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Unreported nuptial agreements in England and Wales

Sharon Thompson [1,*]

[1]School of Law and Politics, Cardiff University, Cardiff, United Kingdom

*Corresponding author: E-mail: ThompsonS20@cardiff.ac.uk

ABSTRACT

Pre-nuptial agreements are not binding under legislation in England and Wales but can have decisive weight on divorce provided they are not unfair. Pressure is mounting for reform, because it is not always clear when the court will determine when an agreement is unfair. However, circumspection is needed before introducing legislation that would make such agreements binding. There are gaps in what we know about pre- and post-nuptial agreements on the ground. There are no data on how the current judge-made law on nuptial agreements is applied (or even *if* it is applied) outside the context of the 'big money' case. This article uses new interview data with barristers and FDR judges to explore these unreported nuptial agreements. It presents six findings that reveal much that is not apparent in big money cases, while informing key questions such as whether nuptial agreements should be made binding, if there might be unintended consequences of reform, and how fairness could be facilitated if legislation were to be introduced.

KEYWORDS: nuptial agreements, divorce, financial remedies, pre-nuptial agreements, post-nuptial agreements

I. INTRODUCTION

One of the great modern ironies of English and Welsh family law is that the 'law on the books'[1] regarding the financial consequences of relationship breakdown has little relevance for many divorcing couples. As Hitchings et al.'s research has shown, around one third formally finalize their finances with a court order and only one in 10 go to court.[2] Even the vast majority of those who do go to court will not have a nuptial agreement, which sets out asset division in the event of divorce, and the main challenge for the judge will be meeting the parties' needs. Despite this, nuptial agreements are increasingly part of the zeitgeist in

[1] R. Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12.

[2] E. Hitchings, C. Bryson, G. Douglas, S. Purdon, and J. Birchall, *Fair Shares? Sorting Out Money and Property on Divorce: Report* (Nuffield, 2023).

England and Wales amongst younger generations, with 46–47 percent of British respondents under-50 viewing pre-nuptial agreements as a 'good idea', compared to 37 percent of those surveyed aged 65 and above.[3] While attitudes towards and enforcement of nuptial agreements have been explored nationally and internationally,[4] there are no official statistics confirming anecdotal evidence that nuptial agreements are more popular in England than ever before. Moreover, there are no data on how the current judge-made law on nuptial agreements is applied (or even *if* it is applied) outside the context of the 'big money' case. In short, it is difficult to get insight into whether couples even have a nuptial agreement when they are not millionaire businessmen,[5] footballers, or wealthy heiresses.[6]

Clearly, there are gaps in what we know about pre- and post-nuptial agreements on the ground. As a result, this article relies on new interview data to find out whether the reported cases provide an accurate representation of those cases that do go to court but are either unreported or settled at the Financial Dispute Resolution Appointment (FDR), which is a court hearing that follows a divorcing couple's application for a financial order. We know that the landscape of the 'everyday' small money divorce is not represented by big money cases,[7] since these cases are unlikely to go to court and will not be reported. The everyday divorce is therefore a known unknown.[8] But the landscape of unreported nuptial agreements, which this article deals with, is an unknown unknown, because when we assume that nuptial agreements feature only in big money cases, we are also likely to assume the case law is representative when this is not necessarily so. By uncovering the unknown unknown, we may discover that which we are not even aware that we do not understand.

This is a timely enquiry for two reasons. First, it is more than 15 years since the Supreme Court in *Radmacher v Granatino* gave nuptial agreements the maximum possible judicial weight without further parliamentary intervention.[9] Enough time has elapsed for those couples who signed pre-nups and post-nups in the aftermath of *Radmacher*'s endorsement to be getting divorced. It is now the best time since *Radmacher* to get a sense of how these agreements are affecting financial settlements and judicial indications in FDRs because a more detailed picture of the consequences of decisive agreements is emerging in a broader range of contexts. Second, legislative reform of nuptial agreements once again has been under consideration by the Law Commission of England and Wales as part of its more general review of financial remedies law.[10]

The study on which this article is based features interviews with 23 barristers about their experiences of nuptial agreements in the FDR context. Because the judge's indication will

[3] M. Smith, 'Are Pre-nuptial Agreements Unromantic?' *YouGov* (15 March 2023) <https://yougov.co.uk/topics/society/articles-reports/2023/03/15/are-pre-nuptial-agreements-unromantic>. 15,109 adults in England, Wales, and Scotland were surveyed between 16 January and 19 February 2023.

