were basically:

“(G)iven the disclosure. ...It was a summary. There was no company valuation. In terms of that point about actually ascertaining the pre-marital wealth, there was nothing reliable ... But there was no way she was going to go in and get a valuation; she didn’t want that at all, she was just taking his figures as read (because) (s)he wanted to get married and I got the impression she was under some pressure. ... She was a lawyer so she knew what the position was and she’d done family law as well, though she’d never done a pre-marital but she wanted to get married, so there was absolutely no question in my mind that she was pressurised into signing it in general terms – she wasn’t under duress in that sense because there was some disclosure, there was legal advice, she wanted to do it. She said ‘I’m quite happy with this’.”

INA

- Who they were representing and who was paying for the representation also made a difference to the type of disclosure requested or given. In ILR’s most recent case, disclosure was minimal, with the husband writing out a list of his properties, with a rounded up or rounded down equity figure next to it:

“I got the impression he just plucked the figures out of thin air. The wife (to be) didn’t really know and she was saying ‘about right’ and all the rest of it. In that

situation I would have liked a bit more – drive by an estate agent’s – particulars – not scientific – but likely to be more accurate than what the husband had kind of said. ... I think had the wife been more switched on, then it would have been different in the sense she would have had as much of an idea as the husband and then you’d say to her, ‘well, it’s entirely up to you, if you’re confident that these figures are about right, then that’s fine, but if you’re not, then perhaps we should consider asking for something else.’”

ILR

In this case, the wife’s legal fees were being paid for by the husband (who had negotiated the wife’s solicitor downwards in terms of the fee being charged for the prospective wife’s advice.⁴⁰ Therefore, even if the wife had wanted to have a greater amount of disclosure in order to know the extent of the assets that she was ‘giving up’ by signing the agreement, this would not have been possible due to the fee limitation placed on the solicitor by the prospective husband. Therefore, a question that the Law Commission may want to consider is whether the type and amount of disclosure required should be prescribed in order to minimise the risk referred to here.

- Tactical nature of disclosure: Disclosure can be used as a tactic when negotiating an agreement, just like the timing of the agreement or giving independent legal advice.⁴¹ An example of this was given by one practitioner who suggested that the emphasis was on the wealthier party to overstate rather than understate their wealth at the time of entering into the agreement – on a tactical basis – to hedge their bets that the agreement would hold more weight if they didn’t underestimate their wealth:

⁴⁰ See page 51 for more detail of this case.

⁴¹ See below at page 56 onwards (timing) and page 63 onwards (independent legal advice).

“it’s generally the wealthier party who will be providing more disclosure, who has more to disclose anyway, and, as I say, if they’ve got it wrong and materially misstated their wealth, then the risk is on them that they’ll lose out by it. In a way it’s an incentive for them to overstate their wealth just to make sure they’re protected.”

ILH

2. Cost

In order to gain a better understanding of the costs incurred in advising and drafting a marital property agreement, two elements of the research data were examined; discussion in the focus groups and data obtained from the interviews – particularly, practitioners’ recollection of the cost in their most recent case and comparing that with their ‘usual’ costs in an agreement case.

Initial findings from the two focus groups appeared to suggest considerable variation in the costs of marital property agreement cases. It appeared that they ranged from the mid hundreds (focus group 1) through to tens of thousands of pounds (focus group 2).

FGH: It would be interesting to see what would everybody say for a very straightforward, mid money pre-nup? I would say £1,000-£3,000 and that’s the minimum.

FGG: I’d say higher than that.

FGF: I’d say £5000.

FGE: I wouldn’t go lower than £3000.

FGG: One I just finished off yesterday was very straightforward, a tiny little bit of an issue about South Africa but we dealt with that relatively simply, so we didn’t have to get their advice, and it was £6000, £7000, and it wasn’t that complicated, there wasn’t that much negotiation.

FGH: A complicated one?

FGG: No.

FGH: Involving multiple jurisdictions, what would you say? £25,000 to £50,000?

FGG: I think similar, depending on whether you're getting silk involved. As soon as you're getting counsel involved – which some firms won't even sign off on an agreement, will they, without counsel's support, then you're much, much higher.”

Likewise, the data obtained through the interviews, gave a similar indication as to the variable amount of costs. As part of the discussion about their most recent case, practitioners were asked about the cost of advising their client. This varied dramatically. The cheapest advice was given by practitioner ILR, whose advice cost £200 + VAT. In terms of the factors which had a bearing on the costs of this case, probably the greatest was the fact that the practitioner did not draft the agreement, but was asked to advise upon an agreement that the husband's solicitors had drawn up, thereby limiting costs to a large extent. However, this was an interesting (and slightly perplexing) case for a number of reasons, not least because the prospective husband paid for the prospective wife's advice and had entered into negotiation with the interviewee as to how much he was willing to pay for that advice. This, as the solicitor admitted, was a major constraint on the amount of advice that could be given to the prospective wife by the practitioner. The prospective husband had assets of about £1m, and he was offering her a very small percentage; a flat with an equity of about £100,000. The practitioner explained to her that £100,000 was probably:

“not sensible and that it was entirely a matter for her, but if she wanted my professional advice, I didn't think she should sign it – is what I said to her. She then said ‘well, can you go back to his solicitors and say, double it, and I'll sign it’. She asked us to go back and to say ‘get a bit more’. I can't remember what it was but she said she wanted one of the other properties where the equity was roughly £200,000, so it was effectively kind of doubling, which I said to her was

- only one-fifth - was still unfair but it was up to her. So I put that to the solicitors. And then I kind of ran out of money and so didn't hear anything further.”

ILR

At the other end of the costs scale, the most expensive ‘most recent’ agreement was provided by practitioner INB with £25,000 of costs on one party’s side. This was the only ‘post-nuptial’ agreement in the entire sample of ‘most recent’ cases. The assets involved were substantial (approximately £20million) and it was done through a quasi-collaborative process.

Table 3: Costs

Practitioner	Cost - recent case	Average cost / range of cost for an agreement
ILR	£200	2-4 hours work; £400-£1000 plus VAT
ILO	£450	Only completed 3 agreements - didn't say what average costs were
INA	£875	Average cost - approx £5,000
ILI	£998	Did not specify an average cost of an agreement
ILC	£1,000	Average cost - 3 hours of time at £300 an hour
IND	£2,250	Average cost - between £2,500-£4,000
INE	£2,500	Straightforward agreement - £1500; Higher end, nearer £3,500
ILG	£3,000	Between £1500 and £10,000-£12,000.
ILJ	£3,000	Did not specify average cost of an agreement
ILE	£3,250	Average cost - approx £2,500
ILD	£3,500	Average cost - £2,000-£4,000
INH	£4,500	Didn't think you could specify an average
INK	£4,500	Between £1500-£2000 and £5,000-£6,000
ILK	£5,000	Did not specify average cost of an agreement
INC	£5,000	£1000 plus VAT
INF	£5,000	Average cost - less than most recent case as that case had counsel
ING	£5,000	Minimum normally £5,000, but have done one for £2000
ILF	£5,250	Minimum £5,000
ILH	£7,000	Ave - £3,500-£7,000; as much as £15-£20,000 if foreign issues
ILB	£7,500	On a £5million asset case - estimate of £3-5,000 plus counsel's fees
ILN	£10,000	Minimum £5,000; complex/international elements - £20,000 or more
ILQ	£10,000	Average - £10-15,000. It can be as low as £5,000
ILM	£15,000	Should cost under £3000. Most expensive for firm - £1million costs
INB	£25,000	Smaller case - £2-5,000; complex case - £15-30,000
Median	£4,500	
Mean	£5,407	

Out of the 24 practitioners who could remember the costs involved in their most recent agreement,⁴² the median ‘costs’ average was £4,500 with the mean average coming out at £5,403. In the vast majority of cases, these costs were given exclusive of VAT.

In order to give some context to the practitioners’ ‘most recent case costs’, included within the table above is reference to the average costs when dealing with marital property agreement cases that those practitioners usually have to deal. Notably, most practitioners’ ‘most recent case’ costs fall within their average range, apart from practitioners INA and ILM. The reasons for the difference between ILM’s most recent case costs compared with their usual run of cases/average case can be put down to the intransigent positioning of the parties in the most recent case and also the particular multi-jurisdictional issues relevant to those parties. INA’s most recent case however, highlights the difficulties of third party involvement over costs and the potential to affect the amount of advice given.

Interestingly, INA drew attention to the fact that although he was advising the prospective wife in that case, the prospective husband was paying for her legal costs. The ‘husband’ had put a limit on the amount of costs the ‘wife’ was permitted, thereby restricting the amount of advice she could have, which INA described as, “rather unpalatable in my view.”⁴³ The issues raised by this case and that of ILR above raise two major implications which the Law Commission may like to consider:

1. The difficulties associated with another person paying for legal advice.

Although the advice given is ‘independent’, any upper threshold restriction

⁴² Five practitioners were unable to remember the costs of their most recent case and consequently, are not included within Table 3.

⁴³ In order to document this ‘limitation’ on the amount of advice INA was able to give to the client, INA made reference to this imposed financial limit in the agreement itself.

placed on costs by a third person may mean that the client may not receive the amount of advice that either they or the practitioner thinks is sufficient for the nature of the case; it may therefore not be as 'full' as the practitioner or their client might wish as it has been constrained by financial limits placed by third parties.

2. Duress. To what extent can limitations of cost be perceived as being an issue that could constitute duress for the purpose of invalidating an agreement?

As Table 3 highlights, the practitioners' responses indicated considerable variation in the costs of their agreement cases. Issues identified which had a bearing on costs were:

- Whether the agreement was multi-jurisdictional. A number of practitioners drew attention to the fact that where the agreement is multi-jurisdictional the costs correspondingly increase: "Where there's a foreign element to it and we're liaising with foreign lawyers, then clearly the costs can mount and we've certainly done ... well, I did a UK one actually where the costs were about £16,000 and we've done foreign ones where certainly the costs could be £15-20,000." (ILH)
- Factors such as nature of firm/practitioner conducting case can also impact costs. The two cheapest 'most recent' case costs in the above table were conducted by family law practitioners in high street firms and, perhaps as expected, the two most expensive 'most recent' cases, were conducted by practitioners from leading firms.
- The nature of conducting negotiations and impact on cost. Two practitioners suggested that one of the problems with collaborative law "is that it can get a

bit expensive. ... The collaborative agreements I have done, the cost of each of them was at least £4000 which is fair bit of money really, so that's the downside of collaborative." (ILD) Out of a sample of 39 practitioners, two additional practitioners, who had undertaken a collaborative process in their most recent case (ILF and INB) were towards the upper end of the scale when it came to average costs in their most recent case. Also, the costs in both of those cases were above the median average for agreement costs. Due to the limited number of practitioners in the sample who had experience of collaborative law, it would be dangerous to draw any conclusions about the financial efficacy of the collaborative process based on these findings; their usefulness is limited to an indication of influences on costs in agreement cases. Ideally, further research needs to be undertaken specifically comparing the drafting of agreements by the collaborative process with more traditional methods before any firm conclusions can be drawn.⁴⁴

- Amount of assets involved and corresponding amount of amount of disclosure required. This factor has a major bearing on costs, particularly if the assets are particularly complex and outside experts/counsel need to be instructed: "(S)ome counsel charge a huge premium, I mean really ... I did one last summer, counsel charged £25,000. Assets were billions. If he got it wrong, he'll be sued and £25,000 will pale into significance. Although it seemed an unbelievable amount of money at the time, I can understand the business case for it." (ILA) The general feeling about using counsel was that it can add

⁴⁴ A recent research report on collaborative law for Resolution, examined how a base of 150 respondents thought the collaborative process compared in terms of timescales and costs. In terms of costs alone – 32.7% thought that the collaborative process was less expensive; 49.3% felt there was no difference in terms of costs and 13.4% thought collaborative law was more expensive. NB: This data concerns collaborative law generally rather than specifically about the cost of drafting marital property agreements. *Collaborative law in England and Wales: early findings – A research report for Resolution* (2009), Resolution, pp56-60.

costs, but the reason for doing so outweighs the higher costs issue. The main reason to engage counsel in an agreement case was to split the risk associated with drafting an agreement, which reflects the array of concerns that practitioners had about doing pre-nuptial agreements particularly the insurance issue: “We do have a standing instruction that partners should advise and that we should take counsel’s advice if we’re drafting or indeed if we’re to review somebody else’s drafting ... for insurance purposes because it’s a high risk area, because if you get it wrong, you can get it very wrong.” (ILA)⁴⁵

3. Timing

This is an issue of import for pre-nuptial as opposed to post-nuptial agreements. In the Green Paper, *Supporting Families*⁴⁶ the Government outlined suggested safeguards in the event that pre-nuptial agreements were made legally binding. It was recommended that where an agreement was signed fewer than 21 days before the marriage, the agreement would not be legally binding. Consequently an important element of this research was to examine the timing of current agreements, not only in relation to when they are signed, but also the lead in time that practitioners feel is necessary in order to address fully the requirements for drafting and advising. One of the aims of the research was also to explore what practitioners think of the current suggested 21 day guideline and what they would prefer in any future reform.⁴⁷

⁴⁵ See discussion at page 65 onwards relating to insurance and risk issues.

⁴⁶ *Supporting Families*, Consultation Paper, (Home Office, 1998), para 4.23.

⁴⁷ See page 108 onwards for a discussion of potential reform options.

Of those practitioners who made mention of timing in their ‘most recent case’, the breakdown was as follows: The initial timescale for when the client first saw the practitioner for advice on the agreement varied from 4-5 months before the wedding (ILF) to 6 weeks (ILP). The most common timescale was 2-3 months prior to the wedding. This short lead-in period in the practitioners’ most recent case is similar to the findings of their general experiences. The actual timing of the agreement in their most recent case varied from signing it with just under 2 months to spare (ILI), 20 days before the wedding (ILA), ‘a couple of weeks’ (ILD) and in one case (ILP), on the eve of the wedding.

The general feeling amongst practitioners across the sample is that clients leave it very late when coming in for advice on drafting a pre-nuptial agreement. The typical response is reflected by practitioner ILH:

“Well, I think some of them introduce the idea with their spouse-to-be very late which is never particularly ideal. I think quite often we’ll get people coming in and saying ‘can we do one of these things and, by the way, we’re getting married on (month ahead) and we’re always conscious that we have this ideal 21 day figure that people bandy around and I think we try to say sometimes, that is the ideal but it’s not by any means set in stone. ... for some reason they’ve built up this enormous wealth, they’re planning a very lavish wedding but somehow everything else gets planned before this and so, quite often, we’ll get them at four to five weeks notice.”

ILH

Although this is by far the majority view, there was the odd practitioner who had experience of dealing with a range of timescales, with INE suggesting that although the majority are within six months of the wedding date, there are some clients who come in at the last minute. “If you had a graph, the balloon I would guess would be

about four to six months before the wedding day, which is reassuring, because at least you'll have time to prepare one.”(INE)

Practitioners emphasised the length of time it takes to undertake full disclosure, particularly if the assets are complex or the case necessitates multi-jurisdictional advice. This can necessitate a long ‘lead-in’ period. Some practitioners, aware of the variety of procedural requirements, would tell clients who had enquired about an agreement only weeks before the wedding, that they would be unable to take the case. One practitioner explained that she had a 3-month time requirement when advising in pre-nuptial agreement cases:

“Well, knowing how clients are and how long it takes them to get something sorted out, and bearing in mind that often you’re dealing with one party having no knowledge whatsoever about the other’s financial affairs, it would probably take that long for financial advisers to report back to clients about what they might be worth, for the other party to get some information about their circumstances. Remember, you’re having to do your schedule of assets. You may have another solicitor on the other side, let alone the drafting exercise and the tweaking – there are usually going to be some alterations.”

