

1. Introduction

The English law on pre-nuptial agreements (“pre-nups”) has made significant progress. The Supreme Court in Radmacher v Granatino¹ recognized the contractual validity of pre-nups and ruled that courts should give full weight to them unless it would be unfair to do so. The Law Commission of England and Wales (“LCEW”) went further to recommend that pre-nups should be enforceable². Yet, no progress has been made in HK. This Article argues that pre-nups should be recognized as contractually valid and should be enforceable. Proposals on how such enforceability should be achieved are also offered.

2. The Current Legal Regime

Before discussing pre-nups, we should first examine the law on ancillary relief in HK. Upon granting a decree of divorce, a court has powers to make orders, known as ancillary relief orders, for financial provision and property adjustment between parties to the marriage (s.4 Matrimonial Proceeding and Property Ordinance (“MPPO”)³). Under s.7(1) MPPO, a court, when making such orders, must have regard to ‘all the circumstances of the case’⁴. The aim of an ancillary relief order is to achieve “fairness” between the parties (LKW v DD⁵). The first step⁶ of

¹ [2010] UKSC 42

² Law Commission, *Marital Property Agreement: a Consultation Paper* No 198 (“Consultation Paper”)

³ Cap.192

⁴ S.7(1) gives several examples such as the parties’ financial resources and needs. These examples do not include pre-nups.

⁵ (2010) HKCFAR 537, [24]; *White v White* [2001] 1 AC 596 followed.

⁶ There is a five-step test in achieving “fairness”: *LKW v DD*, part E.2-E.6

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achieving fairness is to satisfy parties' need. Usually there will be no surplus in the parties' assets after satisfying their needs. But if there is surplus, the total assets will be divided equally between them, unless there are good reasons⁷ for doing otherwise⁸.

For the purpose of this Article, a pre-nuptial agreement is an agreement made between a husband and a wife before marriage to regulate their financial matters upon divorce⁹. A pre-nup usually arises where a spouse (A) seeks to protect his/her wealth from the other (B), who would obtain half of their total assets under ancillary relief¹⁰ – A will then ask B to sign an agreement not to claim A's wealth upon divorce. However, English law traditionally viewed pre-nups as potential encouragements of divorce. Thus, they were void under the public policy that marriage should be a life-long obligation¹¹. This English position is binding in HK¹². Therefore, under HK law, pre-nups are contractually invalid and therefore unenforceable. Nevertheless, they are not completely irrelevant. Pre-nups are captured by the phrase “all the circumstances”¹³ under s.7(1) MPPO and may be given some weight in ancillary relief proceedings. However, no statute or cases¹⁴ has discussed how much weight they have. Therefore, divorcing parties having a pre-nup are unsure as to whether their agreement will be carried out. We should now consider whether pre-nups should be recognized as contractually valid and whether they should be enforceable.

⁷ See *LKW v DD*, part E.5

⁸ Where parties' assets exceed their needs, the court will not consider “needs” in the first place. “Needs” will be counted as a “good reasons” for departing from “equal division”.

⁹ *Halsbury's Law of England*, 5th ed. (Lexis Nexis 2009), para [3108]

¹⁰ Note that equal division will not occur if no assets remain after satisfying parties' needs

¹¹ *Hyman v Hyman* [1929] AC 601

¹² As *Hyman v Hyman* is a pre-1997 case

¹³ *LKW v DD*, [105]

¹⁴ Pre-nup cases are almost non-existent in HK. See Anne Scully-Hill, *Radmacher in Hong Kong: Choosing Between Autonomy and Equal Sharing*, (2001) HKLJ 41(3), 785, 801

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3. Should Pre-nuptial Agreements be recognized?

HK should recognize contractual validity of pre-nups. The traditional English position that pre-nups are contrary to public policy was overruled in Radmacher¹⁵. Indeed, the public policy that marriage should be a lifelong obligation is clearly out-dated, as divorce by consent has been allowed for years¹⁶. Therefore, we should follow Radmacher in recognizing pre-nups' contractual validity.

