

Changes over the centuries in the financial consequences of divorce

Address to the University of Bristol Law Club

Lord Wilson

20 March 2017

Yes, my practice at the Bar throughout its 25 years was in family law and for the following 12 years I was a judge of the Family Division. In the Supreme Court we seldom hear family appeals so it has been necessary for me to spread my wings. At heart, however, I still regard myself as a family lawyer. Over the years I have given several talks about aspects of family law, particularly in relation to its historical development, but never about the aspect which, certainly at the Bar but also in the Division, attracted my closest attention, namely the financial consequences of divorce. Tonight I attempt to repair that curious omission. Legal history intrigues me so I will again concentrate on the history of my subject. I will also bring it up-to-date, albeit cautiously lest, in disclosing too firm an opinion on some topical issue, I might find myself compromised if it were then to come before the court.

I cannot believe that all of you here tonight have elected or will elect to study family law, first-class though that course of study is in Bristol. But, unlike most other areas of law, family law is of interest to everyone. If this address fails to prove interesting to everyone here, I will, Mr President, have let you and your university down.

First, I must make an embarrassing admission. I have always understood that the theoretical justification for requiring a husband (for it will be convenient to regard the male as the paying spouse although that situation is less stereotypical than it was) to maintain his wife following divorce was that the concept of marriage in English law always incorporated an obligation of support for the rest of her life *notwithstanding their divorce*. I knew that such rules as there were about financial support largely emanated from the ecclesiastical court (by which I mean an Anglican church court) until 1857 and that, when in 1857 Parliament created a secular divorce court in order to replace the role of the ecclesiastical court in the determination of family issues¹, the secular court adopted many of its principles. And of course I remembered in church the countless occasions when I had heard – and the one memorable occasion when I myself had articulated – the bridegroom’s promise to the bride, in Cranmer’s heavenly words unchanged

¹ Matrimonial Causes Act 1857, section 6

since 1549, “to have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, to love and to cherish, till death us do part”.

Indeed, I am sure that there were occasions in the Division when I began judgments with a colourful reference to an historical principle, central to the whole concept of marriage, of life-long support between the parties to it notwithstanding their divorce.

But, preparing for tonight’s address, I have come to realise that my previous understanding has been entirely wrong. The orders of the ecclesiastical courts for financial provision were not made in the context of divorce in our modern sense. At any rate from Elizabethan times onwards, those courts had no jurisdiction to pronounce what we call a divorce even if, which they did not, they had wished to exercise it. Apart from their jurisdiction to declare that a marriage was null by reason of some factor in existence at the time of its celebration, their jurisdiction was to grant what we would call a decree of judicial separation. Equally the Anglican marriage service does not contemplate divorce. Its references to life-long support mean life-long support during the marriage.

So, since there was no divorce, the idea of support for the period afterwards never arose. And, if we are to understand the rationale for compelling a husband to maintain a wife thereafter, whether by payment of capital or of ongoing periodical sums or of both, we have to look elsewhere.

The obligation to support a wife *during the marriage* is easy to understand. It arises out of the doctrine of *coverture*, which operated from medieval times and under which a wife’s legal identity was substantially *covered up* by her husband. On marriage he became owner of her property. She could not enter into a contract. If she committed a tort, it was the husband whom the victim sued and who was required to pay the damages. Conversely, if she was the victim of a tort, it was the husband who sued the offender and pocketed the damages. Any money earned by the wife also went to the husband. So the husband’s further promise to her in church – “with all my worldly goods I thee endow” - rang rather hollow. In return, however, for taking all the wife’s money, the husband had – in theory – an obligation to support her.

