Chapter 8
Contractualisation of Family Law in England & Wales: Autonomy vs Judicial Discretion

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Abstract While agreements between family members will not necessarily amount to a formally valid contract in English Law, there is considerable scope for 'contractualisation' or 'private ordering' in a broad sense in the English family justice system. Moreover, the Government is seeking to encourage people to make agreements governing finances and the care of children on relationship breakdown, as an alternative to potentially costly court proceedings. That said, in both adult and child law the possible extent of contractualisation is limited by the general principle that private agreements cannot exclude the jurisdiction of courts. The court therefore retains the ultimate ability to protect the vulnerable in a paternalistic fashion, for example with reference to its statutory powers to do what is 'fair' between former spouses and civil partners and its obligation to treat a child's welfare as its 'paramount' consideration in matters concerning upbringing. Ironically, this leads to a situation where parties to an agreement cannot usually be sure of the true effect of that agreement until it is considered in the course of proceedings that it was often designed to avoid.

General Overview

Family law in England and Wales is largely the product of statute, as interpreted and applied by the courts. In areas where neither Parliament nor the Welsh Assembly have legislated, the applicable law is the 'common law' developed by the judiciary over time (see Slapper and Kelly 2014 for general information about the legal system in England and Wales).

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While a large measure of freedom is afforded to parties contracting about family matters in principle, they may face difficulty in meeting the requirements of a valid contract due to the familial context in which the agreement has been reached.[1] In order to be enforced as such in English Law, a contract must represent an agreement between parties with capacity (see, eg, Peel 2011, ch 12) consisting of an offer and an acceptance (see, eg, Peel 2011, ch 2). The arrangement must be of sufficient certainty (see, eg, Peel 2011, [2–078]–[2–102]), and it must be supported by consideration (see, eg, Peel 2011, ch 3). The parties to an apparent contract must also intend to create legal relations (see, eg, Peel 2011, ch 4). An otherwise valid contract could be rendered unenforceable due to illegality, which is a doctrine that applies to contracts that are contrary to public policy of various kinds (see, eg, Peel 2011, ch 11). A contract could also be set aside on grounds such as duress, undue influence or its being an unconscionable bargain (see, eg, Peel 2011, ch 10), misrepresentation (see, eg, Peel 2011, ch 9), or mistake (see, eg, Peel 2011, ch 8).

Even if their dealings do not amount to a valid contract, parties to familial relations may still be able to engage in 'private ordering' in a broader sense by agreeing on a certain matter. That said, English Law tends to take a rather paternalistic view in family law, leaving much of the substance of a decision to the discretion of the courts. While this – in theory – allows for a fair outcome in all cases, it comes at the price of significant uncertainty. This also explains why English family law does not generally allow parties to contract *conclusively* out of the existing legal rules (where these exist) and thus the judicial discretion: Parliament gave jurisdiction with discretion to the courts, and it is not for two private parties then to oust the jurisdiction of the courts by private agreement.

This chapter considers the validity of, and the weight given to, agreements involving both children and adults in detail, covering both substantive and procedural aspects. In doing so, it highlights the tension between autonomy and paternalism in English family law.

Substantive Family Law

Parents and Children

It a basic principle of English law that 'the court's jurisdiction to determine issues . . . concerning the welfare and upbringing of the children, cannot be ousted by agreement'.[2] In deciding such issues, moreover, a court must treat the welfare of the child as the 'paramount' consideration (taking the child's own views into

[1] See, eg, *Balfour v Balfour* [1919] 2 KB 571. Cf, eg, *Merritt v Merritt* [1970] 1 WLR 1211.

[2] *AI v MT* [2013] EWHC 100 (Fam), [2013] 2 FLR 371, [12] (Baker J).

account where appropriate),[3] so that there will be cases where a court cannot simply approve an agreement between parents or even weigh up the merits of the parents' own arguments alone where they are in dispute. Before discussing these principles, it is necessary to consider parenthood and parental responsibility, which are distinct, and the extent to which they are subject to contractualisation in English Law.

Legal Parenthood

Establishment of Parenthood in Cases of Natural Parenthood and Assisted Reproduction

The default position in English Law is that a child's mother is the woman who gives birth to the child.[4] This position can be varied only by adoption[5] or a parental order made by virtue of a surrogacy arrangement.[6] The determination of the child's other parent is more complex. Subject to adoption or a parental order, a child's father is usually the person who has inseminated the mother, but this is subject to a number of exceptions. There is a presumption that the mother's husband is the child's father,[7] albeit one that is now readily rebuttable via DNA testing,[8] which will usually be ordered in respect of a child in the event of a dispute.[9] The mother's husband is nevertheless treated as the father even if the sperm used to create the embryo was provided by another man, unless it is shown that the husband did not consent to 'the placing in her of the embryo or the sperm and eggs or to her artificial insemination'.[10] It is also possible that the mother's non-marital male partner can become the child's father in the context of assisted reproduction, notwithstanding the fact that someone else is the genetic father. This is occurs when the mother has been treated in a licensed clinic and the 'agreed fatherhood conditions' are met (on which see below).[11]

Parenthood can also be conferred from birth on a 'second female parent' (in addition to the mother) in the context of assisted reproduction, with the provisions for female civil partners and same-sex spouses of the mother[12] and informal female

[3] Children Act 1989, s 1.

[4] Human Fertilisation and Embryology Act 2008, s 33(1) and for the common law *The Ampthill Peerage* [1977] AC 547.

[5] Adoption and Children Act 2002, s 67.

[6] Human Fertilisation and Embryology Act 2008, s 54.

[7] See, eg, Human Fertilisation and Embryology Act 2008, s 38(2).

[8] Family Law Reform Act 1969, Part III and s 26.

[9] See, eg, *Re H (A Minor) (Blood Tests: Parental Rights)* [1997] Fam 89.

[10] Human Fertilisation and Embryology Act 2008, s 35.

[11] Human Fertilisation and Embryology Act 2008, s 36.

[12] Human Fertilisation and Embryology Act 2008, s 42.

partners[13] essentially mirroring those for marital and non-marital male partners of the mother respectively. It is also possible for a child born through assisted reproduction not to have a second parent of any kind. This occurs where a sperm donor consented to the use of his sperm for the creation of the embryo[14] and no-one else is treated as the second parent by virtue of the provisions already considered.

Legal parenthood can thus be contractually established in a broad sense in the context of assisted reproduction. That said, there is no absolute right to assisted reproduction treatment. For example, the relevant legislation expressly provides that '[a] woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for supportive parenting), and of any other child who may be affected by the birth'.[15] Even so, this welfare test does not seem to be particularly important in practice (cf Smith 2010, 51).

