

5-1-2017

## Have Prenup, Will Travel: Why England's Law on Marital Agreements Has Attracted Forum Shoppers and How the Courts Can Fight Back

Karina VanHouten

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>



Part of the [Comparative and Foreign Law Commons](#), [Conflict of Laws Commons](#), [Family Law Commons](#), [International Law Commons](#), and the [Jurisdiction Commons](#)

---

### Recommended Citation

Karina VanHouten, *Have Prenup, Will Travel: Why England's Law on Marital Agreements Has Attracted Forum Shoppers and How the Courts Can Fight Back*, 42 Brook. J. Int'l L. 807 (2018).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol42/iss2/5>

# HAVE PRENUP, WILL TRAVEL: WHY ENGLAND'S LAW ON MARITAL AGREEMENTS HAS ATTRACTED FORUM SHOPPERS AND HOW THE COURTS CAN FIGHT BACK

## INTRODUCTION

Winston Churchill, a paragon of English manhood, once got into a tiff with socialite Nancy Astor at Blenheim Palace, his familial home. Mrs. Astor said to Churchill: “[I]f I were married to you, I’d put poison in your coffee,” to which he replied: “If I were married to you, I’d drink it.”<sup>1</sup> The English have long held a unique view of marriage, and in recent years, their uniquely English way of doing things has been aptly illustrated through the country’s struggle to modernize its matrimonial legal regime. In this climate, marital agreements have become a particularly thorny issue that has fallen largely to English courts to solve, as parliament is either unable or unwilling to address the topic.

Unfortunately, England’s mercurial approach to marital agreements has become an international problem. In recent years, prospective divorcées from around the globe have flocked to English courts to take advantage of the country’s laws, which generally favor the party seeking to invalidate a marital agreement, due to a historic aversion to marital agreements and failure to modernize the matrimonial regime.<sup>2</sup> This forum-shopping phenomenon is problematic because English courts regularly disregard foreign marital agreements that would be perfectly valid and binding in other jurisdictions. Parliament’s reluctance to formally address marital agreements in any significant way is likely due to the fact that such agreements implicate a variety of complicated policy considerations.

---

1. Though it has been debated whether this exact exchange actually took place, it has been well-documented by Churchill biographers and, as such, has left a mark in the annals of history. *See generally* RICHARD LANGWORTH, CHURCHILL IN HIS OWN WORDS xii (2008).

2. *See infra* Part I.

Marital agreements<sup>3</sup> are contracts “between parties contemplating marriage that alter or confirm the legal rights and obligations that would otherwise arise under the laws governing marriages that end in either divorce or death.”<sup>4</sup> Thus, a marital agreement empowers parties to dispel with default matrimonial law and, in its place, insert their vision on how to best dissolve their union.

There has been a significant rise in popularity of marital agreements in recent years. A 2013 study conducted by the American Academy of Matrimonial Lawyers noted that 63 percent of member attorneys cited an increase in requests for prenuptial agreements within the past three years.<sup>5</sup> Studies of “millennials” show that people are getting married later,<sup>6</sup> and it log-

---

3. For the purposes of this Note, the term “marital agreements” will be used throughout to identify both prenuptial (agreements executed before the marriage) and postnuptial agreements (agreements executed following the marriage). See Jens M. Scherpe, *Introduction to the Project*, in MARITAL AGREEMENTS AND PRIVATE AUTONOMY IN COMPARATIVE PERSPECTIVE 1, 3 (Jens M. Scherpe ed., 2012). Prenuptial and postnuptial agreements are distinguishable, and this Note acknowledges the alternate holdings of the Board of the Privy Council in *MacLeod v. MacLeod* and the Supreme Court of England’s holding in *Radmacher v. Granatino*, but the nuances between the two forms of agreement will not be addressed in depth here. While in the Board of the Privy Council made a distinction between the two forms in *MacLeod*, the Supreme Court of England in *Radmacher* essentially “concluded that there should be no general distinction between ante-nuptial and post-nuptial agreements.” Jane Kentridge, *Case Comment: Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, U.K. SUP. CT. BLOG (Sept. 6, 2015, 1:42 PM), <http://uksblog.com/case-comment-radmacher-formerly-granatino-v-granatino-2010-uksc-42/>; see also Jane Mair, *The Marriage Contract: Radmacher v. Granatino*, 15 EDINBURGH L. REV. 265, 267 (2011). Today, the *Radmacher* position reflects the general consensus among recent jurisprudence. See Kentridge, *supra* note 3; Mair, *supra* note 3.

4. Gary A. Debele & Susan C. Rhode, *Prenuptial Agreements in the US*, INT’L ACAD. FAM. LAW. (2006), [https://www.iafl.com/library/iaml\\_law\\_journal/back\\_issues/volume\\_1/prenuptial\\_agreements\\_in\\_the\\_united\\_states/index.html](https://www.iafl.com/library/iaml_law_journal/back_issues/volume_1/prenuptial_agreements_in_the_united_states/index.html). This Note will focus on marriages ending in divorce.

5. *Increase of Prenuptial Agreements Reflects Improving Economy and Real Estate Market: Survey of Nation’s Top Matrimonial Attorneys Also Cites Rise in Women Requesting Prenups*, AM. ACAD. MATRIMONIAL LAW. (Oct. 16, 2013), <http://www.aaml.org/about-the-academy/press/press-releases/pre-post-nuptial-agreements/increase-prenuptial-agreements-re>.

6. See Steven Martin, Nan Marie Astone, & H. Elizabeth Peters, *Fewer Marriages, More Divergence: Marriage Projections For Millennials To Age 40*,

ically follows that prospective spouses are bringing more individual assets into a marriage than couples have in the past.<sup>7</sup> In the event of a divorce, spouses without an agreement often have to litigate to resolve the dispute, which often results in protracted proceedings where judicial discretion becomes the ultimate arbiter of financial outcomes.<sup>8</sup> As an alternative, marital agreements offer couples predictability, a means to plan for their financial future with certainty, protection of future wealth, a plan to provide for children from previous relationships, a shield from liability when one spouse enters a marriage with outstanding debt obligations, and, most importantly, a means to avoid judicial involvement in their private affairs.<sup>9</sup>

There are, however, substantial policy arguments against marital agreements. Some believe that default matrimonial law adequately protects parties, and that couples should not be allowed to contract around it.<sup>10</sup> Yet, prohibiting freedom of contract runs contrary to notions of autonomy and personal liberty, especially in the matrimonial context. By allowing judges to adjudicate personal disputes, the court is vested with more power to dictate financial and personal matters than the parties themselves. Critics of marital agreements<sup>11</sup> have also argued that

---

URB. INST. (Apr. 2014), [http://www.urban.org/research/publication/fewer-marriages-more-divergence-marriage-projections-millennials-age-40/view/full\\_report](http://www.urban.org/research/publication/fewer-marriages-more-divergence-marriage-projections-millennials-age-40/view/full_report); Frank Newport & Joy Wilke, *Most in U.S. Want Marriage, but Its Importance Has Dropped*, GALLUP (Aug. 2, 2013), <http://www.gallup.com/poll/163802/marriage-importance-dropped.aspx>.

7. See Tami Luhby, *Millennials Say No to Marriage*, CNN MONEY (July 20, 2014, 7:33 PM), <http://money.cnn.com/2014/07/20/news/economy/millennials-marriage/>; Laura Cohen, *The Millennial's New Marriage Concept*, MARIE CLAIRE (Aug. 6, 2014), <http://www.marieclaire.com/sex-love/advice/a10251/millennial-marriage-concept/>; Gillian B. White, *The Institution of Marriage: Still Going Strong*, ATLANTIC (June 16, 2015), <http://www.theatlantic.com/business/archive/2015/06/millennials-delaying-marriage-money-weddings/395870/>.

8. Cheryl L. Young, *Is a Prenup a Must for Most Couples?*, WALL ST. J. (Mar. 1, 2015, 11:37 PM), <http://www.wsj.com/articles/is-a-prenuptial-agreement-a-must-for-most-couples-1425271056>.

9. See *id.*

10. See *id.*

11. Opponents of marital agreements also argue that these contracts are a means of subjugating the nonmoneyed, weaker party, traditionally the prospective wife. While this argument remains relevant in some situations, it is largely based in outdated gender stereotypes. Women are increasingly taking it upon themselves to seek out marital agreements. In a majority of marriages today, wives have an equal or higher education level than their husbands, and in over a quarter of marriages, wives earn more than their husbands. Further,

“the nastiness that can arise in negotiating a [marital agreement] can cripple a marriage before it even starts.”<sup>12</sup> This argument, which advocates against full financial disclosure prior to marriage, seems rather pessimistic about the emotional fortitude of prospective spouses.<sup>13</sup> Marital agreement negotiations require a certain level of open dialogue between prospective spouses, but this candor can hardly be seen as a drawback to the beginning of a marital union.<sup>14</sup> If anything, this communication would seem to create a stronger foundation for a marriage.<sup>15</sup>

These policy arguments have been hotly debated around the world, with each nation reaching different conclusions about marital agreements.<sup>16</sup> Though most countries have acknowledged the frequency with which such agreements are being used, internationally, they are not treated consistently.<sup>17</sup> A disturbing

---

women are increasingly participating and succeeding in business, their rise aided by changing social expectations and the recent push to expand family leave policies. Assuming these trends continue, marriage will eventually carry greater economic value for men than for women. See Barbara A. Atwood & Brian H. Bix, *A New Uniform Law For Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 315 (2012). Additionally, a 2015 study by the American Academy of International Lawyers found that 46 percent of practitioners noted an increase in women initiating requests for these agreements. See *Increase of Prenuptial Agreements Reflects Improving Economy and Real Estate Market: Survey of Nation's Top Matrimonial Attorneys Also Cites Rise in Women Requesting Prenups*, *supra* note 5; see also *Luckwell v. Limata* [2014] EWHC (Fam) 502 (Eng.) (noting that the nonmoneyed spouse was the husband, who received a settlement that effectively voided the marital agreement).