However, contractual validity alone doesn't give greater significance to pre-nups: valid or not, they are still one factor for courts' consideration¹⁷. Therefore, the next question is, should the law give more weight to pre-nups? Note that giving pre-nups more weight does not mean making them *enforceable*. Consider the ruling in Radmacher¹⁸:

‘...the court should give [full] effect to a (pre-)nuptial agreement which was freely entered into...*unless...it would not be fair* to hold the parties to the agreement...’

This formulation, while giving pre-nups full weight, still subjects them to the judicial discretion to achieve “fairness” in ancillary relief – a pre-nup is not enforceable by itself. Therefore, once we have concluded that pre-nups should be given more weight, the next question is: should they be enforceable?

¹⁵ [52]

¹⁶ S 11A(2)(c) Matrimonial Causes Ordinance (Cap. 179)

¹⁷ Radmacher, [62]-[63]. UK has the same ancillary relief regime as s.7(1) MPPPO: see s.25 Matrimonial Causes Act 1973

¹⁸ [75]

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4. Should pre-nups be given greater weight?

One may argue that such greater weight is unnecessary since pre-nups are uncommon in HK, as shown by the meagreness of cases¹⁹. However, demand for pre-nups has likely increased after LKW v DD²⁰, which adopted the “equal division” principle and abolished the rule that a party in divorce will only receive money enough to satisfy his/her “reasonable needs”. The change implies that a poorer party to a marriage will now receive more from the richer party. Thus, more “richer parties” now use pre-nups to protect themselves. To adapt to this new phenomenon, the law should give more weight to pre-nups. But even assuming that demand for pre-nups has not increased, there are still a number of stable users of pre-nups²¹, e.g. people seeking to protect family inheritances or business, people entering a second marriage who seek to preserve assets for children in their first marriage, and people seeking to preserve their self-earned wealth²². The law should protect these people’s interest by giving greater weight to their pre-nups.

5. Should pre-nups be enforceable?

At this stage, a pre-nup, with contractually validity and greater weight, is still a factor, albeit an important one, for courts’ consideration in granting ancillary reliefs. Should we go further to make pre-nups enforceable such

¹⁹ Note 14 above

²⁰ SCMP, *Savvy Couples sign up to protect their assets*, 21-11-2010.

²¹ E Hitchings, *A study of the views and approaches of family practitioners concerning marital property agreements* (2011), 30-37. These stable users are likely the same in HK.
(available at <http://www.bristol.ac.uk/law/research/researchpublications/2013/maritalpropertyagreements.pdf>)

²² However, under my proposal below, pre-nups sought to protect self-earned wealth during marriage is not enforceable (though the court may give them decisive weight).

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that they can *exclude courts' jurisdiction*? This reform offer parties to a pre-nup full security of their agreement. However, enforceability does not mean that a pre-nup cannot be challenged in any circumstances. They have to meet certain procedural requirements and can be set-aside in some circumstances. I now discuss the issues brought about by enforceability and discuss the arguments for and against enforceability.

(a) Respecting Autonomy

Supporters for enforceability argue that people should be given freedom to agree on their financial arrangements upon divorce without judicial interference. The rebuttal is that such autonomy is sometimes illusory. A party to a pre-nup may face economic pressure. Consider the usual situation where a party (A) seeks to protect his/her wealth and asks the other (B) to sign a pre-nup. A is likely more wealthy. Greater wealth usually implies greater bargaining power. For example, when parties seek legal advice for their pre-nup, A may pay the legal fees for B; therefore, the legal advice B receives is limited by the amount A paid²³. Falling short of economic pressure, pressure may arise from the relationship itself. For instance, a party may tell the other that he/she will not marry unless the pre-nup is signed. Even without any kind of pressure, people may not pay attention to the details of the pre-nup, as humans are usually optimistic at the time before marriage and believe that divorce won't occur²⁴. Given all these reasons, the "autonomy" argument is insufficient to support enforceability. One may even argue that the *lack* of autonomy supports non-enforceability. But this counter-argument goes too far. Even under

²³ E Hitchings, note 21 above, 69-70

²⁴ Consultation Paper, para 5.27

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considerable pressure, a party more or less exercises free choice. And a reform providing enforceability of pre-nups can impose procedural requirements, such as the need for parties to seek legal advice, which can counter the pressure faced by the parties²⁵. Thus, lack of autonomy is not an argument against enforceability. I believe that the autonomy issue neither supports nor opposes enforceability.

