This month the Government published its Green Paper on "Supporting Families". At paragraph 4.21, the Green Paper states that "the Government is considering whether there would be advantage in allowing couples, either before or during their marriage, to make written agreements dealing with their financial affairs which would be legally binding on divorce." The Government's laudable claim on seeking certainty for spouses on divorce is no doubt also tempered with the hope of reducing costs to the legal aid board. The Government has not, however acted without some judicial support.

The ability of a couple to make arrangements during the period of the marriage as to what occurs afterwards, is commonly exercised. Such arrangements usually occur at the point of separation and providing that the parties negotiate at arms length, having had full disclosure of each others circumstances and in the absence of duress, mistake or undue influence, the court will uphold the agreement.

Although pre-nuptial arrangements are common throughout the western world, such an arrangement here is void as being contrary to public policy. It being considered that its harmful tendency, the encouragement to violate the marriage tie, would probably injure the public. This blanket denial of allowing two persons to enter into a freely negotiated settlement was reaffirmed in the case of F -v- F . There Mr Justice Thorpe in considering such an arrangement described it has having a very limited significance in this jurisdiction: "The rights and responsibilities of those whose financial affairs are regulated by statute cannot be much influenced by contractual terms which were devised for the control and limitation of standards that are intended to be of universal application throughout our society".

It has been another family judge that has been prominent in his advocacy for a change in the law both in and out of court.

In S -v- S the court was concerned with what forum the financial aspects of a divorce were to be tried. The wife's initiation of proceedings in England were stayed by Mr Justice Wilson who considered the pre-nuptial agreement, which provided for the forum of divorce litigation and with its substantial financial provisions, as a significant factor in determining the issue of forum convenes. Where the pre-nuptial agreement provided sufficient provision for the wife and as such, substantial justice would be done then the existence of the pre-nuptial contract was described as being influential or even crucial. Further, His Lordship ushered caution on disapproving of pre-nuptial agreements where they were enforceable in other jurisdictions. His Lordship stated that he could find nothing in s.25 to compel a conclusion that spouses can escape from solemn bargains carefully struck by informed adults. The commercial freedom to enter into a legally binding document being the argument for change.

In N -v- N where the court was concerned with a legally binding Swedish pre-nuptial contract, Mr Justice Wilson described the pre-nuptial agreement as a relevant circumstance in determining an application for financial relief, although this would not conclude the matter. Mr Justice Cazalet however only went as far as describing the agreement as "no more than a material consideration in this court under MCA 1973, s 25".

Out of court, in an interview on BBC Radio 4 on the 30 January 1998, Mr Justice Wilson affirmed his judicial announcements by recommending, in the absence of a significant change in circumstances, that spouses should be bound by their pre-martial contracts.

The emergence of the recognition and significance of the pre-martial contract is evident. Recently, the courts have stressed that it would only exercise its powers to adjust wealth if there was a manifest need for intervention. Section 25 after all, states that " It shall be the duty of the court in deciding whether to exercise its powers ...". It thus seems that if the agreement reached is in the bracket that the court would order, the court will consider the agreement and may not alter it.

Given the obvious recommended pre-legislative intent will we soon see a reported decision on a English pre-nuptial contract? If so, the issues in the case of Edgar as to what extent the parties negotiated at arms length, whether legal advice was given, whether there had been full disclosure, and whether there had been any important changes of circumstances i.e. a change of residence or employment, may still decide the issue. All these factors would effect and militate the validity of such a contract.

The argument against remains a moral one. In a paper drafted by Judges of the Family Division, their Lordships stated "We have reservations about whether the law should strive to encourage pre-nuptial agreements. We all still believe strongly in the institution of marriage as a source of personal and social stability and wonder whether the pre-nuptial agreement conditions the couple to the failure of their marriage and so helps to precipitate it."

The Government in heralding its position that the family unit is the fundamental core of all its proposals is finding that here, at least, the protection of the institution of marriage is being used as a device against them.

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