The Legality Of Prenuptial Agreements In The UK

The current law on financial provisions is rooted in discretion, offering flexibility and fairness. However, lacks certainty due to the vast, seemingly unfettered discretion that the courts have been allocated. The potential to introduce legally enforceable pre-nuptial agreements would allow for certainty in the division of the pool of assets. This approach lines up with the ideology of autonomy, allowing couples to decide for themselves how their pool of assets will be divided without interference from the courts. With certainty comes rigidity thus leads to unfairness. The question remains, are prenuptial agreements the way towards certainty?

Discretion allows for flexibility but unfortunately equates to uncertainty. The current position of the law surrounding financial provisions on divorce is the use of discretion which is governed by s25 of the Matrimonial Causes Act 1973 the “section 25 factors .” This section imposes a duty on the court to have regard to all the circumstances of the case and in doing so the court may grant financial orders. This approach offers flexibility as it “confers wide discretionary powers on the courts over all the property of the husband and the wife, ” therefore, allows each case to be reviewed individually with regard to the specifics of each relationship. This is unique and permits the court to look at each case in isolation. The courts ultimate objective is to enforce “fairness” as Lord Nicholls submits “these wide powers enable the courts to make financial provision orders in tune with current perceptions of fairness .”

However, fairness “is an elusive concept. It is an instinctive response to a given set of facts. It is grounded in social and moral values .” The meaning of fairness “like beauty is in the eye of the beholder, ” posing a lack of transparency for couples who wish to understand what a court may decide as fair. Arguably “fairness is a difficult and complex concept, inevitably subjective and dependant on individual circumstances ” Should the future lives of two individuals be decided using a subjective approach that may differ depending on what judge one receives? Ryznar argues that “there is no universal definition of fairness, ” seemingly the courts exercise palm tree justice, basing decisions on subjective approaches that are not clearly defined in the law. The Law Commission argues, in the majority of cases “the judge’s decision means that one party will receive a bigger share than the other ” portraying the lack of certainty and ironically the lack of fairness that arises out of such principles adopted by the court.

Moving forward, the decision in White v White [2000] UKHL 54 formulated what became known as the ‘sharing principle’ which has paved the road for the courts in exercising their discretion as “in the absence of any indication in the statute as to their objective, the courts have evolved their own .” The ‘sharing principle’ seeks to justify fairness in the splitting of the pool of assets and perhaps is the source of uncertainty and a lack of clarity in the current law. Lord Nicholls argues “the parties commit themselves to sharing their lives ” thus the pool of assets should be divided in relation to the “yardstick of equality ” although should not be misconstrued as a presumption of equal division. In addition to the sharing principle put forth in White v White [2000] UKHL 54 further common law principles manifested in Miller and MacFarlane [2006] UKHL 24 which seek to govern and guide judges when exercising their discretion. The three strands of fairness include the “financial needs of the parties, compensation and equal sharing ” and arguably create more confusion then clarity. The Law commission suggested upon assessment of the ‘sharing principle’ that it left wealthy couples “without any formal, reliable

means ” of ring-fencing property. Ultimately allowing for the discretion of the courts to override the autonomy of the parties and perhaps allow for the theft of one’s property by attaching it to the pool of assets.

In contrast, the majority of cases are not ‘big money’ cases. Couples undergoing divorce proceedings will not usually have large inheritance or wealth from a previous marriage therefore, there is a lesser need to ring fence property. However, Lord Nicholls in Miller argues “too strict an adherence to equal sharing can lead to a rapid decrease in the primary carer’s standard of living and a rapid increase in the breadwinners .” Adherence to the sharing principle may not only infringe the certainty of ring-fenced property but rather may not fully protect the primary carer. Due to the sharing principle not being a presumption of equality. The courts may feel that the breadwinner should be more generously provided for due to greater financial contributions to the marriage, therefore, should depart from equal sharing. One may argue against this but, “the introduction of the sharing principle meant there were no formal limits to sharing ” and ultimately has led to a “lack of predictability. ”