(b) Effects on Marriage

Supporters for enforceability of pre-nups suggest that the potential damage to one's assets upon divorce is one reason why marriage is so unpopular nowadays²⁶. With respect, such correlation is doubtful. The unpopularity of marriage is mainly due to other factors such as job insecurity and increasing unemployment rates²⁷. And most HK young people have not much assets to protect before marriage²⁸. Any effect pre-nups have on marriage will likely work on the "stable users" only. Therefore, the effect of pre-nups on marriage is unlikely universal and does not justify making pre-nups enforceable.

On the other hand, some suggest that pre-nups will discourage marriage. For instance, experience in Australia, where pre-nups are enforceable²⁹, shows that the process of negotiating pre-nups is so confronting the couple that it may lead to breakdown of the relationship³⁰. Again, given that the stable users are not the majority, pre-nups will hardly discourage marriage

²⁵ Ibid., para 5.30

²⁶ Tanie Toh, *Pre-nups and the case for reform: is it worth it?* Hong Kong Lawyer, September 2011

²⁷ HKSAR Central Policy Unit, *Hong Kong Post 80's Generation: Profiles and Predicaments*, 20
<available at: http://www.cpu.gov.hk/doc/en/research_reports/HK's%20Post%2080s%20Generation%20-%20Profiles%20and%20Predicaments.pdf>

²⁸ A research showed that, in 2006, the average young people of age 18-22 earned slightly more than the minimum wage; and their income would not increase much when they grow older. See *ibid.*, 16

²⁹ Family Law Act 1975 (Cth) ("FLA")

³⁰ Fehlberg and Smyth, "*Binding Pre-Nuptial Agreements in Australia: The First Year*" (2002) 16 Int.J.Law&Fam 127, 135

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generally. Thus, I believe that enforceable pre-nups neither encourage nor discourage marriage.

(c) Potential Injustice

Opponents to enforceability of pre-nups may argue that pre-nups are *inherently* unjust. As mentioned at the beginning, a pre-nup usually arises when a party (A) tries to exclude the other (B) from claiming A's wealth, which would be available to B under an ancillary relief³¹. Injustice will also occur where a party faces a significant change in his/her life which was unforeseeable at the time when he/she signed a pre-nup – enforcing the pre-nup may bring undue hardship to him/her. Examples include where a wife unexpectedly gives birth to a child, where a property mentioned in a pre-nup was severely devalued in a financial disaster or where a party suffers a physical disability. The financial entitlement available to a party as agreed in the pre-nup may no longer be sufficient after these changes. Nonetheless, these injustices can be minimized by a proper legislation³². As will be discussed, I propose that only property acquired outside marriage should be covered in a pre-nup. Therefore, a spouse is unlikely to get nothing, as courts retain the discretion to distribute other assets. Moreover, I propose that pre-nups can be set aside where significant change in circumstances occur.

(d) Certainty

³¹ Law Commission: para 5.45

³² Tanie Toh, note 26 above

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Under the current law on ancillary relief, it is very difficult to predict the outcome of the financial distribution³³. For example, while the law provides that property acquired independent of the marriage (“non-matrimonial property”) is excluded from equal division in ancillary reliefs, there is no precise boundary between matrimonial and non-matrimonial property³⁴. Therefore, some argue that enforceability of pre-nups gives parties greater certainty of the financial consequences of their divorce, and therefore reduces the cost and stress in divorce proceedings³⁵.

One counter argument is that uncertainty does not arise in most cases³⁶: usually all assets are directed to cover parties’ need, and this is the end of the story. However, as discussed in section 4, the stable users of pre-nups are usually those with wealth to protect. In relation to their divorce, it is likely that assets available exceed the parties’ needs. Thus, uncertainty arises when the court considers the “equal division” principle and the reasons justifying departure from it.