In the *Taming of the Shrew*, Petruchio accurately describes the situation in which Kate will find herself when she becomes his wife:

“I will be master of what is mine own:
She is my goods, my chattels, she is my house,
My household stuff, my field, my barn,
My horse, my ox, my ass, my anything.”²

It was around 1700 that courts of equity, in an example of their extraordinary function in defiantly softening the hard edges of the common law, came to introduce the concept that, if property intended for the separate use of the wife were to be held for her by trustees, it could not pass to the husband. Furthermore, conscious that the husband might put her under pressure to assign to him her future income under the trust, equity upheld a clause in the deed of trust that, as a female, she should be disabled from making any such assignment³. Clearly, however, these indulgences made available to wives in Chancery assisted only those few with wealthy backgrounds.

In an interesting metaphor Lady Hale has described the conjugal family as “its own little social security system”⁴. But legal, as opposed to moral, obligations of one family member to care for another have been slow to arise. Early English law took no interest in family support obligations. And, when they did arise, they were - inexplicably – not cast upon a husband. An Act of 1601 provided that, when any poor person, thus including a wife, was driven to live in the work-house, her parents, her grandparents and her children could all be made liable to contribute to her support⁵. But why did the list not include - in particular – her husband? Only in 1718 does he seem to have been added to those potentially liable to contribute to her support there⁶.

That original obligation of support cast upon the woman’s wider family members is interesting. Two years ago in the Privy Council we had an appeal from Jamaica⁷ and I came across a section of one of the island’s statutes, passed as recently as 2005, which provides for adults to be made liable to contribute financially towards the support of their parents and grandparents⁸. The reduced role played by the wider family in much of modern British life – particularly white

² Act 3, Scene 2, lines 219-222

³ The so-called Restraint on Anticipation

⁴ The Continuing Evolution of Family Law, 2009. ed. Douglas and Lowe, Chapter 8, p188

⁵ Poor Relief Act 1601, section 7

⁶ Poor Relief (Deserted Wives and Children) Act 1718, section 1

⁷ Bromfield v Bromfield [2016] 1 FLR 482

⁸ Maintenance Act 2005, section 10

British life – is a big, worrying subject, far removed from mine tonight; but the current continuation in Jamaica of even a legal obligation to support parents and grandparents perhaps highlights the extent of the loss for many UK citizens of the close proximity of their wider families.

Following the ecclesiastical decree of judicial separation, the marriage of course continued. So the ecclesiastical court made orders for the husband to make payments to the wife for her to spend on her support. I am not clear whether, instead of spending it, she could keep any of it – would coverture make that possible? But, if the husband persuaded the ecclesiastical court that the wife was responsible for the rift in the marriage, it did not award her maintenance even though the marriage continued. Here emerges one of the major themes in the history of all this, namely the relevance of marital fault to an award of financial provision. So it is at this stage that we find ourselves introduced to the so-called “guilty” wife and to the so-called “innocent” wife; to the Victorian obsession with sexual misconduct such that a wife’s adultery on one occasion was deemed so much more serious than her years of sulky ill-temper towards her husband; and to the double standards under which the wife’s adultery was deemed so much more serious than that of the husband. This last, disgraceful, approach was, of course, developed by men, who have for long seemed to regard their entitlement to sex as wider, and their need for sex as more acute, than that of women; and who, in particular, insisted that there must be no possible reason to doubt that the baby boy to which their wives had given birth, and who would become their heir, was indeed their own progeny.

How much did the ecclesiastical court award to the wife? In 1828 one of its judges addressed the amount of an award for the period while the husband’s suit for a judicial separation was pending.

He said:

“Now though the wife during the pendency of the suit must be presumed not to be guilty, yet she is not to live exactly in the same way as if she were exempt from any imputation: she is as it were under a cloud, and should seek privacy and retirement. These Courts have in such cases been generally disposed to consider, as a fair medium, about one fifth of the net income ...”⁹

⁹ Hawkes v Hawkes (1828) 1 Hag Ecc 526, p526, Sir John Nicholl

I fear that the judge was there paying only lip-service to the presumption of innocence. At all events, fifteen years earlier, the same judge had said that, if at the end of the proceedings the wife was granted a decree because of the husband's "delinquency", which had deprived her of the comfort of matrimonial society, he should be ordered to support her liberally, namely at the rate of a third, or even sometimes of a half, of his income¹⁰. But let's not be carried away by the generosity of this: *his* income may well have been generated by what prior to the marriage had been *her* property! For this did not revert to her even after a decree of judicial separation.