IND

Other practitioners suggested even longer ‘lead-in’ periods than IND. Practitioner FGH for example, suggested that if “you want to ensure that you complete at least four weeks before ... (it) means starting six months beforehand.”

Consequently, the general feeling amongst practitioners was that clients have unrealistic expectations of what is required when drafting a pre-nuptial agreement, which can lead to them coming to see a solicitor for the first time only a matter of weeks before the wedding. Generally, solicitors reported a lack of understanding by

clients about the time-frame needed for pre-nuptial agreements due to the necessary procedural requirements.

In terms of signing the actual agreement, this varied from months before the wedding, through to the day before the wedding. Factors which influence this variation range from the parties coming to see the practitioner late in the day, which condense the amount of time the practitioner has to undertake all the necessary procedural requirements, through to the tactical nature of advising in agreement cases. It therefore appears that the reason for signing the day before the wedding can sometimes be based on a practitioner's advice in terms of which client they are advising (i.e. the financially weaker or stronger party and whether they want it to 'stick'):

“Sometimes we've said to them ‘ just sign it two days before the marriage’, even though they've had legal advice, ‘it's never going to be upheld, and then you've done what you said you'd do, you've signed the wretched thing but it's not going to be binding’ – which is really very unsatisfactory for a lawyer to be in.”

ILC

Ultimately, although the recommended 21 day guideline is something that all practitioners are aware of, their approach in this respect is similar to other procedural elements of drafting pre-nuptial agreements; practitioners' experiences vary. However, many do agree on one crucial point, that signing it in the weeks leading up to the wedding is not ideal, but unfortunately, the way it is due to practical constraints.

4. Duress

The issue of duress came up at various points during both the interviews and focus group discussions. The main experience of practitioners in this regard was in relation to one party pressurising the other that without the agreement being signed the wedding would not go ahead, reflecting the classic inequality of bargaining power positions. Generally, this was handled by placing a clause within the agreement that without the agreement being signed, the wedding would not have gone ahead. For example, in discussing a case where he had represented the prospective wife, INA suggested a practical option of making it clear that there had been some underlying pressure on her to sign the agreement:

“He’d (prospective husband) made it clear it (the marriage) wouldn’t go ahead without this being signed. Indeed, that’s one of the clauses you should look to put in. One of the things that we looked to put in there is making it very clear that without this agreement it wouldn’t have gone ahead.”

INA

Likewise, Practitioner INH did something similar (INH was representing the prospective wife):

“He (prospective husband) was putting an enormous amount of pressure on her. His solicitors had drafted the document with assistance from counsel and it was presented to me for approval, and I sought to make a number of amendments and advised her accordingly, and why we needed to make the amendments, and each time we did that, she would go back to him and I would then be told subsequently ‘we’re not making those amendments, we’re leaving them in’. So, after a number of meetings, a number of attempts to amend the document – we did get some tweaks in – and a huge disclaimer from her, the parties signed the document. This was not before he had cancelled one wedding date. So you can see, there was a huge imbalance between the two of them.”

INH

The added difficulty in Practitioner INH's 'most recent' case, was that due to the inequality of bargaining power between the parties, the practitioner's hands were effectively tied as to both the amount of advice that she could give her client (the prospective husband was paying and wouldn't sanction engaging counsel) and the amount of disclosure she was able to get out of the other party, which was extremely limited. When asked whether any negotiation about the amount of disclosure was entered into with the other side's solicitors, Practitioner INH said: "Yes. But I have to say, not with any force, because my client wouldn't instruct me to do so. And this comes back to the unequal bargaining position that they were in."

A further issue that arose during one of the focus groups was whether third parties driving an agreement could be a legitimate form of duress. Given findings elsewhere in this study about how one of the primary types of clientele for practitioners are clients who's parents are pushing them to get an agreement to protect assets such as family trusts, businesses and inheritances⁴⁸, this is a relevant and legitimate concern:

"FGG: The other thing that's interesting and quite difficult when you take instructions sometimes in pre-nuptial agreements is that it's not the person you're seeing who's driving the agreement, it's a parent, and that is very difficult because sometimes they have no insight, they have no desire for it, and they perhaps have a private income from the trust, or they're an heir to a family business, and it's been made very clear to them that this is something that should happen and perhaps your fees are being paid by the family and the impetus does not come from your client ...

FGJ: I sometimes find those easier to negotiate because you don't have the tension between the husband and wife. You're able to explain and say, 'look, it's just because rich parents want it and I'm sure you'll be much better off, both of you, if you have it.'

⁴⁸ See page 25 onwards.

FGG: They still have to sign on the dotted line, though, don't they?

FGJ: Absolutely. But the consequence of not signing it might be that rich parents don't let them ...

FGF: But it's a form of duress, isn't it?

FGJ: It certainly is but it might be a legitimate form of duress.

FGG: On that duress point, I thought it was interesting that (leading counsel) recently said that he didn't think – because we traditionally would have advised, if a husband or wife to be - I won't marry you unless you sign this – that was a good example of standard duress, and he was saying, he didn't think that that would now be considered to be duress. It has to have an added consequence: I won't marry you and you'll be deported, and you'll have an illegitimate child, or something like that, it had to have an added value to it rather than just to say 'I won't marry you then'."

The issue of what constitutes duress for the purposes of entering into a pre-nuptial agreement is a matter that the Law Commission may want to consider. In particular, whether the law has progressed beyond the standard notion of duress to an enhanced standard (i.e. 'I won't marry you + an additional factor')? Is an enhanced standard now needed to constitute a legitimate form of duress? According to the findings in this research, apart from third party involvement, there appears to be very little evidence of duress going beyond the standard 'I won't marry you, if you don't sign this agreement'. The only example of where there was an 'extra form of duress' was in the 'most recent' case of ILR where it appeared that there were some additional issues; limitations of advice placed upon the prospective wife by her fiancé in relation to fixed price legal advice⁴⁹ and apparently an extra duress factor in the form of immigration issues:

⁴⁹ See discussion on costs at page 51-2

“I suspect she just signed it because she kept saying to me ‘marriage is good for me and signing this document is a prerequisite for the marriage’. She was Brazilian with slight immigration repercussions as far as she was concerned.”

ILR

5. Independent legal advice

The requirement of independent legal advice was accepted by all the practitioners, who agreed with the proposals contained within *Supporting Families*. However, a concern that was raised by a small number of practitioners related to the amount of advice that should be given to the financially weaker party. The circumstances where this was highlighted in particular related to where the agreement was unfair and the practitioner either did not want their client to sign the agreement in that form; wanted them to push for a fairer settlement or forgo any further legal advice on the basis that that option had the highest chance of resulting in the agreement not being legally binding. However, the underlying problem is that the practitioner knows that this person will sign an unfair agreement because they want to get married. In these circumstances, the dilemma for the practitioner is whether to allow their client to sign a patently unfair agreement that may mean it is not followed upon any potential divorce because the terms are blatantly unfair or does the practitioner attempt to push for a fairer agreement at the outset on the premise that leaving it up to the court to decide is uncertain. This, once again demonstrates the tactical nature of advice in agreement cases:

“Basically she was only going to get any increase in the shares up to a certain point. She could have ended up with almost nothing. There was no provision for what would happen if there were children. I don’t think there was any review

clause in it. My view was that, if she signed it as it was, he might well struggle to actually persuade the court to do anything with it at all. So the further difficulty is: do you just leave it as it is and just say, ‘fine, just sign it because it’s rubbish and that’s your best chance of getting out of it’. Or how much work do you do in trying to put it right to get it to where she wants, against the background of her being very, very keen that this marriage is to go ahead.”

INA

“There’s a lot of posturing between solicitors in the way they represent clients in these cases. I’d go to the stage where I would advise somebody that it’s better for them not to be ... for me not to represent them than to represent them and to get them to sign a disclaimer because then there’ll be a greater chance of them being able to not be bound by it. Perhaps that’s not just posturing, that’s just giving very practical advice, because from a presentation point of view, it’s much better that they went into something on their own really that wasn’t in their interests, rather than have a solicitor who opened their eyes and got them to sign a disclaimer, because that would be disclosable presumably, the fact that you signed a disclaimer. In some of the reported cases where that lady – Ella, was it? – where she’d been advised by 3 Canadian sets of solicitors against entering into it, and then she went to a QC – they must have had in that case access, at least in general terms, to the advice she’d had, the adverse advice – so you’re also thinking like that for somebody. You’re thinking, what’s going to look better for you later?”

FGF

An interesting issue that has been touched on already, albeit briefly, is what actually constitutes ‘independent legal advice’. The current proposed safeguard in relation to disclosure is that it should be ‘*full* disclosure of assets and property.’⁵⁰ However, the requirement for independent legal advice is silent as to the *level* of advice required. A concern that was raised during the course of the research was that on a number of occasions, practitioners made reference to a recent case where they had wanted to engage counsel for example, or even provide more advice themselves, but due to the

⁵⁰ *Supporting Families*, para 4.23 at note 46 above (emphasis added).

fact that the cost of the agreement was being paid for by the other party's fiancé, restrictions had been placed on the amount of advice that the practitioner could offer.⁵¹

“It was one of those things that I'd advised that we should see counsel. The husband-to-be was paying her costs and wouldn't sanction it. And she didn't have the resources to pay herself. This was the thing. She was utterly, utterly dependent on him.”

INH

Consequently, the issue of what constitutes 'independent legal advice' may be something that the Law Commission would like to consider, in particular, whether it may be necessary to refer to a sufficient or prescribed level of advice that is required to ensure the legality of an agreement.

6. Risk

This was an issue that was broached during the 'anything else' discussion at the focus groups, and as a consequence was incorporated into the interview schedule. The second focus group was particularly interesting as they talked about how nervous solicitors already are when dealing with pre-nuptial agreements and how this will only intensify if they become binding. They also raised anecdotal evidence of what is happening elsewhere:

“And we're also getting referrals from other firms that I won't mention, who obviously don't want to touch them with a barge pole. There are certain very

⁵¹ In particular, practitioners ILR, INA and INH (see pages 45, 51-54 and 60-62).

major firms who have obviously taken a policy decision, I'm guessing, not to undertake them.”

FGF

“One QC told me of one case, he'd got a quote of £100,000 just to take out insurance cover on a pre-nuptial agreement. And it does make you stand back and think, 'is it work you really should be doing?'”

FGI

There was a continuation of this theme of nervousness in some of the interviews, both in London and in the northern city:

“But they are something I am actually quite nervous about doing. That is because they can easily be challenged. If you do get it wrong, it could be serious negligence problems and for the cost of doing a pre-nup, is it actually worth it? I don't know. I am quite wary about them but I do them, but we have to do them very, very carefully.”

ILE

In interviews a significant number,⁵² albeit it must be noted, not the majority, raised insurance and risk issues as a potential concern for their firm. These responses ranged from those individuals who consider pre-nuptial agreements to be a major issue of concern for the firm to those practitioners who are aware of other firms being anxious and it is the concern of others which engenders an apprehensive approach themselves. This was particularly the case for the larger firms who were dealing with the wealthier clients as it raised a potential problem over the level of their indemnity cover. One practitioner who worked for a leading firm, was not alone in expressing his concerns as well as being aware of how other jurisdictions are also nervous when it comes to the insurance issue:

⁵² 12 out of the 29 interviewees had at least thought about insurance and risk issues when advising clients in relation to pre-nuptial agreements.

“What is happening with firms in England is specific insurance is being obtained by firms on a case by case basis for certain pre-nups and the one I know of is involving (leading counsel), ... and he said that they had to go and get an insurance policy from Lloyds of London that cost £25,000, just to cover the risk, because the people with these assets are so huge. It will become an issue in Australia as well. It will be an issue everywhere. And I believe in California, no respectable lawyer will even do a pre-nup because of their tort situation. But that’s the stuff is what’s really, really interesting about these agreements.”

ILM

Some practitioners mentioned that some firms they know of will not touch pre-nuptial agreements as they are potentially doing themselves out of more money on a divorce.

This is particularly pertinent in the light of Baron J’s comments in *NA v MA*:⁵³

“...we’re not a firm that would turn down, we would always find a way to be insured, we’re pretty rock solid. It’s a bigger problem for smaller firms. And in fact, I don’t know if you know this, but the majority of the (nearby local area) lawyers won’t touch them. As a matter of policy, they won’t do them. You talk to anybody in (nearby local area), I’ve been told they don’t do them, because they’re worried about the conflict because you’ve got the recent case where, I think again it was Florence Baron, I think she said if you draw them up and there’s an issue about them, a different firm should act, so they take the view in (nearby local area) that all you’re doing is doing yourself out of a future divorce.”

INA

In order to split the risk when it comes to drafting pre-nuptial agreements, a number of practitioners suggested that they would use counsel in this regard:

⁵³ See note 7

“If we believe there’s a risk to our insurance policy, we wouldn’t take the case on, but if we did take the case on, we would probably ... the level of instruction you get at this firm, you would probably get a counsel to look at it.”

ILK

“...we have a standard liability of £1m in our terms of engagement. If you see a client and it’s a high asset case and there’s a pre-nuptial agreement, I would automatically refer it on to our risk committee, and I would ask for an increase, and then they decide whether it warrants any approach to the insurance company. But what I also try to do is try to split that risk with counsel, so in one that we had a QC on, he increased his insurance liability to £5m and so did we, so that it was split between the two.”

ING

However, the remaining 17 interviewees were either not aware of the risk associated with drafting pre-nuptial agreements; were not concerned about the insurance and risk implications and that the issue was being over emphasised, or because of their position within the firm, suggested that it was something that they didn’t know about and matters of that nature were left up to the partners or the risk or practice committee.

“That’s an interesting question. It’s never been raised as a particular question when we’ve had to do renewals”

ILL

“...if they’re not enforceable, you tell your client it’s not enforceable. You can’t be done for negligence in my view. I think there is – the profession is right to think about it, but it’s wrong to be too concerned about it.”

ILC

“I don’t know is the answer. I’m not a partner. I don’t know the terms of the insurance.”

ILR

Others, were not quite so blasé, but did wonder if they were missing something about the risks involved:

“Sometimes I worry that I’m missing something entirely. I don’t quite understand the almost hysteria about advising in relation to pre-nups because it seems to me as long as you say to clients, look, these agreements are at the moment unenforceable, but can carry weight, can carry very significant weight in some circumstances and actually you might be entirely held to it, but I can’t guarantee that, then it seems to me you’re covered really. So I don’t quite understand the hysteria with it.”