As explained above, a spouse or civil partner of a mother does not become a parent in the context of assisted reproduction if he or she did not consent to the treatment, and a partner who is not married to or in a civil partnership with the mother must satisfy the agreed fatherhood or second female parenthood conditions in order to become a parent under the law of assisted reproduction. Those conditions require the father or second female parent to give to the person responsible for supervising the licensed treatment a notice that he or she 'consents to being treated' as the father or second female parent of 'any child resulting from treatment provided to [the mother] under the licence'.[16] The woman who is to give birth must also give the responsible person 'a notice stating that she consents' to the intended father or second female parent 'being so treated'.[17]

The agreed parenthood conditions require that neither party has given a further notice withdrawing consent,[18] and the woman who gives birth has not given a subsequent notice that someone else is to be treated as the father or second female parent.[19] A valid notice must be 'in writing and must be signed by the person giving it',[20] or signed at the direction of that person and in the presence of that person and two witnesses if he or she is unable to sign.[21] The mother and father or second female parent must not be within the prohibited degrees of relationship with respect to each other.[22]

[13] Human Fertilisation and Embryology Act 2008, s 43.

[14] Human Fertilisation and Embryology Act 2008, s 41.

[15] Human Fertilisation and Embryology Act 1990, s 13(5).

[16] Human Fertilisation and Embryology Act 2008, s 37(1)(a), s 44(1)(a).

[17] Human Fertilisation and Embryology Act 2008, s 37(1)(b), s 44(1)(b).

[18] Human Fertilisation and Embryology Act 2008, s 37(1)(c), s 44(1)(c).

[19] Human Fertilisation and Embryology Act 2008, s 37(1)(d), s 44(1)(d).

[20] Human Fertilisation and Embryology Act 2008, s 37(2), s 44(2).

[21] Human Fertilisation and Embryology Act 2008, s 37(3), s 44(3).

[22] Human Fertilisation and Embryology Act 2008, s 37(1)(e), s 44(1)(e).

Sperm donors who validly consent to the use of their sperm for the creation of an embryo in the context of a licensed clinic can effectively contract out of legal parenthood. If consent is withdrawn before the embryo is implanted, the embryo is destroyed after a 12-month 'cooling off' period.[23]

Surrogacy

Surrogacy is contractual at its core, but it is tightly controlled in English Law and welfare considerations are applicable.[24] Indeed, it is an offence to do a range of acts relating to a surrogacy arrangement on a commercial basis,[25] unless the act is performed by the commissioning parents or the intended surrogate.[26]

Even where they are made lawfully, surrogacy arrangements are not enforceable as contracts *per se*.[27] Instead, English Law provides for the making of a 'parental order' in order to confer parenthood on the commissioning parents, and to extinguish the default parenthood of the surrogate and any non-applicant who would otherwise have it.[28] A number of stringent requirements must be satisfied before such an order can be made. There must be two applicants for the order (ie commissioning would-be parents), and they must be husband and wife, civil partners, or people 'living as partners in an enduring family relationship'[29] (which includes two men or two women married to each other) who have reached the age of 18.[30] The gametes of at least one of the applicants must have been used to bring about the creation of the embryo that was carried by the surrogate.[31] The child must have his or her home with the applicants at the time of the application,[32] and the Human Fertilisation and Embryology Act 2008 suggests that the application must be made within 6 months of the child's birth.[33] Provided they can be found and are capable of giving it,[34] the consent of the surrogate mother and any non-applicant who is the child's legal parent

[23] Human Fertilisation and Embryology Act 1990, sch 3. See, generally, *Evans v United Kingdom* [2007] 1 FLR 1990.

[24] Human Fertilisation and Embryology (Parental Orders) Regulations 2010/985, r 2.

[25] Surrogacy Arrangements Act 1985, s 2. See also s 3.

[26] Surrogacy Arrangements Act 1985, s 2(2).

[27] Surrogacy Arrangements Act 1985, s 1A.

[28] Human Fertilisation and Embryology Act 2008, s 54.

[29] Human Fertilisation and Embryology Act 2008, s 54(2).

[30] Human Fertilisation and Embryology Act 2008, s 54(5).

[31] Human Fertilisation and Embryology Act 2008, s 54(1).

[32] Human Fertilisation and Embryology Act 2008, s 54(4).

[33] Human Fertilisation and Embryology Act 2008, s 54(3). But see *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam) for possible extensions of this time limit.

[34] Human Fertilisation and Embryology Act 2008, s 54(7).

must be obtained,[35] and the surrogate's consent is ineffective if given less than 6 weeks after the birth.[36] By contrast with adoption (on which see below), there is no scope for the court to dispense with the need for consent on the basis of the child's welfare. Finally, when making the order the court must be satisfied that 'no money or other benefit has been given or received by either of the applicants' in consideration of the making of the order, consent to it, the handing over of the child or the making of arrangements relating to the order.[37] That said, the payment of reasonable expenses is excepted, and the court can authorise the making of other payments (and, particularly for international surrogacy cases, do so quite regularly: see Gamble and Ghevaert 2011, 504).[38] If the requirements for a parental order are not met, the longer and less contractual process of adoption must be followed in order to transfer legal parenthood.

Adoption

Adoption, which by definition confers legal parenthood on the adopter(s) of a child, does have contractual elements. A child can in principle be adopted by one person,[39] a married[40] or civil partnership[41] couple, or 'two people (whether of different sexes or the same sex) living as partners in an enduring family relationship'.[42] The minimum age for an adoptive parent is 21,[43] unless one of the prospective adopters is already the child's parent.[44] The parents or guardians with parental responsibility are able to consent to a child's placement for adoption by an agency, including to placement with particular prospective adopters.[45] The child's existing parents or guardians are also able to give advance consent to the final adoption itself.[46]

[35] Human Fertilisation and Embryology Act 2008, s 54(6).

[36] Human Fertilisation and Embryology Act 2008, s 54(7).

[37] Human Fertilisation and Embryology Act 2008, s 54(8).

[38] Human Fertilisation and Embryology Act 2008, 54(8). For authorisation of payments see eg *Re C (Parental Orders)* [2013] EWHC 2408 (Fam), [2014] 1 FLR 757 and *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), [2011] Fam 106.

[39] Adoption and Children Act 2002, s 51, which imposes conditions in relation to prospective sole adopters who are married or in a civil partnership.

[40] Adoption and Children Act 2002, s 144(4)(a).

[41] Adoption and Children Act 2002, s 144(4)(aa).

[42] Adoption and Children Act 2002, s 144(4)(b).

[43] Adoption and Children Act 2002, s 50(1); 51.

[44] Adoption and Children Act 2002, s 50(2).

[45] Adoption and Children Act 2002, s 19.

[46] Adoption and Children Act 2002, s 47.