When in 1857 full divorce became available, the secular court borrowed the ecclesiastical court's rule of thumb proportions; and even when, 110 years later, I began to practise as a family lawyer, I remember arguing that a wife should have a fifth of the joint incomes pending the suit for divorce and a third of them following the grant of a decree. It was arbitrary but it was at least a starting-point. But at around that time *capital* provision for the ex-wife was being introduced – payment of cash lump sums in 1963¹¹ and transfers of property in 1971¹² – and this made it far more doubtful whether, if ongoing maintenance was also to be payable to her out of income, an award of one-third of the joint incomes following decree would remain appropriate.

In 1973 the Court of Appeal gave a landmark judgment¹³, delivered by the brilliant Lord Denning, who was a curious mixture of the progressive and the reactionary. There was one admirable aspect of the decision, to which I will revert. But the court also said that the fairest starting-point would be to continue, and indeed to extend, the one-third ratio, so that the ex-wife might receive one-third of the family assets and, going forward, one-third of the joint incomes. I can vouch for the fact that this idea died a death almost as soon as it emerged. The arithmetical cutting of both the cakes, so I recall, was just too arbitrary and, when we practitioners loyally sought to try to do it, we realised that it scarcely ever reflected a fair, or even workable, result.

But the longevity of the ecclesiastical court's one-third ratio following judicial separation has led me to run ahead of myself. I must go back in time. The history of financial provision *following actual divorce* begins prior to 1857. For, following the Restoration, the practice grew up whereby rich, well-connected husbands, and occasionally their wives, persuaded Parliament to pass a private Act relating only to them and declaring them to be divorced. If Henry VIII could do it,

¹⁰ *Otway v Otway* (1813) 2 Phillimore 109, pp 109, 110, Sir John Nicholl

¹¹ Matrimonial Causes Act 1963, section 5(1)

¹² Matrimonial Proceedings and Property Act 1970, section 4(1)

¹³ *Wachtel v Wachtel* [1973] Fam 73

why couldn't they? A verdict in Parliament on one couple's private behaviour was, of course, a serious confusion of the legislative role with the judicial role. But what did Parliament say about financial support for the wife following the divorce? There was a functionary in the House of Commons called "The Ladies' Friend", whose duty was to see that the husband had put suitable, albeit no doubt moderate, provision into a trust for the wife, even for a so called "guilty" wife, before the Act which divorced them was passed by Parliament. Stemming from the modest efforts of this panjandrum has been the legal industry which today identifies the financial consequences of divorce.

We arrive at 1857. A court for divorce and matrimonial causes was created, to which both a husband and a wife could present a petition for divorce, although, predictably, the statute permitted the wife to secure a decree only if she could demonstrate substantially worse misconduct on the part of the husband than *vice versa*.¹⁴ In recommending this momentous reform, a Royal Commission had devoted only one paragraph out of 51 to the financial consequences of the proposed decree of divorce. It had noted that, as a general rule, all liabilities between husband and wife should cease altogether upon the divorce.¹⁵ Nevertheless the 1857 Act¹⁶, together with one in 1866,¹⁷ empowered the court to order the husband either to set up a trust out of which the wife was to be paid, or to pay her directly, such regular sums "as having regard to her Fortune (if any), to the Ability of the Husband, and to the Conduct of the Parties, it shall deem reasonable".

So alongside the novel power to grant a divorce was a novel power to impose financial obligations for the period afterwards. As Lord Atkin later explained,¹⁸ it served "the public interest to provide a substitute for [the] husband's duty of maintenance and to prevent the wife from being thrown upon the public for support".