ILD

Others mentioned that they haven’t, but have recently are becoming more aware of it as an issue:

“It’s funny actually because I did one not so long back and it was a living together agreement for £50m and at the time it crossed my mind that the risk to the firm versus the fee that I was charging – I acted for the girlfriend in that case, the male partner was extremely wealthy and very well known – it crossed my mind and I felt, no, I wouldn’t. I don’t think, to be fair, she would have paid and I don’t think he would have stood for it. It was a remarkably onerous agreement on the girl that I acted for. She came in with the father, she was pregnant, and he wouldn’t let her move in until she’d signed it. There was talk about it not being his baby and him knowing about it and the whole thing was just horrible. But I am sort of aware of that argument but I have never been to counsel on a pre-nup.”

INI

Others suggested that it may become a problem in a few years time, but at the moment all they can do is advise on the law as it is and record the advice given on the

file, particularly the warnings about how they are not legally binding but can be taken into account.

“I think it’s a difficult one, a difficult one for us simply because we can only advise the client on what the law is today and it’s making the clients aware of that, But obviously if 3 years down the line, they decide to get divorced and the pre-nup isn’t withheld (sic), there can be a claim, but I think if it’s clearly recorded on the file, the advice that’s been given, the warnings that have been given. And as far as I’m aware, I don’t personally deal with that because of the size of the firm – but I don’t think there’s a problem getting insurance cover.”

ILF

Consequently, the issue of risk and potential exposure to future insurance claims is a major consideration for some, but by no means the majority of practitioners in this sample. A small, but significant number of those interviewed thought about and acted upon considerations relating to insurance claims and heightened risk by either raising their insurance cover in the case of the very wealthy client or engaging counsel to split the risk. Perhaps the more concerning finding however, is the reference made by those practitioners who refuse to undertake any pre-nuptial agreement work because of the risks involved and/or the potential of missing out on future revenue in a divorce.

D) Current practice – Content

This particular section will examine the type of provisions that practitioners put into an agreement and how practitioners structure an agreement. In order to do so, three different elements of the interviews will be analysed: The responses practitioners gave when describing their most recent case; the advice that they gave in the two scenarios and some general responses to specific questions about the content of the agreements in which they draft/negotiate.

1. How do practitioners negotiate the content?

i) Mediation and collaborative law

Interestingly, not one practitioner within the sample (both from the focus groups and the interviews) had used mediation to negotiate a marital property agreement. Practitioner ILB suggested the reason that more pre-nuptial agreements don't get referred to mediation is due to the fact that lawyers:

“are very hung up about having full and frank disclosure, independent legal advice (and) no undue pressure on either party ... But generally at the moment you're under huge time pressure because they come to see you a month before,

there's no time to go to negotiation, but at the moment it does seem to be because of the case law, it's in that kind of adversarial approach which is what we're dealing with."

ILB

The time constraint issue was incredibly pertinent and was reflected elsewhere in the sample. When discussing practitioners' most recent case, some interviewees mentioned that there was just not enough time to utilise mediation or the collaborative process. A further difficulty with using mediation was identified by practitioner ILA who suggested that it is the nature and appropriate recording of the negotiation that has occurred between the parties that is significant:

"...the thing I would be most concerned about, which we are slightly hung up on, is that if you are the paying party and you want something to bite, it's very helpful to show that there have been concessions and there's been a real negotiation, and of course that you couldn't demonstrate in mediation because it's privileged. Evidentially it would be very difficult."

ILA

However, unlike mediation, where parties are generally dispatched to a mediator to come up with an agreement, practitioners felt that the collaborative process lends itself to negotiating agreements to a much greater extent. Perhaps this is due to the fact that the lawyers remain present and on-hand throughout the process. Although not a widespread means of negotiating agreements, five practitioners in the sample of 39, said that at some point they had used the collaborative process to negotiate a pre-nuptial agreement, with one using a quasi-collaborative process to negotiate a post-nuptial agreement in order to effect a reconciliation.⁵⁴ In this particular case the

⁵⁴ In the recent research report on collaborative law for Resolution, survey respondents were asked about the relationships between the parties in all of their opened collaborative cases

lawyer was convinced that it was the process of negotiating the post-nuptial agreement through the collaborative process that helped the parties reconcile: “I have to say, if they’d gone to two different lawyers, the outcome would have been entirely different. I’m quite convinced of that. I can’t speak highly enough of the collaborative process.” (INB) Overall, out of those practitioners who made mention of collaborative law as something they had knowledge of, or were familiar with, the general view was an overwhelmingly positive one. For example, although Practitioner INA had not conducted an agreement through the collaborative process, he nevertheless maintained that collaborative law is a great mechanism for dealing with agreement cases:

“I think collaborative law is absolutely ideal for doing pre-marital agreements, and we’re seeing more of them ... because it’s about dignity and trust. If you can do that when you’re divorcing, surely ideally something that you’re planning when you’re happy and you can see what each person is saying about it. It’s very polarising, going to independent lawyers.”

INA

Some practitioners suggested that they take quite a conciliatory approach to advising in agreement cases despite not being collaboratively trained:

“I think – my view of pre-nups is they’re sort of – they’re sort of a collaborative process at the end of the day anyway because it’s all amicable, the parties are choosing to do it. Our approach tends to be – which we’ve started doing over recent cases – rather than launching in and doing an agreement straight off and sending it off to the other side, is to actually do like a one-page heads of

during 2006 and 2007. Out of the cases opened by 184 lawyers, only 0.7% of the cases involved couples seeking to enter pre-nuptial or pre-registration agreements. When asked a slightly broader question relating to the types of relationship which had featured in *any* of these lawyers collaborative cases, of the 206 practitioners, 4% (eight) lawyers had been involved in cases involving pre-nuptial or pre-registration agreements. NB: There was no further breakdown as to the number of lawyers/number of cases which involved couples requiring post-nuptial/post-registration agreements. *Collaborative law in England and Wales: early findings – A research report for Resolution* (2009), Resolution, pp23-24.

agreement and say ‘these are the broad principles we want in it. Can we agree these before we get into the detail of the agreement itself?’ I think people like that because it’s very easy for most clients to understand, they can discuss it between each other at home before the lawyers get involved and that’s the main thing.”

ILH

One element of this quote that perhaps needs to be questioned is whether both parties are ‘choosing to do it’, especially in the light of findings from this research which demonstrate that two categories of the ‘usual’ type of client relates to couples where one party wants an agreement rather more than the other side.⁵⁵ Consequently the drafting of agreements is not always a mutual process, and as already explained, a number of practitioners raised a variety of concerns about inequality of bargaining power and the emotional nature of agreements.⁵⁶ Nevertheless, another practitioner suggested that collaborative law may be a good option even if it is only one party that is pushing for the agreement. In this situation it would be a “question of working together to try to achieve something which is reasonably fair to both parties.” (ILN)

During both focus groups, discussion ensued as to the benefits and disadvantages of the collaborative process in relation to marital property agreements. As with the general view expressed during the interviews, the overall sentiment was pretty positive:

“...it’s much nicer to have them (conversations) sitting round the table than sending letters back and forth and not knowing what is being said. It takes a very large degree of maturity to be able to have those conversations but you also know the process is going to be moving, you’ll pick up the phone to somebody

⁵⁵ See findings at pages 25-28.

⁵⁶ See in particular the findings at pages 59 onwards relating to duress/inequality of bargaining power and page 34 concerning the emotional nature of agreements.

and you'll say, the wedding's in 4 weeks time, can we schedule a meeting for tomorrow or maybe the next day, and you can move the timetable along."

FGH

However, a couple of disadvantages were mentioned. As previously discussed, one of the problems associated with collaborative law is that "it can get a bit expensive" (IND), whilst another concern was that during the collaborative process, one or both of the parties may feel inhibited about asking for further advice or explanation from their lawyer due to the round-table nature of the process. In response to this particular criticism, practitioner FGA suggested that "you have to be sensitive to that, and you have to give opportunity for that to happen." (FGA)

ii) Negotiating within the boundaries of the current law

One of the many dilemmas for practitioners when advising in marital property agreement cases is the problem of attempting to construct an agreement that the courts will look at in the event of a divorce and give due consideration and weight, whilst also representing the interests of the client. Within a discretionary system, where, ultimately, the courts have the final say in the event of a divorce settlement, practitioners suggested that there is no point in constructing an agreement that is so much in favour of one party that the judge feels that they have to intervene: "the trick is to be mean ... but not so mean as to be outrageous or to offend the judge and the judge feel he has to get involved." (ILN)

Consequently, what practitioners appear to be doing when advising clients in marital property agreement cases (and in particular, pre-nuptial agreements), is to advise in the context of the current law and how the court would deal with the finances on the breakdown of the relationship:

“For instance, a second marriage client that we had, a man who came in and just wanted to give his wife a payout of £10,000 or something, just something ludicrous, would never hold any weight whatsoever, and it was a bit of a try-on really, and ‘you’re never going to get the other side to agree to that and it’s never going to be binding anyway, they’re not going to take a blind bit of notice, it’s completely unreasonable’ – so those sorts of expectations you’ve got to manage. The other end of the spectrum is you’ve got somebody coming in and asking for a pre-nup and because they’re desperately in love and planning their wedding, they’re saying ‘oh, I’d give her this, I’d give her that’ and you’re saying ‘that’s more than they’d actually get, so there’s really not much point in you doing this’.”

ILQ

As a consequence, the notion of ‘fairness’ was referred to time and again in relation to the way in which agreements are negotiated. The vast majority said that they took this approach, although this will of course be tempered by who they are representing and the inherent difficulties of advising within the boundaries of the current law. For example, a practitioner representing the wealthier party will generally advise their client that the terms of an agreement should be towards the lower end of the boundaries of fairness:

“What we always do when we’re doing these sorts of agreements is encourage them to make the sort of provision that would make it an agreement that’s going to carry weight. Someone’s saying ‘we want an agreement that says she gets absolutely nothing and he keeps the lot’ – what we’d be saying is, ‘it’s not going to work, you know, it’s pointless, that agreement will be pointless and it wouldn’t be worth the paper it’s written on’.”

ILD

However, this was not the case for all practitioners. Practitioner ILP suggested that she will only negotiate within the boundaries of fairness when acting for the financially weaker party. Accordingly, when acting for the financially stronger party

(to whom she refers to as the ‘man’), she suggests that there is no point in having an agreement which “is going to give the woman exactly what she would be entitled to under the law.” Furthermore, Practitioner INA suggested that over the past few years, the developing law has broadened the negotiating positions a little in that practitioners may now be a little bolder in protecting the wealthier parties’ assets:

“You must have regard to the factors that the court will take into account but there is no point in getting it too close to what the courts will do, otherwise there’s no point having it. So I think what my advice will have changed as a result of cases like Crossley and we’ll wait to see what happens with Macleod – the movement is definitely changing and I think now you can be bolder in protecting the assets than you could even two or three years ago. But you have to make sure ... the other key factor is you have to make sure that it recognises likely changes. So either it only lasts until there are children or you have a review if there are children or you ensure, in the case where they’re definitely planning to have a family, you ensure that the arrangements are stepped so that you take into account the likely impact of that. You have to take into account the House of Lords in *Miller;McFarlane*, you have to take into account marital property, the main home, the likelihood and needs in a case, because the court is not going to leave somebody completely penniless without a home, so a lot of the agreements are structured about making sure that that basic stuff is done.”

INA

Practitioners identified two main issues arising out of this approach to negotiating agreements. First, what is the point of having an agreement if the outcome is always going to be within the boundaries of fairness? Practitioner FGF summed up this conundrum:

“(W)hat you’re basically trying to do, if there’s any chance of that agreement being upheld, because there’s so much emphasis in the case on unfairness, is ... you’re trying to guess what the eventual award would be and go in at the lowest end, and if you try and explain that to a client, they may well say, ‘if that’s what

might happen anyway, when we get divorced, then what's the point of me doing this?' I have to say I struggle with that myself as a rationale. I read an article that made that point – it actually crystallises itself in your mind when someone else verbalises it, but that's basically the purpose of the exercise if you're going to be doing a cost effective job.”

FGF

Secondly, if the practitioner's advice is to refrain from signing a very unfair agreement and the parties subsequently try to negotiate something a bit better, then concerns were raised that because this client has managed to negotiate a slightly better potential settlement (even if agreement is still 'unfair' within the usual perception of the current law), then this will be taken into account by the court and more likely to be binding compared with the very unfair agreement:

“...she would have been better off in a funny sort of way signing the first version, which was ridiculous, than instructing us to negotiate a slightly more reasonable ... well, instructing us to increase it, because the more – which was still fairly ridiculous – but as it was increased, the chances of the court accepting it increased as it increased. Oddly enough she'd have been better off signing something completely ridiculous because she would then have the security of knowing that it was unlikely to be upheld by the court.”

ILR

iii) Negotiating within the boundaries of current court practice

As referred to previously,⁵⁷ there is a general awareness amongst practitioners about how their local court deals with issues on divorce. This can occasionally impact on the drafting of a pre-nuptial agreement and the advice a practitioner gives to his/her client. This was highlighted by Practitioner INE when discussing scenario two. She suggested:

⁵⁷ See pages 34-35 above

“Again, being in this neck of the woods, I’d look to limit that maintenance for 5, 10 years, and you may justify that locally. I don’t know if you’d get away with it in London. I’m sure you wouldn’t. Your North/South divide! Spousal maintenance is the hardest issue in any divorce.”

INE

Although this was the only practitioner who explicitly mentioned how the usual approach of the local county court would impact their advice when advising upon and drafting a pre-nuptial agreement, a number of other practitioners mentioned the disparity of approach in different courts in ancillary relief proceedings:

“We don’t really get involved in cases outside of (local area) very often, obviously from time to time, and that’s an interesting one when you see how courts round the country deal with things. One of the interesting things is the clean break principle. In the (local court) of course, if you’re a woman with children, you’re going to get maintenance. But other courts, I remember going down to (other area) once to do a hearing in (different) County Court. I was saying all this about ‘this is obviously not a clean break case’ – it was an FDR – and the judge said ‘actually, we do that quite a lot round here’.”

ILD

It is therefore impossible to say with any certainty that local county court practice and approach in ancillary relief cases makes any notable difference to the way in which agreements up and down the country are negotiated, but it is nevertheless a useful indication of an additional factor that influences practitioners when drafting and advising upon agreements.

iv) Considerations of time

Currently, there is a general feeling amongst practitioners that there is a shelf-life for agreements. Consequently, depending on the type of client being advised, the predicted efficacy of the subsequent agreement will vary. For example, for those older clients on a second marriage or wishing to ring-fence pre-existing assets, there is not as much concern about time-limiting the agreement as there is for young couples starting out. The limitations of time are most relevant where financial or familial circumstances may change dramatically, such as if a couple have children, one partner gives up work, or a business flourishes, or indeed in this economic climate, flounders.

On a number of occasions a ‘five year’ marker was raised by practitioners in relation to their present understanding and interpretation of the current law. It was suggested that if a marriage was to break down within this first ‘five year’ period, an agreement would in all likelihood be upheld, particularly if there wasn’t a major change in circumstances between the divorce and the marriage:

“I did stress to her, as I do to all my clients, that when you’re looking at the enforcement of a pre-nup, the first five years of marriage, providing you haven’t had any major change in circumstances ... is really the life of the pre-nup. The further away you get from the set of circumstances you had at the time the pre-nup was entered, the less likely it is that the court will uphold it, particularly if you’ve had a massive change in assets that are marital as opposed to coming from elsewhere.”