[4] 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; B. Bix, 'Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage' (1998) 40 *William and Mary Law Review* 145; L.-A. Buckley, 'Autonomy and Prenuptial Agreements in Ireland: A Relational Analysis' (2010) 38 *Legal Studies* 164; L.-A. Buckley, 'Relational Theory and Choice of Rhetoric in the Supreme Court of Canada' (2015) 29 *Canadian Journal of Family Law* 251, 258; M. Kaye, L. Sarmas, and B. Fehlberg, B Smyth, 'Prenuptial agreements—What's happening?' (2023) 36(1) *Australian Journal of Family Law* 38; R. Probert and T. Dodsworth, 'Contracts and Relationships of Love and Trust' in E Peel and R Probert (eds.), *Shaping the Law of Obligations: Essays in Honour of Ewan McKendrick* (Oxford University Press, 2023); aq_page J Scherpe (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart, 2012).

[5] See, e.g. *Versteegh v Versteegh* [2018] EWCA Civ 1050.

[6] See, e.g. *Radmacher v Granatino* [2010] UKSC 42; *Luckwell v Limata* [2014] EWHC 502 (Fam).

[7] E. Hitchings, 'Chaos or Consistency? Ancillary Relief in the 'Everyday' Case' in R. Probert and J. Miles (eds.), *Sharing Lives, Dividing Assets* (Hart, 2009).aq_page

[8] Although this is less of an unknown now thanks to the research in Hitchings, Bryson, Douglas, Purdon, and Birchall (n 2).

[9] [2010] UKSC 42.

[10] Law Commission, *Financial Remedies on Divorce* (Law Com No 417, 2024). This was considered previously in: Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014).

reflect what may happen should the case go to final hearing, we might logically assume that the resolution of disputes about nuptial agreements following an FDR hearing is no different from what we see in the case law. But the contextual differences matter. In an FDR hearing, the judge's indication is driven by the goal of settlement; his or her aim is not to determine who has 'won' the dispute.[11] As my findings will also show, court resources can determine how a nuptial agreement is evaluated, and so the outcome might differ depending upon whether the FDR is private. The flexibility of the current law—for better or for worse—also furnishes FDR judges with broad discretion to interpret parties' circumstances in various ways.

This article is divided into three main sections. An overview of the current law on nuptial agreements according to reported cases is provided in Section 2, followed by six findings from my study in Section 3. Section 4 looks to the question of legislative reform: whether nuptial agreements *should* be made binding, whether there might be unintended consequences of reform, and how fairness might be facilitated if legislation were to be introduced.

II. WHAT WE DO KNOW—REPORTED NUPTIAL AGREEMENTS IN ENGLAND AND WALES

Pre- and post- nuptial agreements are not binding in England and Wales. Instead, they are given effect as part of a judge's discretion to determine the financial consequences of divorce. Pursuant to *Radmacher v Granatino*, a valid nuptial agreement must comply with a two-step test. First, the agreement must have been freely entered into by the parties.[12] Secondly, the agreement will not be upheld if the court determines that it would not be fair to do so.[13]

The Supreme Court has described circumstances in which it would be unfair for an agreement to be given effect as follows:

> 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.[14]

As a result, the court typically refuses to give effect to an agreement because the judge does not consider sufficient provision to have been made for the parties' needs.[15] This focus upon needs has prevailed even when the parties have sought to have a pre-nup set aside because their choice to sign was constrained by pressure.[16] However, when giving effect to an agreement is equated to giving effect to individual autonomy (even though one of the parties

[11] The judicial indication is not binding (ie it is a suggested solution, not a decision based upon the facts of the case).

[12] Standard contractual vitiating factors, such as duress, fraud, and misrepresentation will taint an agreement's validity. While financial disclosure and independent legal advice might affect the voluntariness of an agreement, these are not 'tick-box' procedural requirements for a valid agreement.

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

[14] *Radmacher* [81] (Lord Phillips).

[15] *MN v AN* [2023] EWHC 613 (Fam); *Luckwell v Limata* [2014] EWHC 502; *Brack v Brack* [2018] EWCA 2862; S. Thompson, 'Using Feminist Relational Contract Theory to Build Upon Consentability: A Case Study of Prenups' (2020) 66 *Loyola Law Review* 55; R. Probert and T. Dnodsworth, 'Contracts and Relationships of Love and Trust' in E Peel and R Probert (eds), *Shaping the Law of Obligations: Essays in Honour of Ewan McKendrick* (Oxford University Press, 2023).