But how was this novel power to be exercised? The answer was that it was to be exercised in favour of a so-called "innocent" wife who had obtained a decree against the husband but not, save in exceptional circumstances, in favour of a so-called "guilty" wife against whom the husband had obtained a decree. In a case in 1861 one of the judges of the new court, hearing a

¹⁴ Matrimonial Causes Act 1857, section 27

¹⁵ First Report of H.M. Commissioners Appointed to enquire into the Law of Divorce, 1853, para 43

¹⁶ Matrimonial Causes Act 1857, section 32

¹⁷ Matrimonial Causes Act 1866, section 1

¹⁸ *Hyman v Hyman* [1929] AC 601, p629

claim for financial provision by a wife who had obtained a decree, reasoned that, had she remained married, she would have been entitled to her husband's support and that, since she had lost that entitlement only as a result of his misconduct, he should compensate her.¹⁹ This has been described as the "contractual analogy".²⁰ So she was awarded £100 per annum, payable quarterly on the four usual feast-days. But the judge directed it to cease in the event not only of her remarriage (which was entirely reasonable and in due course was made by statute an event upon which payments of maintenance would automatically cease) but also of her having sexual relations with anybody. She was after all divorced so, assembled here in 2017, we ask: why shouldn't she have been able to make love to somebody without forfeiting her maintenance? The answer is surely to remind ourselves of the Victorian principle, in hopeless conflict with human nature, that all sex outside marriage was a grave sin.

That was the "innocent" wife. By contrast, the "guilty" wife – on the receiving end of the husband's petition – was rarely awarded maintenance. Occasionally her circumstances were such as to yield for her what was later to be described as a "compassionate allowance". There was a case in 1904 in which the "guilty" wife did secure an allowance of £1 per week. It was because otherwise she would have been led into what the President of the Probate, Divorce and Admiralty Division called "the terrible temptation which might otherwise assail her", namely "a life of prostitution".²¹ But her pound a week was, again, only "*dum casta*" – "while chaste", no sex allowed, even on a non-paying basis. What is interesting is that the court's usual refusal to make financial provision for a "guilty" wife (which usually meant an adulterous wife though it could also mean a cruel wife or a deserting wife) continued even up to 1973.

In 1967, following my graduation, I acted for a month as marshal to a High Court judge out on circuit in Manchester. The entire month was spent in his hearing just one divorce case. It was all about whether the wife had committed adultery in Paris. The QC later to become Mrs Justice Heilbron was in the blue corner and the QC later to become Mr Justice McNeill was in the red corner. It was crucial for the wife to defend the allegation of adultery because, if she was guilty of it, she would be likely not to receive any financial provision from her extremely wealthy husband. I was fascinated both by the advocacy and, of course, by the focus on sex, although convinced that I was going to be hopeless at both of them. But the case shows you how, in the course of one professional life-time in family law (although I believe that I must be one of the

¹⁹ Fisher v Fisher (1861) 2 Sw and Tr 410, p413

²⁰ Law Com: "The Financial Consequences of Divorce: the Basic Policy", 1980, Cmnd. 8041, paras 11, 12

²¹ Squire v Squire and O'Callaghan [1905] P4, p8

few family lawyers still working full-time after 50 years), its pre-occupations have changed out of all recognition.

Well, what was to be done after, say, 1970 about the impact of a wife's so-called matrimonial misconduct upon the size of the husband's award to her? We young practitioners were all a bit surprised when in 1971 the President of our newly created Family Division, having found that, by her conduct, the wife was 25% responsible for the breakdown of the marriage, suggested that accordingly 25% should be the percentage – albeit the maximum percentage because it might be reduced as a result of other factors – by which what should otherwise have been her financial award should be reduced.²² We reluctantly began to advise a husband that, even if he was found to be 75% responsible for the breakdown of the marriage, he could nevertheless secure a 25% discount and that it was accordingly well worthwhile for him to dredge up allegations against his wife. But in the event, on appeal, the President's mathematical approach to conduct was disapproved²³.