That said, the adoption cannot be finalised without a court order following a minimum period of co-residence involving the child and the adopters,[47] and notice to and assessment by a local authority where the child was not placed by an adoption agency.[48] In any case, it is an offence[49] *inter alia* for parents to take steps including 'handing over a child to any person other than an adoption agency with a view to the child's adoption by that or another person',[50] unless they are acting in pursuance of a court order,[51] one or more of the prospective adopters are 'parents, relatives or guardians' of the child,[52] or the prospective adopter is 'the partner of a parent of the child'.[53] Analogously with surrogacy, there is also an offence of agreeing to make, making or receiving a payment relating to the adoption of a child,[54] with the exception of reasonable expenses.[55]

The court, moreover, technically makes its determination on whether to make an adoption order on the basis of the child's welfare and not parental consent *per se*.[56] It nevertheless seems inherently unlikely that a court would refuse to make the order where all relevant parties support the adoption. In spite of the availability of consensual adoptions, however, it should be emphasised that adoption is now seen in England and Wales primarily as a means of securing a permanent home for children who have been compulsorily removed from the care of their parents due to their having suffered or being likely to suffer significant harm (see Harris-Short 2012 for discussion). The consequence of this is that adoption orders are often made without the consent of the relevant parents, on the basis that the child's welfare 'requires' that the need for their consent be dispensed with.[57]

Post-adoption contact (including indirect contact such as the exchange of cards and letters) can be agreed between the birth family and the adopted relatives, and indeed a court is unlikely to order such contact in the *absence* of such agreement (see Sloan 2014 for discussion).

[47] Adoption and Children Act 2002, s 42.

[48] Adoption and Children Act 2002, s 44.

[49] Adoption and Children Act 2002, s 93.

[50] Adoption and Children Act 2002, s 92(2)(e).

[51] Adoption and Children Act 2002, s 92(1).

[52] Adoption and Children Act 2002, s 92(4)(a).

[53] Adoption and Children Act 2002, s 92(4)(b).

[54] Adoption and Children Act 2002, s 95.

[55] Adoption and Children Act 2002, s 96.

[56] Adoption and Children Act 2002, s 1.

[57] Adoption and Children Act 2002, s 52(1)(b).

Exclusion and Termination of Legal Parenthood

Except as regards sperm donation (on which see above),[58] legal parenthood cannot be excluded where it would otherwise exist in the absence of adoption or a parental order. There is no right to an anonymous birth in English Law (see Marshall 2012 for discussion), and (at least) the mother is under a duty to register the child's birth with herself as the mother.[59]

The only means by which parenthood can be terminated are adoption and parental orders. These have been discussed above and, as Bainham (2005, 132) notes, outside of them 'parenthood is for life'. A person cannot be the subject of an adoption application once he or she reaches the age of 18.[60]

Parental Responsibility

Nature and Exercise

'Parental responsibility' ('PR') is distinct from legal parenthood. It is defined as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.[61] While both are often held by the same people, not all fathers necessarily have parental responsibility. Moreover, it can be held by more than two people and the acquisition of parental responsibility by one person does not in itself cause it to be terminated in respect of anyone else.[62] The Children Act 1989 expressly provides that '[w]here more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility' unless legislation on a provides otherwise on a particular issue[63] or they are purporting to act inconsistently with a court order,[64] though the judiciary have generated a duty of *consultation* between all holders of PR on certain important matters (Herring 2013, 426–427).

[58] NB that egg donation does not confer legal parenthood *per se* in any event.

[59] Births and Deaths Registration Act 1953, s 2, cf s 10 and also Welfare Reform Act 2009, sch 6.

[60] Adoption and Children Act 2002, s 49(4).

[61] Children Act 1989, s 3(1).

[62] Children Act 1989, s 2(6).

[63] Children Act 1989, s 2(7).

[64] Children Act 1989, s 2(8).

Acquisition of Parental Responsibility by Parents

Parental responsibility is conferred automatically on all mothers,[65] as well as on fathers married to the mother[66] and second female parents in a marriage or civil partnership with the mother.[67] In such cases, only adoption can terminate parental responsibility (and transfer it to the adoptive parents).[68] Fathers and second female parents who are not in a marriage or civil partnership with the mother do not automatically have parental responsibility, and are vulnerable to having it removed by court order even when they do acquire it.[69] They can acquire it by several means, some of which are contractual in nature.

One method by which a parent who is not in a marriage or civil partnership with the mother can obtain PR is by agreement with that mother.[70] The 'parental responsibility agreement' must be made using a prescribed form,[71] and recorded in the Principal Registry.[72] The more straightforward acquisition of parental responsibility by registration on the child's birth certificate is also contractual in nature, since the mother's co-operation with the registration is currently in substance vital (without a court order).[73]

Parents who are not in a marriage or civil partnership with the child's mother can also acquire PR via an order of the court,[74] which is much less likely to be the result of an agreement between the parties.

Acquisition of Parental Responsibility by Non-parents

There is a basic statutory rule that '[a] person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another', even if such a holder 'may arrange for some or all of it to be met by one or more persons acting on his behalf'.[75] Nevertheless, parental responsibility can effectively be conferred contractually on non-parents in some circumstances.

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[65] Children Act 1989, s 2(1), s 2(2)(a) and s 2(2A)(a).

[66] Children Act 1989, s 2(1).

[67] Children Act 1989, s 2(1A).

[68] Adoption and Children Act 2002, s 46.

[69] Compare Children Act 1989, s 2(1) and s 2(1A) with s 2(2)(b) and s 2(2A)(b).

[70] Children Act 1989, s 4(1)(b), s 4ZA(1)(b).

[71] Children Act 1989, s 4(2), s 4ZA(4). See Parental Responsibility Agreement Regulations 1991/1478, sch 1, as amended.

[72] Parental Responsibility Agreement Regulations 1991/1478, r 3.

[73] Children Act 1989, s 4(1A), 4ZA(2). Births and Deaths Registration Act 1953, s 10(1)(a)-(c), s 10A(1)(a)-(c). Cf Welfare Reform Act 2009, sch 6.

[74] Children Act 1989, s 4(1)(c), s 4ZA(1)(c).

[75] Children Act 1989, s 2(9).

Parental responsibility can be conferred on a step-parent, ie a non-parent who is in a marriage or civil partnership with a parent, provided that the parent him- or herself has parental responsibility. This can occur by agreement of all parents of a child with parental responsibility,[76] and this agreement is expressly classed as a 'parental responsibility agreement' with the same formality and recording requirements as for a parent who has not automatically acquired PR.[77] A step-parent can also acquire PR via court order,[78] and the parental responsibility of a step-parent can be brought to an end only via court order.[79]

Parental responsibility can also be conferred via guardianship,[80] which governs who is to have the responsibility of looking after a child in the event of parental death. Guardians may be appointed by a parent with PR,[81] and a guardian or special guardian can appoint someone to take the appointor's place after his death.[82] The appointment must be made by will,[83] or in other dated writing that is signed either by the appointor or by someone at his direction with witnesses if he or she is incapable.[84] Analogously with a will, the later appointment of a guardian by the same person in respect of the same child revokes the earlier appointment unless it is clear that the appointment of an additional guardian was intended.[85] Revocation can also occur by a signed and dated instrument,[86] by destruction of the appointing instrument with the intention to revoke it,[87] or by dissolution or annulment of the relevant marriage or civil partnership if the appointee was in such a relationship with the appointor unless a contrary intention appears in the document.[88]

The appointment of a guardian takes effect on the appointor's death if either the child is left with no parent with PR,[89] or there was a child arrangements order naming the appointor as a person with whom the child was to live in force immediately before the appointor's death[90] (provided that order was not also made for the benefit of a surviving parent),[91] or the appointor was the child's last surviving

[76] Children Act 1989, s 4A(1)(a).