12. Young, *supra* note 8.

13. See *id.*

14. See *id.*

15. See *id.*

16. See Gabriel Cheong, *Prenuptial Agreements Around the World*, MASS. PRENUPTIAL AGREEMENTS (Aug. 25, 2010), <http://www.massachusetts-prenuptial-agreements.com/prenuptial-agreement/prenuptial-agreements-around-the-world/>.

17. International marriages are on the rise, especially in Europe. For example,

[c]alculations by Giampaolo Lanzieri, an Italian demographer, show that in France the proportion of international marriage rose from about 10% in 1996 to 16% in 2009. In Germany, the rise is a little lower, from 11.3% in 1990 to 13.7% in 2010. Some smaller countries have much higher levels. Nearly half the marriages in Switzerland are international

trend has emerged in recent years where prospective divorcées actively seek out a divorce in a jurisdiction that favors their position's interpretation of the marital agreement.<sup>18</sup> Because legal treatment of marital agreements differs so greatly amongst nations, jurisdiction and choice of law can be decisive.

In the realm of international marital agreement law, no country has become more problematic than England. English matrimonial law, codified in the Matrimonial Causes Act of 1973 (MCA)<sup>19</sup>, does not formally recognize marital agreements, and only recently have courts recognized them as some evidence of the parties' intentions with respect to financial settlement upon divorce.<sup>20</sup> Because of this treatment, marital agreements that are binding elsewhere are often disregarded by English courts, where judges exercise wide discretion over financial provisions in divorce settlements, resulting in significantly larger settlement awards for nonmoneyed spouses than would be the case in other jurisdictions.<sup>21</sup> This is problematic because it results in judges substituting their own financial judgments for terms bargained for and agreed to by parties that previously negotiated a marital agreement.<sup>22</sup>

Procedurally, forum shoppers are enticed by English courts because marital agreements are not subject to a conflict-of-laws analysis in England. Many other jurisdictions analyze marital agreements as contracts and apply a conflict-of-laws analysis to

---

ones, up from a third in 1990. Around one in five marriages in Sweden, Belgium and Austria involves a foreign partner.

*Herr and Madame, Señor and Mrs*, ECONOMIST (Nov. 12, 2011), <http://www.economist.com/node/21538103>. Further, one study estimated that "the total number of cross-border marriages among 25-39-year-olds . . . was about 12 m[illion] in 2000." *Id.*

18. See Mark Harper & Brett Frankle, *An English Practitioner's View on Pre-Nuptial, Post-Nuptial and Separation Agreements*, in MARITAL AGREEMENTS AND PRIVATE AUTONOMY IN COMPARATIVE PERSPECTIVE 122, 124 (Jens M. Scherpe ed., 2012).

19. Matrimonial Causes Act 1973, c. 18 (Eng.).

20. See Rebecca Lang, *Nuptial Agreements. Where Have We Got To and Where Are We Going?*, 5 PRIV. CLIENT BUS. 248, 249 (2014).

21. See Harper & Frankle, *supra* note 18, at 124 n.8 (citing a cover story in *Sunday Times Magazine* on October 9, 2005, about divorce in England).

22. *Id.*

foreign marital agreements.<sup>23</sup> English courts apply such an analysis when considering international commercial contracts,<sup>24</sup> but, when an English court exercises jurisdiction over a divorce, all relevant documents (including a marital agreement) are analyzed under English law as part of the divorce proceeding, regardless of the nationality of the parties or the choice of law in the marital agreement.<sup>25</sup> This is partly due to the fact that English matrimonial law is difficult to reconcile with legal regimes in the rest of continental Europe.<sup>26</sup> As a result of the perceived unfairness of the current law, England has earned a reputation as “the divorce capital of the world.”<sup>27</sup> Even more colorfully, some refer to the current state of the law as a “gold-digger’s charter” because of the ease with which one can convince an English court to disregard a marital agreement.<sup>28</sup>

Nonetheless, English domestic matrimonial law has been reformed to an extent. In 2010, the Supreme Court of England inspired hope for reform in *Radmacher v. Granatino*, which abandoned the old rule that marital agreements are per se invalid as contrary to public policy and established criteria for analyzing such agreements.<sup>29</sup> In practice, however, English courts have failed to apply the *Radmacher* test consistently, particularly with regards to foreign marital agreements, making it seem that little has actually changed.<sup>30</sup> Following *Radmacher*, courts have come to wildly different conclusions in cases with similar facts and generally are reluctant to find that both parties to a marital agreement possessed the requisite understanding of the agree-

---

23. See *infra* Part IV.

24. See George A. Zaphiriou, *Choice of Forum and Choice of Law Clauses in International Commercial Agreements*, 3 INT'L TRADE L.J. 311, 333 (1978).

25. See Lang, *supra* note 20.

26. See Joanna Miles, *Marital Agreements and Private Autonomy in England and Wales*, in MARITAL AGREEMENTS AND PRIVATE AUTONOMY IN COMPARATIVE PERSPECTIVE 89, 93 (Jens M. Scherpe ed., 2012).

27. Robert E. Rains, *A Prenup for Prince William and Kate? England Inches Toward Twentieth Century Law of Antenuptial Agreements; How Shall It Enter The Twenty-First?*, 23 FLA. J. INT'L L. 447, 477 (2011).

28. Harper & Frankle, *supra* note 18, at 124.

29. See generally Kentridge, *supra* note 3.

30. One English practitioner and scholar noted that, “from a practitioner’s perspective, when we come to look at how [marital] agreements work in practice, one might query whether anything has really changed.” Harper & Frankle, *supra* note 18, at 123.

ment at the time of execution, effectively invalidating most marital agreements.<sup>31</sup> Despite an exhaustive study by the English Law Commission ("Law Commission")<sup>32</sup> on marital agreements, legislative reform is not imminent and forum shopping continues to be a problem.<sup>33</sup> As a result, foreign marital agreements will continue to be disregarded by English courts, unless they begin treating marital agreements as contracts entitled to a conflict-of-laws inquiry. A conflict-of-laws inquiry will enable courts to determine the proper law to apply when faced with an international marital agreement, thus giving meaning to validly executed marital agreements and eliminating the incentive for non-moneyed spouses to file for divorce in England.

This Note will analyze how current matrimonial law in England affects the enforceability of foreign marital agreements, while proposing a temporary, judicially implemented solution of reviewing foreign marital agreements through a conflict-of-laws inquiry, pending domestic legislative reform.<sup>34</sup> Part I will outline the default English matrimonial rules and the extent to which courts have tolerated marital agreements in the past. Section A will discuss the historical approach to marital agreements in England and the policy underlying the historical norms. Section B will briefly summarize the relevant statutory matrimonial law in England (namely the MCA), and section C will analyze the treatment of marital agreements in the courts. Part II will examine the *Radmacher* decision and discuss parliament's failure

---

31. See Lang, *supra* note 20.

32. See LAW COMMISSION, MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS para. 1.32 (2014), [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc343\\_matrimonial\\_property](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc343_matrimonial_property) [hereinafter LAW COMMISSION]. The Law Commission is a nonpolitical, independent body that was set up by parliament in 1965 to keep the law of England and Wales under review and to recommend reform where it is needed. See Elizabeth Cooke & Spencer Clarke, *Law Commission's Report on Marital Property, Needs and Agreements*, 48 FAM. L.Q. 359 (2014).

33. One bill has been introduced in parliament but has stalled and is unlikely to proceed any further. See *Divorce (Financial Provision) Bill [HL] 2013-14*, U.K. PARLIAMENT, <http://services.parliament.uk/bills/2013-14/divorcefinancialprovision.html> (last visited Apr. 19, 2017).

34. This Note does not focus on divorces between English citizens, though the implications for English natives are potentially massive as well. See *Judge Overrides Prenup as Bob the Builder Tycoon's Daughter Divorces*, GUARDIAN (Feb. 28, 2014), <http://www.theguardian.com/law/2014/mar/01/judge-overrides-prenup-bob-the-builder-divorce>.



to respond with statutory reform. Part III will illustrate how forum shopping continues to be a problem post-*Radmacher*. Section A will explain how foreign marital agreements come under the jurisdiction of English courts and why this is problematic from a forum-shopping perspective. Section B will demonstrate how English courts continue to treat foreign marital agreements inconsistently, despite the framework outlined in *Radmacher*, because there is no statutory guidance for interpreting and enforcing these agreements. Part IV will then suggest that, pending legislative reform, English courts should subject foreign marital agreements to a conflict-of-laws inquiry, which would remove the incentive to forum shop foreign premarital agreements into England, where nonmoneyed spouses would no longer be able to invalidate their foreign marital agreements. This solution will be illustrated by examining a similar approach used by courts in Singapore, whereby courts perform a conflict-of-laws analysis for foreign marital agreements and apply the proper law of the contract to the marital agreement, even if that law is not the *lex fori*.<sup>35</sup> Singapore has been successful at implementing a streamlined yet comprehensive conflict-of-laws approach for foreign marital agreements, which deters prospective forum shoppers and results in validly executed foreign marital agreements being enforced.<sup>36</sup>

#### I. THE HISTORY AND STATE OF THE LAW IN ENGLAND BEFORE *RADMACHER*

The English matrimonial law regime acts as the default law for divorce and related financial settlement determinations. In turn, marital agreements seek to alter or confirm this default law. Currently, the main statutory authority for matrimonial law in England is the MCA, but, beginning in the nineteenth century, the law on marital agreements has largely been shaped by case law, due to the fact that the statutory law does not address marital agreements directly.