ILP

“I think the one thing that possibly comes as a surprise to them (clients) is the short shelf life of them, the idea that they should be reviewed after 5 years, or they’re harder to uphold after five years or so.”

INE

What was also worthy of note from a ‘time-frame’ perspective, was analysing practitioners responses to the scenarios to see if there was any regularly occurring

issues or interesting options that practitioners suggested. One possible inclusion that was raised in response to scenario two (Alan and Jane) was the possibility of staggering payments from Alan to Jane based on the length of the marriage:

“(O)bviously the longer the marriage, the more generous we’d advise him to be.”

ILG

“I’d probably say, after five years of marriage, she should get a certain amount; after 10 years, increase that, so it’s incremental and then a court – say, they split up after 20 years – then a court could see that actually they’d thought about that and she is benefiting from more of his assets rather than just a flat rate which may mean the pre-nup may not hold water.”

ILJ

Of course, this approach would not suit every agreement, and as with all advice on agreements, it is highly fact dependent. In the first scenario for instance, instead of staggered payments, the *raison d’être* of the agreement was to ring-fence the assets of the older couple:

“(I)t’s probably going to be one of those cases where actually the pre-nup might last longer than the first five years because the children are grown up and there’s obviously no chance of other children, and assuming their state pensions and private pensions keep going, and their savings and house prices are roughly going to be in line, there’s no reason why the pre-nup can’t last longer because I can’t see any major change in circumstances that could take place.”

ILP

The ‘staggered approach’ to payment enables parties to protect their assets particularly for the first few years of their marriage, with having the added advantage (as Practitioner ILJ suggests), of indicating to any court upon divorce that the payments had at least been considered in line with current legal practice, rather than

just a flat rate sum. However, if the parties want the agreement to be taken into account in the longer term, practitioners are faced with two principal dilemmas; on the one hand advising clients that pre-nuptial agreements are most successfully enforced in the shorter-term marriage,⁵⁸ whilst on the other, advising them that if the marriage endures beyond “the first 10 years ... then it’s really much more difficult to anticipate what the financial situation might be” (INH) and at that point other issues such as whether to incorporate review clauses may well become the pertinent question.

The issues surrounding reviewing agreements are discussed below,⁵⁹ but in terms of limiting agreements based on time, some practitioners suggested that they utilised this option when drafting agreements because of the difficulties surrounding trying to predict every eventuality, particularly for young couples who do not have children.⁶⁰ An example of a time-limited pre-nuptial agreement was highlighted by Practitioner INF:

“(I)t was a wealthy individual but he wasn’t very old, he was only in his 30s, it was family money, and basically it said that if the marriage only lasts 5 years, or until there are any children, if that’s earlier, she’ll only get £1million. And then after that, basically, all bets are off. I actually think when people are quite young, that’s almost a better way of dealing with it instead of trying to predict everything going forward forever, because I think you get into a mess trying to do that, because I don’t think you can do it.”

INF

⁵⁸ In *Crossley v Crossley* (note 7 above), Thorpe LJ described the short-marriage case in which the pre-nuptial agreement was being disputed by the wife, as the ‘paradigm case’ in which the pre-nuptial agreement was “not simply one of the peripheral factors” but a “factor of magnetic importance.” Per Thorpe LJ at para 15.

⁵⁹ See page 90

⁶⁰ Practitioners noted that these difficulties were not so prescient for older couples who are entering into their second marriage and want to ring-fence pre-existing assets.

It is suggested that if pre-nuptial and pre-registration agreements are made legally binding, then the uncertainty of time and the difficulties of ‘crystal-ball gazing’ (highlighted by many in the sample) may only intensify. The method by which practitioners currently deal with the short versus long-term implications of pre-nuptial agreements, by time-limiting their efficacy for example, could be something that the Law Commission may want to consider.

2. Structure of agreement

The structure of agreements drafted by practitioners, appeared, on the whole, to be as individual as the parties they were advising. Practitioner ILP highlighted that in one pre-nuptial agreement she had drafted, it;

“...ran to about 90 pages, and there was a particular American stance for everything and anything. And then I’ve drafted some which are just completely and utterly straightforward three page agreements, really designed to protect against what would happen if the marriage broke up within a very short time.”

ILP

However, some general trends could be discerned from the data. First, one practitioner mentioned Resolution’s ‘Precedents’ as a helpful tool when drafting agreements (ILQ) whilst another mentioned that their firm have their own precedent when drafting agreements. (ILN) Interestingly, another practitioner suggested that it’s not until more cases over disputed agreements go through the courts will practitioners know what works and what doesn’t:

“I think, in time we’ll see through the courts when they start looking more towards pre-marital agreements or pre-registration agreements, really how are we going to start drafting them? There are lots of ways of drafting – it’s how effective they are going to be in the future will depend on various case work, that we start looking towards how much weight is attached to them in the future.”

ILO

In terms of length of the actual document, some variation of approach could be discerned. On the one hand, it was felt by a couple of practitioners that the general trend at the moment is for a greater amount of depth and detail being incorporated within current agreements: “The trend is for them to be longer and longer, fitting in more of the story, the context within which you have come to this particular negotiated agreement.” (ILA) A related point, and probably due to the uncertainty of the law, one practitioner mentioned her dislike for agreements which contained a paragraph outlining a current assessment of the law: “I don’t really want my agreement to be based on particular – you know, if the agreement was disputed at a later stage, obviously you go back and you look at the files, and you see where both parties were at, but I don’t think it’s helpful to summarise in one paragraph what the case law is.” (ILB) On the other hand, another practitioner suggested that keeping them simple is important and not trying to predict the future within the document “because to some extent the more detail you put in there, the more you try to do, the more potential you have to stuff it up. But I do agree with the sentiment of, this should be rethought and renegotiated, and things like that, but again it’s just so hard to predict what’s going to happen in the future.”(ILM)

This ‘fitting in of the story’ (ILA) was viewed as vital by a number of practitioners, irrespective of whether it was placed within the preamble to the document or in accompanying documentation: “The more information you can give as

to why it has been entered, then the more evidentially sound it becomes as to why they did it and how their minds were thinking clearly about what they wanted.” (ILP) This practitioner suggested that this was done through putting it in the preamble to the agreement and in the agreement itself. Another practitioner mentioned how important recitals are to set the scene:

“The recitals are absolutely critical to the agreement, were you highlight what it is that you’ve agreed to do. So, for example, if it is close to the wedding, and I’m drafting for the person who wants to protect, I will say ‘although we recognise that it’s close to the wedding, both of us are very happy that this is an appropriate thing to do and there is no duress.’ That doesn’t stop the court finding that there was, but it’s another hurdle.”

INA

Only a couple of practitioners described how they structure an agreement. Although when discussing the two scenarios with the interviewees, an apparent standard began to emerge, albeit that very few practitioners actually articulated the route they would go down when putting together an agreement. One of the few was Practitioner IND:

“I would very much deal with the agreement in the way I have done previous ones – the opening ambit about who they are, the status of them. You want to make sure you’re doing it in plenty of time. What they seek to achieve in the agreement. A section about – and you’d refer to your schedules here – about what assets they’re coming in with. And then equally what they’re planning on doing.”

IND

3. Children

The question of how to deal with children within a pre-nuptial agreement is an issue that is dealt with in a variety of ways. As will be explored below, approaches of practitioners within the sample varied from those who leave the issue out of consideration completely to those who make substantial reference to the provision for children and consider the needs of the primary carer within the agreement.

The research for this study took place between the months of November 2008-February 2009, a number of months after the decision in *NG v KR (Pre-nuptial contract)*.⁶¹ In *NG v KR*, Baron J used the six safeguards stated in the Green Paper *Supporting Families* (1998) as the basis around which she analysed the viability of the pre-nuptial agreement. Baron J suggested that the pre-nuptial agreement in that case ‘fell foul’ of the safeguards outlined in the Green Paper on six counts; one of these relating to the fact that the agreement did not provide for any future children of the relationship: “In this marriage the birth of children was a real factor which affected the husband’s ability to earn substantial sums. The fact that the PNC made no provision in such circumstances and indeed omitted any consideration of such factors is a flaw which I consider makes the deal, prima facie, unfair.”⁶²

In light of this recent decision, subsequent commentary has suggested that it is important that practitioners ensure that all the ‘safeguards’ outlined in the Green Paper are followed, and in particular that if no reference is made to future children in the agreement, then this “will be an obvious ‘flaw’ undermining the overall effectiveness of the agreement.”⁶³ Consequently it is quite surprising that the results of this study found such a variable approach to the anticipated need to provide for future children within pre-nuptial agreements.

⁶¹ See note 7.

⁶² Per Baron J at para 38(d) in *NG v KR (Pre-nuptial contract)* (see note 7 above).

⁶³ Murray, A ‘Drafting Pre-Nuptial Agreements: *NG v KR*’ [2009] *Family Law* 143

This variation of approach can be seen through two elements of the research; through a variety of general questions as to how agreements are dealt with and in analysing the practitioners' approaches to scenario two. Dealing with the latter issue first, when practitioners were asked about how they would deal with the prospect of additional children within the second scenario, there was no consistent response. Amongst the 29 interviewees, the most popular alternatives when giving advice on the prospect of additional children in scenario two were:

- Incorporating a review clause on the birth of children (eight practitioners)
- Larger capital sum (six practitioners)
- Purposely leaving out any reference to child support/maintenance issues in the agreement (six practitioners)
- Providing for a decent family home within the agreement (six practitioners)

In addition to these most popular 'groupings' of advice, the range of responses to the scenario also encompassed the following advice options:

- Time-limiting certain aspects of the pre-nuptial agreement
- Attempting to negotiate a larger capital sum (housing, maintenance etc. combined in a clean break settlement)
- A clause relating to potential private school fees
- Putting a clause into the agreement detailing an intention to pay child support at some level associated with CSA/C-MEC rates
- One practitioner suggested that that they would advise inserting a clause within the agreement to enable the family home to revert back to the father after a specified period of time.

The findings generated from the general question element of the research also resulted in outcomes which demonstrated an array of current practice. At the one extreme were practitioners who took the view that any provision for children would be separately negotiated on any divorce, whereas at the other end of the scale were those who felt that there was no reason why a practitioner should not be able to incorporate future provision for as yet unborn children into an agreement. These alternative positions are demonstrated by the following two excerpts from Practitioners ILH and FGJ:

“We tend expressly in the document to say we’re not going to cover children, we’re not going to deal with the capital or income position, very much say to clients ‘the court likes to deal with this, it’s their overriding priority and therefore we don’t want to drift into that’.”

ILH

“It’s not beyond the wit of man to actually work out what’s going to happen if there are children. It’s not particularly an unexpected event, so there’s no particular reason why you should not have a perfectly satisfactory agreement that covers that. ... The more difficult one is, the longer the agreement goes on, the further away you get from the original asset base and the original income and everything else, potentially the more unfair the agreement is.”

FGJ

Another popular option was to build in consideration for future children through the use of review clauses within agreements. However, the use of review clauses is not without its problems, although this is discussed fully in the following section.⁶⁴

“You give advice and you say, review, review, review. Or you can put, if there are kids, then all bets are off, quite frankly.”

FGA

⁶⁴ See page 90 onwards.

When discussing scenario 2, ILK suggested:

“But I think the whole issue of maintenance would be very difficult to advise on and it may be just more suitable to agree that there be a review clause and a review clause will say that these things are going to be reviewed.”

ILK

Some practitioners use staggered payments on the birth of children.⁶⁵ However, Practitioner ILM suggested that problems can arise with this ‘staggered’ approach to the financial award:

“I still think that’s a bit iffy actually because – I have one client at the moment – non pre-nup case – but the child has got a very rare genetic problem and needs a huge amount of care and it is a really high needs medical child, and there’s no way that that wife can work. I’m acting for the husband but I can see that she can’t work, and you don’t know what life is going to bring. And the same with fortunes at the moment – they’re all going down – and to give... There could be a situation where you provide someone with a certain amount of money, there might not be that money there. It’s very difficult to deal with that. And I don’t think you can predict the future. And that is what I would say to a client as well.”

ILM

A further option for some practitioners is to make reference to child support payment rates within the agreement. When discussing scenario two, Practitioner ILF suggested:

“whether you have (a provision) in there that says he will pay x amount of child maintenance, or whether you have a general intention that he will pay child maintenance at a level above the CSA but to reflect the standard of living that they’ve enjoyed during the marriage, and school fees of course – we don’t know whether or not the children are privately educated and it could well be that his children are privately educated, her daughter isn’t, but if they get married, that

⁶⁵ For example, the amount agreed upon will increase with the number of children born to the relationship.

the daughter might be privately educated as well, so that's one of the things I'd want to flag up at the outset as well."

ILF

Some practitioners' expressly put in clauses relating to existing children, but kept the agreement vague as to future children. This could be achieved by incorporating provisions relating to reasonableness rather making express provision as to amounts.

4. Review clauses

A review clause placed within an agreement allows for a review after either a certain period of time or after a specified occurrence (for example, the birth of a child or loss of employment). Depending on the content of the review clause the agreement may be worded so that the failure by the parties to review the agreement may cause the agreement to lapse. However, this does not necessarily have to occur, and review clauses can and are used when no consequence results from the failure to review (i.e. the agreement remains valid). Likewise, the agreement may make reference to potential consequences if there is no review or the consequence/outcome if the parties cannot agree on a revised agreement at the review.⁶⁶ But of course, this raises the question of whether the agreement is as valid in the period following a potential review that has not taken place (i.e after a period of time) or after a major change of circumstances (i.e the birth of a child) particularly where the agreement makes no mention of intended consequences of a failure to review. The upshot of this intrinsic

⁶⁶ For example, 'in the event the parties cannot reach an agreement on review, the original agreement stands as drafted'.

dilemma is that the results from the research found a very mixed view of review clauses:

“Terrible mistake to have a review clause, unless you’re for the economically weaker party. ... Because – well, a) it will cause discord, if you have a clause saying ‘on the 10th anniversary, there will be a review’; and b) well, it depends what the review clause says. Does it say that the agreement ceases to have effect?”

ILN

“There’s a quite strong differing view between different partners within our team. Some very much feel that you’re a hostage to fortune by having a review clause in there because: is there an onus on the law firm that drafted this thing to come back every 5 years and remember to ask the client to look at this; if not, is the firm itself negligent? ...Others though think it’s good to explicitly put it there so the parties are fully aware of that and are encouraged to blow the dust off it to make sure it does remain fair and reasonable in the future.”

ILH

“I think they’re good. I think you need to review the situation, ever-changing as it is at the moment, financially, both parties need to review their situation. It’s like you would look at a will, you’d look at it and ‘do we need that again?’ I don’t see that there’s a reason why you shouldn’t be reviewing financially your agreement when you got married. You might even agree to tear it up and say ‘let’s forget about it, I don’t want anything to do with it, what’s the point?’ But I think there’s nothing wrong with a review at all. I think that’s perfectly reasonable.”

ILO

“I think they’re a necessity for alerting the client to the fact that it (the agreement) does have a shelf life. I think too many clients go away thinking, well, that’s it, it’s done. It isn’t, is it, definitely not.”