But it was the great judgment delivered two years later by Lord Denning to which I have already referred which in effect finally disposed of the relevance of so-called matrimonial misconduct to the size of the financial award.¹³ Lord Denning's case was an appeal from Ormrod J – who we all felt to be an almost uncomfortably progressive judge. He was quick, impatient and rather brilliant. He was also fiercely pro-wife and, when appearing before him for a wife, I soon realised that it was wiser to let him take all the points. We judges are always keener on points which we believe to have been introduced by ourselves. In his judgment Ormrod J had said that “the forensic process ... is much too clumsy a tool for dissecting the complex inter-actions which go on all the time in a family”; that “it takes three to commit adultery”, in other words that it included the so-called “innocent” husband, whose conduct had probably in some way driven the wife to it; and that “conduct in these cases usually proves to be a marginal issue which exerts little effect on the ultimate result unless it is both obvious and gross”.²⁴ In effect Lord Denning's judgment approved what Ormrod J had said. Short of conduct both obvious and gross, the court (so said the Court of Appeal) should not reduce its order because of one party's so-called guilt or blame. So the contractual justification for ordering provision following divorce was finally abandoned. By a stroke, the divorce court's protracted and intrusive investigations into who was at fault were shut down – in my view rightly so. When I was a judge

²² *Ackerman v Ackerman* [1972] Fam 1

²³ *Ackerman v Ackerman* [1972] Fam 225

²⁴ *Wachtel*, cited above, pp 79-80

of the Division, I usually felt that I simply could not get to the bottom of why one or other or both of the parties to the marriage had ultimately behaved so badly. Now that awards to the wife are, as I will explain, so large, one does sometimes hear a husband expostulate: “She was entirely at fault ... she left me for him ... how on earth can it be fair for me to have to pay her half of all I have?”. I have no doubt that occasionally his expostulation is fair but I suspect that, more often, his attitude (or that of a wife in a reverse situation) reveals no insight into the contribution which his (or her) conduct will have made to the breakdown of the marriage.

In 1928, in a judgment apparently thought at the time not even to have been worthy of inclusion in the official law reports, the President of the Divorce Division had observed that, in fixing the amount of the future maintenance of an innocent wife, he should perhaps seek to reflect the position in which she would have been if the marriage had continued.²⁵ It is interesting to note how a judge’s throw-away remark can sometimes take root. From 1971 to 1984 this so-called principle of “minimal loss” was enshrined in statute as being the objective of the whole exercise: so the Act provided that, after considering seven specified factors, the court should so exercise its powers as to place the parties, so far as it was practicable, in the financial position in which they would have been if the marriage had not broken down.²⁶ When we family advocates acted for wives, we therefore sought to demand that the court should provide them with funds for a life-style as comfortable as that enjoyed during the marriage. When we acted for husbands, however, we stressed that the objective was subject to what was practicable and that, from that perspective, the wife’s demands were ridiculous. On that particular issue the husbands almost always won: for it was hardly ever practicable to enable the wife to enjoy as comfortable a life-style as had been enjoyed during the marriage. In 1984 Parliament swept the objective away.²⁷ But the requirement to consider the specified factors remained.