---

35. This Latin phrase translates to “the law of the court or forum.” *Lex Fori*, LEGAL DICTIONARY, <https://thelegaldictionary.org/dictionary/lex-foi/> (last visited May 24, 2017).

36. Wai Kum Leong, *Marital Agreements and Private Autonomy in Singapore*, in *MARITAL AGREEMENTS AND PRIVATE AUTONOMY IN COMPARATIVE PERSPECTIVE* 311, 349 (Jens M. Scherpe ed., 2012).

*A. The Historical Approach to Marital Agreements in England and the Underlying Policy Concerns*

The law in England regarding marital agreements “has remained remarkably impervious to change over the past century and a half”<sup>37</sup> and is historically hostile to the idea of prospective spouses contracting around the default matrimonial law.<sup>38</sup> Historically, this unwillingness to accept marital agreements stemmed from the fear that marital agreements allowed parties to collude to end their marriage and that, because these agreements anticipated divorce, they encouraged it and, in some cases, created financial incentives to get divorced.<sup>39</sup> Marriage was seen as essential to the fabric of society, both in a religious and economic sense, and anything that threatened the sanctity of marriage was poorly received.<sup>40</sup> These concerns linger today but are accompanied by the concern that marital agreements, by allowing parties to contract around default law, remove power from the state and consequently may make the state less able to protect vulnerable parties.<sup>41</sup>

Historically, discussion of marital agreements most often arose in the context of marriage contracts, which were drawn up to solemnize unions that today are known as arranged marriages.<sup>42</sup> In 1844, an English court considered such an agreement by a wife, who claimed she was entitled to financial support upon her divorce.<sup>43</sup> The court concluded: “Where the [marital] contract is that, in the event of any separation taking place between the husband and the wife, the husband shall make a certain provision for his wife, the Court sees that it is an inducement to the wife to be guilty of the worst conduct.”<sup>44</sup> The general jurisprudence during this era reflected a real concern that marital agreements could create a financial incentive for divorce and undermine the institution of marriage.<sup>45</sup> Courts were unwilling

---

37. Rains, *supra* note 27, at 455.

38. *See id.*

39. *See* Miles, *supra* note 26, at 97.

40. *See id.*

41. *See id.*

42. *See* Rains, *supra* note 27, at 455.

43. *Id.* at 455–56.

44. *Id.* at 456 (quoting *Cocksedge v. Cocksedge* (1844) 60 Eng. Rep. 351–53, [246]–[47] (Eng.)).

45. *See* Miles, *supra* note 26.

to accept agreements that sought to facilitate divorce in the future, as divorces were designed to be difficult to obtain, thus acting as a deterrent.<sup>46</sup>

This judicial distaste for agreements anticipating separation or divorce was echoed in 1857, when a court articulated the rule that “no state of future separation can ever be contemplated by agreement made either before or after marriage . . . it is forbidden to provide for the possible dissolution of the marriage.”<sup>47</sup> Even as recently as the 1960s, marital agreements were akin to “collusion” in the eyes of some English judges,<sup>48</sup> showing that the historical hostility to anything that facilitates obtaining a divorce, including marital agreements, pervades the jurisprudence.

Yet, this historical attachment to the institution of marriage and the legal and economic protections it provides must be reconciled with the modern recognition of an individual’s right to create duties and rights through contracts.<sup>49</sup> England has been unique in its reluctance to enforce marital agreements in any form,<sup>50</sup> and this reluctance does not entirely stem from historical concerns. Rather, this historical aversion to marital agreements as instruments that make divorce “easy” is complemented by modern policy considerations. A marital agreement, as a specific type of contract, circumvents the state’s power to craft a remedy in the event of a divorce.<sup>51</sup> In displacing the state’s power, marital agreements create a framework that excludes the state as the ultimate arbiter of settlement upon divorce and confine the state

---

46. See Rains, *supra* note 27, at 455–56.

47. *Id.* at 456 (quoting *H v. W* (1857) 3 K. & J. 382 [387] (UK)).

48. The Right Honourable Lord Wilson of Culworth, Justice of the Supreme Court of England, described an experience as a young solicitor, where his client “absurdly” remained married to her husband after the judge refused to grant them a divorce in light of their “collusion” in reaching an agreement that resolved their financial issues prior to appearing in court. See Lord Wilson of Culworth, *Foreword*, in *MARITAL AGREEMENTS AND PRIVATE AUTONOMY IN COMPARATIVE PERSPECTIVE* vii (Jens M. Scherpe ed., 2012).

49. See Debele & Rhode, *supra* note 4.

50. For comparison, U.S. courts began recognizing the validity of marital agreements in the 1960s and 1970s. See *id.* England is not the only country that still takes this position on enforcing marital agreements, but it is in the minority. For a concise list of different national positions on marital agreement law, see Cheong, *supra* note 16.

51. See Debele & Rhode, *supra* note 4.

to enforce only certain equitable principles.<sup>52</sup> Thus, by accepting marital agreements, the state (through the courts) surrenders a great deal of power to the parties, which is significant in a jurisdiction such as England, where judges currently exercise wide discretion over matrimonial matters.<sup>53</sup> This concern is valid, considering that, in England's current system, judicial discretion is the primary means of ensuring fair outcomes and protecting vulnerable parties who may have unwittingly bargained away their rights in a marital agreement.<sup>54</sup> There is, however, ample evidence that judicial discretion is not the only way to protect individual parties to a marital agreement. Jurisdictions that allow marital agreements have developed equitable principles that act as substantive and procedural safeguards to protect the vulnerable parties entering into a marital agreements, both when these agreements are executed and enforced.<sup>55</sup>

### *B. Statutory Matrimonial Law in England: The MCA*

As English jurisprudence and policy have long been against enforcing marital agreements, it is no surprise that, statutorily, there is no provision that expressly validates the execution or enforcement of marital agreements.<sup>56</sup> Thus, it is essential to examine the default matrimonial law in England, the MCA, as marital agreements are interpreted within the context of this underlying statutory framework.<sup>57</sup>

---

52. *Id.*; see also Jens M. Scherpe, *Marital Agreements and Private Autonomy in Comparative Perspective*, in *MARITAL AGREEMENTS AND PRIVATE AUTONOMY IN COMPARATIVE PERSPECTIVE* 443, 489–511 (Jens M. Scherpe ed., 2012). Substantive safeguards include invalidating agreements that seek to evade spousal support entirely or are against public policy and modifying agreements when there was a material change in circumstances since the execution of the agreement. *See id.* at 507–09. Procedural safeguards include requiring full financial disclosure from both parties, having both parties be represented by independent counsel, and invalidating agreements that are signed under duress or in haste. *See id.* at 515–17.

53. *See* Miles, *supra* note 26, at 90–91.

54. *See id.*

55. These equitable principles are codified in U.S. law and are generally accepted as requisites throughout mainland Europe as well. For the most recent scholarship, see UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2012) [hereinafter UPMAA].

56. *See* Nigel Lowe, Address Prepared for the ISFL Colloquium on Family Law, Prenuptial Agreements: The English Position 1, 5 (Oct. 11, 2007), [http://www.indret.com/pdf/508\\_en.pdf](http://www.indret.com/pdf/508_en.pdf).

57. *See* Scherpe, *supra* note 3, at 1.

The MCA<sup>58</sup> governs divorce and the determination of financial settlements upon divorce.<sup>59</sup> In determining financial settlements in a divorce action, the MCA grants the courts powers of “ancillary relief,” which include the power to issue binding financial orders.<sup>60</sup> In providing ancillary relief, the court has vast discretion and is at liberty to

make property adjustment orders (including the [direct] transfer of ownership from one spouse to the other or even to any child of the family); . . . order property to be sold and direct to whom the proceeds should be paid; . . . order the one-off payment of lumps sums; . . . order the sharing of pension rights; and . . . order [periodic payments].<sup>61</sup>

With respect to property, English matrimonial law operates under a separate property regime, which does not embrace the concept of community property (property owned jointly by a married couple, also known as matrimonial property).<sup>62</sup> Yet, the courts have “extensive powers to adjust spouses’ property and financial rights on divorce [that] trump the parties’ separate property rights.”<sup>63</sup> Thus, the effects of the separate property regime are negligible in a sense, as the court pulls in all the same property and assets that would be captured by a community property regime.

The separate property distinction does, however, affect the manner in which a financial settlement is made by an English court. Because English statutory law does not recognize matrimonial property, courts frequently craft financial settlements that do not distinguish between maintenance (usually a temporary, adjustable form of financial relief meant to cover monthly living expenses) and property (a permanent property distribution).<sup>64</sup> Thus, when an English court employs its powers of ancil-

---

58. Matrimonial Causes Act 1973, c. 18 (Eng.).

59. The sections specific to financial settlement upon divorce are sections 25, 34, and 35.

60. See Miles, *supra* note 26, at 91; Rains, *supra* note 27, at 458; see also Matrimonial Causes Act 1973, §§ 23–24.

61. Lowe, *supra* note 56, at 3.

62. See Miles, *supra* note 26, at 90; Lowe, *supra* note 56, at 3.

63. Miles, *supra* note 26, at 91.

64. See *id.* at 93; Jens M. Scherpe, *Foreign Marital Agreements: The Approach of the English Courts*, 3 PRIV. CLIENT BUS. 190, 193 (2010). It is im-

lary relief to make a financial determination, the division of assets (property, money, etc.) is also meant to cover monthly financial needs going forward.<sup>65</sup>

This system is fundamentally different from the rest of continental Europe and the United States, where courts normally divide matrimonial property and make separate awards of maintenance, where necessary.<sup>66</sup> Maintenance awards are flexible and can be adjusted based on the income of the payor and payee, remarriage, and other life events.<sup>67</sup> Property distributions, however, are final determinations of ownership and cannot be adjusted.<sup>68</sup> Thus, there is a great deal at stake in an English property settlement, where maintenance is assumed to be included in the property distribution, and property distributions are permanent and final. This also provides one explanation for English courts' unwillingness to consider foreign law when evaluating a foreign marital agreement. Marital agreements drafted outside of England often contemplate property and maintenance separately because they were drafted to be enforced in a jurisdiction that makes this distinction. Yet, because England's system does not distinguish between property and maintenance, English courts are unable to enforce these agreements by their terms.