[16] See eg *KA v MA (Prenuptial Agreement: Needs)* [2018] EWHC 499 (Fam).

might often be unable to exercise that autonomy), the corollary of this is that varying or disregarding a pre-nup because of needs is viewed as a threat to autonomy. When there appears to be an artificial choice between meeting needs or promoting autonomy, the scope of needs is in danger of being narrowly constrained by the court to avoid accusations of paternalism.[17] *Cummings v Fawn* is one illustration of this[18]:

> Imagine that the discretionary range is a line of books on a shelf bracketed left and right by book-ends. The book-ends may be quite far apart. The right book-end represents a comfortable, perhaps even luxurious, life-style. The left book-end represents a spartan lifestyle catering for not much more than essentials. The space in between is the discretionary range. When the Supreme Court says that it may not be fair to uphold an agreement which leaves the applicant in a predicament of real need, it is clearly saying that if the result of the agreement would place the applicant in a standard of living to the left of the left-hand bookend, then that would be unfair. It is also saying that to make the agreement fair it should be augmented by no more than is necessary to move the applicant's lifestyle just to the right of that left-hand bookend.[19]

The judge's focus upon basic provision of need in this case decontextualized the Supreme Court's statement, homing in on the words 'real need' while sidelining the stated importance of recognizing how the work of one spouse enabled the other to excel in their career, because they have been relatively unencumbered by care and domestic obligations.

Another factor that is directly related to the exercise of autonomy is the imbalance of power. The pressure when signing nuptial agreements has been normalized by the court, as Peel J explains:

> In almost every Pre or Post Marital Agreement one or other, or both, parties are under a degree of pressure, and emotions may run high. The collision of the excitement engendered by prospective marriage, and the hard realities of negotiating for the breakdown of such a marriage, can be acutely difficult for parties. Tension and disagreement may ensue. If, as here, one side of the family is applying pressure, the difficulties are accentuated. But in the end, each party has to make a choice and unless undue pressure can be demonstrated, the court will ordinarily uphold the agreement.[20]

This suggests power inequalities are now accepted as a feature of, rather than a problem with, nuptial agreements. While autonomy is used to justify the current legal status of nuptial agreements more generally, it does not factor much in the way they are adjudicated in the reported cases. The next section turns to whether this is reflected in unreported cases too.

III. WHAT WE DO NOT KNOW—UNREPORTED NUPTIAL AGREEMENTS

This section discusses six preliminary findings from a study on lawyers' experiences of unreported nuptial agreements. These interviews were carried out from November to

[17] See Lord Phillips in Radmacher: 'It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best': *Radmacher* [78].

[18] *Cummings v Fawn* [2023] EWHC 830 (Fam).

[19] *Cummings* [14]. This case concerned a *Xydhias* agreement rather than a nuptial agreement, but these obiter comments relate to Mostyn J's assessment of what constitutes a fair agreement more generally. The judge also overshadowed the wife's contention in this case that there was material non-disclosure; a factor that is of direct relevance to her exercise of autonomy.

[20] *WC v HC* [2022] EWFC 22 [31].

December 2024.[21] I spoke to 23 barristers, FDR judges and Private FDR judges from a range of locations around England, including London and Southeast England, Liverpool, and the Midlands about their experience of nuptial agreements. Some interviewees specialized in high-net-worth cases, while others dealt mostly with lower/modest asset cases. Some interviewees worked exclusively as Private FDR judges, making indications regarding nuptial agreements at the time of relationship breakdown, while others were routinely involved in advising clients during the drafting process. All interview extracts have been anonymized, which has included the removal of specific details relating to, for example, niche careers, car brands, and other characteristics about property that might enable jigsaw identification.

1. Finding 1: Nuptial agreements are no longer the preserve of the rich

Reported cases involving nuptial agreements tend to involve substantial levels of wealth, and it makes sense that most couples would not bother getting an agreement unless there was something significant worth protecting in the event of divorce. Many of the barristers I spoke to were involved in the drafting process of nuptial agreements as well as the FDR and mentioned the complicated and expensive work involved in preparing a properly negotiated pre-nup. It is therefore logical to assume that nuptial agreements are the preserve of the rich, bearing little relevance to the rest of the population. However, several interviewees contradicted this assumption, noting that sufficient time has passed since *Radmacher* for pre-nups to 'trickle down'[22] into the public consciousness. Not only are pre-nuptial agreements more common, but they are also entered into when the parties have modest assets. As interviewee 13 notes, 'even at a quite modest level of cases I think it's becoming more socially acceptable'.