[77] Children Act 1989, s 4A(2).

[78] Children Act 1989, s 4A(1)(b).

[79] Children Act 1989, s 4A(3).

[80] Children Act 1989, s 5(6).

[81] Children Act 1989, s 5(3).

[82] Children Act 1989, s 5(4).

[83] Children Act 1989, s 5(5)-(5)(a).

[84] Children Act 1989, s 5(5)(b).

[85] Children Act 1989, s 6(1).

[86] Children Act 1989, s 6(2).

[87] Children Act 1989, s 6(3).

[88] Children Act 1989, s 6(3A), s 6(3B).

[89] Children Act 1989, s 5(7)(a).

[90] Children Act 1989, s 5(7)(b).

[91] Children Act 1989, s 5(9).

special guardian.[92] Guardians can also be appointed by court order in the same circumstances, even where a guardian had been otherwise appointed.[93] A guardian can disclaim his appointment by signed writing 'within a reasonable time of his first knowing that the appointment has taken effect'.[94] Guardianship can be terminated by court order.[95]

Special guardianship is distinct from guardianship in not being linked to the death of the parent, and allows a non-parent to be given PR[96] and to *exercise* it 'to the exclusion of any other person with parental responsibility for the child (apart from another special guardian)'.[97] It might be useful where a child lives with a non-parent but adoption is considered inappropriate. Special guardianship is conferred by court order,[98] which limits its contractual features.

Parental responsibility is also given to those who have the benefit of a child arrangements order naming that person as one with whom the child should live (for the duration of the order),[99] those granted an emergency protection order in relation to the child,[100] and local authorities who have taken the child into compulsory state care.[101] Courts, rather than agreements, play a central role in the latter two protective processes.

Financial and Material Support for Children

There are various ways through which a person may be made financially liable for a child. For example, non-resident legal parents (irrespective of whether they hold parental responsibility) can be made liable via an application to the Child Maintenance Service by the 'person with care'.[102] Courts also have jurisdiction to make orders for financial provision for children (or to give the force of a court order to a private arrangement) in certain circumstances, both in respect of legal parents and in respect of spouses and civil partners of a parent who have treated the child as a 'child of the family' but are not themselves parents of the child.[103]

[92] Children Act 1989, s 5(7)(b).

[93] Children Act 1989, s 5(1)-(2).

[94] Children Act 1989, s 6(5).

[95] Children Act 1989, s 6(7).

[96] Children Act 1989, s 14C(1).

[97] Children Act 1989, s 14C(1)(b).

[98] Children Act 1989, s 14B.

[99] Children Act 1989, s 12(2).

[100] Children Act 1989, s 44(4)(c).

[101] Children Act 1989, s 33(3).

[102] See, generally, Child Support Act 1991, as amended.

[103] See, eg, Child Support Act 1991, s 8; Children Act 1989, sch 1.

Policy underpinning the system of child maintenance in England and Wales is currently dominated by contractualisation. This has led to concerns that the interests of children will be prejudiced for the sake of administrative efficiency (see, generally, Wikeley 2007). The Child Maintenance Service is a statutory body responsible for the payment of maintenance by a 'non-resident' legal parent to support a child.[104] It can require the non-resident parent to make payments, based on a formula applied to the non-resident parent's income upon application by a parent with care. But the Government's policy is to encourage 'family-based arrangements', and one way that it has done this is by introducing charges for the use of the Child Maintenance Service (Child Maintenance Options 2014).

It is expressly provided in the Child Support Act 1991 that '[n]othing in [it] shall be taken to prevent any person from entering into a maintenance agreement',[105] which is defined as 'any agreement for the making, or for securing the making, of periodical payments by way of maintenance . . . to or for the benefit of any child'.[106] That said, '[w]here any agreement contains a provision which purports to restrict the right of any person to apply' to the Child Maintenance Service 'for a maintenance calculation', the Act declares 'that provision shall be void'.[107] Even where the relevant agreement is embodied in a consent order approved by a court (on which see section "Court scrutiny"), the consent order cannot prevent an application to the Service unless the order has been in force for 'less than the period of one year beginning with the date on which it was made'.[108]

It has been seen that the courts have residual roles in supporting children in a material sense, which includes making of capital and property provision (as distinct from regular maintenance) by non-resident parents, and in ordering provision by non-parents who treated the child as a 'child of the family' in relation to a marriage or civil partnership.[109] The welfare of minor children also remains the 'first' consideration in proceedings between adults for relief on divorce or dissolution of a civil partnership,[110] and Baroness Hale has said that '[t]he invariable practice in English law is to try to maintain a stable home for the children after their parents' divorce'.[111] All of these court-based mechanisms can be the subject of a consent order, which are considered in the "Court scrutiny" section.

[104] See, generally, Child Support Act 1991, as amended.

[105] Child Support Act 1991, s 9(2).

[106] Child Support Act 1991, s 9(1).

[107] Child Support Act 1991, s 9(4).

[108] Child Support Act 1991, s 10(4)(aa).

[109] See, eg, Children Act 1989, sch 1.

[110] Matrimonial Causes Act 1973, s 25(1); Civil Partnership Act 2004, sch 5 para 20.

[111] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [128].

Decision-Making Concerning a Child's Upbringing

A significant issue in family law is how a child's time should be divided as between his or her (usually separated) parents. This can be the subject of 'child arrangements orders' made by a court under the Children Act 1989,[112] and there is set to be a statutory presumption that (except in limited circumstances) 'involvement' of both parents in the child's life will further the child's welfare.[113] Other significant issues surrounding upbringing (such as circumcision,[114] vaccination[115] and schooling)[116] can be the subject of 'specific issue orders' or 'prohibited steps orders' under the same Act.[117]

It should be noted, however, that the Family Justice Review (2011a, [5.3]) pointed to evidence that around 90 % of parents did not go to court to make arrangements for their children on separation, and the Children and Families Act 2014 imposes a general requirement that a person attends a 'family mediation information and assessment meeting' before relying on court-based family proceedings.[118] Moreover, the encouragement of mediation has been coupled with the near-withdrawal of legal aid to fund legal representation in private law family proceedings (see, eg, Hunter 2014).

Agreements concerning upbringing (whether made in mediation or otherwise) can be the subject of a 'consent order', through which an agreement made by the parties is approved and given the status of a court order (see further the "Court scrutiny" section). Strictly speaking, such an agreement cannot be safely considered binding until such an order is made. Herring (2011, 138) asserts that '[a]t the end of mediation it is common for the court to be presented with the agreement and be asked to formalise it by means of a consent order', even if the actual process of mediation on Parkinson's (2013, 201) account generally 'operates as a confidential process outside judicial scrutiny and control'.