INI

One fundamental issue surrounding the incorporation of review clauses within agreements concerns the appropriate trigger to provide for a review. Whether it is based on timing (i.e. a review after a specified period of time) or after a change of circumstances (i.e. birth or adoption of a child / loss of employment / disability). In terms of the findings within the research, there did not appear to be a strong tide of opinion as to which was preferable. It appeared that it was down to the individual agreement and the desires and wishes of the parties, as well as the advice given by the practitioners based on these factors. Some practitioners viewed review clauses on the birth of children as not only impractical but also expressed concerns as to whether there was any point in incorporating a review clause for children as “the pre-nup is much less likely to be enforced, however catered for.”(ILP) However, consistent with the findings of most of this research, where inconsistency of viewpoint was more evident than consistency on a number of occasions, other practitioners liked the idea of an agreement being reviewed on the birth of children (INA). Perhaps therefore, the only accurate description of the findings in this regard is the variable nature of the opinions. Perhaps luckily, ‘the appropriate trigger point’ was not where the main crux of the debate lay. Practitioners were more concerned about issues such as the practicalities surrounding review clauses and the consequences of failure to review. Even those practitioners who agreed with the theoretical concept of a review clause, appreciated the practical difficulties associated with them:

“It’s just not a priority cost-wise, unless they’re really wealthy. It’s just not realistic to think that people a) have the motivation unless they’re going through a particularly bad patch, but also, if they’ve already spent £20,000 on each side or whatever, they’re not going to want to go through an identical process all over again, which is what it will be.”

FGF

“If you’ve got a six-month old baby, renegotiating your pre-nuptial agreement is not top of your list at that point. That’s just one example of complete impracticality. That’s why part of me says I don’t like them.”

ILB

Only a couple of practitioners made reference to what they would incorporate within an agreement if a couple failed to review. Of those, Practitioner INE expressed how this area is particularly contentious during negotiation:

“... but the one thing that causes real acrimony – and I’ve found this in about half a dozen pre-nups is what should happen on review.”

INE

This can be particularly difficult if one party is playing a tactical game and wants the agreement to lapse if not reviewed (normally the side in the weaker financial position).

“Usually one of my main battles with the solicitor on the other side, depending on who I’m acting for, is whether the agreement lapses if the agreement is not reviewed.”

FGJ

Consequently, the practitioner has to advise their client as to the array of options if the agreement is not reviewed. One practitioner summed up the variety of options that clients have and how this is dealt with within the agreement:

“I always say to people, ‘the review clause ought to be in there if you want this to carry weight but the probability is you won’t review it and therefore let’s think about what happens if you don’t.’ Some will say, ‘well, in which case, let’s not have a review clause’ – fine; some will say, ‘well, actually, I’m only worried about this for a few years, because once we’ve been together for 5 years, I’ll feel

okay about it anyway’ – again, okay, fine, so it just falls away; others are more concerned about it and therefore you have saved on those weird things like ‘we recognise it’s not appropriate but we want it to be taken into account.’”

ILD

The difficulty for practitioners is, even if the agreement does carry on in its existing terms after the review period has expired, the question remains as to the extent that they should be upheld when an anticipated review does not occur, the circumstances have changed and the terms provided for the agreement to nevertheless still stand.

Interestingly, and as an aside, very few practitioners had undertaken a review.

One of the tiny minority was Practitioner INA:

“all we did was look at it and agreed that nothing had to be changed, and they signed a supplemental deed to say that was the case.”

INA

This lack of experience amongst the sample is perhaps not that surprising for a number of reasons:

- Pre-nuptial agreements have only come to the fore in the last few years, and as discussed in section A of this report, the number of agreements made by practitioners has been quite modest, and most of these have been drafted in the last few years. Likewise, a good proportion, although not a majority of the sample⁶⁷ noticed an increase in the number of agreements in the last few years. Therefore of these recent agreement cases, it is probably a correct assumption that most of those clients have yet to get to their first review date – after five years for example or on the birth of a child.

⁶⁷ See pages 9-13.

- The impractical nature of review clauses could be the reason for the lack of practitioner experience in conducting a review; clients have reached the review point/occurrence and either have not thought about it or have just been too busy with children/careers etc.
- As one practitioner suggested: “I don’t know how many of them are reviewing it themselves and saying, actually we’re quite happy with the provision that’s made” (INH) so they could view an ‘official’ review as a waste of time and money and overall, not necessary.

Following the *Macleod* decision, two practitioners suggested that in the future, all of their clients will be advised to incorporate a clause within their pre-nuptial agreement to allow for a review within six months of the wedding in order to take into account the ramifications of the Privy Council decision:

“...because of *Macleod* – which I’m sure you’re familiar with – I think there’ll be a lot more post-nups, and in fact we’re about to write to all clients advising them – who have done a pre-nup – that they ought to consider doing a post-nup.”

ILN

Consequently, the current situation for some practitioners is that they are advising clients to come back within a three to six month (ILP) period of their wedding to have a post-nuptial agreement. Given the short time span between the pre-nuptial and post-nuptial agreement, it is likely that it would provide for exactly the same terms and encompass the same disclosure, providing there are no major changes in circumstances in the intervening period.

“ I know *Macleod* didn’t say ‘all post-nups are going to be binding immediately, and that’s the end of it’. There’s going to be some flexibility because they’re not binding as a matter of law, they’re only taken into account. But certainly what the case does seem to suggest is that, if you’ve had a post-nup, then you will find

it one step easier to have it enforced than you would simply with a pre-nup. And I know it sounds bizarre, but you can enter something on the 1st January, get married and then something on 1st March which is exactly the same and the latter has more chance of being enforced but that's where we are with the law, that's what seems to have come out of the case *Macleod*.”

ILP

What appears to be developing as a result of the *Macleod* decision, is a seemingly two-stage process for pre-nuptial agreements and a two tier approach to marital property agreements, due to the increased legal consequences of having a post-nuptial agreement compared with a pre-nuptial agreement where the consequences remain unclear and subject to the vagaries of s.25 MCA 1973. Given that early indications from this study appear to suggest a practical impact of the decision in *Macleod*, with some practitioners advising ‘pre-nup’ clients to return for a post-nuptial agreement within six months, the Law Commission may want to investigate whether the consequences of *Macleod* are not only appropriate and proportional, but whether the differentiation in legal consequences between pre-nuptial and post-nuptial agreements is necessary and justified.

E) Views of practitioners

1. Level of wealth below which agreements not relevant?

Although the findings from this research tend to indicate that the type of client wanting a marital property agreement can be found within quite a narrow frame of reference, an additional contextual consideration for the Law Commission is whether there is a level of wealth below which an agreement may not be feasible (i.e. because needs would overtake).

As with the vast majority of findings in this research, the views of practitioners are variable; some gave a range of figures as to the base level of wealth required for an agreement to be feasible, whilst others suggested that it depends on contextual factors such as where the client lives, local housing costs etc. At the lower end of the scale, one practitioner drafted a pre-nuptial agreement for an individual who wanted to ring-fence the existing equity in his ex-council house.

However, the overall view that can be discerned from the findings is that generally the wealth level to make an agreement feasible is the relevant needs level i.e. the feasible cases will be ones that go beyond the level of needs. This will of

course vary depending on a number of factors; location, housing costs, standard of living and resources of the individual family. This was reflected in the variation of level of wealth that some practitioners referred to as the minimum required to make an agreement feasible. This ranged from practitioners who suggested that parties would need at least property and £100,000 in savings to those that suggested one million pounds in assets.

“The answer has to depend on where your practice is based because it’s fundamentally about rehousing costs. Yes, I would have said £1million. It slightly depends on what sort of property someone’s living in and is it mostly in property?”

ILN

“I would say if they both had property and there were substantial savings around about £100,000, or I would say that there was particularly some sort of inheritance aspect where there is something of sentimental value, something which has been in the family for many, many years and they really want to try and afford some form of protection for that before they get married, and that’s when I would advise them to look at a premarital or pre-registration agreement.”

ILO

One of the questions that was asked of practitioners was whether, in a ‘needs’ case, if the parties want an agreement, should the law take a protectionist/paternalistic stance and prevent them from having one. On the whole, opinion was that if clients want to protect their assets they should be able to subject to the costs relating to the agreement and the parties needs in the future: “It’s the principle, I think, as much as the amount. It’s the principle: I’ve got kids and I’d better look after them. ... So the principle almost overtakes the value, or the proportionality or any cost-benefit analysis.”(FGA) They suggested that there was a perception that agreements were for the wealthy but if people are looking for a degree of certainty it is irrelevant whether they have

“£10,000 or £10 million, they would still want that degree of certainty ... as long as they are not put off initially by the fees that are charged.” (FGD) Practitioners generally agreed that the fees to draft an agreement acted as a gatekeeper mechanism, particularly in the limited assets case and the cost to draft an agreement can become potentially disproportionate. Furthermore, the length of marriage is an additional factor that may make a smaller money agreement more worthwhile:

“If you have someone who has zero or very, very little and someone who has an asset to protect, it is worth entering a pre-nup. I have dealt with a couple of cases which didn’t have pre-nups, very short marriages like 18 months or 13 months, and one party had assets which got taken into account, and with the pre-nup you would have a good chance of protecting that asset in that sort of case.”

ILP

At one of the focus groups and in a couple of the interviews, attention turned to the rationale for having an agreement, particularly the need to look to the future rather than just the current asset level of the parties:

“Sometimes it’s not a question of what you’ve got now, but what you are likely to get in the future ... large bonuses, ... an inheritance. I had one the other day. He seemed to have very little assets – it was actually quite a difficult one to draw up because they don’t know whether he was going to inherit it or not – how do you draw up something like that?”

FGE

The issue of trying to protect *future* as opposed to *pre-existing* assets is interesting. Given that a number of the practitioners’ rationales for not having a base level of wealth was due to the uncertainty of future wealth and what parties may want to protect in the future (“they may be income rich and capital poor” ING), the question for the Law Commission is whether protecting the future potential marital acquest

should be a legitimate aim of a pre-nuptial agreement. According to current principles, it is all very well to attempt to ring-fence future inheritances, (a justifiable departure from equality per *Miller;McFarlane*) but what about future business assets/bonuses/earnings that are, at the time of the pre-nuptial agreement, just that, potential income, and crucially, potential ‘family income’? The question of the viability of ring-fencing future and as-yet unearned ‘family income’, particularly in a threshold needs case, is something that the Law Commission may want to consider.

“If they’ve got no money, if neither of them has got any money, then in reality what are you going to say to them? ‘The way in which the law works is that if you start off a relationship in a marriage with nothing between you, then everything that you accumulate is probably going to be divided equally’; explain to them how it works if there are children, if one party has care of the children, if that’s how it works; ‘in reality what do you actually want to achieve by doing this agreement?’”

INJ

“(If you’re looking at the majority of people, you know, i.e. those who don’t have their sort of surplus assets, then ... again, what I’m always saying to clients is ‘you can’t have an agreement that doesn’t give someone their reasonable needs, it’s not going to work’. So, bearing in mind that, although the law has changed significantly since *White*, still most cases are reasonable needs, and actually for those people, it’s not going to carry significant weight.”

ILD

2. Should pre-nuptial agreements be binding and if so how?

As with the rest of the research, this particular series of questions elicited a variety of responses. The ‘headline’, almost superficial response, is that the majority of practitioners, when asked the question of whether they should be legally binding said

yes (25 out of 39 = 64%). Although within this range, practitioners varied in their opinion from those who wanted strict enforceability with no/limited get out to those who believed that stringent regulation with safeguards is necessary.

i) Practitioners' views on why agreements should not be binding

In focus group two, the discussion about whether agreements should be legally binding was fascinating to watch and listen to. The group managed to discuss their way to a consensus that agreements should not be legally binding after analysing all the difficulties associated with them. A particularly pertinent point was raised by practitioner FGE, who, whilst acknowledging that the focus group had managed to argue their way out of believing pre-nuptial agreements should be legally binding, suggested that there was a widespread belief that most practitioners would think that they should.

“One of the fundamental questions we have to ask is why it is perceived by the Law Commission that they should be made binding. Why are we looking at this? Where is the pressure coming from? Is it coming from family lawyers? Because, if you ask most family lawyers, who haven't sat around talking about pre-nups, whether or not they thought pre-nups should be binding, I would have thought a fair number, given what are considered to be some very generous awards recently, I would think they'd say, yeah, of course they should be. I think it's interesting that us 6, having sat around and looked in considerable detail over the past half an hour are probably now coming to the consensus that they should not be.”

FGE

Practitioner FGE's view that most practitioners would probably think that pre-nuptial agreements should be legally binding has been borne out by the findings of this

research, with the majority of the practitioners involved in the study believing that pre-nuptial agreements should be made legally binding in some form.⁶⁸ However, 14 practitioners expressed reservations about making pre-nuptial agreements legally binding. A variety of reasons were given, ranging from imposing a certain system onto a discretionary regime, through to those who felt that the final say should remain with the court upon marital and civil partnership breakdown.

- The imposition of a certain scheme (legally binding pre-nuptial agreements) onto a discretionary regime was felt to be inconsistent with the nature of the system already in place:

“I don’t think you can have legally binding agreements within a discretionary system because you’re always going to then ... our whole concept of fairness would be blown out of the water, which runs absolutely through all of family case law. They can’t suddenly go, well, this applies to people who haven’t entered into a pre-nuptial agreement but if you have, tough, that’s it.”

FGG

- The concerns relating to certainty displacing or overriding fairness as the implicit objective upon divorce for those individuals who have a pre-nuptial agreement caused some consternation amongst practitioners:

“A policy decision which is that certainty is an important part of fairness and can in some way displace what objectively speaking may be fair, this is quite difficult for us to grapple with. It certainly has been difficult for me to grapple

⁶⁸ It is also relatively consistent with the as yet, unpublished findings concerning pre-nuptial agreements from my research into the ‘everyday’ ancillary relief case. In that research, the interview sample of 24 practitioners were asked whether they believed that pre-nuptial agreements should be legally binding; 12 out of 24 (50%) said yes or that they thought agreements should be given more weight; 11 out of 24 (46%) said no or expressed reservations about them, whilst one practitioner (4%) said it depended on the asset level of the parties.

with. I can see the benefit of unclogging the crowded court lists but if that's the sole reason to push through reform, I think it would be misplaced."

FGI

- The circumstances in which the parties find themselves at the time of a divorce, can be completely different to the situation when the pre-nuptial agreement was drafted: "I think there are too many variables in people's lives to be prescriptive to that extent. I think they should be more persuasive and of more evidential value but I don't think they should be legally binding upon a court." (INI)
- A number of practitioners felt that the ultimate decision upon a divorce should be the courts and it is right and fair that the court has the final say:

"I think it's right that the courts are able to consider all the circumstances. ... I think the power difference between people, when you're looking to get married, you could agree to something that wasn't in your best interests and you could be held to it, you don't know what's going to happen in the future and I think it's better that at the time of the breakdown, you can have all your arguments then rather than trying to crystal ball gaze and work out what's going to happen in the future – that's your insurance policy for life and you've got to negotiate it when you're running up to a wedding."