Lord Nicholls was a Law Lord of powerful intellect whose principal area of expertise had been in Chancery and whose exposure to the law relating to divorce had been negligible. In 2000 an extraordinary thing happened. I get the impression that one morning, possibly while spreading marmalade on buttered toast, he will have told Lady Nicholls “I think that today I will introduce a sharing approach to the division of property on divorce”. For in the seminal case of *White v*

²⁵ *N v N* (1928) 138 LT 693, p697

²⁶ Matrimonial Proceedings and Property Act 1970, section 5(1), then Matrimonial Causes Act 1973, section 25(1)

²⁷ Matrimonial and Family Proceedings Act 1984, section 3

*White*²⁸ he persuaded his four colleagues, none of whom had any greater experience of English divorce law than he had, to agree to introduce into the law of financial provision following divorce the notion, said at that time to be only a yardstick to be used by way of cross-check against a result which the court had provisionally reached by other means, that the assets of the parties should be *shared*; and indeed that the sharing should be equal. There was nothing either in the specified factors or elsewhere in the governing statute which suggested an equal sharing of property. But it was – in principle – a far-sighted decision, whose time had come. It had been seriously considered 30 years earlier but nothing had come of it. In many other respected continental jurisdictions property is shared equally on divorce – albeit normally as a result of an agreement to that effect made by the parties prior to celebration of their marriage.

But in my opinion Lord Nicholls made one error. It would have been fine if he had said that his yardstick of equal division applied only to *matrimonial* property, in other words when accumulated by one or other or both of the parties during the marriage. That would have been no more than an extended recognition of the crucial part usually made by the home-maker in the creation of wealth during the marriage – which is indeed one of the specified factors of which the statute requires the court to take account. But, both then and later, Lord Nicholls made clear that his yardstick also applied in principle to *non-matrimonial* property, in other words property which one or other party had brought to the marriage or had acquired by gift or inheritance during it, although he observed that departure from an equal sharing of that type of property might more often be appropriate.²⁹

Inevitably Lord Nicholls' *yardstick* of equal division by way of cross-check soon came to be interpreted as a *starting point* and it is now accepted to be a sharing *principle*.³⁰

When I was a member of the Court of Appeal, I tried to go as far as I could – within the bounds of the doctrine of precedent – to limit the sharing principle to matrimonial property and to suggest that a transfer of non-matrimonial property should not take place except when it was dictated by what the transferee actually *needed*.³¹ I stressed that last exception because if, for example, a husband brings a mass of property into a long marriage, but if no further property is accumulated during it, the wife at the end of it still, for example, *needs* a home. Three months

²⁸ [2001] 1 AC 596

²⁹ *White*, cited above, p 610; *Miller v Miller* [2006] 2 AC 618, paras 23-25

³⁰ *Charman v Charman (No 4)* [2007] 1 FLR 1246, para 65

³¹ For example, *K v L*, [2012] 1 WLR 306, para 22

ago, in an appeal to the Privy Council from the British Virgin Islands, an opportunity presented itself for me to have another go at excluding non-matrimonial property from the sharing principle. It was a slight, but very welcome, surprise when Lady Hale, who was the president of that panel, approved that part of my draft.³² But have I nailed it? Only time will tell.

I should add that there is a move afoot to go even further and by statute to prohibit *any* transfer of non-matrimonial property to the other spouse otherwise than by agreement.³³ In the House of Lords there is a group of distinguished, well-meaning peers, who have convinced themselves that application of the present law of financial provision is too unpredictable; that access to it through the courts is too expensive; and that ex-wives should be forced to stand on their own two feet, largely irrespective of their age and circumstances. The trouble is that these would-be reformers lack experience of practice in the present system. I suspect that they believe too readily what they read in the papers and that they regard the exceptional cases as the norm. This leads them to exaggerate the difficulties of our current system and to ignore the virtue of principles which have a sufficient degree of elasticity to enable a reasonable result to be fitted to each case. Some of the rigid provisions which the group have included in their proposed reform bill, in particular the one to which I have referred, would have had grotesque consequences if they were to have been applied to a number of the cases in which I have participated during my career.

Another hot potato is the possibility under our current law for periodical payments to continue to be made by the husband to the wife for many years following the divorce, sometimes (unless she remarries) even until one of them dies. I well understand that it is a running sore for husbands to have to continue payments long after the divorce; and my experience is that their new wives are often even angrier about it than they are! The obligation can eat into their married life in more ways than one. The trouble is that it is usually unrealistic to tell a wife, left on her own perhaps at age 60 after a long marriage, that, following payments for say three years, she must fend for herself. So we judges have to strike a difficult balance. In my view it betrayed a lack of insight when, last month, one of these peers suggested³⁴ that, when we do decide to award long-term maintenance, we are motivated by antiquated notions of chivalry. Did you see the piece in yesterday's Observer³⁵? Apparently a new study confirms that, notwithstanding the

³² *Scatliffe v Scatliffe* [2016] UKPC 36, para 25(x)

³³ Divorce (Financial Provision) Bill, HL, 26 May 2016, clause 2(4)

³⁴ *Sunday Telegraph*, 12 February 2017, p9

³⁵ *The Observer*, 19 March 2017, p30

existing powers of the court, husbands tend to make a far stronger economic recovery from divorce than wives.

Is the continental system, which encourages the parties to provide for the financial consequences of divorce in advance of the marriage, preferable to our traditional post-breakdown analysis of all the circumstances which have by then arisen? The question now arises in an acute form under the label of “the pre-nuptial contract”. Ms Radmacher was a wealthy German heiress. Mr Granatino was a Frenchman with a good income but no substantial assets. Their pre-nuptial contract, executed in Germany, provided that, in the event of divorce, neither should make any financial claim against the other. After eight years of life in London their marriage broke down and he made financial claims against her. Until that case was decided, comments by English judges had mostly been dismissive of the legal significance here of a pre-nuptial contract.³⁶ But in 2010 the Supreme Court ruled that Mr Granatino should be held to the pre-nuptial contract and that the only provision which Ms Radmacher was obliged to make for him should be for what he needed in order to care appropriately for their two children during his periods of contact with them.³⁷ As a member of the Court of Appeal which had reached a similar conclusion, I very much approved of this decision.

But one feature of the Supreme Court’s judgments in that case may need further attention; and so I must express myself cautiously. The decision was of course that a pre-nuptial contract would be upheld only if, prior to entry into it, each party had (among other things) made full disclosure of their resources, had received legal advice and time to reflect on it and had entered into it voluntarily. But the decision was also that the contract would not be upheld if it would not be “fair” to hold a party to it.³⁸ But what, in this context, would be unfair? Clearly a contract which makes less provision for a party than he or she would have secured under the ordinary law does not, on that account, generate an unfair outcome; any contrary conclusion would make the pre-nuptial contract not worth the paper on which it was written. So at what point does the relevant unfairness kick in?

This question is part of a wider debate in which, unusually, I find myself not necessarily in agreement with my illustrious colleague, your former Chancellor, Lady Hale, who indeed dissented in the *Radmacher* case on the very issue of what was fair on the facts of that case. If

³⁶ For example, *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45, p66

³⁷ *Granatino v Radmacher* [2011] 1 AC 534

³⁸ *Granatino*, para 75

you decide to get married, to what extent should you be allowed to opt out of its normal legal consequences? Marriage is a public status, conferred by the state; it is still surrounded by various pre-conditions; and it is attended by various economic benefits – in particular, for the more affluent, the freedom of the inheriting widow or widower from inheritance tax. One view is that in those circumstances parties should not be able to opt for marriage-lite, in which the law's verdict about the extent of their obligations on divorce in the light of all the circumstances which have arisen is overridden by what they chose to agree perhaps many years earlier. I wonder, however, whether by modern standards, that view is too patronising. Does it make our law inappropriately intrusive into personal, adult, arrangements? My own view is that we have now reached the stage in which, if acting with appropriate care and understanding, parties should be allowed to elect the sort of marriage which they want.

I thank you, Mr President, for having invited me to give this address. As you have heard, my preparation for it has required me, among other things, to look back over my career. It has made me realise that I would not want to have changed my life in family law, as a barrister and then as a judge, for any other career in the world, legal or otherwise.