It has nevertheless been recognised (Potter 2010, [1.3]) that '[c]ourt orders, even those made by consent, must be scrutinised to ensure that they are safe and take account of any risk factors'. Therefore, a court will not necessarily give effect to an agreement made between the parents if matters proceed that far,[119] since the court is obliged to treat the child's welfare as the 'paramount' consideration when making

[112] Children Act 1989, s 8.

[113] Children Act 1989, s 1(2A), to be inserted by Children and Families Act 2014, s 11.

[114] See, eg, *Re J (A Minor) (Prohibited Steps Order: Circumcision)* [2000] 1 FLR 571.

[115] See, eg, *Re C (A Child) (Immunisation: Parental Rights)* [2003] EWCA Civ 1148, [2003] 2 FLR 1095.

[116] See, eg, *M v M (Specific Issue: Choice of School)* [2005] EWHC 2769 (Fam), [2007] 1 FLR 251.

[117] Children Act 1989, s 8.

[118] Children and Families Act 2014, cl 10. See Parkinson (2013, 203) for a discussion of the extent to which such meetings were already used in practice before the 2014 Act.

[119] See, eg, *Re W (A Minor) (Residence Order)* [1992] 2 FLR 332.

a decision about his or her upbringing[120] and (as noted above) it is a basic principle that 'the court's jurisdiction to determine issues . . . concerning the welfare and upbringing of the children, cannot be ousted by agreement'.[121] Particular problems might arise where an agreement has been reached by parents whose relationship has been characterised by domestic violence (Craig 2007).

In *AI v MT*, however, the judge held that 'having regard to the parties' devout religious beliefs and wish to resolve their dispute through the rabbinical court, and acknowledging that it always in the interests of parties to try to resolve disputes by agreement wherever possible, including disputes concerning the future of children . . . , the court would in principle be willing to endorse a process of non-binding arbitration'.[122]

Finally, account should be taken of the so-called 'no order' principle, which instructs that '[w]here a court is considering whether or not to make one or more orders under [the Children Act 1989] with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all'.[123] This is effectively a means of deference to parental decision-making, though sometimes the 'no order' principle can in fact be overridden by a court's desire to give effect to a parental agreement. In *Re G (Children) (Residence: Making of Order)*, it was recognised that 'where parents can agree future dealings with regard to the children, that is better for the children than having bitterly contested court proceedings',[124] and that 'the court should not be astute to go behind agreements carefully negotiated in difficult questions of this sort'.[125] On the other hand, it was held that the first instance judge in the case should 'have paid respect to the decision of the parents whose views were that an order would be beneficial to the management of their children's lives and that that management would be more beneficial with the order than without it'.[126]

Partners

Marriage and Civil Partnership

Baroness Hale has said that marriage is in some sense a contract, but that it also a status, meaning *inter alia* that 'the parties are not entirely free to determine all its legal consequences for themselves [and] [t]hey contract into the package

[120] Children Act 1989, s 1(1).

[121] *AI v MT* [2013] EWHC 100 (Fam), [12] (Baker J).

[122] [2013] EWHC 100 (Fam), [12] (Baker J).

[123] Children Act 1989, s 1(5).

[124] [2005] EWCA Civ 1283, [2006] 1 FLR 771, [12] (Ward LJ).

[125] [2005] EWCA Civ 1283, [13] (Wall LJ).

[126] [2005] EWCA Civ 1283, [13] (Wall LJ).

which the law of the land lays down'.[127] While she identified 'considerable freedom and flexibility within the marital package', she was in no doubt that 'there is an irreducible minimum'.[128] While her view influenced her decision to dissent in key respects in *Radmacher v Granatino* (on which see below), it will become clear that both aspects of marriage are indeed reflected in English Law.

Before proceeding with a discussion of marriage, it should be noted that England and Wales introduced civil partnerships in 2004 as a functional equivalent to marriage for same-sex couples, with surprisingly little controversy. Perhaps this was due to the fact that, somewhat curiously, the ability of unmarried couples (including same-sex couples) jointly to adopt children had been introduced 2 years earlier (via the Adoption and Children Act 2002, see also above) and thus the usually somewhat more controversial issue of same-sex parenting was not part of the discussions surrounding the Civil Partnership Act 2004. Civil partnership was intended to be 'marriage in almost all but name' (Hale 2004, 132), and with the reforms of the Human Fertilisation and Embryology Act 2008 (on which see above), which put same-sex couples on the same footing as opposite-sex couples, this was achieved.

Nevertheless, in 2013 the Marriage (Same Sex Couples) Act was passed, which opened up marriage to same-sex couples. Somewhat bizarrely (and certainly very different from all other jurisdictions bar Scotland which have taken a similar path) the 2013 Act left the Civil Partnership Act largely unchanged, leading to the internationally almost unique situation that in England same-sex couples are now privileged above opposite-sex couples because the former can choose between civil partnership and marriage and for the latter marriage is the only way to formalise their relationship.

Entry Into, and Conduct of, Marriage/Civil Partnership

The jurisdiction of England and Wales does not distinguish between a *régime primaire and secondaire* with regard to marriage/civil partnership relations. There are very few limitations on who can enter into a marriage or civil partnership, and those that exist are hardly surprising: complying with certain formalities, certain prohibited degrees (based on consanguinity and affinity), a minimum age of 16 and that neither party is already married or in a civil partnership. Failure to comply with any of those conditions renders the marriage/civil partnership void.[129] England and Wales still retain grounds for voidability of marriages,[130] namely absence of valid consent, respondent suffering from venereal disease at the time of the marriage, respondent pregnant by another person than the applicant, specific grounds relating

[127] *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534, [132].

[128] [2010] UKSC 42, [132].

[129] Matrimonial Causes Act 1973, s 11 and Civil Partnership Act 2004, ss 3 and 49.

[130] These can be invoked only by the spouses or civil partners themselves, and only while they both still are alive.

to a change of legal gender before or after the time of the marriage as well as non-consummation due to incapacity or wilful refusal.[131] Apart from the two consummation grounds (which also do not apply to same-sex marriages) and the venereal disease ground the same applies to civil partnerships.[132]

Although there are no express statutory provisions and there appear to be no conclusive modern precedents on these matters, agreements seeking to restrict access to marriage by contractual arrangements (for example by requiring the consent of specific persons) are likely to be void for public policy reasons (Peel 2011, [11–041]). This can be inferred from the fact that while there is in principle the need for parental consent for the marriage/civil partnership of a person not yet 18 years old,[133] a marriage otherwise validly concluded (ie not void or voidable according to the statutory provisions)[134] is nevertheless deemed a valid marriage. Thus if a marriage is valid even if it was entered into contrary to certain statutory requirements, this must *a fortiori* be true for contractual requirements.