ILQ

- Due to the way in which the content of an agreement is negotiated, the outcome is generally what the court does/would do anyway. Consequently, the odd practitioner speculated about the usefulness of pre-nuptial agreements: "I actually think there's not much point in doing them, to be honest. I can see why people think it's better to have one than not to have one at all but I actually think they're a whole load of stress and money and highly unlikely to

get you very far anyway unless they're what the court would have done anyway, in which case why not leave the court to do it at the time? So I just think it's better if there weren't any at all." (ILQ) A related concern here, that was not articulated by any of the practitioners in the sample, is that if pre-nuptial agreements are made legally binding and discretion is removed at the final stage of the process if a couple possess an agreement, then that may have an effect on the way in which agreements are initially negotiated. The underlying substantive element of fairness as a guideline by which agreements are currently negotiated may well become less prevalent. Of course, this will depend on whether any 'safeguards' incorporate a discretion to set aside and upon what basis that is set.

- Some practitioners felt that the current situation is adequate; giving pre-nuptial agreements some weight, requiring safeguards, but ultimately, giving the court discretion. In discussing the *Supporting Families* safeguards, practitioner FGH suggested: "It's almost as though practice has taken us to the position where we have a kind of relatively sensible approach which was advocated but not brought into force." (FGH) These practitioners tended to like the current approach and did not want legal reform.

ii) Practitioners' views on why agreements should be binding
and how to make them binding

There was an assortment of responses amongst the 25 practitioners who suggested that pre-nuptial agreements should be legally binding. At the 'strict enforcement' end of the scale, were those practitioners who wanted limited safeguards and either very

limited or no means of resiling from or getting out of the agreement. These practitioners generally took an autonomous view of the law; that the state should reflect and enforce the wishes of the parties. Furthermore, any safeguards should generally be procedural and focused on the time at which the agreement is drafted, rather than a catch-all ‘get-out’ provision at the end, which allows for a claim at the time of divorce based on substantive concepts such as unfairness or significant injustice for example. Consequently any ‘get-out’ at the end should be limited or non-existent. Practitioner INB, who held the most extreme view out of the sample, made a comparison with ordinary contractual principles and furthermore suggested strict enforceability with no ‘get-out’:

“I think they should be binding. Actually, my view is that they should be binding as per any other contract. I don’t even go along with the Resolution proposals for reform, the safeguard of ‘significant injustice’. I think we’ve got all the usual safeguards with contracts – duress, undue influence, all that sort of thing, that would make a contract void or voidable, whatever, and I think we’re dealing with ... these are adult people making contractual decisions they make every day about other things which also have massive implications, without having any legal advice. So I think it is very paternalistic of the state to suggest that people aren’t capable of doing that. That’s my personal view. Now that would result in injustice for some people but the system at the moment is pretty bad.”

INB

At the other end of the scale (tending towards the majority), were those practitioners who felt that stringent regulation of agreements is necessary, but not strict enforcement of them. This is in order to not only protect vulnerable parties, but due to the fact that the existing system is discretionary. According to practitioner ILM, “I don’t think there should be strict liability on them. I don’t think they should always be 100% binding. There needs to be a safeguard and an out clause.” The reasoning

amongst the majority of practitioners for a system which allowed for regulation, but shied away from a 'strict liability' approach was due to aspects such as clients' vulnerability, the need to marry certainty with the discretionary system already in place, the need for a safety net to allow for a party's basic needs which may not be catered for within an agreement and to cater for any significant change in circumstance, balanced against the need for some certainty, reflecting parties' wishes and responding to the requirements and needs of an increasing international clientele.

"I would like the certainty certainly if they were legally binding but I think there's always going to be a greyness to them because there are always going to have to be a certain number of caveats, sort of protective elements to it, I suppose, to make sure that it's not unreasonable, unfair, call it what you want. I think it would be helpful if they were. I think people are more and more expecting it. They're used to it, particularly when we get quite a few international clients coming through from the private client side, so they're used to ... we've had Danish, French, US clients and they're almost staggered to find that it isn't binding. I think, on the whole, they're a funny creature altogether. They're never entirely satisfactory to do and very often there'll be a slightly bitter taste when it comes out in people's mouths to debate these things just before going into a marriage but I can understand why people want them. I think on the whole I would rather they were binding."

ILH

There is no overall agreement amongst practitioners as to the type of reform they would like to see. Options which were mentioned by one or more practitioners include:

- Giving pre-nuptial agreements more weight/elevating their status; perhaps as an added element within s.25 or as a presumption within the current law that any agreement should be upheld:

“I think there should be a presumption that, providing all those guidelines are done, there should be a presumption that the agreement should be upheld. And before you embark, I think you should be able to challenge it, but before ... the presumption should be that it will be upheld. And that if someone just tries to issue the application anyway, then the first triable issue should be: should this be upheld? Before you go through all the expense of the Forms E, the disclosure, all those questions, etc, there should be really ‘what we can do now is Notice to Show cause why this agreement should not be upheld – that should be the first thing that is done – or why the agreement should be upheld, whatever – that should be the first thing. And if the courts decide, yes, that’s fine and there should be a presumption that it should be fine, unless something terrible has happened.”

ILE

- Procedural reform; adding a preliminary hearing into the system to address the issue of any marital property agreement before getting to the s.25 factors

“I think the Family Proceedings Rules should change so that we do actually get that ‘just cause’ type of hurdle. ... You don’t want to go through the whole Form E disclosure process if you don’t have to. So some screening, some hurdle, I think will be a good idea. Almost ... the kind of hurdle that I have in mind is the kind of hurdle that you have to get over to get leave to appeal. It’s a simple way of looking at it. As an analogy, similar to a leave to appeal, get somebody experienced looking at it and saying, ‘oh, well, there is a case to argue here’ or ‘there patently isn’t’.”

INA

However, a recurring theme throughout the focus groups and interviews was the issue of relevant safeguards, although the way in which practitioners would like to see the safeguards worded differed amongst the sample. For example, from the ‘get-out’ clause being based on some element of fairness (INK) to allowing for basic needs

(ILA). In the next section, practitioners' views and opinions about the various safeguards will be addressed in turn.

Safeguards

All the interviewees⁶⁹ believed that retaining the basic procedural 'up-front' safeguards as outlined in *Supporting Families* is necessary and acceptable. The variable responses related to the extent of each safeguard and the value of a 'discretion to set aside' at the end of the process.

a) Timing

Practitioners' opinions varied on the period of time before the wedding date that the agreement should be signed. Although many practitioners expressed a preference for clients to come to see them as far in advance of the wedding as possible to give them time to undertake the variety of procedural requirements necessary when drafting pre-nuptial agreements, the focus of this element of the research was in exploring practitioners' views on any potential time-requirement safeguards in terms of the date of signing the agreement. As with other elements of this research, the views amongst the sample were variable. Practitioner ILP, for instance, felt that the 21 day time limit was 'perfect', whilst practitioner ING suggested that there was no need for any time limits:

⁶⁹ This included those practitioners who believed that pre-nuptial agreements should not be made legally binding. Their views were canvassed as to what sort of reform they would prefer if agreements were made binding.

“I don’t think there should necessarily be a timeframe because it’s unfair. You may have those who just don’t understand and appreciate, which most lay people ... if I didn’t do this job, I would think, what difference does it make, as long as you’ve done it before you’re married? But I think if the law were changed, there shouldn’t be a limit.”

ING

At the other end of the scale were a group of practitioners who expressed a preference for a six month period between the agreement being signed and the wedding taking place. Practitioner ILM went as far as to suggest that the current 21 day guideline is “a load of crap” and suggested a much longer lead up is important because weddings/marriages can be incredibly emotional:

“Who hasn’t sent out wedding invitations and bought dresses and got people to buy them things or whatnot, 21 days before a marriage? It’s a load of rubbish, I think. I actually don’t like that rule at all.” That’s very different to Australia. I can’t remember it off the top of my head, but it’s much more. It would be part of the subset of duress. So there would be no fixed timeframe. Certainly, if it was a Vegas wedding, you know, maybe 21 days is fine, but in a traditional upper middle class invitations and what not type wedding, I think 21 days is silly.”

ILM

Of course one of the difficulties with having no guideline or fixed timeframe can be observed with the current system to a certain extent, where the lack of any fixed time determinants result in tactical manoeuvrings between the parties and their respective lawyers. However, Practitioner ILM was not alone in this view. At one point in the interview, Practitioner ILE suggested that the time-frame “should be a lot longer than that (21 days) really”. But later on, suggested that “there can be circumstances where it can be done a week before.” It appears that this practitioner would prefer a

guideline rather than a rigid time limit, which is consistent with the opinion of ILH, who would also prefer time-frames not to be ‘set in stone’.

However, the majority of practitioners when asked about ideal time-frames recommended a period of a few months. At the one end of the scale, Practitioner INC felt that the 21 day guideline was “nonsense. It’s got to be months before. I’d say a minimum of three to six months beforehand.” At the other end of this scale, Practitioner ILA suggested a two month time-frame between the date of signing and the wedding on the basis of the following rationale:

“Let’s compare and contrast it with current financial disclosure within financial proceedings. You get 10 weeks for a Form E and then another four to six weeks before what could be the day on which you make a decision, if it was an FDR. So, 16 weeks, I think that’s quite a long period of time but I think 2 months might be something somebody could concentrate on it. The difficulty is if you look at what’s happened over the last two months in the financial markets, how could you ever keep financial disclosure accurate?”

ILA

Practitioners ILB, ILF, ILQ and ILR also felt two months was about right:

“I’d say at least two months because otherwise you’re in the situation whereby if you’re being pressurised by duress, you’ve got everything booked, the invitations have gone out, and you’re then in an absolutely impossible situation. Whereas I think if it was two months, there’s still a chance if you can’t reach resolution for you to actually call it off or what have you.”

ILF

Nevertheless, although practitioner ILB considered the two month mark to be an improvement on 21 days, she expressed concerns about underlying pressure even with this expanded time-frame, especially when one considers how far in advance the average wedding is planned: “most weddings are pretty much planned two months

before, and everyone's been invited, and how do you just cancel it? Obviously the longer the period, the less emotional pressure, but then you have difficulty with balancing up-to-date disclosure. Plus people just don't think about it" (that far in advance).

If any 'overall trend' can be discerned from the data, it is the expressions of concern with the current 21 day guideline by the majority of the sample, although not by all.

b) Duress

This 'safeguard' was one of the few that contained little disparity of opinion, with all practitioners accepting that there needed to be a safeguard against the possible problem of duress. The vast majority suggested that the approach in the Green Paper was appropriate.⁷⁰

As demonstrated in the 'Current Practice – Procedure' section of this report, a number of practitioners recognised that duress was prevalent in a proportion of their pre-nuptial and pre-registration agreement cases. They suggested that the issue of duress was less likely (although not impossible) with post-nuptial and post-registration cases because the 'bargaining element' of the impending marriage had been taken away.⁷¹ A practical way of dealing with a perceived element of duress at the time of signing the contract was to put it in letters to the client and/or a clause within the contract making a note of the fact that one party had threatened that the marriage would not go ahead unless the other party signed the agreement.

⁷⁰ According to the Green Paper, *Supporting Families* (see note 46 above) the written agreement would not be legally binding "where under the general law of contract the agreement is unenforceable" (para 4.23)

⁷¹ Although this corresponds with the Privy Council approach in *Macleod* (see note 7 above), what has not been addressed is the question of whether duress can still be present in a post-nuptial agreement and whether this should be reflected in any potential law reform (see pages 30-32).

Based on the results of this research, although the majority of the practitioners appear to be happy with the Green Paper approach to duress, the findings from other elements of the study not directly related to the duress question indicate additional concerns which are particularly pertinent to the relative positioning of parties who require a pre-nuptial or pre-registration agreement. What was not discussed in the interviews or focus groups was what sort of pressure constitutes ‘duress’. Time and again practitioners raised the ‘typical scenario’ of the financially stronger party exerting emotional pressure upon their client (normally the financially weaker party), through the ‘I won’t marry you if you don’t sign the agreement’ argument. As the findings in the section above demonstrate, there is very little evidence (apart from the one case of practitioner ILR) of any ‘additional element’ of duress being found (i.e. I won’t marry you *plus* an additional factor).

The questions that the Law Commission may therefore want to consider are whether any future reference to duress should be made through the contractual law analogy (as occurred in the *Supporting Families* Green Paper) or whether any future reference should be tailored more precisely to the specific duress issues surrounding marital property agreements.

c) Independent legal advice

As referred to in the previous section on practitioners’ approaches to independent legal advice in their current cases, one of the key findings from the research is that the stronger party (both financially and in terms of bargaining power) may be paying for their prospective spouse’s legal advice. This may then impact the amount of legal advice they receive, which is what occurred in three of the practitioners’ ‘most recent’ cases (ILR, INA and INH). The overriding concern under these circumstances is how

will a practitioner be able to re-negotiate the terms of a pre-nuptial agreement placed in front of the financially weaker spouse, when the financially stronger spouse is paying and has put a financial limit on the amount of legal advice. Consequently, the questions that the Law Commission may want to consider are, if the paying spouse puts a limit on the amount of advice the other can receive, to what extent has that other party received full legal advice? Furthermore, to what extent should any requirement for 'independent legal advice' make reference to the 'level' of legal advice required?

Again, the vast majority of the sample when asked the question about potential safeguards that they would like to see in any future reform, failed to mention anything other than the contents of the Green Paper. Furthermore, apart from one practitioner, no suggestions were forthcoming from the sample as to how to deal with this apart from a caveat within the pre-nuptial agreement itself to state who was paying for the legal bills and any limit that was accordingly placed on the advice given. This would have the consequence that if the agreement is used in a future dispute, the lack of 'full' legal advice may be a factor that the court could take into account.

One practitioner did mention the procedural unfairness that can occur due to inequality of legal advice. Their novel suggestion as a potential safeguard was that in addition to independent legal advice, the advice would also have to be of a similar standard:

"Well, both parties would have, I hope, a similar standard of advice and if one couldn't afford it, the other one would have to pay for their partner to have a similar quality of lawyer, maybe someone with a similar ... if one person's going to go to a top lawyer, they can't then expect their husband/wife-to-be to go to a very junior lawyer in a practice which isn't maybe familiar with pre-nups but that's all they can afford. It has to be equality of legal advice and opportunity to get, say, counsels' or other experts' opinions. But at the end of the day, if they've

had everything explained to them, if they've both had everything explained to them, and they know what would happen if they signed the pre-nup, what would happen if they didn't, what would happen if they divorced or just lived together, then that is their choice to sign it."

ILJ

It is for the Law Commission to consider whether prescribing a level of legal advice is important and justified or whether the current suggestion of 'independent legal advice' is sufficient.

d) Disclosure

Practitioners' desires and wishes over what sort of disclosure they would like to see in any potential reform appears to be as variable as their views and approaches on current practice. At the one extreme (and the most popular option out of the 29 practitioners interviewed) were eight practitioners who would like to see a Form E approach to disclosure:

"If pre-nups are to be made legally binding, then I think it should be in a Form E type document. There should be everything set out with supporting documentation. It goes back to having full knowledge and if a document is going to be legally binding, really you should have everything there. ... I think it would also remove some of the awkwardness for the clients because it's quite difficult when you're planning for a wedding and your partner wants to draw up a pre-nup to say 'well, actually, can we ask for these trust documents or that bank statement or this, that and the other?' but if it was something that they were legally obliged to do, it would remove an element of awkwardness."