Another interviewee said that 'it's just exploded, and it's definitely not your average prenup person or client'. As they put it:

> It's no longer the child of a super international, uber rich family. They're still looking for prenups, obviously, but it's now your average London City professional or professional couple who are increasingly doing it, either because they consider themselves to be financially independent people, and they want that to continue during the marriage, so they're probably viewing marriage in a slightly different way to maybe previous generations, or because of inheritance and I think that's just becoming so much more significant now.[23]

The range of wealth for contracting parties is much greater than the reported cases suggest:

> I do get inquiries from people who I look at and I just go, well, you wouldn't have done a prenup 10 years ago … [There is] a wider awareness of them. People know what they are. I have had those conversations with not really wealthy people—they might have just a property and a couple of grand in a bank account—you're still getting those people … And this isn't the second marriage. They are first marriages with people [in their] late 30s, early 40s, who are doing prenups now, having just bought a property. And that's the only asset that that group of people [has] … to be fair the vast majority still aren't, but they are popping up now … It's just in the public consciousness and we both know this is broadly not

[21] University research ethics approval was obtained in advance of this study. 70 barristers and FDR evaluators were contacted for interview. Interviewees were targeted according to their expertise of nuptial agreements as stated on Chambers' websites. Snowball sampling was also employed. Interviews were carried out via Zoom until saturation point was reached. Thematic analysis was used to process and identify patterns within the interview data.

[22] Interviewee 21.

[23] Interviewee 3.

automatically enforceable, but people still think that they're gonna get a level of protection with them.[24]

While nuptial agreements are now sought out by those with more modest assets, under the current law they are unlikely to have much, if any, relevance to the outcome on divorce:

[These] sort of cases I'm dealing with right now—modest to low value—it won't make that much difference … where it's plainly obvious that needs is the only thing that's going to lead it, because the prenup was never going to be capable of meeting needs.[25]

An example of this is as follows:

I did a prenup with a very young couple last year, just before getting married, that literally was a prenup to protect £20,000 in a bank account. They didn't even have a property yet; they could not yet have been in their 30s as well. I did a prenup for them, just to protect 20 grand in a bank account, which was a bit silly in my view, because I said to them, well, are you still going to even have that should a divorce come in 20 years from now?

That a nuptial agreement was insisted upon despite this interviewee's advice that it was not necessary is telling. This could simply be because of increased cultural awareness of such agreements, and the perhaps misguided need for an agreement because the default law of financial remedies is not properly understood.[26] In these scenarios, when there is a nuptial agreement, but the pot of assets is small, the current law does a lot to protect vulnerable parties. By ensuring that agreements must not be unfair when given effect by the court, there is still flexibility to try and stretch all of the assets to meet the parties' needs where possible.

Yet this finding is still concerning. It suggests a greater trend of couples wanting to marry without signing up to marriage's legal consequences.[27] And if legislative reform were to make nuptial agreements binding without substantive safeguards in place, the use of such agreements in these lower income cases could create severe hardship for families.[28]

A further concern is that nuptial agreements are sometimes used strategically in needs cases to limit the recipient's claim. Indeed, several interviewees told me that their clients were advised to sign a nuptial agreement in mid-range money cases even though the level of wealth meant the terms of the agreement were unlikely to be given effect on divorce: 'Whenever I'm involved, it's always sold as like an insurance policy. You might have an excess, but you know, it's better to have it than not'.[29]

Or, as another interviewee told me:

even if it is not followed, the fact of this agreement being in place, it may well have an impact on the assessment of needs. And therefore, you know, even if it is unfair, it may still help you to have it.[30]

[24] Interviewee 2.

[25] Interviewee 2.

[26] As indicated by research in E Hitchings, C Bryson, G Douglas, S Purdon, and J Birchall, *Fair Shares? Sorting out money and property on divorce: Report* (Nuffield 2023).

[27] Interviewees also noted the pressure from parents to sign a pre-nuptial agreement. This finding is corroborated by empirical research undertaken in Australia: M Kaye, L Sarmas and B Fehlberg, 'Prenuptial agreements: lawyers' reflections on the influence of family' (2025) Journal of Social Welfare and Family Law.

[28] See eg Baroness Deech's Divorce (Financial Provision) Bill which focuses upon procedural, not substantive safeguards.

[29] Interviewee 14.

[30] Interviewee 3.