Another objection to the “certainty” argument is that enforceability of pre-nups will not end the disputes. Instead of arguing whether an ancillary relief is “fair”, parties shift to argue other matters, such as the *terms* of the pre-nups³⁷. These disputes are inevitable. But it is submitted that arguing on contractual terms still give rise to greater certainty than arguing on “fairness” of ancillary reliefs. Unlike the vague notion of “fairness”, contractual disputes are governed by more developed contractual rules. And after the reform on enforceability has been implemented for a certain period, a special jurisprudence on pre-nups terms will likely develop.

³³ This is the view of some UK practitioners: Hitchings, note 21 above, 66. HK practitioners likely share the same view, as we have a similar ancillary relief regime

³⁴ LKW v DD, [88]

³⁵ Consultation Paper, para 5.33

³⁶ Ibid., para 5.36

³⁷ George, Harris & Herring, *'Pre-Nuptial Agreements: For Better or For Worse?'* (2009) Family Law 934, 934

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Apart from contractual disputes, some suggest that parties will also shift to argue on whether the procedural requirements are satisfied or whether pre-nups should be set aside. These disputes, however, can be minimized by proper formulations of the procedural requirements and substantive safeguards. Therefore, this is not an argument against enforceability itself. To conclude the above discussion, enforceability of pre-nups will offer greater certainty.

6. The Reform Proposals

From the discussion above, we can conclude that pre-nups should be made enforceable on the ground of certainty. Moreover, the reform should aim at reducing potential injustice brought by such enforceability.

6.1. Only Special Property Covered

I propose that a pre-nup should only cover property acquired *outside marriage* (hereinafter called “special property”), i.e. inheritance, gifts and property acquired before the marriage³⁸. One may ask, while people can use pre-nups to protect their “special property” from their spouses’ claims, why those who earn money themselves during marriage (e.g. entrepreneurs) should not be protected? This different treatment is justified by the principle of fairness. In a marriage, that one party can earn money is often due the fact that the other is taking care of the family³⁹. Thus, a family is a single economic unit. It is unfair if the money-earner can exclude the homemaker, who has sacrificed his/her career in contributing to their family, from claiming the income⁴⁰.

³⁸ Consultation Paper, para 5.56

³⁹ The principles of fairness applies no matter how the division of labour is carried out: LKW v DD, [38]

⁴⁰ Ibid.

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The argument against my proposal is, if pre-nups can only cover “special property”, what *reform* has actually been made? The current law also contains the rule that “non-matrimonial” property is excluded from equal division⁴¹. Moreover, why should the law deprive people the autonomy of making agreements regarding their wealth acquired during marriage? My responses are as follows. First, my proposal does improve the law by making it clearer. The current distinction between matrimonial and non-matrimonial property is unclear. For example, it was held that the longer the marriage is, the more likely an inheritance will become a “matrimonial property”⁴². My proposal, by categorizing inheritance, gifts and property acquired before marriage as “special property”, offers greater certainty. Second, my reform does offer autonomy⁴³, namely, the autonomy for people to contract out of *courts’ discretionary distribution* of “special property”. What I don’t propose is the autonomy to contract out of the *fairness* principle that wealth acquired during marriage should be equally shared. Autonomy shouldn’t go beyond fairness.

6.2 Procedural Requirements

A pre-nup should fulfil the below procedural requirements. Otherwise it will be invalid and unenforceable. Some requirements go beyond general contractual requirements. The rationale of those requirements is to guard against the pressure that a party faces when entering into a pre-nup.