ILJ

At the other extreme, five practitioners would like to have a more limited form of disclosure in terms of a bare schedule of assets (with no documentary evidence). The

following quote is indicative of the rationale for those practitioners who want this sort of approach to disclosure:

“people who come to a pre-nuptial agreement in the real world do not come to you 6 months in advance, they come to you usually about a month or sometimes weeks away. There simply isn’t the time or the desire to fill out Form Es. It’s not a useful tool. Secondly, ... the difference between this and divorce is on a divorce there is, if people haven’t been together, there is good reason to question what has been happening on transactions.”

ILK

The second most popular option was a document specifically designed for dealing with disclosure in pre-nuptial agreement cases, but based loosely on the Form E. Consequently, seven practitioners suggested a ‘truncated Form E’ approach to disclosure in any potential reform. Not as onerous therefore as requiring elements of the current Form E such as 12 months bank statements and life insurance policies, but following the standard Form E format:

“A page or two setting out their capital, income and some documentary evidence attached to support that – capital, income, liabilities, pensions – so you’ve got the full range of things covered in the Form E with a bit of documentary evidence to support that – P60, valuations of houses whatever, bonds – I wouldn’t necessarily say the process of Form E but if some parties were happy to enter into the format of a Form E, if there was prescribed disclosure in a similar format to Form E, that would help people perhaps.”

INI

“I think that if we’re actually going to have legislation about this, I think it should be perhaps more but not to the extent of the Form E financial disclosure.”

ILB

The practitioners who opted for this option did so for a number of reasons, including time, complexity and the cost of undertaking the full Form E process. A less onerous, but more ‘middle-of-the-road’ option, was the schedule of assets with documentary evidence choice, with six practitioners suggesting that this was their preferred route for any potential reform: “a schedule of assets but with documentary disclosure ... pay slips, tax returns, pensions statements.” (INE)

Finally, there were three practitioners who felt that disclosure depends on the assets available and any potential reform should allow for that:

“I think it would depend on the assets. There may well be some cases that are complicated enough to warrant a full Form E approach. But I do agree with the general status quo that you don’t need to go as far as a Form E approach and, provided both parties have disclosure in a clear and concise way, then ... the schedule disclosure is not about splitting of assets or scrutinising the assets – it is about setting the context of the pre-nup within what’s available. And at the end of the day if you have got a very high asset party, then they are seeking to protect those assets, so the onus is on them to give proper disclosure in accordance with pre-nup terms so that they can’t then be challenged on it if it does become contested.”

ILP

It is suggested that the Law Commission should consider the issue of disclosure as a matter of importance. Whilst some practitioners’ feel that disclosure needs to be variable to reflect the assets and complexity of the case, the majority of practitioners appeared to desire a more certain approach so that it makes thing clear for them:

“I think what makes it easier for us, if we’ve got clear guidelines to say ‘this is how you’ve got to do it and if you prepare it on this basis and it doesn’t fall foul at the time of what you’re wanting to rely on it, ... then if you then know that we can complete this form in full and do this and do that, that the chances are it will

carry, it will be binding, or it will certainly carry a weight, if you're relying on it, that would help us as practitioners definitely.”

INK

The results from this sample of 29 practitioners not only indicates an inconsistency in terms of current practice, but also a wide array of opinions as to the preferred level of disclosure in any potential reform. At the moment, disclosure (like a number of issues in agreement negotiations), is a tactical game. The financial stronger party only has to give as much disclosure as he/she is willing/prepared to pay for; this is compounded by the fact that the financially weaker party cannot compel further disclosure of assets (particularly if the financially stronger party is paying for both parties legal advice). One aspect that the Law Commission might want to consider is the relationship between the binding nature of the agreement and the disclosure required; the more binding the agreement, arguably the more full the disclosure needs to be, as there will be limited further opportunity for the parties to disclose their wealth and enter into negotiation about asset allocation. The less binding the agreement, disclosure may not need to be as full as there may be opportunity at a later date for inquiry.

e) Children

As discussed previously, current practice is extremely varied when it comes to making future provision for children and the primary carer. For example, some practitioners fail to make any reference to potential future children whilst at the other end of the scale, other practitioners make quite thorough provision. Consequently it was felt that exploring practitioners' views about incorporating children within agreements should be looked at, in particular, the 1998 Green Paper's proposals. In *Supporting Families*, it was suggested that the agreement would not be legally binding

‘where there is a child of the family, whether or not that child was alive or a child of the family at the time the agreement was made.’⁷²

Of those who expressed a view of the Green Paper’s proposals, opinion was wide-ranging. Certain practitioners felt the proposal was sensible due to the fact that it is impossible to predict what will happen when children are involved:

“I think I’d probably like to incorporate that (the Green Paper proposal regarding children). I really don’t think we should be including the children aspects into it. I really don’t. That’s really going to muddy the waters. There are lots of provisions to account for children’s needs in the future going forward, and I think as a way of just having something between those two people before they enter ... Just the capital assets and their wealth before the enter into a marriage, I think that’s perfectly fine, but if you start to put the children aspect into it, as it said in the Green Paper, that shouldn’t be legally binding with the children in there, involved in that. I agree with that.

ILO

Likewise, other practitioners wanted to retain the safeguard of having a judge looking at the agreement in the context of a divorce. However, those who agreed with the provision relating to children in the Green Paper were in the minority, with the majority either not expressing an opinion on the matter, or suggesting that there was no need for the sort of provision contained in the Green Paper. The practitioners who chose the latter option suggested it was because it would affect the vast majority of cases and as a result legislation would only be relevant for a narrow band of people, as the majority of people who enter into pre-nuptial agreements either have or will have children:

“Well, that’s going to negate them all, isn’t it, really, to some extent? ... I’d forgotten that, I must admit, and I hadn’t really thought about it, but I think that’s

⁷² See note 46 above at para 4.23.

going to be harsh. But I do think the best interests of the children should have some input into the deal that is struck and I think that is important and I think that is the point of a lot of family law, financial provision for economically vulnerable people who are caring for children.”

ILM

Consequently, there was a general awareness amongst the sample of the need for some element of certainty when drafting pre-nuptial agreements, but that this has to be balanced against the needs of the vulnerable and the best interests of the child. There were some practitioners (those who generally made provision for children in the agreements that they currently draft) who felt that it wasn't too difficult to make provision for the birth of children within the agreement. Practitioner ILP suggested an alternative means of checking whether the provision for any children (and primary carer) was appropriate:

“I think it can cater for children. I think that we're all a bit put off because of what the Green Paper says and because the general view seems to be that children are such a radical change in circumstances that they will scupper the whole basis of a pre-nup. But if you had a scenario where your pre-nup can cater for children, and I'm thinking particularly of where there's enough wealth for you to do so – and we have enough guidance under Schedule 1 as to how cases go, as to what awards are made, and if you did cater for children adequately – and I mean adequately – I think if you're trying to restrict what children would get or the entitlement of the main carer or the children – then you're into a no go area with the courts – you know, first consideration under the Children Act. Provided you were able to cater for children in some way adequately, properly in line with the case law, then there should be no reason why you couldn't do so, again for the short term life of the pre-nup with reviews thereafter.”

ILP

Again, the limited life-span of the current understanding of agreements was raised by practitioner ILP, but it seems that for those practitioners who believe that it is possible

to make provision for children within an agreement, they are acutely aware of the need to make that provision adequate/fair/reasonable.⁷³

“If you have adequately provided for children within the document, then surely that should be sufficient. It’s where there hasn’t been adequate provision that I think the court should have the discretion. I still think there has to be some discretion with it but then in turn that does make our job as family lawyers more difficult.”

INK

Other suggestions for alternative options for reform in relation to the incorporation of children within an agreement ranged from the idea of ‘trigger points’ - the existence of children as a trigger for a review of the agreement by the court or as a ground for overturning by the court, to not incorporating any specific reference to children within the safeguards, but retaining a relatively broad ‘discretion to set aside’:

“if you’ve got ‘significant injustice’, then the ... in judging ‘significant injustice’, the children are going to be the first concern. If you take it from the ancillary relief, it’s the first concern. It probably wouldn’t be the paramount concern, as in Children Act, but I think first concern is a good way of looking at that. They’ve got to have somewhere to live and they’ve got to be given enough money to live on.”

INA

f) Get out clause/discretion to set aside

The issue of whether there should be a discretion to set aside and the level at which that should be set, initiated a significant amount of discussion amongst the sample. The practitioners were asked about their views of the Green Paper’s proposal, which

⁷³ Likewise, practitioners’ opinions varied in this respect; some suggesting that provision needs to be fair, with others suggesting that provision that was reasonable or adequate would be sufficient.

suggested that an agreement would not be legally binding ‘where the court considers that the enforcement of the agreement would cause significant injustice (to one or both of the couple or a child of the marriage)’.⁷⁴ Again, a variety of views were expressed ranging from those practitioners in the sample who felt that there should be minimal allowance made with regard to discretion to set aside an agreement, to those who felt that the threshold level to set aside should be set at a quite a low level. The range of options considered by practitioners included setting aside on the basis of manifest injustice, at the upper end of the threshold scale, to fairness, at the lower end of the scale. For the purpose of this discussion, the Green Paper’s proposal of ‘significant’ injustice was used as the reference point for practitioners – i.e. whether they believed that any discretion to set aside should be set at a higher or lower level.

At the one end of the scale, were six practitioners who felt that significant injustice was too low a point at which to place the safety net to resile from the agreement.

“You can then just see that opening up to a whole raft of litigation because if you have a scenario where you’ve got a professional couple, they both take advice, they both enter into it, full and frank disclosure, everything else applies, and you have your get-out ‘significant injustice’ clause, 3 years down the line it breaks up, their financial circumstances are one party’s improved, the other’s has really got a lot worse, they would surely in that case argue ‘significant injustice’, which defeats the whole purpose of having a pre-nup in the first place.”

ILF

The vast majority of practitioners (12) who gave an opinion on the matter appeared to favour a more tightly defined ‘change of circumstances’ approach to any discretion to set aside. However this ranged from suggestions concerning a lower threshold, such

⁷⁴ See note 46 above at para 4.23

as a ‘mere’ change in the parties’ circumstances, through to a higher threshold of a ‘significant’ or ‘catastrophic’ change in the parties circumstances. Therefore as a category, the options for potential reform were quite widely drawn. As an example of this widely differing approach, Practitioner ILD suggests amalgamating the concepts of ‘fairness’ and ‘significant change of circumstances’ to come up with his preferred option:

“I say generally they ought to be enforceable unless obviously if they’re – I wouldn’t use the word ‘manifestly’ – if they’re unfair as a consequence of a change in circumstances, then that change in circumstances ought to be taken into account. ... I think it would have to be a significant change because I think if people are going to enter into these agreements, they ought to expect to be held to them and so simply to say, it’s no longer fair, seems a bit of a cop out. But if they could say, it’s no longer fair because of a significant change, which actually, I suppose, if you’re saying ‘no longer fair’ as opposed to ‘was never fair’, that’s inevitably because there’s a change in circumstances but I do think the change ought to be significant and having children would be one of those significant events.”

ILD

A good proportion of the sample (eight practitioners) felt that significant injustice was about the right level at which any discretion to set aside should be set.

“I think it should be ... in the same way as it is difficult to extend a term order for maintenance, I think it should be something that you have to get over a barrier but I don’t think it should be manifestly absolutely dreadfully wrong, you know, because I think there will be those people who will be vulnerable.”

ING

The issue of ‘needs’ was another recurring theme. A small group within the sample felt that the safety net and the threshold level at which the agreement could be set

aside was the question of whether the parties reasonable (FGI) or basic (ILA) needs were catered for within the agreement.

At the other end of the scale were seven practitioners⁷⁵ who felt that significant injustice was too high a threshold at which discretion to set aside should be set. Furthermore, when practitioners were asked about utilising the courts current understanding of ‘fairness’ as the criterion against which agreements should be judged, although just over a handful of practitioners agreed that this would be a good idea, the majority felt that utilising the concept of fairness when dealing with pre-nuptial agreements would be pointless:

“If you have an overriding ‘unless it’s unfair’, you might just as well not have it at all. So there has to be a normative set of rules.”

INA

One characteristic of the current ‘uncertain/non-binding’ system is that the weaker party is protected through the rather paradoxical contrivance of having to make any agreement relatively fair. This is to ensure that there is a greater chance that it will be upheld upon any divorce suit in the future. The less fair an agreement is, the more chance according to practitioners that it will be overruled by the court. However, when questioned, it appeared that the vast majority of practitioners do not want any discretion to set aside to be based on fairness due to the inherent uncertainty of this concept and the prospect of litigation flowing from it. Consequently, the question for the Law Commission is at what level (if any) should there be discretion to set aside? Or perhaps more radically, should there be a cross-check at the beginning of the process rather than at the end? This was suggested by one practitioner:

⁷⁵ The remaining six practitioners either did not express an opinion or made another comment.

“I would think that if you say you want them to be enforceable, if there’s any point in doing them, you’ve got to do them properly, otherwise it’s worthless really. So if there’s going to be a move towards saying ‘well, this is something everybody should consider doing and if it’s relevant, do it properly’, why couldn’t it go to the court for approval? Why can’t a judge be given the ability to say ‘that is an agreement which in the circumstances in the financial disclosure seems reasonable’? And if it’s seen as reasonable by a judge at the outset, the person who’s seeking to rely on it later on is surely going to find it much easier to rely on? ... I think that when a Consent Order goes to the court now on divorce, I think the judge looks at what’s reasonable in the circumstances, having looked at the statement of information, because there are certainly Consent Orders which you submit to the court which don’t actually necessarily appear fair to one party, but it’s what as a couple, a separated couple, they’ve agreed to, and in the light of their respective circumstances, I think the judge is saying ‘that’s reasonable in the circumstances. It might not be wholly fair, but they’ve agreed it and they’ve both had advice about it’ – so I think it’s probably reasonable.”

INJ

F) Conclusions

Where the law is not prescriptive and allows for wide-ranging discretion, as demonstrated in its current statutory silence towards pre-nuptial agreements, it is inevitable that there will be issues as to how consistently such discretion is exercised. However, given the suggested safeguards laid down in the 1998 Green Paper which have metamorphosed into almost non-statutory guidelines,⁷⁶ the lack of consistency across the findings in this research is quite surprising.

The approaches that the sample take in their usual case vary dramatically, both in relation to the procedural aspects of advising clients (differences in approach to disclosure, difficulties and differences found with timing and cost for example) through to drafting marital property agreements (differences in terms of content – how to deal with children and review clauses for instance) and the views and opinions of practitioners when discussing how the law should be reformed.

Key issues from the research findings:

The numbers of marital property agreements

The number of pre-nuptial agreements that practitioners are advising upon is not particularly large, even the practitioners who have the largest marital property agreement caseloads are rarely advising in excess of 15-20 per annum. Furthermore, although it appears that the perception amongst the sample is that there has been an increase in at least the number of enquiries in the last few years, the data is inconclusive as to whether this has transferred into an increase in the number of actual

⁷⁶ According to Margaret Hatwood; "...if you are seeking to ensure an agreement is binding, follow the guidelines in the green paper." See note 39 above at p.1023. Likewise, Ashley Murray suggests that; "The journey towards a pre-nuptial agreement should now be mapped against the six safeguards set out in the Government's Green Paper *Supporting Families*. Such an approach is likely, following this judgment, (*NG v KR*) to find increasing favour as an 'industry standard' in this area." See note 63 above at p.145.

agreements. Likewise, very few practitioners in the sample have had experience of advising upon and drafting post-nuptial agreements.