Put simply, even if deemed unfair by the judge, a nuptial agreement can still limit that judge's needs assessment on divorce. And so, interviewees told me that nuptial agreements were being used not just to contract out of sharing, but to contract out of needs:

> The 2014 Law Commission proposals, I mean, we've already adopted them and gone way further … because they said you couldn't exclude needs. And we have said, you know, you cannot exclude needs [entirely], but you can certainly put them into a bracket.[31]

This leads to the second finding, which relates to how needs are assessed when a nuptial agreement is in place.

2. Finding 2: Fairness (at the time of enforcement) normally means meeting needs, but the meaning of needs varies

As the Supreme Court has said in *Radmacher*, a nuptial agreement will not be given effect if it purports to leave one of the parties in a 'predicament of real need'.[32] But the reported cases have not confirmed definitively whether this means needs under a nuptial agreement is different from needs absent an agreement. On the one hand, Mostyn J has suggested *Radmacher* needs are more scaled back, sufficient only to keep the lesser-moneyed spouse from 'destitution'.[33] On the other hand, Peel J has said this approach is 'too straitjacketing'.[34] Technically, the latter must be the case, for the court cannot oust its own jurisdiction to consider needs within the context of the other section 25 factors, such as the parties' standard of living.[35]

However, almost all interviewees told me that pre-nups are being used to 'lower the bar' of needs, suggesting that in FDR hearings, the scope of needs is being tightened substantially in many cases.[36] In one interviewee's view, this more conservative assessment of needs was because 'where there is a nuptial agreement, that is the starting point', which can lead to practical differences in terms of computation.[37]

Another interviewee explained that a more conservative assessment could influence, for example, the level of housing provision made for the lesser-moneyed spouse:

> Well, it's the difference, isn't it between, for example, outright housing or a sort of a more like Schedule 1 type housing provision, or, you know, much less generous provision. Those kinds of cases where you sort of get use of a bigger house for a bit, and then you have to sell it, and then you have to release some money, and then you downsize to an even smaller house. That's obviously quite mean, but then it aligns more with a Schedule 1 type approach. But some judges are more flexible on that, and that's harder to gauge. It makes it harder to advise on it, obviously, because you don't really know how far a judge is going to stick their neck out, but the guidance from the High Court, it is as a kind of a proper ceiling, a proper depressor of the award, which it should be, because the whole point of it in the first place was to limit claims.[38]

[31] Interviewee 17.
[32] *Radmacher* [81].
[33] *Kremen v Agrest (No 11)* [2021] EWHC 45 (Fam), [72].
[34] *HD v WB* [2023] EWFC 2 [53].
[35] Underscored by King LJ in *Brack v Brack* [2018] EWCA 2862 at [131].
[36] Interviewee 13
[37] Interviewee 19.
[38] Interviewee 11

Others said the needs assessment (and the judicial indication more broadly) could depend upon the judge:

> It's very unpredictable. It's very difficult to identify a consistent approach being deployed. And I think it really depends on who your judges are and what they have for breakfast that morning. Some judges see pre-nups as just, you know, a factor in the case. Other judges take a proper kind of hardcore approach and think that, you know, if you signed a pre-nup, you've got to go some way before you're getting out of it. So, it's hard to predict.[39]

Or, as another interviewee put it:

> The lower down the judicial pecking order, you get a broader diversity of opinions. You know, between [judge] A and [judge] B, you might get a really, really different approach.[40]

This was also acknowledged by judges I interviewed:

> I'm a great fan of flexibility and discretion. I'm not really a fan of the straitjacket. There are some judges who are very much in favour of, you know, taking a fairly hard line and saying: "You're a grown up. You can read the document, it's clear, you should be held to your bargain". Personally, I take a sort of slightly more flexible view of things, and I always think it's better to try and arrive at an outcome which ensures everyone's needs are met at a sensible level, and there's an overall fair outcome.[41]

This lack of consistency as to how needs will be assessed in the FDR can present real problems for barristers (and solicitors) when advising clients. As we will see in the final section of this article, more than one interviewee suggested that reform of nuptial agreements (and financial remedies more generally) should provide more clarity on needs.

But even a template at the drafting stage, or rigid mode of assessment in the courtroom on divorce cannot alter the fact that circumstances often change between the signing of the agreement and the divorce in unknowable ways. For instance, one interviewee told me about an FDR that assessed needs generously because of the severity of the wife's illness:

> Just before they split up, she got very serious cancer. She couldn't work, and [the evaluator] was just so struck by the illness and said it was obviously such a magnetic section 25 factor that really he just looked at meeting her needs at a generous level for the rest of her life. The prenup made no difference there.[42]

Other interviewees were of the view that the needs assessment could be gendered:

> If the man is trying to get out of the nuptial agreement, I do find judges will be harder on them in terms of assessing their needs than if a woman were to argue it.[43]

[39] Interviewee 10.
[40] Interviewee 3.
[41] Interviewee 22.
[42] Interviewee 1.
[43] Interviewee 9. Several interviewees also referred to the approach taken in *Luckwell v Limata* [2014] EWHC 502 (Fam)—and *Radmacher* itself—as evidence of a gendered approach that is more punitive to men than women.