Section 25 of the MCA outlines the factors for courts to consider when determining a financial settlement in a divorce action.<sup>69</sup> The court's duty in deciding whether to exercise its power of ancillary relief<sup>70</sup> is to "have regard to all the circumstances of the case," with emphasis on the following factors: each party's income, earning capacity, financial needs, the standard of living previously enjoyed by the family, the age of each party, the duration of the marriage, each party's past or foreseeable future contribution to the welfare of the family, each party's conduct, if

---

portant to note that periodic payments are available as a form of ancillary relief, but these are rarely implemented in practice. See Matrimonial Causes Act 1973, c. 18, § 24 (Eng.).

65. See Miles, *supra* note 26, at 93; Scherpe, *supra* note 52.

66. See Miles, *supra* note 26, at 93; Scherpe, *supra* note 52.

67. For further discussion about the basic distinction between maintenance and property, see generally *Overview of Chapters 4 (Division of Property Upon Dissolution) and 5 (Compensatory Spousal Payments)*, in PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (AM. LAW INST. 2002).

68. See *id.*

69. Matrimonial Causes Act 1973, § 25.

70. These ancillary powers are outlined in sections 23 and 24 of the Matrimonial Causes Act 1973. See *id.* §§ 23–24.

it would be inequitable to disregard it, and the value of any benefit that either party stands to lose as a result of the dissolution or annulment of the marriage.<sup>71</sup> The MCA thus allows courts wide discretion to craft a financial settlement that best suits the parties, but notably, does not include marital agreements as one of the factors for a court to consider.<sup>72</sup>

Sections 34 and 35 of the MCA govern maintenance agreements (also known as "separation agreements"), which are agreements between spouses that outline the rights and liabilities toward one another when living separately, prior to divorce.<sup>73</sup> Maintenance agreements differ from marital agreements because separation agreements apply only to the time period between separation and divorce.<sup>74</sup> In the past, sections 34 and 35 have provided guidance to drafters of marital agreements as to the type and manner of provisions a court will enforce. Reliance on this section of the statute, however, is complicated because it contains an inherent contradiction.<sup>75</sup> Section 34 provides that, "[i]f a maintenance agreement includes a provision purporting to restrict any right to apply to a court for an order containing financial arrangements, then that provision shall be void."<sup>76</sup> Section 34 also states that "any other financial arrangements contained in the agreement shall . . . be binding on the parties to the agreement,"<sup>77</sup> leading to the perplexing result that the financial arrangements laid out in a maintenance agreement could be both void and binding. Section 35, which also relates to maintenance agreements, is similarly muddled and does not lend itself to clear understanding. It allows a court to alter the terms of a maintenance agreement if the court is satisfied that circumstances have changed since the agreement was made.<sup>78</sup> Thus, under sections 34 and 35 of the MCA, a maintenance agreement has equal chances of being ruled void, binding, or adjustable.<sup>79</sup> Further, under the default property regime, "all the spouses' assets, however and whenever acquired, are subject to

---

71. *Id.* § 25.

72. *Id.*

73. *See Rains, supra* note 27, at 459. A maintenance agreement under English law is the equivalent of a separation agreement in the United States. *Id.*

74. *See id.* at 460.

75. *See id.* at 460.

76. Matrimonial Causes Act 1973, c. 18, § 34(1)(a) (Eng.).

77. *Id.* § 34(1)(b).

78. *See Rains, supra* note 27, at 459.

79. *See id.* at 460.

the court's extraordinarily wide powers [of ancillary relief] and are therefore at risk of being redistributed."<sup>80</sup> Thus, a great deal is at stake in drafting a marital agreement, and the existing default statutory law does not give clear guidance as to how to draft an agreement so that it will be enforced.

### C. The English Courts and Marital Agreements

Aside from granting judges wide judicial discretion under the MCA, statutory law has done little to create a modern matrimonial framework in the English courts.<sup>81</sup> Not surprisingly, English courts have become the driving force in defining and modernizing matrimonial law and, by default, marital agreement law (but with limited success). By way of example, the drafters of the MCA failed to include a clear statement of the overall objective a court should strive for when applying their powers of ancillary relief.<sup>82</sup> Currently, the MCA gives judges enormous discretion and also allows them to decide how to use it.<sup>83</sup> The House of Lords in *White v. White* clarified the overall judicial objective courts should seek under the MCA when determining a settlement upon divorce, holding that the underlying objective is to "achieve a fair outcome between the parties as judged against the yardstick of equality."<sup>84</sup>

In determining marital financial settlements, the "yardstick of equality" translates into courts employing a "fairness" standard to guide judicial determinations.<sup>85</sup> In theory, fairness, applied in the context of marital financial settlements, can result in appropriately tailored outcomes for families and their unique circumstances.<sup>86</sup> It can, however, also result in vast uncertainty for spouses who would prefer to settle their marital finances autonomously and without judicial interference by executing a marital agreement.<sup>87</sup> The fairness inquiry is further guided by factors

---

80. Lowe, *supra* note 56, at 5.

81. See Miles, *supra* note 26, at 90–91.

82. See Lowe, *supra* note 56, at 5.

83. See *id.*

84. *Id.* at 4. See generally *White v. White* [2000] UKHL 54.

85. Fairness is determined by inquiring into "whether the enforcement of the agreement would cause significant injustice, or whether the agreement itself is fair." Harper & Frankle, *supra* note 18, at 137.

86. See generally Jens M. Scherpe, *Questionnaire*, in *MARITAL AGREEMENTS AND PRIVATE AUTONOMY IN COMPARATIVE PERSPECTIVE* 9 (Jens M. Scherpe ed., 2012).

87. See generally *id.*



laid out in section 25 of the MCA, and particularly the following three principles articulated in subsequent case law:<sup>88</sup> equal sharing,<sup>89</sup> needs,<sup>90</sup> and compensation.<sup>91</sup> It is decidedly unclear, however, “how the principles interrelate in practice,”<sup>92</sup> particularly in regards to divorces that involve a marital agreement, showing that the judiciary’s ability to fine-tune the MCA is limited at best.

For many years, the seminal English case regarding marital agreements was *Hyman v. Hyman*, where the court held that marital agreements are against public policy and thus invalid.<sup>93</sup> The decision stressed that no private agreement could subvert the court’s jurisdiction over financial settlements in a divorce action.<sup>94</sup> This precedent was followed almost unchanged from the date of its decision in 1929, to as recently as 1999, when the court in *N v. N* noted that “[t]he attitude of the English courts to [marital] agreements . . . has always been that they are not enforceable.”<sup>95</sup>

In the years since, English jurisprudence has evolved slowly, and courts will now consider a marital agreement as some evidence of the parties’ intentions when making financial settlement determinations.<sup>96</sup> The post-2000 case law indicates that marital agreements are a material consideration in the financial

---

88. See Miles, *supra* note 26, at 94.

89. Equal sharing refers to the “sharing of the fruits of the matrimonial partnership of equals (sometimes referred to as ‘entitlement’).” Lowe, *supra* note 56, at 4.

90. Needs are thought of as those “(primarily housing and financial) generated by the relationship between the parties. This is often where the search for fairness begins and ends since in most cases the available assets are insufficient to provide adequately for the needs of two homes.” *Id.*

91. Compensation is usually employed “for relationship-generated disadvantage.” *Id.* This occurs when one spouse has made significant financial sacrifice (in terms of earning potential or otherwise) for the benefit of the family unit. *Id.*

92. Courts will often address compensation (as in for a spouse who sacrificed earning potential to be a caregiver) as an element of need or equal sharing. See Miles, *supra* note 26, at 94; Harper & Frankle, *supra* note 18, at 137–38.

93. *Hyman v. Hyman* [1929] AC 601 at 628–29 (UK).

94. The court held that “the wife’s right to future maintenance is a matter of public concern, which she cannot barter away. . . .” *Id.*

95. Lowe, *supra* note 56, at 6 (quoting Justice Wall in *N v. N* [1999] EWHC (Fam) 838, [34] (Eng.)).

96. See *id.* at 7.

settlement upon divorce, either as a part of “all the circumstances” in consideration or as “conduct” that the court is directed to take into account under the MCA section 25 factors.<sup>97</sup> Under the conduct inquiry, the existence of a marital agreement can serve as evidence of the party’s intention to be bound by a marital agreement generally or as proof of consent to some or all of the terms outlined in the agreement.<sup>98</sup> Though not considered enforceable, marital agreements play an important evidentiary role. That said, England remains “almost alone not only in Europe but also among other common law jurisdictions” in refusing to recognize marital agreements as binding contracts.<sup>99</sup>

## II. THE *RADMACHER* DECISION AND PARLIAMENT’S FAILURE TO RESPOND WITH REFORM

During the first decade of the twenty-first century, English jurisprudence on marital agreements shifted course significantly from viewing them as contrary to public policy to acknowledging that, under certain circumstances, they might be enforceable. Responding to lower courts acknowledging marital agreements as evidence of the parties’ intentions, the two highest courts in England addressed marital agreements almost simultaneously. These courts vacated the old rule laid down in *Hyman v. Hyman*, which stated that marital agreements are invalid as contrary to public policy, and attempted to create a modern framework for courts to interpret marital agreements going forward. Concurrently, the Law Commission issued a report on marital agreements and recommended legislation legitimizing such agreements.<sup>100</sup> To no avail, both the courts and the Law Commission invited Parliament to formally recognize marital agreements as binding contracts.<sup>101</sup> In 2008, the Board of the Privy Council<sup>102</sup>

---

97. *Id.* at 7; *see also* *Ella v. Ella* [2007] EWCA (Civ) 99 (Eng.) (holding that the marital agreement played a “major factor” in the case); *M v. M* [2002] 1 FLR 654 (Eng.) (holding that the existence of a marital agreement served as a factor in granting the nonmoneyed spouse a “more modest award than might have been made without it”).