In England and Wales marriage (or civil partnership) does not even change the proprietal relations of the spouses in general. Therefore – apart from the abovementioned difficulties of the spouses in proving that their agreement was intended to create legal consequences – the parties in principle can live their marriage/civil partnership as they see fit and consequently also agree contractually to certain matters, although there may well be public policy exceptions in certain cases.[135] That said, the enforcement of such agreements would probably in any event be an issue dealt with only in the context of divorce/dissolution.

There is, however, probably one exception. As mentioned above, non-consummation is one of the grounds for annulment of a marriage. In *Brodie v Brodie*[136] it was held that an agreement not to consummate the marriage violated public policy and was therefore void and could not be relied upon by either party. However, this was qualified later[137] so that if there was a good reason for the agreement such as old age, infirmity or physical impairment, an agreement to have merely a 'companionship marriage' (or civil partnership) would not be contrary to public policy and thus could successfully be relied upon by the respondent in nullity proceedings.

[131] Matrimonial Causes Act 1973, s 12.

[132] Civil Partnership Act 2004, s 50.

[133] Marriage Act 1949, s 3; Civil Partnership Act 2004, s 4.

[134] Matrimonial Causes Act 1973, ss 11-12.

[135] For example the right to claim restitution of conjugal rights was abolished by the Matrimonial Proceedings and Property Act 1970, and it is therefore to be presumed that any agreements seeking to enforce such a right would be contrary to public policy.

[136] [1917] P 271.

[137] Cf *Morgan v Morgan* [1959] P 92.

Divorce/Dissolution of Marriage/Civil Partnership: The Substantive Law

Divorce and civil partnership dissolution in England and Wales are in theory based on the irretrievable breakdown of the relationship, which needs to be proved using certain facts (behaviour by the respondent such that the applicant cannot reasonably be expected to live with the respondent, desertion for 2 years, separation for 2 years and consent to divorce, separation of 5 years and (for marriage only) adultery by the respondent and that the applicant finds it intolerable to live with the respondent).[138] However, in practice the so-called 'special procedure' essentially renders these conditions more or less meaningless, making divorce available on demand and certainly if the couple agree on the divorce.[139]

While again there are no express statutory provisions and no conclusive modern precedent on these matters, it is to be assumed that agreements facilitating access to divorce (or dissolution in case of civil partnership) would be considered void for public policy reason (see, eg, Peel 2011, [11–039]; see also Barton 2007). (Given the low threshold for divorce in practice, it is unlikely that such agreements would be concluded or invoked in the first place.) The same applies *a fortiori* for agreements restricting access to divorce, as the statute clearly stipulates under which circumstances the court must grant a divorce (or civil partnership dissolution). Hence an agreement that the couple live apart would not, for example, preclude a petition for divorce/dissolution based on the fact that the couple lived separately as required by section 1(2)(e) of the Matrimonial Causes Act 1973.

Divorce/Dissolution of Marriage/Civil Partnership: Property-Related Consequences

England and Wales, unlike continental European jurisdictions, do not have a matrimonial property regime and as a consequence do not distinguish between/have different approaches to different financial consequences of divorce (cf Miles 2011, 2012a, b; Scherpe 2011, 2012a, b). According to the statutory provisions,[140] the entire financial consequences of divorce are discretionary, so in principle the court is totally free to decide on any financial consequences of divorce, including redistribution of all property of the spouses (including pre-marital and inherited property), pensions and spousal maintenance. All of these are decided by the court together and there is no formal distinction between property, pensions and maintenance as there is in continental European jurisdictions (cf Scherpe 2012b). Alongside statutory factors,[141] the judiciary have developed an overall objective of

[138] Matrimonial Causes Act 1973, s 1 and Civil Partnership Act 2004, s 44.

[139] Introduced by Statutory Instrument 1991 No. 1247 (L.20).

[140] Matrimonial Causes Act 1973, Part II.

[141] Matrimonial Causes Act 1973, s 25.

'fairness' with strands of 'needs', 'compensation' and 'sharing' to guide the exercise of discretion.[142]

The same principles apply to all kinds of marital agreements, and the starting point for this is that the jurisdiction of the court to decide on these matters cannot be ousted.[143] This may change if the Law Commission's (2014) proposals on 'qualifying nuptial agreements' are implemented, but for the moment no agreement between the parties would preclude either of them from going to court and asking for a ruling on the matters regulated by the agreement in question. That said, in *Radmacher v Granatino* it was established that marital agreements (which the Court refers to as 'nuptial agreements') should be considered by the courts when exercising their discretion as follows:

> The court should give effect to a nuptial 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.[144]

This applies irrespective of whether they were concluded before or during the marriage. For so-called 'separation agreements' (ie agreements concluded between the spouses after the marriage has in substance ended) the lead authority is *Edgar v Edgar* in which it was held by Oliver LJ that:

> . . . in a consideration of what is just to be done in the exercise of the court's powers under the Act of 1973 in the light of the conduct of the parties, the court must, I think, start from the position that a solemn and freely negotiated bargain by which a party defines her own requirements ought to be adhered to unless some clear and compelling reason, such as, for instance, a drastic change of circumstances, is shown to the contrary.[145]

This is strikingly similar to the test now to be applied to marital agreements in general according to *Radmacher v Granatino* (in which *Edgar v Edgar* was expressly approved), so the question now really has shifted to when such agreements are deemed to be fair. Space precludes a detailed exposition of this complex issue, and it therefore must suffice to say that contracting out of sharing property is likely to be accepted by the courts when exercising their discretion, opting out of the fairness-strands of needs and compensation is distinctly less likely. According to *Radmacher v Granatino*:

> Of the three strands identified in *White v White* and *Miller v Miller*,[146] it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an

[142] See, in particular, *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

[143] *Hyman v Hyman* [1929] AC 601, recently confirmed in *Radmacher v Granatino* [2010] UKSC 42. Therefore sections 34-36 Matrimonial Causes Act 1973 are essentially without any practical relevance and in a Court of Appeal decision they were said to 'have been dead letters for more than thirty years' (*Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 2 FLR 1181, [134] (Wilson LJ)).

[144] [2010] UKSC 42, [75].

[145] [1980] 1 WLR 1410, 1424.

[146] The Supreme Court here refers to the seminal cases of *White v White* [2001] 1 AC 596 and *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

> ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned.[147]

Hence, any agreements regarding post-divorce maintenance must meet these standards. It is very important to note that 'needs' in English law is interpreted much more generously and comprehensively than in most (if not all) continental European jurisdictions and certainly is not restricted to periodical payments or to what is necessary for mere subsistence (Law Commission 2014), and agreements leaving a spouse destitute and dependent on state benefits where the other party has the means to prevent that will certainly not be upheld.

As a result, the fate of any agreements on these matters is uncertain until the issue has been decided by a court (which may decide to embody the agreement in a consent order as described below), taking into account the individual circumstances of the case at hand.