Or, as another put it:

> Men who are trying to repudiate, there's a definite gender bias there. The men in their 30s, the attitude, which isn't spoken, but you can feel it, is, well, just go and get a job. You're a man, whereas a woman in that position would find it much easier to persuade the court that she needs this provision.[44]

That the assessment of needs can be arbitrary in this way creates difficulties for those lawyers aiming to provide comprehensive legal advice. Indeed, several interviewees noted that nuptial agreements are: 'difficult to draft—it's all speculative'.[45] Or as another put it: 'they're incredibly difficult to devise, and I feel they're getting more difficult, because the advice that you have to provide with them has about 85 caveats.[46] While these difficulties cannot be circumvented, lawyers have tried to build flexibility into the agreement's terms where possible, as the next finding indicates.

3. Finding 3: The legal status of nuptial agreements influences how they are drafted

The uncertainty of the needs assessment, which appears to be exacerbated by an inconsistent approach amongst FDR judges, has influenced how lawyers phrase terms within the agreement. For instance, one type of safeguard built into agreements was referred to as a 'needs shortfall' provision:

> I am now … as a matter of course [including] what's called a needs shortfall provision drafted into the prenup, which says that to the extent that separate property won't enable them to meet their housing and/or income needs at the time of the divorce, the other party, to the extent it's affordable to them, will pay them what they need, and I now include wording that says that the calculation of needs won't be any less generous than it would otherwise be absent there being a prenup.[47]

This can help the lesser-moneyed spouse in those cases where the moneyed spouse is trying to use the nuptial agreement to limit their needs claim. Some interviewees told me the 'needs shortfall' provision ideally would be coupled with a review clause. Interviewees explained the benefit of review clauses, not only in making nuptial agreements even more difficult to challenge on relationship breakdown, but also because they can provide an important level of protection to the economically vulnerable spouse:

> In those cases where I'm acting for someone on the weaker end of the power imbalance, I generally will insist on at least having a review clause in there on, you know, for example, the birth of a child. I mean, it's more than often than not, still the woman who is, is that side of it. And, you know, potentially every 10 years, or something like that, just to have that one element. But again, I don't know how that would play out [on divorce], I haven't seen a judgment dealing with undermining a prenup because the review clause wasn't acted upon.[48]

[44] Interviewee 1.
[45] Interviewee 11.
[46] Interviewee 1.
[47] Interviewee 3.
[48] Interviewee 3.

It is therefore frustrating for these lawyers when the moneyed spouse pushes back on the ability to review:

> And if you have those shortfall provisions, I'm trying to button in a review clause anyway, I would inevitably get back a response saying, well, we've got the shortfall provision, why do we need to review? I'm not going to agree to that! But that does mean that you don't then have that built in scope to fundamentally change the agreement if you have, let's say, a child, or things change dramatically, and you just think, actually, this isn't really fair anymore, even though it's still meeting needs.[49]

As this interviewee also noted, review clauses seem to have 'gone out of fashion':

> because essentially, people just want to put their prenup in a cupboard and never look at it. And so it's actually quite unlikely that people would remember to follow up on a review and then left in a scenario where that could be used tactically to try and undermine the terms of the prenup, even though you always include within a review clause, wording that says, if this review clause is triggered but not acted upon, that will not change the intended effects of the terms of disagreement. You could still fight against it.[50]

Another important finding regarding how the current law influences not the lawyers, but the clients themselves, relates to the second half of the *Radmacher* test: that agreements must not be unfair on divorce. More than one interviewee told me that compliance with the fairness assessment helped make their client more reasonable during the drafting process than they otherwise would have been:

> The fairness argument is quite helpful to try to get your wealthier client to be a bit more reasonable and decent at the beginning, because you can say to them, you can't screw them into the ground like this. It's not going to work, because the court will let them out at the other end. So, you're going to have to, for example, put more money on the table, because otherwise this isn't really worth the paper it's written on. If you say [in the agreement] you go away with absolutely nothing, regardless of children and lifestyle and everything, the court's not going to think that's fair.
>
> So, you can use that at the beginning to say to your—call it paying husband—client, you need to put more into this, or it needs to be sort of more locked into a reasonable approach. And that generally works.[51]

This shows how much work the fairness safeguard is doing not only at the time of enforcement, but before the marriage too, which patently has significant implications for any potential reform. That is, if the fairness safeguard is removed, there will be individuals who cannot be persuaded to negotiate a reasonable nuptial agreement, and the consequences for the financially vulnerable spouse could be dire.