98. Lowe, *supra* note 56, at 6.

99. *Id.* at 5.

100. *See* LAW COMMISSION, *supra* note 32.

101. *See* *MacLeod v. MacLeod* [2008] UKPC 64; *Radmacher v. Granatino* [2010] UKSC 42.

102. Unlike the United States, the United Kingdom does not have one highest court of appeal. The Judicial Committee of the Privy Council is the court of

decided *MacLeod v. MacLeod*. In *MacLeod*, the Board of the Privy Council considered the marital agreement of a U.S. couple who got married in Florida and who had been residing on the Isle of Man, a Crown dependency.<sup>103</sup> In its decision, the court opined that “the difficult issue of the validity and effect of [marital] agreements is more appropriate to legislative rather than judicial development,”<sup>104</sup> but it ultimately held that the marital agreement in question was valid and enforceable.<sup>105</sup> The court, however, ruled that the provisions that explicitly sought to oust the jurisdiction of the court were void, showing the Board of the Privy Council’s reluctance to fully sanction a document that would circumvent their traditional powers of ancillary relief.<sup>106</sup> The Board of the Privy Council’s holding effectively vacated the long-held precedent of *Hyman v. Hyman* and “swept away . . . the old rule that agreements providing for future separation are contrary to public policy.”<sup>107</sup> In spite of this departure from established precedent and the Board of the Privy Council’s explicit request for legislative guidance on the matter, parliament remained silent.

Two years after *MacLeod*, in October of 2010, the Supreme Court of England laid down a highly anticipated decision in *Radmacher v. Granatino*.<sup>108</sup> While *Radmacher* was initially

---

final appeal for overseas U.K. territories, Crown dependencies, and the Commonwealth countries that have retained the appeal to Her Majesty in Council. The Supreme Court of England is the court of final appeal for England proper. See JUD. COMMITTEE PRIVY COUNCIL, <https://www.jcpc.uk> (last visited Apr. 17, 2017). The Supreme Court of England is not bound by the precedent of the Board of the Privy Council, and vice versa, but the two highest courts look to one another as persuasive authority. See Kentridge, *supra* note 3.

103. The Isle of Man is a British territory. See Harper & Frankle, *supra* note 18, at 140.

104. *MacLeod* [2008] UKPC [35].

105. See *id.*

106. See *id.* The court found it significant that the marital agreement was postnuptial and not prenuptial (a distinction not discussed here); more importantly, however, the court held that marital agreements are legally valid. *Id.*

107. Kentridge, *supra* note 3.

108. See *Pre-nuptial Victory for Heiress*, BBC NEWS (July 2, 2009, 1:17 PM), <http://news.bbc.co.uk/2/hi/uk/8130176.stm>.

hailed as a groundbreaking decision,<sup>109</sup> it has not drastically altered judicial treatment of marital agreements.<sup>110</sup> Rather, it reflects a peak in the gradual judicial recognition of marital agreements as at least some evidence in financial settlement determinations.<sup>111</sup> In *Radmacher*, the Supreme Court of England echoed the sentiments of the Board of the Privy Council's earlier decision in *MacLeod*.<sup>112</sup> In *Radmacher*, the court addressed whether, and to what extent, a court should take into account a foreign marital agreement when exercising its ancillary powers of relief under section 25 of the MCA.<sup>113</sup> The parties involved were Katrin Radmacher, a German heiress, and Nicholas Granatino, a French banker turned professor.<sup>114</sup> Their marital agreement, which was of German origin and declared itself to be governed by German law, provided that neither party would claim the assets or income of the other in the event of a divorce.<sup>115</sup> The parties filed for divorce in England in 2007, while they were living in London, and Granatino requested £6.9 million from his former spouse.<sup>116</sup>

The case reached the Supreme Court of England in 2010, and the court, citing *MacLeod*, held that, when considering marital agreements, "[a] court should give effect to a [marital] agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."<sup>117</sup> In determining the validity of a marital agreement, the court formulated the following three-part inquiry:

---

109. *See id.*

110. *See* Harper & Frankle, *supra* note 18, at 123.

111. *See* Lowe, *supra* note 56, at 7.

112. Thus, the two highest courts in England were in agreement that marital agreements are legally valid documents. *See* Kentridge, *supra* note 3.

113. *Id.*

114. *Radmacher v. Granatino* [2010] UKSC 42.

115. *See* PLC Private Client, *Supreme Court Upholds Prenuptial Agreement in Radmacher Case*, THOMSON REUTERS PRACTICAL L. (Nov. 3, 2010), [https://uk.practicallaw.thomsonreuters.com/4-503-6520?\\_lrTS=20170418014011262&transitionType=Default&context-Data=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-503-6520?_lrTS=20170418014011262&transitionType=Default&context-Data=(sc.Default)&firstPage=true&bhcp=1); *see also* Kentridge, *supra* note 3.

116. *See* PLC Private Client, *supra* note 115.

117. *Radmacher* [2010] UKSC 42, [75] (quoting *MacLeod v. MacLeod* [2008] UKPC 64).

A. Were there circumstances attending the making of the agreement that detract from the weight that should be accorded to it?

B. Were there circumstances attending the making of the agreement that enhance the weight that should be accorded to it; the foreign element?

C. Did the circumstances prevailing when the court's order was made make it fair or just to depart from the agreement?<sup>118</sup>

In the Part A analysis, the court determined that, "if the terms of the agreement are unfair from the start, this will reduce its weight," and outlined several factors to consider in making this determination, including: the existence of undue influence or pressure, disclosure of financial and material information, intent of the parties to be bound, the parties' emotional states, their age and maturity, whether the parties had been in long-term relationships before, and whether the marriage would have gone ahead without an agreement.<sup>119</sup> Here, the court did not find any mitigating forces to be an issue in the parties' agreement.<sup>120</sup>

With respect to Part B, the court found that the foreign nature of the marital agreement entitled it to "decisive weight," but that the foreignness was simply one of several factors that "fortified" the conclusion to give the agreement determinative weight.<sup>121</sup> The English court "'eyeball[ed]' the foreign law"<sup>122</sup> but did not perform a choice-of-law analysis.<sup>123</sup> Instead, under the English court's analysis, the fact that the marital agreement could have been binding in both Germany and France<sup>124</sup> merely established the intention of the parties to be bound generally,<sup>125</sup> but it did not necessarily make the agreement binding in England. As a

---

118. *Id.* [76]–[113].

119. None of these factors were held to be equivocal. *See id.* [68]–[73].

120. *See* Kentridge, *supra* note 3.

121. Miles, *supra* note 26, at 119 (referring to the Court of Appeal's analysis). The opinion of the Supreme Court of England did not directly comment on the foreign nature of the agreement. *See* Kentridge, *supra* note 3.

122. Miles, *supra* note 26, at 119.

123. Under Rome I, a regulation providing for choice-of-law in contract, a foreign commercial contract is typically subject to a choice-of-law analysis within the European Union. *See* Council Regulation 593/2008, 2008 O.J. (L 177) (EC). Until England formally exits the European Union, they remain bound by such policies.

124. *See* Kentridge, *supra* note 3.

125. *See* Miles, *supra* note 26, at 119.

result, while the court acknowledged the foreign nature of the contract, it simply disregarded the conflict-of-laws issue, ultimately emphasizing that English law alone governed the case.<sup>126</sup>

In the Part C analysis, the court reiterated the rule that “the overriding criterion to be applied in ancillary relief proceedings is that of fairness” and considered the three elements that traditionally comprise the “fairness” inquiry: need, compensation, and sharing.<sup>127</sup> Here, the court found that, in terms of need and sharing, it was unnecessary for the wife to share her family fortune because the husband renounced any claim in the marital agreement,<sup>128</sup> and, as a banker turned professor, he was generally able to provide for his own needs.<sup>129</sup> Further, with respect to compensation, the court found no reason to compensate the husband for sacrifices made on behalf of the family because he did not make any during the marriage.<sup>130</sup>

The *Radmacher* decision was groundbreaking in the sense that the Supreme Court of England formally swept away the notion that marital agreements are invalid as contrary to public policy,<sup>131</sup> while articulating a thoughtful, nuanced approach for determining the weight they should be given. While the court valiantly attempted to create a workable standard, it ultimately failed to set out a framework that produces consistent results in practice, as demonstrated by subsequent case law, because the judiciary has a limited ability to make law and policy in this realm.<sup>132</sup> Despite the test laid out in the majority opinion directing future courts regarding marital agreements, the dissenting opinion in *Radmacher* foresaw the need for legislative reform and echoed *MacLeod*,<sup>133</sup> opining “[t]here is not much doubt that the law of marital agreements is a mess . . . [and] is ripe for systematic review and reform.”<sup>134</sup>

---

126. *See id.*

127. *Radmacher v. Granatino* [2010] UKSC 42, [75].