(a) Vitiating Factors

⁴¹ LKW v DD, [87]-[97]

⁴² LKW v DD, [92]-[93]. The rationale is that, as the family’s interdependence grows, it becomes harder to disentangle what came from where

⁴³ Despite that such autonomy may be illusory

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All requirements for general contractual validity should apply. Two doctrines deserve special attention: duress and presumed undue influence. Regarding duress, a concern is, if a party makes a threat to the other that he/she will not marry unless the pre-nup is signed, does that amount to duress? If so, many pre-nups will be voidable as that situation may often arise. Fortunately, that will unlikely amount to duress under present common law rules. The basis of duress is “illegitimate pressure”⁴⁴. Making a threat not to marry is legitimate because marriage is an important life choice and one should be entitled to give conditions on marriage. However, if one makes the same threat *shortly before wedding*, the pressure is likely illegitimate because the other party is given extremely limited time for consideration. The experience in the US shows that such “last minute tactics” are common⁴⁵. To provide greater certainty, it is desirable if the above common law rules can be expressly stated in legislation. The legislation should state that (1) a threat not to marry, *without more*, does not amount to illegitimate pressure and (2) a court may find illegitimate pressure having regard to *all the circumstances*, particularly *the time when the pre-nup was entered into*.

Presumed undue influence also presents problems. To establish presumed undue influence, the plaintiff must prove: (a) the parties to the agreement were in a relationship of trust and confidence and (b) the agreement ‘calls for explanation’ – i.e. it was not readily explicable by the relationship itself. Usually, elements (a) and (b) arise in “surety wives cases”: where a husband influences his wife to undertake debts for him. If the plaintiff proves (a) and (b), the burden shifts to the defendant to show that there

⁴⁴ *Chitty on Contract*, 31st ed (Sweet & Maxwell 2012), para 7-008-7-009. The other basis is that the plaintiff has no “reasonable alternative”

⁴⁵ Oldham, *With all my Worldly Goods I Thee Endow, or Maybe Not* (2011) 19 Duke J Gender L Poly 83, 89-90

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was no undue influence⁴⁶. The problem we face is whether the reform on making pre-nups enforceable is pointless, as presumed undue influence will always render them voidable⁴⁷? Given that the doctrine of presumed undue influence developed in the context of “surety wives cases”, which is very different from the context of pre-nuptial agreements, I propose that the doctrine of presumed undue influence should not be available in relation to pre-nups⁴⁸.

(b) Signed Writing

Unlike ordinary contracts which may be written or oral, a pre-nup should only be made in signed writing. The purpose is to help parties appreciate the fact that they are entering into a formal legal relationship.

(c) Timing Requirement not needed

Some suggest that parties should be required to sign the pre-nup *a certain period before* the wedding. While this may prevent people from signing the agreement under time pressure⁴⁹, it is difficult to set a proper timing requirement. A short timing requirement, say several weeks, is unrealistic: at the time of signing, wedding has been planned for a long time and the parties will unlikely cancel it. A long timing requirement, say several months, is impractical because people usually don't think about pre-nups at an early stage⁵⁰. Therefore, I don't recommend a timing requirement. The issue of time pressure have been dealt with in relation to duress. The

⁴⁶ Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44

⁴⁷ Consultation Paper, para 6.38

⁴⁸ As the LCEW suggests: see *ibid.*, para 6.40

⁴⁹ For a contrary view, see *ibid.*, para 6.109

⁵⁰ Hitchings, note 21 above, 62. This finding is likely applicable to HK too. In HK, there are many things other than a pre-nup to prepare before a wedding.

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court is directed to find illegitimate pressure having regard to all circumstances including the time the agreement was signed.

(d) Independent Legal Advice

Independent legal advice should be required for a valid pre-nup. As mentioned, a party signing a pre-nup may face pressure from his/her spouse. Legal advice counters such pressure to a certain extent. Also, signing a pre-nup means that one is contracting out of the protection from the “equal division” principle. Independent legal advice helps one think again whether to take such risk. After giving legal advice, a lawyer should issue a certificate, which should be conclusive evidence that legal advice has been given. Note that where the enforcement of a pre-nup is *unilateral*, i.e. only one party (A) seeks to protect his/her wealth from the other (B), the law should only require B to take the legal advice. Legal advice for A is unnecessary⁵¹.