4. Finding 4: Nuptial agreements are increasingly difficult to challenge

When asked about the weight now attached to nuptial agreements in the FDR process, the following response was typical: 'I think we are in a movement now where prenups are going

[49] Ibid.
[50] Ibid.
[51] Interviewee 11.

to be more enforceable than they ever have been'.[52] This appears to be following a series of reported cases handed down from the High Court Bench.

Several interviewees suggested that the practical consequences of limited court resources and time help to explain why it is very difficult to challenge a nuptial agreement:

> There's still a big margin of appreciation … if you're in a court FDR, the system can range from anything from a judge refusing to give an indication at all, shouting at everyone and telling them to get out their court, all the way through to a moderately detailed indication with the judge who's read the papers and understands what's going on. But in, I would say, probably in the vast bulk of cases, the level of indication given inside the court system, by virtue of the fact the court is so overburdened with these cases and has no judicial preparation time, is surface level to put it kindly. So, I don't think I've ever been to a court FDR, where a judge has really taken apart a prenuptial agreement or a postnuptial agreement and given a firm indication.[53]

It is important to note here the contextual differences between court-based and Private FDR. In court, a judge might hear several cases in one day and often does not have time to read documents in detail, meaning complex aspects of the case can be disregarded. In contrast, a Private FDR takes place outside court. The judge or evaluator overseeing the process is normally a barrister or retired judge, and they can spend the entire day on one case, giving the substantially more time to read the submissions and documentation in advance. As one Private FDR judge put it:

> Time is the main thing. So, it's time to prepare, time to listen to the parties, time to reflect on your indication, and then time for the parties to negotiate properly, without having the pressure of the court system. [Court-based FDR] is a very, very different experience, because you pitch up to a court, there probably won't be a private waiting room. You'll be in a sea of other people.[54]

As well as limited court resources, the influence of notarized agreements (which have been signed by couples who married abroad but are divorcing in England and Wales) has profoundly impacted the way in which nuptial agreements are given effect. Notarized agreements are typically used by couples in civil law jurisdictions to elect a matrimonial property regime.[55] This is a vital distinction from nuptial agreements drafted in England and Wales, where there is no matrimonial property regime to select, and the effect is in many cases to contract out of the sharing principle.[56] Notarized agreements have been readily enforced in reported cases in part because of the weight they would carry in the country they were drafted.[57] Yet there was a clear sense amongst interviewees that this close adherence to notarized agreements had also influenced the weight attributed to what they referred to as '*Radmacher*-style agreements'. Several interviewees were dissatisfied with the apparent conflation of what are essentially two very different types of agreements.

This does not necessarily mean that notarized agreements must always be stringently enforced in England and Wales in comparison to '*Radmacher*-style' agreements. Indeed, the

[52] Interviewee 2.
[53] Interviewee 10.
[54] Interviewee 22.
[55] For a comprehensive overview of the approaches taken in different jurisdictions, see Scherpe (n 4).
[56] Interviewee 8.
[57] This was the approach in *Radmacher*, and more recently in *BI v EN* [2024] EWFC 200.

increasingly prevalent 'destination wedding', often facilitated by a wedding planner, further complicates matters, as one interviewee explained:

> I do wish British couples wouldn't enter into these [notarised agreements] when they get married abroad as it puts them in a really difficult position … My client said to me, Oh, I've just had to sign something (they were getting married in Italy). And I said, "have you been asked to enter into a matrimonial property regime?" And she said, "I don't know". And she said, "we've got a wedding planner". She said: "I had to sign some documents recently". I said, "I'd like to see them". She'd been asked to enter into a separate regime. You've got to be careful about signing these things. You might be held to them.[58]

5. Finding 5: Inequality of bargaining power is ubiquitous, but is largely unimportant where the parties have had independent legal advice

Some interviewees noted that nuptial agreements are often predicated on power imbalance.[59] This continues to be gendered, just as Lady Hale speculated would be the case in her dissenting judgment in *Radmacher*.[60] But because most nuptial agreements so often one-sided, with one party ring-fencing their assets from the other, power imbalance has come to be accepted as an inevitable feature, sometimes to a degree that is concerning.[61]