128. *See Kentridge*, *supra* note 3.

129. His own needs (including for housing) would, to a large extent, be met indirectly by the provision made for him to care for his daughters until the younger daughter reached the age of 22. *See id.*

130. *See id.*

131. *See id.*

132. *See generally* *GS v. L* [2011] EWHC (Fam) 1759; *B v. S* [2012] EWHC (Fam) 265; *Z v. Z* (No 2) [2011] EWHC (Fam) 2878.

133. *See Radmacher v. Granatino* [2010] UKSC 42, [133]–[134].

134. *Id.* [133].

Prior to *Radmacher*, English courts expressly requested legislative guidance with respect to the validity of marital agreements.<sup>135</sup> In response, in 2008, the Law Commission initiated a project to look into the status and enforceability of marital agreements.<sup>136</sup> Following *Radmacher*, the Law Commission's report took on new importance, as the law had reached a confusing impasse.<sup>137</sup> Statutorily, marital agreements remained unenforceable, but case law afforded them whatever weight a particular court chose to give them using the *Radmacher* factors.<sup>138</sup> Lord Justice Hoffman described this strange status quo as "the worst of both worlds."<sup>139</sup>

The Law Commission's final report was issued in February 2014.<sup>140</sup> The report acknowledged *Radmacher* and noted that the courts have gone as far as possible in endorsing the validity of marital property agreements without an amendment to the statutory framework, and that "only legislation can enable parties to enforce agreements without involving the courts' discretionary jurisdiction under the Matrimonial Causes Act 1973."<sup>141</sup> The report recommended statutory confirmation of the contractual validity of marital agreements and introduced a model form for such agreements—the "qualifying nuptial agreement"—with built-in procedural safeguards that would enable parties to enforce agreements without judicial interference.<sup>142</sup> The report acknowledged that the Supreme Court of England has pushed the law as far as is possible toward endorsing the validity of marital property agreements, and that "only legislation can enable . . . couples to make contractual, and truly enforceable arrangements about the financial consequences of divorce or dissolution."<sup>143</sup>

---

135. See generally *MacLeod v. MacLeod* [2008] UKPC 64.

136. See Kentridge, *supra* note 3.

137. See Harper & Frankle, *supra* note 18, at 133.

138. See *id.* at 133.

139. *Id.*

140. See LAW COMMISSION, *supra* note 32.

141. *Id.* para. 1.34.

142. See *id.* paras. 1.32, 1.35, at x (defining a "qualifying nuptial agreement" as "a marital property agreement which is enforceable, providing certain conditions are met, without the need for the agreement to be scrutinized by the court in its discretionary jurisdiction. Such agreements are not available under the current law."); see also Cooke & Clark, *supra* note 32.

143. See *id.* para. 1.34.

Immediately following the publication of the 2014 report, a bill was introduced into the House of Lords that would have enacted many of the Law Commission's suggestions.<sup>144</sup> The first reading of the bill took place in the month of its introduction<sup>145</sup> but has since stalled and is unlikely to proceed further.<sup>146</sup> Further, no alternative legislative proposals have been introduced and parliament has not adequately addressed the "muddled state of the law."<sup>147</sup>

### III. THE PROBLEMATIC EFFECT OF ENGLISH LAW ON FOREIGN MARITAL AGREEMENTS

The English position on marital agreements remains highly mercurial and poses a significant risk to holders of foreign marital agreements who expect such agreements to be enforced. England does not subject foreign marital agreements to a conflict-of-laws analysis, so as long as an English court has jurisdiction over the parties, English law is applied, regardless of the origin of the marital agreement, the nationality of the parties, or the presence of a forum selection clause. The MCA and international legal developments make it relatively easy for foreign

---

144. See *Baroness Deech's Divorce (Financial Provision) Bill to Receive Second Reading on 27th June*, FAM. LAW WK. (June 17, 2014), <http://www.familylawweek.co.uk/site.aspx?i=ed130366>. The bill reflects a comprehensive reform of existing law and proposes that

a [marital] agreement is to be treated as binding unless – (a) the agreement attempted to impose an obligation on a third party who had not agreed in advance to be bound by it; (b) a party did not receive his or her own legal advice before the agreement was made; (c) the agreement was made less than 21 days before the marriage; (d) there was no full disclosure of assets as between the parties before it was made; or (e) the agreement is unenforceable under the rules of contract law.

Divorce (Financial Provision) Bill, 2014 [HL] Bill 89, <http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0089/14089.pdf>.

145. To become law, a bill must pass through five phases in the House of Lords, five phases in the House of Commons, the consideration of amendments, and the royal assent. The second reading for the bill has not been scheduled, and as "the 2013-2014 Parliament has prorogued . . . this bill will make no future progress." See *Divorce (Financial Provision) Bill [HL] 2013-14*, *supra* note 33.

146. See *id.*

147. Kentridge, *supra* note 3.



parties to come under the jurisdiction of the English courts. Despite the advances made in England's treatment of marital agreements in *Radmacher*, forum shopping is still a problem, as evidenced by the continued inconsistent treatment of foreign marital agreements in English courts.

*A. Forum Shopping: How It Works and Why the Current English Matrimonial System Attracts Forum Shoppers*

From an international perspective, the English legal system has earned a reputation for having what has "unflatteringly [been] called a parochial attitude towards the resolution of financial and property disputes following divorce."<sup>148</sup> In English courts, "family law disputes are governed by English law . . . regardless of the nationality or domicile of the parties, their habitual residence at the time of marriage and/or of making a marital property agreement, or any choice of law clause in that agreement."<sup>149</sup> English courts have exhibited unwavering reluctance to apply any law other than their own when evaluating the validity of a marital agreement,<sup>150</sup> which has enormous substantive implications, especially when viewed in light of the ease with which one can fall under the jurisdiction of an English court for a divorce proceeding.

In terms of jurisdiction over divorce, English courts defer to both domestic and international law, but it is quite simple for a divorce action and the related financial settlement determination to fall under the English courts' jurisdiction.<sup>151</sup> Under the MCA,

so long as the parties have been married for at least one year, under the [MCA], the English court has jurisdiction to undertake divorce (and ancillary relief) proceedings where either of the parties of the marriage is domiciled in England [or] Wales at the date of commencement of the proceedings, or where either of them has habitually been a resident in England [or] Wales throughout the period of one year ending on such date.

---

148. Miles, *supra* note 26, at 114.

149. *Id.* at 115.

150. See Mair, *supra* note 3; see also Miles, *supra* note 26, at 115.

151. See James Copson, *The Attitude of the English Court to Conflict of Jurisdiction in Divorce and Related Financial Proceedings*, 34 FAM. L.Q. 177, 177 (2000).

The place of celebration of the marriage, the residence or domicile of the parties at the date of the marriage and current citizenship are, in themselves, immaterial.<sup>152</sup>

Under the Brussels II regulation, EU Member States must follow the “first-seised rule,” which provides that, once divorce proceedings have been initiated in an English court, the parties are bound by that jurisdiction’s judgment of divorce.<sup>153</sup> Thus, a party wishing to avoid jurisdiction in England may seek to stay divorce proceedings in an English court and request relief in another jurisdiction, but this is by no means a “fail-safe method” of avoiding the application of English law to the financial settlement determination.<sup>154</sup> The impending Brexit further exacerbates the uncertainty. On June 23, 2016, England voted to exit the European Union, and it is unknown whether the jurisdictional rules under Brussels II will still apply to England, as the exact terms and timing of England’s exit from the European Union remain unclear because they have yet to be negotiated.<sup>155</sup>

---

152. *Id.*

153. *See Miles, supra* note 26, at 115. With respect to jurisdiction,

Council Regulation (EC) No 2201/2003 (Brussels II (bis)) which essentially provides that first in time wins, i.e. the first EU state in which divorce proceedings are initiated shall hear the divorce. A court is deemed to be seised of jurisdiction for Brussels II (bis) purposes when the document initiating the proceedings, or an equivalent document, is lodged with the court, provided that the applicant has not subsequently failed to take the steps he or she was required to take to have service effected on the respondent.

Harper & Frankle, *supra* note 18, at 129.

154. Despite seeking a stay of the financial settlement, English law could apply regardless where

the English court . . . might not regard that forum as being more convenient, or even available as a forum . . . [or] where the competing forum would, as a result of the English divorce, treat English law as the applicable law for dealing with the property and financial matters.

Miles, *supra* note 26, at 118.

155. On June 23, 2016, a majority of U.K. voters (52 percent) voted to leave the European Union. The terms of withdrawal have yet to be formally negotiated. *See* Alex Hunt & Brian Wheeler, *Brexit: All You Need to Know About the UK Leaving the EU*, BBC NEWS (Mar. 30, 2017), <http://www.bbc.com/news/uk-politics-32810887>.

For non-EU Member States, where divorce proceedings in England are opposed, the forum of divorce is usually determined by the doctrine of *forum non conveniens*,<sup>156</sup> the application of which is also difficult to predict and will not necessarily preclude the application of English law to a financial settlement determination if the parties or the marriage have significant ties to England.<sup>157</sup>

Once an English court has gained jurisdiction over a divorce, English law will be applied. In this realm, England has been less receptive to international law and notions of comity. In 2010, sixteen EU Member States signed on to the Rome III regulation, which provided for enhanced cooperation in choice-of-law determinations for divorce actions.<sup>158</sup> The statute provided criteria for determining the proper law to apply in the event of a divorce between citizens of different Member States.<sup>159</sup> Negotiations for Rome III began in 2006, before *Radmacher* and the Law Commission's 2014 report, at a time when England was not yet ready for a more liberal approach to matrimonial property, particularly where reform would potentially involve applying law other than the *lex fori*.<sup>160</sup> England, however, did not sign on to Rome III, and if the Brexit is any indication, the country does not seem inclined toward enhanced international cooperation with respect to choice-of-law determinations in marital agreements.