Informal Cohabitation

Cohabitation outside marriage and civil partnership remains without a comprehensive legal framework in England and Wales, despite very strong recommendations by the Law Commission that a statutory framework covering property matters should be introduced (Law Commission 2007). Thus, with a few exceptions (for example in succession law and protection from domestic violence) cohabitants have to rely on the general law to regulate their relationships and/or resolve any disputes. This includes the possibility to enter into contracts, which are not therefore considered contrary to public policy *per se*[148] as there are no 'default rules' and hence no public policy expressed by Parliament. Indeed, Barton (2007, 79) highlights the fact that while 'spouses and civil partners are precluded from excluding the jurisdiction of the court over the division of assets on divorce or dissolution', '[c]ohabitation contracts are the less constrained because the legal shadow under which they are negotiated... is much smaller' and 'there are no equivalent rules regarding agreements regulating the ongoing relationship of the parties'.

That said, if an agreement were held to constitute 'a contract *for* sexual relations outside marriage' rather than 'a contract *between* persons who are cohabiting in a

[147] [2010] UKSC 42, [81].

[148] See, generally, Probert 2004 as well as Barton 2007.

relationship which involves such sexual relations',[149] it would be void for reasons of public policy (see Probert 2004 for discussion; see also Barton 2007, 92).

Similarly, where cohabitants make a declaration of trust as to the joint ownership of the family home that complies with the relevant formality requirements,[150] that declaration will be conclusive in the absence of fraud or a similar defect.[151] Where there is no such declaration or the declaration is inconclusive as to the respective shares of the parties, the 'common intention constructive trust' is often employed by the courts to resolve the matter.[152] As its name suggests, this trust is in principle concerned with the parties' intentions, but considerations of 'fairness' are also present (see, generally, Sloan 2015 for a discussion of the operation of the constructive trust in cases involving cohabitants).

Procedural Family Law

Jurisdiction

The Alternative Dispute Resolution techniques used in England and Wales vary widely and include, *inter alia*, mediation, arbitration, collaborative law and conciliation proceedings as well as lawyer-lawyer negotiation. Apart from arbitration,[153] there is almost no regulation of these ADR techniques, and relatively little integration between them and the courts. Mediation appears to be much favoured by the Government as it is perceived to be a cost-cutting tool. There are a few court-annexed mediation schemes, but participating in the mediation nevertheless remains voluntary (Scherpe and Marten 2013, 372 ff).

That said, the Civil Procedure Rules ('CPR' – Rules and Practice Directions by the Ministry of Justice) define as their overriding objective *inter alia* that the case be dealt with expeditiously and with as little expense as possible, which in turn is connected with the court's duty to encourage the parties to use an ADR procedure if the court considers that appropriate, and the court then has to facilitate such a procedure.[154] This can, for example, include so-called 'mediation orders' by the court, but in essence these are nothing but rather robust recommendations to mediate (Andrews 2013, 40) and cannot 'force' the parties to mediate. The courts also have the power to stay proceedings while the parties attempt an ADR.

[149] *Sutton v Mishcon de Reya* [2003] EWHC 3166 (Ch), [2004] 1 FLR 837, [23] (Hart J).

[150] Law of Property Act 1925, s 53(1)(b).

[151] *Goodman v Gallant* [1986] Fam 106.

[152] See, in particular, *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.

[153] Arbitration Act 1996.

[154] CPR 1.4(e).

Furthermore, according to their professional codes of conduct all legal advisers are obliged to inform the parties of ADR possibilities (Scherpe and Marten 2013, 375 f). While the parties cannot be compelled to attempt a form of ADR, they must at least approach the issue of ADR in good faith (Practice Direction: Pre-action Conduct, para 8.1; cf Andrews 2013, 38 ff); failure appropriately to consider ADR can result in significant costs implications.[155]

ADR in Family Law

The ADR techniques used in England and Wales in family law are similar to those used in general (see, eg, Barton and Jay 2013). But as the Final Report of the Family Justice Review (2011b, [101]) asserted, '[m]ost separating couples make their own arrangements for the care of their children and division of their assets, without resort to court proceedings'.[156] Similar to the CPR, the Family Procedure Rules state that '[t]he court must consider, at every stage in proceedings, whether alternative dispute resolution is appropriate'.[157] However, despite many pilot projects and court-annexed schemes, it remains true that 'most family mediation takes place prior to application to the court and outside the court's domain' (Parkinson 2013, 201), and the same applies to other forms of ADR. As stated above, there is now a general statutory requirement for parties to attend a 'family mediation information and assessment meeting' before relying on court-based family proceedings, but mediation as such is not compulsory.

Arbitration is of course well-established in commercial and other civil law disputes and regulated by the Arbitration Act 1996. But, as Barton and Jay (2013, 840) rightly assert, '[t]he recognition of arbitration as a means of settling disputes within family proceedings is in its infancy' and indeed arbitration made its appearance in family law only quite recently (Singer 2012a, 2012b). As the parties cannot oust the jurisdiction of the court in most family matters (see above), arbitral awards in family matters will not be binding and therefore their substance will be subject to judicial scrutiny, with very few exceptions (see Singer 2012b, 1500 for potential examples, all of which concern issues where the court has no discretion). The parties will therefore generally be advised to seek to have the arbitral award incorporated into a consent order (on which see below) in order to bring about certainty and enforceability.

[155] See e.g. *Dunnett v Railtrack Plc (Costs)* [2002] EWCA Civ 303, [2002] 1 WLR 2434; on costs see Scherpe and Marten 2013, 386 ff and Andrews 2013, 43 ff.

[156] See also, eg, Hunt 2011.

[157] Family Procedure Rules 2010/2955, r 3.2.

Court Scrutiny

Agreements between parties reached through ADR will be considered to be contracts (provided the necessary requirements for this are fulfilled) and are then enforceable as such. Arbitral awards are final and binding on both parties in general, unless agreed otherwise in the arbitration agreement.[158] However, with regard to family law things are quite different.

As explained above, the parties in family law generally cannot oust the jurisdiction of the court, which means that even where an agreement is in place (irrespective of whether this agreement was reached by ADR or not) either party can still take the matter to court. The court will then decide 'normally', but taking into account the existence of the agreement when exercising its discretion. Agreements have increasingly been given weight with regard to the financial relations of the parties, but less so when the welfare of children is concerned.

Making Consent Orders

The fact that any agreement is still subject to the court's scrutiny creates considerable uncertainty and has been described as 'the worst of both worlds',[159] as each party might feel bound by the agreement but cannot be sure that the other party will abide by it. Therefore it is common practice to ask the court to make a so-called 'consent order'. As Barton and Jay (2013, 840) have put it, 'all routes [of ADR], including those which start earlier with pre-marital and cohabitation contracts, must converge at the finishing line of a court order'.

To obtain a consent order, the parties will jointly present to the court the agreement they have reached (whether by ADR or not), and the court will then scrutinise the agreement, taking into account not only its existence but also that both parties have asked the court to order accordingly. If the court finds that the content of the agreement does not violate public policy and is within what the court could order using its discretionary power, it will almost inevitably make a consent order in cases and agreements concerning financial matters.[160]

However, if the agreement concerns the upbringing of children, their welfare is paramount and, as explained above, this means that the court will more readily (and indeed is bound by law to do so) disregard agreements that, in the view of the court, are not consistent with the child's best interests. With regard to arbitration of matters relating to children and consent orders, Barton and Jay (2013, 844) note that '[t]he position of agreements relating to children is entirely different' to those

[158] Arbitration Act 1996, s 58(1).

[159] *Pounds v Pounds* [1994] 4 All ER 777 (Hoffmann LJ).

[160] See e.g. *Xydhias v Xydhias* [1998] EWCA Civ 1966, [1999] 2 All ER 386. See also Barton and Jay 2013, 844, and *S v S (Arbitral Award: Approval)* [2014] EWHC 7 (Fam), [2014] 1 WLR 2299.

relating to finances, because '[t]here is no tried and tested mechanism for obtaining the imprimatur of a court order as there is with the financial arrangements and the facts on which a child's welfare is to be judged are not as easily established and expressed'. Hence any arbitral awards concerning children are certainly not binding on the parties (Pearce 2013; Tolley 2013) and a consent order might be more difficult to obtain (Burrows 2013, 1189 f).

Departing from Consent Orders (in Ancillary Relief Proceedings)

Once made, a consent order then has the same legal effect as any other court order and can only be overturned/appealed out of time in extraordinary circumstances. As was held by the House of Lords in *Barder v Calouri*,[161] the lead decision on appeals out of time against consent orders regarding a financial settlement, this requires that:

1. the basis or a fundamental assumption underlying the order had been falsified by a change of circumstances;
2. such change occurred within a relatively short time of the making of the original order;
3. the application for leave to appeal was made reasonably promptly;
4. the granting for leave would not prejudice unfairly third parties who had acquired interests for value in the property affected
   (usually referred to as '*Barder* criteria'; see also Lowe and Douglas 2007, 1065).

The courts take a very strict view on these criteria, and the circumstances/new events must be indeed extraordinary. But if leave to appeal out of time is granted, the case is then reconsidered in the light of all the circumstances present at the time of the appeal.[162] Lowe and Douglas (2007) *inter alia* list the following groups that potentially qualify as '*Barder* criteria':

Death of One of the Spouses In *Barder* itself and *Smith v Smith (Smith Intervening)*[163] the order had been made on a 'clean break' basis and to ensure that the wife was financially safe for years to come, but in both cases the wife committed suicide shortly afterwards and the appeal was allowed. The same was held in *Passmore v Gill and Gill*[164] and *Barber v Barber*[165] where the wife died unexpectedly shortly after the order. By contrast, the death of the wife in *Benson v Benson*[166] 15 months after the order was not deemed to be sufficient to fulfill the '*Barder* criteria'.

[161] [1988] AC 20.

[162] S*mith v Smith (Smith Intervening)* [1992] Family Law 69. See also *Garner v Garner* [1992] 1 FLR 573.

[163] [1992] Family Law 69.

[164] [1987] 1 FLR 441.

[165] [1993] 1 FLR 476.

[166] [1996] 1 FLR 692.

Similarly in *Amey v Amey*[167] the wife had died just 2 months after the consent order, but since the agreement (and hence the order) had been made without any assumption as to the wife's health, the unexpected death was insufficient cause for the court to intervene.

Remarriage of One of the Spouses In England and Wales financial settlements often include capitalised maintenance rather than periodical payments. As the latter would stop in case of a remarriage, it is hardly surprising that the payor of such capitalised payments would feel aggrieved (if not deceived) if the payee remarried shortly after receiving a capitalised sum. Hence in *Wells v Wells*[168] (where the wife remarried 6 months after the order) and *Williams v Lindley*[169] (where the wife became engaged 2 months after the order) the orders were set aside because of the new event. By contrast, in *Chaudhuri v Chaudhuri*[170] the remarriage of the wife was not held to be sufficient as the change of circumstances had been less drastic than that of *Wells* and the original agreement had expressly contemplated the possibility of a remarriage, so in that sense it was not unexpected. Similarly, if the new partner was unknown to the spouse at the time of the consent order, a remarriage ought not to lead to the order being set aside as the possibility that one of the spouses might remarry cannot, as such, be deemed to be unexpected and extraordinary.

Change in Valuation of Property Many cases have been brought on the basis of changes in the valuation of certain property, but normal market fluctuations are certainly not sufficient to constitute a *Barder* event.[171] The changes must have been unforeseen and unforeseeable.[172] Indeed, the courts have taken a rather robust approach to these cases, and have certainly given short shrift in situations where one of the spouses agreed to accept assets with higher risks and then these risks either materialised (resulting in a loss) or paid off (resulting in a gain) and not allowed appeals out of time.[173]

Non-disclosure of Assets, Fraud etc. Needless to say, if the order is based on the wrong facts, and one of the parties is to responsible for this, then an appeal out of time will be allowed.[174]

[167] [1992] 2 FLR 89.

[168] [1992] 2 FLR 66.

[169] [2005] EWCA Civ 103.

[170] [1992] 2 FLR 73.

[171] See, eg, *Rundle v Rundle* [1992] 2 FLR 80; *Cornick v Cornick* [1994] 2 FLR 530.

[172] *Rundle v Rundle* [1992] 2 FLR 80.

[173] *Myerson v Myerson* [2009] EWCA Civ 282, [2010] 1 WLR 114; *Walkden v Walkden* [2009] EWCA Civ 627, [2010] 1 FLR 174.

[174] Cf, eg, *Livesy v Jenkins* [1985] 1 AC 424.

Loss of Income/Redundancy The courts have also been firm in cases where one of the spouses lost his or her job after the order was made, essentially coming to the conclusion that losing one's job in this day and age is never unforeseeable.[175]

That said, certain parts of a consent order are open to judicial review just like any other court orders, namely periodical payments. These by their very nature are meant to be varied should circumstances change, and thus it is open to either party, irrespective of whether the order was a consent order or a 'normal' order, to apply for a variation of these periodical payments.[176]

All of the decided cases concern financial matters, and there appear to be no authorities on appeal out of time regarding consent orders concerning children. However, this is hardly surprising since it is open to the parties at any time to ask the court for a new order regarding residence, contact etc., so that there simply is no need for leave to appeal out of time. When the issues agreed upon by the parties (whether embodied in a consent order or not) are revisited by the court, the yardstick for the decision remains that the welfare of the child is paramount, and no court in England and Wales would jeopardise the welfare of any child simply because of an agreement the parties had entered into previously.

Conclusions

This chapter has demonstrated that there is considerable evidence of contractualisation in the family law of England and Wales. Indeed, in many ways such contractualisation, or at least 'private ordering' in a looser sense, is actively encouraged by the state.

That said, given that the ultimate control is reserved by and for the courts, autonomy has very clear limits in English family law, particularly in the case of parents purporting to make decisions with regard to children as distinct from that of adults making decisions about their own lives. This distinction is acceptable since the state has a particular normative duty to ensure the welfare and flourishing of children, who have interests that are independent of the wishes of their parents.

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