One example of this one person's threat not to marry unless the agreement goes ahead.[62]

> I think there is a gender dynamic to it. It's much easier to be the rich man saying I'm not going to get married than it is to be a woman in her mid-30s. Would you know anyone who wants a family to say, right, I'm not going to get married?[63]

We already know from reported cases that this is unlikely to affect the weight given to the agreement by the court, and this is also reflected in what my interviewees told me:

> They say, Oh, well, he said that he wouldn't marry me if I wouldn't sign. Well, that can't possibly be undue influence. Because the whole point of this is that if you don't sign, you don't marry, and if you don't marry, you don't have a claim [since in England and Wales there are no bespoke financial remedies available to unmarried cohabitants].[64]

Another interviewee questioned why the moneyed spouse would want a pre-nuptial agreement if they were not willing to make the marriage the consideration for the agreement.[65]

But in shutting down the ability to make this argument successfully in the FDR hearing, those circumstances where such threats might be genuinely coercive are not heard. In many cases, barristers told me they have learned not to run the argument, and that the best strategy is to focus upon needs. Interviewee 1 told me: 'my learning point … was, sometimes it's just needs, needs, needs'. In so many of these cases, your only way in really to repudiate is

[58] Interviewee 6.

[59] Interviewee 22 noted that nuptial agreements are 'invariably there to protect the financially stronger party, at the expense of the financially weakened party'.

[60] *Radmacher* [137].

[61] *SC v TC* [2022] EWFC 67 provides an example of where pressure can make a difference.

[62] Parallels can be drawn here with Anne Barlow's research on uneven couples in the context of cohabitation: A Barlow, 'Modern Marriage Myths: The Dichotomy between Expectations of Legal Rationality and Lived Law' in R. Akhtar, P. Nash, and R. Probert (eds.), *Cohabitation and Religious Marriage* (Bristol University Press, 2020) pp. 39-52.

[63] Interviewee 3.

[64] Interviewee 17.

[65] Interviewee 8.

needs.[66] Interviewee 9 confirmed this, saying: 'you will always argue needs, because needs is a much easier argument to run for someone who wants to argue that no or little weight should be attached to the agreement'.

There was one notable exception where imbalance of power made a salient difference:

> He was still standing fast by the terms of the supposed agreement. First of all, the evaluator, the adjudicator at the FDR, said … there was obviously an exploitation of a dominant position by the husband, because he had used his knowledge of property law and in anticipating what was going to happen with his internalised plans throughout the marriage … to put himself in a position if there was any separation later on—because, of course, he'd been through [divorce] once already—to ensure that his property was properly protected. And she didn't have the time to get any advice on that, and … I went, that stinks. And the judge agreed with me that ultimately that stunk, and said, it's unlikely at a final hearing that a court would ever uphold this pre-nuptial agreement. So, we then went away and basically just put it aside, went through the section 25 factors between us and reached an agreement.[67]

Independent legal advice also tends to be a barrier to raising issues of power in the FDR.[68] Two interviewees[69] compared nuptial agreements to surety transactions, referring to the case of *Etridge No 2*.[70] Since *Etridge*, the spouse of a borrower now needs to be advised independently when she stands as surety for her husband's business debts. Research shows that following this decision, far fewer cases involving such secured lending transactions are being challenged based on the husband's undue influence. This is because banks can rely upon a certificate of independent legal advice from the surety's solicitor to refute any later claims.[71] Just as this restrictive approach to undue influence has been criticised in the context of surety transactions,[72] whereby a wife faced with losing her family home is left with no recourse because she was independently advised to sign a security contract, this approach when applied (albeit unofficially) to nuptial agreements can mean that limitations on one party's ability to exercise autonomy are not even raised in the FDR. As one interviewee put it: 'if you've got a lawyer, you can't run undue influence, because that's the whole purpose of having the lawyer'.[73]

Independent advice is a very important safeguard, and when done well it can be a lifeline for the party potentially left vulnerable by the nuptial agreement. Two examples of this stand out from my interviews.

First is the couple that ultimately did not marry, because the lesser-moneyed spouse would not sign a document containing wording that said they had freely entered into the agreement:

> I had one which very sadly, ended up with the parties not getting married, but the financially weaker party's lawyer was … repeatedly saying that there was undue pressure exerted against their client and they would not agree to a … background term saying that both

[66] Interviewee 1.
[67] Interviewee 6.
[68] *Versteegh v Versteegh* [2018] 2 FLR 1417.
[69] