

# Divorce (Financial Provision) Bill 2017-2019

## Submission of Written Evidence

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### Summary

1. Baroness Deech's Divorce (Financial Provision) Bill 2017-2019 has three main components: equal division of net matrimonial assets (that is, deferred community of property), the curbing of periodical payments to a maximum of five years (unless this would lead to 'serious financial hardship') and binding prenuptial agreements (subject to standard procedural safeguards such as independent advice, cool-off periods and disclosure).
2. This submission focuses on the issues raised by the Divorce (Financial Provision) Bill, with particular focus on matters relevant to the legal status of nuptial agreements.

### Background to the Author of the Submission

3. The author is a Senior Lecturer in Law at Cardiff University and is author of several publications on financial provision on divorce and nuptial agreements, with particular focus on prenuptial agreements. These include the book *Prenuptial Agreements and the Presumption of Free Choice*<sup>1</sup> which was shortlisted for three major book prizes and was cited and applied by the High Court of Australia in *Thorne v Kennedy*.<sup>2</sup> This work was also cited by the Law Commission of England and Wales in its report on marital property agreements.<sup>3</sup>

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<sup>1</sup>S Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Hart 2015)

<sup>2</sup>[2017] HCA 49. See also S Thompson, 'Thorne v Kennedy: Why Australia's decision on prenups is important for English law' (2018) 48 *Family Law* 415-419.

<sup>3</sup>Law Commission, *Matrimonial Property, Needs and Agreements* (2014) Report no. 343.

## Reform in line with the Scottish system

4. Baroness Deech has proposed reform of financial provision on divorce in line with the Scottish system. She argues England and Wales should seek to emulate success of the Family Law (Scotland) Act 1985 by dividing matrimonial property equally and by making prenuptial agreements binding. The 1985 Act's effectiveness is supported by Mair, Mordaunt and Wasoff's insightful research, which indicates broad satisfaction among Scottish practitioners with the legislation.<sup>4</sup> The appeal of the Scottish experience is therefore unsurprising. But, although comparative perspectives can be invaluable, transposing the approach of another jurisdiction onto one's own must not be done before understanding the context in which the system operates. Whilst Scotland recognises contracts that look very much like prenuptial agreements, such contracts are different not least because they have evolved to opt out of a default system very different to that in England and Wales. Furthermore, Mair, Wasoff and Mackay describe factors such as long-established recognition of marriage-related contracts as contributing to a 'settlement-friendly' environment in Scotland that is very different from the legal landscape in England and Wales.<sup>5</sup> As a result, any comparison between English and Scottish law must be sensitive to jurisdictional differences.
  
5. There are some benefits to introducing a system based on equal division of assets acquired during the marriage. Cooke, Barlow and Callus have also acknowledged the attractions of the certainty achieved by this property regime.<sup>6</sup> Yet, although Baroness Deech repeatedly emphasises fair division of assets through equal sharing,<sup>7</sup> Cooke et al's research reminds us that even if equal division seems equivalent to fairness in the public mind, this is not necessarily the case in practice.<sup>8</sup> Ring-fencing non-matrimonial property and removing judicial discretion from property adjustment would result in a double blow to the non-moneyed spouse. This is because it would remove flexibility to divide non-matrimonial property so that spousal needs are met and it would remove

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<sup>4</sup> J Mair, E Mordaunt and F Wasoff, *Built to Last: The Family Law (Scotland) Act 1985 – 30 Years of Financial Provision on Divorce* (Nuffield 2016).

<sup>5</sup> J Mair, F Wasoff and K Mackay, *All Settled? A Study of Legally Binding Separation Agreements and Private Ordering in Scotland: Final Report* (ESRC 2013).

<sup>6</sup> E Cooke, A Barlow and T Callus, *Community of Property: A Regime for England and Wales?* (Nuffield 2006).

<sup>7</sup> Hansard, HL Deb vol 778, col 947, 27 January 2017)

<sup>8</sup> *Ibid.*, p. 36.

flexibility to recognise the value of non-financial contributions to the family in long marriages.