Some suggest that one should be able to *waive* his right to legal advice where the agreement is plainly understandable⁵². This suggestion, though helping people save legal costs, should be rejected. This suggestion may lead some people, who wrongly think that they can go ahead without legal advice, to enter into agreements they later regret. Moreover, whether an agreement is “plainly understandable” is prone to litigation. Therefore, legal advice should always be required. This requirement is not too burdensome: if an agreement is really simple, the costs of legal advice will also be lower.

⁵¹ Consultation Paper, para 6.96

⁵² In some US states, pre-nups are invalid without independent legal advice, unless the agreement is reasonably understandable to a layman: See Ellman (reporting on the US) in Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (Oxford 2011), 422

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The next question is what information should the legal advice contain. The Australian experience gives us much guidance. Originally, Australian law required lawyers to advise on whether the agreement was *financially* advantageous to the party⁵³. This was too onerous for lawyers. As a result, many lawyers refused to give legal advice for fear of professional liability⁵⁴. The provision was later amended: lawyers now only need to advise on (1) the effect of the agreement and (2) the advantage and disadvantage to that party, assessed at the time when the legal advice was given⁵⁵. This approach should be adopted, as it relieves lawyers from the burden of giving financial advice and predicting future consequences⁵⁶.

As mentioned in relation to “autonomy”, a problematic situation is where one party (A) pays for the other (B) to receive legal advice, such that the amount of advice B receives is controlled by the amount A paid. My solution is that the law should require a lawyer to state in the certificate the amount of legal fee and who paid the fee. Therefore, when a pre-nup is challenged in a court, the court may find that the amount of legal fee is disproportionate with the complexity of the matter. The court may then infer that the legal advice was not *independent*.

(e) Financial Disclosure

In entering into a pre-nup, a party effectively agrees to forgo certain financial entitlement that would otherwise be available in ancillary relief. Therefore, he is entitled to know how much he will forgo. Thus, parties must disclose their financial situations before entering into a pre-nup.

⁵³ FLA 1975 s 90G(1)(b)

⁵⁴ Felberg and Smyth, note 30 above, 135-136.

⁵⁵ FLA 1975 s 90G(1)(b) (as amended by the Federal Justice System Amendment (Efficiency Measures) Act 2009)

⁵⁶ The LCEW suggests so: Consultation Paper, para 6.99

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Again, if a pre-nup is *unilaterally* enforced (i.e. A seeks to exclude B from claiming A's assets), only A should be required to make disclosure.

Some suggest that one should be allowed to *waive* the right to financial disclosure by the other party, especially when the parties have already known each other's financial situations⁵⁷. This suggestion should be rejected. A person in love may wrongly believe that he knows his lover well. The law should ensure that he receives correct information.

Regarding the *scope* of disclosure, we should follow the Australian approach⁵⁸ that only *material* financial information should be disclosed. Therefore, one seeking to protect only part of his assets (e.g. an inheritance) needs not disclose information of the other assets. The next question is, in relation to the material information, what should be the *extent* of disclosure? This is controversial. While the Australian law requires "full and frank disclosure"⁵⁹, the US's Uniform Premarital Agreement Act 1983 ("UPAA") only requires "fair and reasonable disclosure"⁶⁰. "Full and frank disclosure" may be unnecessary. For instance, one needs not know precisely whether an asset listed in the pre-nup worth \$1 billion or \$1.01 billion – it doesn't really matter. Yet, the "fair and reasonable" test is too wide and prone to litigations. Thus, I propose a middle ground – "substantial disclosure". On one hand, "substantial disclosure" does not require one to conduct full assets valuation; on the other hand, it prevents floodgate of litigations.

One final issue is whether non-disclosure should be an *independent* ground for invalidating a pre-nup? While the LCEW Consultation Paper suggests so, many jurisdictions do not invalidate pre-nups unless the non-disclosure

⁵⁷ Such waiver is allowed in the US's Uniform Premarital Agreement Act 1983 s.6(a)(2)(ii)

⁵⁸ FLA 1975 s. 90K(1)

⁵⁹ Ibid., see also *Blackmore v Webber* [2009] FMCA Fam 154

⁶⁰ s.6(a)(2)(i). The UPAA was a Uniform Act. It has no legal force but 27 states adopted whole or part of it.