Concerns arising from the differences between pre-nuptial and post-nuptial agreements:

The assumption that the court's current approach to post-nuptial agreements is based upon is that there is less pressure after the date of the wedding than before. However, the results from the research appear to suggest that a solid proportion of post-nuptial agreements are really pre-nuptial negotiations that have just run out of time, or agreements that are entered where the parties are seeking a reconciliation. Although further research would be useful on the issue of whether any pressure is exerted in these types of post-nuptial scenario, and the extent to which such pressure is felt and acted upon by the parties negotiating a post-nuptial agreement, it is appreciated that this will in all likelihood not be possible. Consequently, in the light of *Macleod*, the Law Commission may want to consider whether the differentiation between pre-nuptial and post-nuptial agreements in terms of the assumed pressure that individuals are under when entering into them is a matter for consideration within any potential reform. Furthermore, would a prescribed form of disclosure for instance minimise any potential risk?

In addition, what appears to be developing as a result of the *Macleod* decision is a two-tier system for pre-nuptial and post-nuptial agreements. As a result of recent case law, it appears that these two types of marital property agreement have differing legal consequences and this is thereby impacting on the advice a small number of practitioners are giving to their clients. One of the apparent consequences of the decision in *Macleod* appears to be that some practitioners are advising clients to

undertake a form of two-stage process to their pre-nuptial agreement, whereby they are advising clients to return within a short period after their wedding to make a post-nuptial agreement – probably with the same terms as the pre-nuptial agreement, in order to give the agreement a better chance of being binding. The Law Commission may therefore want to investigate whether the consequences of *Macleod* are not only appropriate and proportional, but whether the differentiation in legal consequences between pre-nuptial and post-nuptial agreements is necessary and justified.

Issues arising in relation to the content of agreements

The current position for practitioners when drafting a pre-nuptial agreement is to construct it within the boundaries of fairness. This is to give the agreement the best chance of being upheld upon the couple's potential divorce/dissolution. One of the principal consequences of this is that the agreement pays greater attention to the needs of the weaker party than it may otherwise have done. The three issues that the Law Commission may want to consider is, first, whether an agreement should be reasonable or fair to the parties or is it a mechanism solely to reflect the (stronger) parties' wishes? Secondly, without this indirect control mechanism will agreements become increasingly unfair or unreasonable? And finally, in any future law reform, should there be a mechanism to check against unfairness or unreasonableness?

It is suggested that if pre-nuptial agreements are made legally binding, the uncertainty of time and the difficulties of 'crystal-ball gazing' (highlighted by many in the sample) may only intensify. The method by which practitioners currently deal with the short versus long-term implications of pre-nuptial agreements is to time-limit their efficacy. The Law Commission may wish to consider the implications of this finding when it comes to addressing the content of agreements. A corresponding short

versus long-term issue, relates to the protection of *future* as opposed to *pre-existing* assets. A question for the Law Commission is whether protecting the future unearned marital acquest should be a legitimate aim of a pre-nuptial agreement, particularly in a threshold needs case.

The final key issue that arises under the ‘content’ heading is the question of review clauses. Practitioners conveyed a very mixed view of review clauses, with a number of concerns ranging from their practicality to what would be the appropriate trigger point for a review. Consequently, the Law Commission may want to consider matters such as whether review clauses are a desirable inclusion into agreements; whether or not review clauses should be a mandatory or discretionary feature of agreements; the consequences of failing to review and whether the law should provide for a default position on the parties failure to review an agreement.

Independent legal advice

The issue of what constitutes ‘independent legal advice’ may be something that the Law Commission would like to consider, in particular, whether it may be necessary to refer to a sufficient level of advice to ensure the legality of an agreement. This is suggested against the backdrop of findings which suggest that there are a number of difficulties associated with a person other than the client themselves paying for legal advice. Although the advice given is ‘independent’, any upper threshold restriction placed on costs by the paying party (not necessarily the client) could mean that the client may not receive the amount of advice that either they or the practitioner thinks is sufficient for the nature of the case. It may therefore not be as ‘full’ as the practitioner or their client might wish, but has been constrained by financial limits placed on them by the paying party. A further question which therefore needs to be

addressed is whether limitations of cost constitute duress for the purpose of invalidating an agreement? Accordingly, the questions that the Law Commission may want to consider are; if the paying spouse puts a limit on the amount of advice the other can receive, to what extent has that other party received full legal advice; whether the current requirement of ‘independent legal advice’ is sufficient and thirdly, to what extent should any requirement for ‘independent legal advice’ make reference to the ‘level’ of legal advice required?

Duress

According to the findings in this research, apart from third party involvement, there appears to be very little evidence of duress going beyond the standard ‘I won’t marry you, if you don’t sign this agreement’. The questions that the Law Commission may therefore want to consider are whether any future reference to duress should be made through the contractual law analogy (as occurred in the *Supporting Families* Green Paper) or whether any future reference should be tailored more precisely to the specific duress issues surrounding marital property agreements. The ultimate issue therefore is what constitutes duress for the purposes of entering into a marital property agreement? In particular, has the law progressed beyond the standard notion of duress to an enhanced standard (i.e. ‘I won’t marry you + an additional factor’)?

Disclosure

The findings from this research indicate that the current approach to disclosure in a case depends on factors such as the nature and amount of assets; what the parties are willing to pay; whether the parties have agreed amongst themselves to limit their

disclosure, who is paying for the legal advice and what they are willing to pay for and furthermore, allow the other party to see.

Consequently, it is suggested that the Law Commission should consider the issue of disclosure as a matter of importance. First, it appears that whilst some practitioners' feel that disclosure needs to be variable to reflect the assets and complexity of the case, the majority of practitioners wanted a more certain approach. One aspect that the Law Commission might want to consider is the relationship between the binding nature of the agreement and the disclosure required; the more binding the agreement, arguably the more full the disclosure needs to be as there will be limited further opportunity for the parties to disclose their wealth and enter into negotiation about asset allocation. The less binding the agreement, disclosure may not need to be as full as there may be later opportunity for asset allocation and inquiry.

Discretion to set aside

At what level (if any) should there be discretion to set aside an agreement? Or perhaps more radically, should there be a cross-check or judicial enquiry at the beginning of the process rather than at the end to check that the agreement is reasonable or provides for the parties' needs? Results from the research were mixed, with views ranging from those who wanted strict enforceability of agreements to encourage greater certainty to those who placed greater weight on the vulnerability of the weaker parties and the need for law reform to allow for a broader discretion to set aside. However, if any 'majority approach' was discerned, it was in favour of a lower rather than a higher threshold, but not so low as to engender a plethora of future litigation.

Appendix 1: Interview Schedule

Introduction

Who I am
Main aims research
Confidentiality
Permission to record the interview

General Background: Firm

Size of firm: number of partners, branches, etc
Name and make-up of department

General background: Solicitor

Status within firm
Years p.q.e.
Panel / professional memberships
Main areas of specialisation (self-definition)
Mediation/Collaborative law training or practice
Experience of marital and civil partnership property agreements

Marital Property Agreement Background

How are cases allocated:

- Within firm
- Within department

Approximate number of pre-nup/mpa/pre-cip cases in last year (individually/firm)
Anyone else in firm doing such cases?

Most recent case specific background

Describe in outline (i.e. without disclosing confidential details relating to the client) the most recent marital property case in which you were involved (this could be advising on a pre-nup, drawing up an agreement whilst the parties are still married/registered or advising on an ancillary relief case involving an existing pre-nup).

Main issues: Nature and approximate value of property and finance

Initial advice

Disclosure

Progress of case

General impression of:

- client
- other party
- other party's solicitor (if any)

Referrals:

- mediation/collaborative law
- counsel
- elsewhere

Court proceedings:

- if issued, details (type, stage, etc)

Other steps taken

Outcome

Costs

Views on most recent case

Impressions of case – easy or difficult to sort out? Why?

Factual complexity

Legal complexity

Procedural complexity

Client's understanding of issues

Client's response to advice

Client's response to outcome

How well has law and procedure worked for this particular client

How fair in solicitor's personal opinion

Impressions of client (eg. Needy, aggressive, difficult, generous)

How much advice or explanation did this client need? More or less than other clients?

Why?

Was this case atypical in any way from the usual run of marital property agreement cases with which you deal?

Vignettes

Scenario 1

Tony (75) and Rose (70) want to get married. They have both been married before. Rose has one child from her first marriage whilst Tony has three children from his first marriage. None of the children are dependent on their parents.

Tony and Rose are financially secure. They own their own homes outright (Rose's home is worth £325,000 and Tony's is worth £250,000), they both have some investments/savings (Rose; £75,000 and Tony; £40,000) and both are in receipt of private and state pensions. They want to safeguard their own homes and monies for their respective children to inherit.

Tony and Rose come to see you and ask for your advice in drawing up an agreement which will not only safeguard their assets in the event of their death, but will also ensure that in the event of a divorce, neither party will have a claim on the other's property nor a claim for financial provision.

Scenario 2

Alan (46) comes to see you. He and Jane (34) are getting married in 5 months time. Jane has never been married before although she does have a daughter (aged 4) from a previous relationship. Alan is a widower and has two children from his previous marriage (a girl, 15 and a boy, 13). Jane receives a small amount of child support from her ex-partner. Her apartment has been valued at £450,000 and she has a mortgage of £225,000. She is an executive at a television production company, earning £80,000 p.a. She is planning on selling her property and moving into Alan's home which is much bigger and more suitable for them both. Alan is a successful author who has written a series of novels that have become best-sellers. Alan has a large proportion of his assets tied up in overseas investments and a Jersey trust for the children. He has no mortgage on his homes, which comprise a London property worth £2.5 million and two holiday homes; one in Devon (worth £800,000) and the other in the South of France (worth £1.75 million).

He comes to see you to discuss the possibility of drawing up a pre-nuptial agreement in order to protect his existing assets for the children of his first marriage.

Advise Alan

General Views on Marital Property Agreements

1. What are the circumstances in which you are asked for marital and civil partnership property agreements?
 - Why clients come to them? i.e does the work come from clients themselves or is it a result of practitioners' pro-active advice
 - What type of clients want such an agreement?
 - The rate of follow-through?
 - What level of wealth makes an agreement feasible, and below which you might tell clients to go away?
2. What is your experience of advising clients with respect to such agreements?
 - Is this difficult/straightforward?
 - Problems that arise in obtaining client instructions?
 - Response from clients?
 - Disclosure issues?
 - Ballpark figure for cost of an agreement?
 - Does the non-legally binding nature of marital property agreements deter clients from entering into agreements/getting married?
 - Has the firm had any difficulties in obtaining Professional Indemnity Insurance re. drawing up such agreements?
3. What is their experience of enforcing or arguing against an existing agreement?
 - Was it upheld/abided by in part/overturned and WHY?

- Did it go to court? If so – what is their impression of approaches taken by their usual court(s) re. enforceability of agreements?
 - To what extent had the agreement helped/hindered the eventual outcome?
 - Were clients pleased/sorry they had made the agreement?
4. Should marital property agreements be legally binding?
- If so, how? Etc
5. What reform would they consider to be the most useful?
- Eg. What is their view of the safeguards suggested by the 1998 Green Paper *Supporting Families*? 1998 Paper too wide-ranging?
 - What alternative approaches to safeguards might they advocate?
 - What would they prefer – onerous safeguarding (against pressure etc) before the agreement, or more or less extensive discretion to set aside later?
 - One catch-all provision (eg. Significant injustice? / Manifest injustice? – High or low threshold?
 - What would practitioners do about disclosure (i.e. advance disclosure about everything?)

Appendix 2: Letter to practitioners inviting them to participate in the research and accompanying information

Dear

I am an academic at the School of Law, Bristol University and have recently been awarded a grant by the Law Commission to undertake some preliminary empirical research into marital property agreements as a prelude to their 10th Programme of law reform. As you are no doubt aware, as part of the programme, they are planning to undertake a project on marital property agreements. Consequently, I am writing to request permission to interview you as part of this study.

The study will provide much needed research from a qualitative perspective into how legal professionals draft such agreements, advise clients and deal with existing agreements. Enclosed are further details about this project, which includes information regarding the aims of the study as well as the methods of collecting and analysing the data. It is hoped that this study will not only make a positive contribution to this under-researched area but provide some much needed qualitative work which can inform the Law Commission's project.

If you are willing to take part in this study, it is anticipated that the interview will take approximately sixty minutes and that it will be held at your place of work. I will contact you by telephone within the next two weeks to confirm whether you would like to take part, and if so, arrange an interview time at your convenience. I wish to emphasise that this is voluntary unpaid participation and participants can withdraw their consent at any time. If you would like any further information about the project then I am more than happy to provide additional information on request. The research will be carried out with strict adherence to research ethics (please see the details enclosed for further information).

Yours sincerely,

Dr Emma Hitchings
Senior Lecturer in Law

Further details

As you are aware, pre-marital and pre-registration property agreements made between spouses and civil partners (or those contemplating marriage or civil partnership) are not currently enforceable in the event of the spouses' divorce or the dissolution of the civil partnership. Agreements are, however, a material consideration either as part of "all the circumstances" or as "conduct" under s.25 MCA 1973. There has recently been an increasing amount of commentary as to whether greater prominence should be given to pre-nuptial and pre-registration agreements, with the Law Commission taking up the issue of their enforceability in its 10th Programme of law reform. Consequently, this project seeks to ascertain how practitioners advise clients who want a pre-nuptial or pre-registration agreement; what are solicitors' understandings of the law on which their advice is based; what types of client want pre-nuptial/marital agreements; do solicitors believe that the non-legally binding nature of marital property agreements deters clients from either making the agreement or marrying/entering into a civil partnership and what sort of reforms would practitioners prefer or suggest?

As this research is a small empirical study designed to investigate how legal professionals involved in drafting such agreements deal with them, I intend to interview approximately 26 legal professionals and carry out two focus groups with 8 practitioners in each. I propose to record the session, unless you object to the use of a digital recorder. The data will then be transcribed and the professional transcriber will be required to sign a confidentiality agreement and to confirm that no copies of the data have been retained following delivery of the transcripts to the researcher. The anonymous data will then be stored and processed in accordance with the Data Protection Act 1998. The data will be stored securely through password protected computer files and destroyed when it is no longer required or after six years (whichever is the earlier). Information will not be disclosed to a third party unless required by a legal duty and there is a complaints procedure in place at the University of Bristol in the unlikely event that a participant wishes to lodge a complaint. Furthermore, the research will be undertaken in accordance with the ESRC and SLSA code of ethics and the research will strive to protect the rights of participants, their interests, sensitivity and privacy. For further information please refer to the SLSA website: http://www.slsa.ac.uk/download/ethics_drft2.pdf

Once the research has been analysed, an anonymised summary of the key research findings with no direct quotations will be distributed to participants. However, this will be delayed until the findings are in the public domain. In conjunction with Professor Elizabeth Cooke (Law Commissioner for Family and Property Law) we hope to publish the findings of the research in a leading academic law journal. The second publication will be aimed at family practitioners (e.g. *Family Law*).

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