Inconsistencies arise when deliberating the definition of financial needs which is not defined in the statute, “individuals struggle to know what the law requires of them. ” Financial needs are left to the court’s discretion although do encapsulate “factors such as age, health, length of marriage and standard of living. ” However, the inaccessibility of the law created by the lack of a definition leads to uncertainty as to the outcome of any given case. Due to the “wide range of outcomes ” offered by the courts it becomes extensively difficult for individuals to predict what outcome may await them on divorce. Mysteries relating to compensation add to the gap in the current law as it is submitted “the last of these three has the status of a unicorn, discussed and described but never actually seen. ” The principle of compensation is barely relied upon therefore, due to its nominal existence uncertainty arises in the current law. If a couple were to attempt to discern “what their legal rights and responsibilities were ” they would have immense difficulty. Arguably these three strands attempt to produce a map of the current pathways available for couples seeking to live separate, independent lives. In reality the courts have created a labyrinth and “to say that the uncertainty is concerning is an understatement. ”

While it is proclaimed that the “current law creates too much potential for uncertainty and inconsistent outcomes. ” The discretionary approach offers couples a “tailor-made, personal approach ” (White, Miller, MacFarlane) therefore, it may be that the benefits outweigh the uncertainties. Mr Justice Mostyn wrangles with the unpredictability of the discretionary approach. Perhaps, the proposition that discretion is unfettered and uncertain is unsteady. It is possible that “where a true discretion exists the margin of appreciation if you like, is much more limited than is generally supposed ” highlighting the narrow scope of the courts power in ancillary relief cases. Perhaps the exercise of discretion is based upon adherence to rules and regulations. Mr Justice Mostyn submits “this is not an unfettered or even broad discretion”, “It is regulated by, and subordinated to, rules. ” It may then be contended that discretion does not amount to a complete lack of clarity due to its narrow nature. Lord Denning expresses the need for a discretionary approach, he states “the courts must not fetter it by rigid rules ” due to the possibility of an unfair outcome the court must be at liberty to exercise such powers ultimately to “give each party an equal start on the road to independent living .”

Comparatively, discretion is a dark cave with infinite exists which creates undoubted uncertainty. There is a need for reform to the current discretionary approach. The introduction of qualifying nuptial agreement will be “a reliable way for couples to decide in advance how their

property will or will not be shared. ” The decision in Radmacher v Granatino 2010 UKSC 42 represented a “sea change in the United Kingdom’s approach to prenuptial agreements whereby they were no longer contrary to public policy ” and were ultimately to be upheld by the court “unless it would be unfair to do so ” . Prenuptial-agreements reap rewards that the discretionary approach does not thus prenuptial-agreements “provide for jointly optimal division of duties by eliminating the fear of the consequences. ” whilst the “outcome of the case is hard to forecast ” using the discretionary approach. Arguments is favour of such agreements point to the autonomy of the parties and convey the importance of deciding for themselves the outcome of their divorce, Poliacoff proclaims “negotiation of prenuptial-agreements serve to strengthen a relationship on a footing of honest communication. ”Couples are able to comprehend with certainty and content what may occur in the possibility of a breakdown of their marriage as “successful planning may spare the parties the emotional pain of an adversarial proceeding against a former loved one .”

Legally enforceable prenuptial-agreements would provide individuals with “greater certainty about financial consequences of divorce ” whereas the discretionary approach makes it extremely difficult for couples to understand the current law as “a member of the public reading section 25 would have no sense of what the outcome would be. ” Prenuptial-agreements could offer “greater reassurance” for couples regarding their future. They allow for security whereby children exist from a former marriage as “certainty may be important for those who are remarrying and have children from previous marriages. ” Prenuptial-agreements “would allow parties to define, from the outset of the relationship ” how the pool of assets should be divided upon separation.

Whilst prenuptial agreements allow for greater clarity, they produce rigidity. Couples become shackled to a contract that may not reflect their change in circumstances at the time of separation, therefore amounts to unfairness. Empirical research portrays that whilst a “small majority were in favour” of introducing binding prenuptial-agreements there were uncertainties surrounding the “ultimate fairness of such agreements” such as the inability to predict changes in future circumstances. In contrast, Radmacher v Granatino conveyed the importance of autonomy emphasising the reason why courts should give effect to prenuptial-agreements, highlighting the need for “respect for individual autonomy. ” Arguably, couples who are “seeking to protect their wealth ” do not want the state to intervene with their property. After all, autonomous individuals “should be entitled to make decisions without the law interfering in their lives. ”

Versteegh v Versteegh 2018 EWCA Civ 1050 at 44, referring to LJ King in Radmacher v Granatino proclaimed “where a party has full appreciation of the implications” the court is urged to give effect to the agreement “unless it would be unfair to do so” but inconsistences arise when dealing with what weight is to be accorded to the agreement and whether any weight given is fair. The court appears to use discretion in deciding whether a prenuptial-agreement can be enforced. Radmacher v Granatino 2010 UKSC 42 @74 highlights “the courts can overrule the agreement of the parties whether contractual or not.” Surely this negates the so-called certainty that prenuptial-agreements are rumoured to offer.