Even since *Radmacher*, this closed-minded attitude toward the application of foreign law in divorce actions has remained unchanged.<sup>161</sup> Under the current law, foreign marital agreements, unlike other contracts, are not entitled of a choice-of-law analysis in English courts.<sup>162</sup> The English fondness for applying its own law is especially significant because English matrimonial law is fundamentally different than the rest of continental

---

156. For a discussion of the doctrine of *forum non conveniens*, see Edward L. Bartlett Jr., *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380 (1947).

157. See Harper & Frankle, *supra* note 18, at 130–31.

158. See Council Regulation (EC) 1259/2010, 2010 O.J. (L 343).

159. See *id.*

160. See HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, *ROME III – CHOICE OF LAW IN DIVORCE* (2006).

161. See Fiona Kendall, *What is Rome III and Why Is the UK Not a Participating Member State?*, CLARION SOLIC. (June 30, 2014), <http://www.clarionsolicitors.com/blog/what-is-rome-iii-and-why-is>.

162. See *id.*

Europe.<sup>163</sup> All continental European jurisdictions recognize matrimonial property,<sup>164</sup> whereas England does not embrace the concept of community property between spouses.<sup>165</sup> In practice, this means that, where most European jurisdictions consider maintenance awards separately from property distributions, English law does not make this distinction.<sup>166</sup> In England, financial settlement awards encompass both maintenance and a distribution of property.<sup>167</sup> This fundamental difference explains why English courts are often unwilling to be bound by foreign marital agreements because, in England, ancillary relief is seen as a “package deal,” and the division of property is also meant to cover needs of the other spouse, which in many other jurisdictions would be provided for in an award of maintenance.<sup>168</sup> Thus, foreign marital agreements that provide for division of property and contemplate separate maintenance awards simply do not fit within the framework of current English matrimonial law. In an apparent effort to achieve a more equitable result, “English courts in recent years [have] recognized that it is desirable in cases with a foreign aspect to have a ‘sideways look’ at the outcome that would be achieved were the relevant foreign law to be applied.”<sup>169</sup> But, statutorily, section 25 of the MCA does not list either foreign law or marital agreements as factors to consider when determining a financial settlement,<sup>170</sup> so it is unsurprising that English courts have historically afforded little weight to foreign marital agreements in determining financial settlements upon divorce.<sup>171</sup> *Radmacher* illustrated this strange reality when the English court refused to enforce a German marital agreement, signed by German and French spouses, which was valid and enforceable in both Germany and France.<sup>172</sup> Despite the agreement to the contrary, the parties were still subject to the English court’s powers of ancillary relief.<sup>173</sup> Though the court considered the marital agreement to be valid in the sense that it

---

163. See Scherpe, *supra* note 64, at 191; Miles, *supra* note 26, at 93.

164. See Scherpe, *supra* note 64, at 191; Miles, *supra* note 26, at 93.

165. See Miles, *supra* note 26, at 90.

166. See Scherpe, *supra* note 64, at 193; Miles, *supra* note 26, at 90–93.

167. See Scherpe, *supra* note 64, at 193; Miles, *supra* note 26, at 90–93.

168. Scherpe, *supra* note 64, at 193.

169. Miles, *supra* note 26, at 119.

170. See Rains, *supra* note 27, at 458.

171. See Miles, *supra* note 26, at 114–15.

172. See Kentridge, *supra* note 3.

173. See *id.*

was not against public policy, it ultimately did not strictly enforce its terms.<sup>174</sup> The agreement merely served as some evidence to be considered in the court's determination of ancillary relief.<sup>175</sup>

*B. The Post-Radmacher Jurisprudence and Remaining Problems for Foreign Marital Agreements in England*

Subsequent cases have brought to light the inconsistency and unpredictability of the *Radmacher* framework, particularly with respect to foreign marital agreements.<sup>176</sup> This is largely because *Radmacher* did little to reform domestic marital agreement law in practice,<sup>177</sup> and English courts apply English law to divorce proceedings, regardless of the nationality of the parties or the origin of the marital agreement.<sup>178</sup> The post-*Radmacher* jurisprudence shows that English courts have reached wildly different outcomes in cases involving a foreign marital agreement but generally demonstrate a reluctance to find that both parties to the agreement possessed the requisite understanding of the agreement's implications at the time of execution.<sup>179</sup> Their analysis tends to be conclusory and lacking in a clear application of the *Radmacher* factors.

In 2011, two divorce cases involving foreign marital agreements reached the English courts. In *GS v. L*, the parties married and maintained their matrimonial home in Spain but lived in London at the time of the divorce, which enabled an English court to exercise jurisdiction over the parties.<sup>180</sup> Prior to their divorce, the parties executed two marital agreements under Spanish law, but the English court found that the facts surrounding the execution of the documents rendered them invalid.<sup>181</sup> In the agreements, the husband wanted the wife to be a homemaker, but she felt financially vulnerable in that position.<sup>182</sup> Further, they were executed at a time when "[the hus-

---

174. *See id.*

175. *See id.*

176. *See* cases cited *supra* note 132.

177. Harper & Frankle, *supra* note 18, at 143.

178. Harper & Frankle, *supra* note 18, at 143.

179. *See* Lang, *supra* note 20, at 249.

180. *See* *GS v. L* [2011] EWHC (Fam) 1759.

181. *See id.* [63].

182. *See id.* [63].

band] had been utterly preoccupied with his work” and uninterested in formalizing the parties’ ownership of assets.<sup>183</sup> Ultimately, the court ascertained that “neither party had a full appreciation of the implications of the nuptial agreement.”<sup>184</sup>

That same year, in *Z v. Z*, an English court mostly upheld a French marital agreement where the parties were French citizens living in London at the time of their divorce.<sup>185</sup> Here, the court found that both parties entered freely into the agreement “with [a] full understanding of its implications.”<sup>186</sup> The court noted that the agreement was properly executed and “would have been binding [had] the divorce proceeded in France.”<sup>187</sup> The court found no circumstances that rendered the agreement unfair, despite the husband expressly telling the wife, in writing, that he would not enforce their marital agreement.<sup>188</sup>

When taken together, *GS v. L* and *Z v. Z* demonstrate that, following *Radmacher*, English courts still reach wildly different outcomes where parties seek to enforce foreign marital agreements. *Radmacher* clarified the English judiciary’s willingness to accept marital agreements as at least some evidence of the parties’ intentions,<sup>189</sup> but the courts still lack statutory guidance in determining whether to accept these agreements as binding contracts, creating uncertainty for parties and practitioners who seek to enforce such agreements and showing the limits of judge-made law in this area.

In 2012, an English court decided *B v. S*, where the parties were foreign nationals living in England at the time of their divorce.<sup>190</sup> They had executed two marital agreements, one when they married in the Catalonia region of Spain, where the default matrimonial regime of the region is separate property, and a later one that confirmed the first agreement.<sup>191</sup> Like in *GS v. L*, the court held that the parties had entered into the agreement without a full appreciation of its implications,<sup>192</sup> as, at the time

---

183. *Id.* [65].

184. *Id.* [66].

185. *See generally* *Z v. Z* (No 2) [2011] EWHC (Fam) 2878.

186. *Id.* [45].

187. *Id.*

188. *Id.*

189. *See* Kentridge, *supra* note 3.

190. *See generally* *B v. S* (Financial Remedy: Marital Property Regime) [2012] EWHC (Fam) 265.

191. *Id.*

192. *Id.* [34].

of execution, "there had been no discussion at all as to whether the [second] agreement was intended to be influential, let alone binding, were the parties to divorce in England."<sup>193</sup>

That same year, an English court decided *Kremen v. Agrest*, where a Russian couple who had previously entered into a marital agreement in Israel sought divorce in London.<sup>194</sup> The court attributed no weight to the marital agreement<sup>195</sup> after finding that the wife had entered into the agreement under pressure from the husband, did not retain independent legal advice, and lacked a complete understanding of the agreement's implications.<sup>196</sup>

Taken together, *B v. S* and *Kremen v. Agrest* show that English case law is moving further away from *Radmacher* and that courts are becoming even less likely to enforce a marital agreement. The trend in post-*Radmacher* jurisprudence seems to be that, in most cases, the court will find that at least one party lacked full appreciation of the agreement's implications at the time of execution, but the existence of an agreement is given at least some arbitrary weight,<sup>197</sup> thus creating a minefield for practitioners and parties who are unable to predict how a court will rule.

#### IV: A JUDICIALLY IMPLEMENTED SOLUTION: REMOVE THE INCENTIVE TO FORUM SHOP BY APPLYING A CONFLICT-OF-LAWS ANALYSIS TO FOREIGN MARITAL AGREEMENTS

England remains the "divorce capital of the world,"<sup>198</sup> and practitioners argue "there will be in the coming years an increasing number of divorces involving what the European Commission calls 'international couples.'"<sup>199</sup> One study estimated that "the total number of cross-border marriages among 25-39-year-olds . . . was about 12 [million] in 2000," and these numbers are

---

193. *Id.*

194. See generally *Kremen v. Agrest* (No 11) (Financial Remedy: Non-Disclosure: Post-nuptial Agreement) [2012] EWHC (Fam) 45.