### **Reform of Periodical Payments**

6. A further blow to the non-moneyed spouse is in clause 5(c) of the Bill, which limits periodical payments to a maximum of five years unless serious financial hardship can be established. Recent research indicates that women take longer than men to recover economically on relationship breakdown at all levels of wealth,<sup>9</sup> and Baroness Deech's proposed curb on maintenance will only exacerbate this inequality. This provision would bring an end to the non-discrimination principle championed in *White v White*<sup>10</sup> by prioritising financial contributions and would see a return to the pre-*White* era whereby the non-moneyed spouse would be required to produce a budget of her needs so that it could be assessed whether five years of periodical payments is 'reasonable'. This is clearly in line with the outmoded pre-*White* mentality that the breadwinner's assets are his alone. Baroness Deech's justification for this is that the 'divorcing wives of oligarchs' are being awarded '£83,000 per annum [for] cocktail dresses – a sum that would provide 19.7 million water purification tablets for Africa'<sup>11</sup> whilst other ex-wives are struggling.
  
7. This gendered gold-digging trope is consistently used to justify the protection of the moneyed spouse's property to the detriment of the non-moneyed spouse. My research shows that the effect of this is to disproportionately harm women.<sup>12</sup> Refuting this, Baroness Deech says women want this reform, because there is now equality in work and education. There are indeed more female principal breadwinners than ever before but importantly, this does not mean modern division of labour in the home is equal. Indeed, limiting financial provision in a way that affects caregiving spouses reinforces structural inequalities between men and women in the family. As a result, future reform must pay attention to these inequalities that continue to permeate family life. However,

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<sup>9</sup> H Fisher and H Low, 'Recovery from Divorce: Comparing High and Low Income Couples' (2016) 30(3) *International Journal of Law, Policy and the Family* 338.

<sup>10</sup> [2010] UKHL 54

<sup>11</sup> Hansard, HL Deb vol 778, col 946, 27 January 2017.

<sup>12</sup> S Thompson, 'In Defence of the "Gold-Digger"' (2016) 6 (6) *Oñati Socio-Legal Series* 1225.

the effect of the Divorce (Financial Provision) Bill, if introduced, would be to assume a version of equality that does not represent the experiences of many couples in practice.

### **Binding Nuptial Agreements**

8. The Divorce (Financial Provision) Bill would introduce binding prenuptial and postnuptial agreements. It arguably makes sense that legislation seeking to introduce deferred community of property would also require a provision enabling couples to contract out of its one size fits all approach. However, clause 3 of the Bill would make nuptial agreements binding with almost no exception, an approach more extreme than in jurisdictions where such agreements are enforced.<sup>13</sup> The clause incorporates procedural safeguards at the drafting stage but there is no facility to account for changes in circumstances after the agreement has been signed, unless ‘serious financial hardship’ can be proven. Unlike the Law Commission’s recommendations<sup>14</sup> the Bill contains no requirement for spousal needs to be met that fall short of serious hardship.
  
9. Baroness Deech’s case for binding prenups is supported by a YouGov poll<sup>15</sup> indicating public appetite for reform. But no mention is made of Barlow and Smithson’s research, which presents a more nuanced picture of public opinion than YouGov and demonstrates that understanding the effects of binding prenups can change the perception of those surveyed.<sup>16</sup> Despite the clear need for reform and the Bill’s laudable intentions, the wider ramifications of these proposed reforms merits closer attention. There is a risk that these changes may exacerbate gendered inequalities between spouses both during marriage and on separation by rejecting judicial flexibility to that properly values caring contributions in favour of procedural certainty.
  
10. There is almost always inequality of power between parties entering nuptial agreements. One party will usually want an agreement more than the other. An agreement may not accurately reflect the wishes of both parties. More often than not,

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<sup>13</sup> See S Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Hart, 2015) chapter 3.

<sup>14</sup> Law Commission, *Matrimonial Property, Needs and Agreements* (2014) Report no. 343.

<sup>15</sup> YouGov, *Survey Results: Prenups* (2010).

<sup>16</sup> A Barlow and J Smithson, ‘Is Modern Marriage a Bargain: Exploring Perceptions of Pre-Nuptial Agreements in England and Wales’, (2012) 24 *Child and Family Law Quarterly* 304.

such an agreement is created *because* there is inequality of bargaining power. Furthermore, the course of marriage and family life can create dependency in a way that may not be anticipated by the terms of a nuptial agreement. So even if the parties begin their marriage as financially independent individuals, this is frequently not the case at the end of the marriage. Whilst matters sometimes work out as planned in the nuptial agreement, this should not detract from the fact that commonly, particularly in longer marriages, matters do change.