Prenuptial-agreements will not be given substantial weight unless they are “freely concluded and properly informed ” but how can a court know for certain whether both parties truly intended the outcome of such an agreement without using discretion as “the parties are unlikely to have intended that there ante-nuptial agreement should result, in one party being left in a

predicament of real need ” while the other goes on to live independently; this will surely be held to be unfair. It may be that the parties obtained “sound legal advice ” but how does the law account for couples who have not obtained legal advice. In response, the Law Commission, Matrimonial Property, Needs and Agreements (No343, 2014) @6.125, recommend prenuptial agreements will be held void unless “both parties have received legal advice at the time the agreement was formed.” It appears to be up to the court to weigh up factors such as the whether the parties “intended that the agreement be effective ”, or whether there has been “undue influence or pressure. ” The courts are effectively realigning discretion through their ability to weigh up the circumstances of prenuptial-agreements. Once again, the undefined concept of fairness is at our doorstep and we are back to square one; uncertainty.

Issues surrounding pressure rebut arguments in favour of autonomy. Dr Hitchings uncovered that “practitioners raised the typical scenario of the financially stronger party exerting emotional pressure ” upon the financially weaker party. Prenuptial-agreements may produce greater clarity as to the outcome of any given case but at what cost? Lady Hale commented “the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision ” to which she is otherwise entitled. Thompson proclaims there is a “uniquely emotional context of prenups to be taken into account. ” Arguably, Individuals in loving relationships are unable to think rationally and emotionlessly when deciding on how their pool of assets will be split in a potential divorce as Lady Hale claims some “may wonder whether people who are in love can be expected to make rational choices in the same way as a businessman. ” With this comes uncertainty, the current law offers flexibility and freedom with the court’s ability to “craft solutions that fit the circumstances of the individual case. ” In contrast, prenuptial-agreements strengthen a marriage as Stake argues “planning can promote confidence by revealing and thus securing the common needs and hopes ” of couples, reducing emotional turmoil during separation and allow for clarity.

When problems surrounding a “gender dimension ” and inequality arise, certainty becomes an elusive concept as “premarital agreements generally harm women and children .” Often prenuptial agreements “only benefit the strong at the expense of the weak. ” At times women “suffer from the gender gap in earnings. ” Even the highest paid women are likely to suffer due the exitance of a prenuptial-agreement whereby they effectively waver their rights to claim for ancillary relief upon divorce. The Law Commission submits they “will provide certainty and the court will have no discretion to override that protection .” How can true fairness and certainty exist when an agreement discriminates or belittles the other? It may be that discretion should remain the way forward due to its links with true flexibility and fairness.

Putting gender aside, the practicalities of enforceable prenuptial-agreements would not necessarily reform the current law as the vast majority of couples claiming ancillary relief are not filthy rich and “there is no use for discretion with limited assets ” Fairness and D pg141. Ultimately, discretion only poses a threat to wealthy couples therefore valid prenuptial-agreements may only be suitable for this minority of the population; they cannot be applied on a universal basis. Certainty is never certain as the Law Commission explains “the terms of a marital property agreement are always subject to the courts review ” pg82 therefore, it is “never possible to be certain ” LCpg82 what the outcome of any given case will be.

Conclusively, the uncertainty that the discretionary approach offers sits on the fence. Offering flexibility and fairness but amounting to ambiguity as to the outcome of any given case. Issues surrounding the definition of fairness amount to a lack of clarity in the current law. Prenuptial

agreements provide for certainty but lead to rigidity, allowing couples to anticipate the outcome of a future divorce whilst they effectively waver their rights to claim for ancillary relief potentially amounting to unfairness. In this case the courts retain their discretionary powers when deciding if a prenuptial agreement should be upheld. Ultimately, discretion forever remains due to the potential unfairness of prenuptial-agreements and certainty is unfortunately a façade.