195. *Id.*

196. See generally Lang, *supra* note 20.

197. See generally *id.*

198. Harper & Frankle, *supra* note 18, at 125.

199. Elizabeth Cooke, *The Law Commission's Consultation on Marital Property Agreements*, in MARITAL AGREEMENTS AND PRIVATE AUTONOMY IN COMPARATIVE PERSPECTIVE 144, 157 (Jens M. Scherpe ed., 2012).

only rising with our increasingly mobile society.<sup>200</sup> Whilst the English courts are likely to continue to apply the *lex fori* in matrimonial matters, “it will be unrealistic for them not to be aware of and take into account the property law of other jurisdictions.”<sup>201</sup> To do otherwise will allow forum shoppers to continue to profit from English law, as prospective divorcées seeking to invalidate their marital agreements will continue to use England as a forum for their divorces for as long as the English system continues to incentivize this behavior.

Domestic matrimonial law reform is currently at a standstill,<sup>202</sup> and Brexit was a strong indicator that national sentiment does not favor signing on to an international uniform law on marital agreements.<sup>203</sup> The present situation, where foreign marital agreements are routinely disregarded by English courts, is untenable. Going forward, British courts must adopt a different approach. Where parliament has failed, the judiciary should take on a more active role to streamline its treatment of foreign marital agreements without having to rely on parliament to craft a new system. English courts should thus adopt a conflict-of-laws analysis when faced with a foreign marital agreement. This approach is not novel, but it is consistent with English courts’ treatment of foreign contracts generally. In England, courts regularly utilize a conflict-of-laws analysis for international commercial contracts, thus demonstrating that courts are both capable of such an analysis and cognizant of the importance of performing one in nonmarital contracts.<sup>204</sup>

Practically, implementation of such an approach to foreign marital agreements is best illustrated by examining the system utilized by Singapore, a former British territory. One scholar, Wai Kum Leong, declared that “the state of [marital agreement] law in Singapore may well be about as good as law can be”<sup>205</sup> because it is founded on basic principles of contract law and is

---

200. *Herr and Madame, Señor and Mrs*, *supra* note 17.

201. Cooke, *supra* note 199, at 157.

202. Despite the Law Commission’s report, its suggestions have not been incorporated into a bill with any likelihood of becoming law. See *Divorce (Financial Provision) Bill [HL] 2013-14*, *supra* note 33.

203. England’s surprising vote to exit the European Union seems to indicate that English sentiment is more in favor of nationalism than enhanced cooperation in the international legal sphere.

204. See generally Zaphiriou, *supra* note 24.

205. See Leong, *supra* note 36, at 349.



tempered by restrained judicial discretion. Under this conservative approach, foreign marital agreements are subject to a conflict-of-laws analysis<sup>206</sup>—essentially the same as an international commercial contract would be—generally ensuring that the proper law of the contract governs and that an equitable outcome is achieved.

In Singapore, upon reaching a Singaporean court, a marital agreement is first analyzed from a purely contractual perspective.<sup>207</sup> The court first inquires as to whether the agreement complied fully with the requirements of basic contract law.<sup>208</sup> For an agreement with foreign elements, the court then performs a choice-of-law analysis to determine the proper law of the contract.<sup>209</sup> Once the proper law is determined, the agreement is evaluated under that jurisdiction's law.<sup>210</sup> This choice of law has potentially massive substantive implications in terms of whether a contract will be enforced or not, and by utilizing a standard conflict-of-laws inquiry, a Singaporean court ensures that the proper law is applied.

By way of example, in *TQ v. TR and Another Appeal*, Dutch and Swedish prospective spouses executed a marital agreement in the Netherlands and intended to set up a marital home in England.<sup>211</sup> At the time of divorce, the parties' marital home was temporarily located in Singapore due to the husband's business.<sup>212</sup> The agreement was in Dutch and incorporated Dutch law.<sup>213</sup> The foreign element raised a conflict-of-laws issue, and because of the parties' nationalities, the temporary nature of their residence in Singapore, and the nature of the agreement, the Singaporean court determined Dutch law to be the proper law of the contract,<sup>214</sup> meaning that the "validity, interpretation and effect of the agreement" was determined in reference to

---

206. *See id.* at 334.

207. *See id.* at 321.

208. *See id.*

209. *See id.* at 344. The "proper law of the contract" is the jurisdiction's law that applies. As a former British territory, Singapore largely follows customary European choice-of-law rules, and, essentially, this analysis is what a court would perform for a commercial contract that did not specify choice of law or specified a choice of law other than that of the forum seized. *Id.*

210. *See id.*

211. *See id.*

212. *See id.* at 330.

213. *See id.* at 344.

214. *See id.*

Dutch law, not Singaporean law.<sup>215</sup> The Singaporean court applied a Dutch legal analysis and accordingly found that the marital agreement was “validly formed” and substantively effective.<sup>216</sup>

Further, in “very limited circumstances,” the Singaporean courts retain “residuary discretion” to adjust provisions of marital agreements that would otherwise result in violations of public policy or inequitable outcomes.<sup>217</sup> Singaporean jurisprudence has warned against abusing this judicial discretion, opining that judges should always “have regard to the general principles of the common law of contracts, if for no other reason than to place some legal parameters on what would otherwise be a wholly substantive exercise of discretion on the part of the court.”<sup>218</sup>

Adopting an approach akin to the one used by courts in Singapore would solve a number of the problems plaguing the current English approach to foreign marital agreements. It would create predictability for international parties entering into marital agreements and would harmonize the treatment of marital agreements with general principles of English contract law principles.<sup>219</sup> English contract law recognizes the principle of freedom of contract and generally protects individual autonomy by recognizing choice-of-law provisions in contracts.<sup>220</sup> Most importantly, by including a conflict-of-laws analysis for foreign marital agreements, England would give credence to valid for-

---

215. *Id.*

216. *Id.* at 321.

217. *Id.* at 323.

218. *Id.* at 348.

219. One practitioner notes, it is “frustrating for clients who are considering pre-nuptial agreements to be told that the agreement they sign, which will likely cost a not insignificant sum to prepare, might be binding, but at the same time might not.” Harper & Frankle, *supra* note 18, at 143.

220. See generally Zaphiriou, *supra* note 24. English legal precedent favors contractual freedom:

The weight of precedent in the United Kingdom favors free choice of law governing the parties’ contractual obligations. . . . Choice of law clauses are generally upheld unless they are contrary to public policy or attempt to evade mandatory provisions of the law with which the contract is most substantially connected.

*Id.* at 312.

eign agreements and remove the incentive to forum shop a divorce into English courts. In the wake of Brexit, there is even more reason to effectuate such a change, as there is an impending legal vacuum of sorts,<sup>221</sup> and such a change will provide incentives to bolster the domestic legal regime by harmonizing treatment of foreign contracts.

Conversely, embracing a conflict-of-laws analysis for foreign marital agreements would bring new challenges as well, particularly for the judiciary. It would require additional effort of judges, who would potentially be applying another nation's substantive matrimonial law. Like the Singaporean court that analyzed a marital agreement under Dutch law in *TQ v. TR*, such an endeavor would require additional research. English courts, however, have long demonstrated their ability to work through conflict-of-law issues as well as substantive foreign law questions in commercial contracts, thus making it likely the judiciary would prove to be equally savvy in the context of marital agreements. Yet, there is reluctance to accept marital agreements under traditional contract law principles due to the sensitive nature of the "bargain" they represent and the related policy concerns, including protecting vulnerable parties. This reticence, however, is largely unwarranted, given that, under the new proposal, English judges would, similar to Singaporean judges, retain discretion to modify provisions that risk violating domestic law or public policy. These restrained powers of discretion would simply be less potent than the current ancillary powers of relief exercised by English judges in divorce proceedings.

In sum, the benefits of subjecting foreign marital agreements to a choice-of-law analysis outweigh the potential difficulties, as this solution represents a rational temporary plan that is ready to be implemented while English courts await legislative reform. Although parliament has evidenced reluctance to address the Law Commission's findings, the judiciary can act immediately to streamline its treatment of foreign marital agreements without relying on parliament to craft a new system.

---

221. See *id.* at 311. Though the terms of England's exit from the European Union have not been negotiated, it is likely there will be holes in the legal landscape where EU law once governed when England ceases to be bound by EU protocols.

## CONCLUSION

Until English law changes, prospective divorcées seeking large financial awards will continue to take advantage of the favorable legal climate in England. The simple fact is that parties seeking to invalidate marital agreements can generally obtain better outcomes in English courts than anywhere else.<sup>222</sup> That said, marital agreements are contracts and should be treated accordingly.<sup>223</sup> The *Radmacher* court valiantly attempted to produce guidelines by which to evaluate these agreements,<sup>224</sup> but this is only effective if marital agreements are presumed to be binding documents, a change that can only be achieved legislatively. As post-*Radmacher* case law indicates, courts continue to treat marital agreements less like contracts and more like evidence.<sup>225</sup> As a world financial center, London is home to a number of wealthy individuals, and the courts will continue to find themselves inundated with both foreign and domestic marital agreements. If England maintains the current approach to marital agreements, particularly in disregarding foreign agreements, there will surely be an international response. A Singapore-like approach thus would be an appropriate stopgap measure, pending parliamentary reform, by which the courts can address this issue as it affects foreign marital agreements.

Karina VanHouten\*

---

222. See generally Harper & Frankle, *supra* note 18.

223. See UPMAA, *supra* note 55.

224. See Kentridge, *supra* note 3.

225. See generally Lang, *supra* note 20.

\* B.S., Middlebury College; J.D., Brooklyn Law School. Thank you to the staff of the *Brooklyn Journal of International Law* for their efforts in the publication of my Note. I would also like to thank my friends, family, and professors for their encouragement and support throughout this process. All errors or omissions are my own.