11. The dependencies that emerge during married life are likely to be gendered. Career sacrifices tend to be made by the wife when children are born, which might not have been provided for in a nuptial agreement. Domestic work (such as child care and housework) is gendered, and so more women than men give up financial independence to fulfil these roles.<sup>17</sup>
  
12. In addition, there are often gendered power issues when a nuptial agreement is created, as the non-moneyed spouse is more likely to be the woman and the moneyed spouse is more likely to be the man. This can be broken down further when looking at the source of wealth. In most English cases where the moneyed spouse is the wife, the source of the wealth is her family.<sup>18</sup> In most English cases where the moneyed spouse is the husband, the source of the wealth is his career. ‘Career wealth’ is different from ‘family wealth’ because it is possible for a party to generate ‘career wealth’ over the course of a marriage while their partner sacrifices their own career to support the family. A nuptial agreement may protect the enhanced earning capacity of the moneyed spouse without compensating the non-moneyed spouse’s career sacrifices that contributed to such enhanced earnings.
  
13. The issues with this gendered division are exacerbated further given that the non-moneyed spouse tends to have less leverage when negotiating the terms of a nuptial agreement, especially if that spouse has no particular desire for a nuptial agreement to be signed. Any future legislative reform must take into account this power imbalance that frequently affects nuptial agreements.

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<sup>17</sup> S Thompson, ‘In Defence of the “Gold-Digger”’ (2016) 6(6) *Oñati Socio-Legal Series* 1225.

<sup>18</sup> *Radmacher v Granatino* [2010] UKSC 42; *Luckwell v Limata* [2014] EWHC 1035 (Fam).

14. One solution to this could be to not enforce nuptial agreements at all. But this would take power away from couples for whom it is important to determine financial matters in the event of relationship breakdown. As a result, other solutions must be explored.
15. Aside from the Divorce (Financial Provision) Bill, the Law Commission of England and Wales has proposed reform of nuptial agreements pursuant to the Nuptial Agreements Bill.<sup>19</sup> The safeguards built into this Bill undoubtedly contribute to a higher overall standard of fairness than the Divorce (Financial Provision) Bill, as there is scope to make adjustment beyond ameliorating ‘serious financial hardship’ for the parties’ housing, child care and other financial needs.
16. These safeguards are important because nuptial agreements frequently provide for future circumstances that are often impossible to predict. One of the most common change in circumstances is a change in lifestyle as a result of the increasing success of the moneyed spouse during the marriage. In these situations, the lesser income producing spouse could receive a relatively small percentage of this wealth under a nuptial agreement, having to scale down his or her lifestyle after separation. It is imperative that there is scope to take such changing circumstances into account at the time the nuptial agreement is given effect.
17. It is possible to reconcile the provisions governing nuptial agreements with a discretionary approach to property adjustment if the court adopts a relational approach (as the High Court of Australia did in *Thorne v Kennedy*).<sup>20</sup> This means considering the wider context in which the nuptial agreement was signed. It should not be assumed that both parties have exercised autonomy in the signing of a nuptial agreement, as doing so serves to side-line contextual factors such as how and why the agreement was made. Assuming autonomy also means the question of *why* an individual would knowingly sign a bad agreement is not asked.

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<sup>19</sup> Law Commission, *Matrimonial Property, Needs and Agreements* (2014) Report no. 343.

<sup>20</sup> I have developed this approach further in a theory I call Feminist Relational Contract Theory, or FRCT. See S Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Hart 2015), chapter 6.