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is coupled with some fault. In Australia, non-disclosure must be coupled with fraud; and under the US's UPAA, non-disclosure must be coupled with unconscionability⁶¹. While I agree that non-disclosure *alone* can do harm – a party would not have signed had he known the real financial position of the other party⁶², it is unfair to invalidate the whole agreement if the non-disclosing party had no fault⁶³. A better way of balancing the parties' interests is to provide that a party can only enforce an agreement if he can *prove* that he has exercised *due diligence* in making substantial disclosure.

6.3 Safeguard based on substantive results

Finally, even if a pre-nup fulfils all procedural requirements so that it is valid and enforceable, it should be set aside when severe hardship will result from its *enforcement*, i.e. the law should provide some substantive safeguards. Given that a pre-nup can only cover assets acquired outside marriage, it will be unnecessary to rely on such safeguards in most cases. Severe hardship will seldom occur because courts can still make equal distribution in respect of assets acquired in marriage. A smaller reliance on safeguards will also make the law less controversial. If *all* kinds of assets can be covered in pre-nups, the law has to rely greatly on the safeguard clauses to eliminate hardship. It is extremely hard to formulate a proper safeguard clause: if pre-nups can be struck down on “unfairness”⁶⁴, certainty is undermined because pre-nups can be easily challenged; but if

⁶¹ But some states adopting the UPAA modified the Act to the effect that non-disclosure and unconscionability are separate grounds of invalidation: Oldham, note 45 above, 99-100

⁶² Ellman, note 52 above, 421

⁶³ For example, the non-disclosure was due to a negligently made survey report.

⁶⁴ The LCEW discussed such option: para 7.37-7.38

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pre-nups can only be struck down on, say “significant justice”⁶⁵, fairness is undermined as pre-nups can only be challenged in the most extreme cases. My proposal therefore avoids this difficult balancing exercise.

I propose that a pre-nup should be struck down if it (1) gives insufficient provision to children of the family or (2) leaves a party dependent on public security. As the LCEW pointed out⁶⁶, these rules preserve the public policies that children’s interest should be a first priority⁶⁷; and social security should be left to those in real need⁶⁸.

Should the law provide further safeguards beyond these two safety nets? Under the premise that pre-nups can only cover “special property”, I will now examine the situations where a party would be ‘wiped clean’ of financial entitlements upon divorce. Consider the scenario where A, the wealthier party, seeks to protect his “special property” from B. B will receive no money in divorce if (1) A does not work or works under low income during marriage⁶⁹ or (2) an unforeseeable and significant change in circumstance, such as serious physical disability, occurs to B⁷⁰. Situation (1) is foreseeable. Indeed, if B has foreseen, at the time of entering into a pre-nup, that A would not work or would receive low income⁷¹, B should not have entered into the agreement. Thus, B does not deserve protection in situation (1). But situation (2) is unforeseeable at the time when the agreement is entered into. In situation (2), the law should set aside the pre-nup and distribute money to B from A’s special property. Therefore, a pre-nup should only be set aside where an *unforeseeable and significant*

⁶⁵ E.g. New Zealand Property (Relationships) Act 1976, s 21J(1).

⁶⁶ Consultation Paper, para 7.16

⁶⁷ Radmacher, [77].

⁶⁸ Hyman v Hyman, 629

⁶⁹ But if B works, hardship will unlikely result to B

⁷⁰ Or the change in circumstances occurs to both of them, e.g. a financial disaster devalued their assets acquired in marriage

⁷¹ And B knew that he would not receive money from A’s special property

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change in circumstances has occurred. Changes in circumstances should include, but are not limited to, serious physical disability, financial disaster and the unforeseen birth of a child⁷².

7. Conclusion

Pre-nups are important for people who need to protect their assets acquired outside marriage. To protect their interests, pre-nups should be valid and enforceable. Moreover, it is hoped that my proposals on how pre-nups should be made enforceable can ensure certainty on one hand, and preserve fairness between the parties to a pre-nup on the other hand.

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⁷² Consultation Paper, para 7.33