18. It is imperative that family violence is taken into account where a couple has entered into a nuptial agreement, including family violence that commenced after the agreement was finalised. Ignoring such violence would also mean ignoring parties' changing intentions of over the course of the relationship, so that the nuptial agreement would only represent the parties' intentions in the discrete moment it was signed. Such an approach marginalises important context pertaining to the nuptial agreement. Indeed, understanding the way people make decisions and enter agreements is not based on the concept of an isolated rational individual. A richer understanding of nuptial agreements that pays attention to family violence and other relational inequalities does not force the court to choose between either respecting party autonomy or protecting those rendered economically vulnerable under an agreement. A deeper, more contextual enquiry enables the court to do both.
19. Nuptial agreements should not automatically be deemed unenforceable, but by adopting a different approach as suggested in my book,<sup>21</sup> which views the intentions of the parties as developing over time, the focus is on the parties' relationship instead of the bargaining process at the time the agreement was signed. This approach considers conduct as evidence of party autonomy in the overall context of the relationship. The most obvious incidences would be where the parties change their careers, income, or deal with assets differently from the way anticipated by the agreement. But the focus of this approach would not be on these incidents per se; it would be on how, for example, a career change had affected the parties' relationship with one another and their intentions regarding nuptial agreements.
20. In the United States<sup>22</sup> there are cases that suggest that this approach could be effective in practice. In Oregon, in *Baxter v Baxter*,<sup>23</sup> the court held that the parties' mutual intentions had changed. The prenuptial agreement in this case specified that ownership of the parties' assets would remain separate during the first 13 years of their marriage, during the latter part of the marriage the wife left her job to work unpaid in her

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<sup>21</sup> S Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Hart 2015), 182.

<sup>22</sup> See S Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Hart 2015), chapter 3 for the results of an empirical study of attorneys' experiences of nuptial agreements in New York, where such agreements have been binding since the 1980s.

<sup>23</sup> 911 P 2d 343 (Oregon 1996).

husband's business and paid off some of the business debt using her separate assets. Accordingly, variation was justified by the court.

21. When deciding the weight to be attached to nuptial agreements, there must be scope for the court to appreciate patterns of power and the lived realities of the parties to agreements. This means ensuring that the provisions affecting nuptial agreements in the Divorce (Financial Provision) Bill have the capacity to appreciate parties' changing circumstances after a nuptial agreement is signed. This is important if it is accepted that nuptial agreements are not only concerned with the maximisation of wealth. It must be ensured that the voices of those on the short end of power because of family violence or because of economic disadvantage incurred through care are not drowned out by those wishing to guarantee their assets will be protected.

### **Concluding remarks**

22. Each component of the Divorce (Financial Provision) Bill seeks to reform the law of financial provision on divorce pursuant to the Matrimonial Causes Act 1973 in order to clean up its 'antagonistic and inflammatory' nature and make it more certain.<sup>24</sup> Baroness Deech's proposals would indeed bring more certainty, something that judges, practitioners and academics agree is especially pressing since the removal of legal aid from Family Law. However, closer scrutiny of Baroness Deech's arguments is vital in order to determine what would be lost by introducing the legislative provisions she is proposing. When this Bill was debated previously, Baroness Deech noted that most 'people prefer the certainty of misery to the misery of uncertainty'.<sup>25</sup> However, she does not explain what certain misery means, nor does she acknowledge the potentially harmful consequences of reform as detailed in academic research.

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<sup>24</sup> Hansard, HL Deb vol 778, col 945, 27 January 2017.

<sup>25</sup> Hansard, HL Deb vol 778, col 948, 27 January 2017.

## LIST OF RELEVANT PUBLICATIONS

Thompson, S., (2018). *Thorne v Kennedy*: Why Australia's decision on prenups is important for English law. *Family Law* 48, pp. 415-419, free text available at:

<<http://orca.cf.ac.uk/110827/>>.

Thompson, S. and Sandberg, R., (2017). Common defects of the Divorce Bill and Arbitration and Mediation Services (Equality) Bill 2016-17. *Family Law* 47, pp. 425-451, free text available at: <<http://orca.cf.ac.uk/99619/>>.

Thompson, S., (2016). In defence of the 'gold digger'. *Oñati Socio-Legal Series* 6(6), pp. 1225-1248, available open access at:

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2887022](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2887022)>.

Thompson, S., (2015). *Prenuptial agreements and the presumption of free choice: Issues of power in theory and practice*. Hart Publishing.

Thompson, S., (2011). Levelling the prenuptial playing field: Is independent legal advice the answer? *International Family Law* 4, pp. 327-331.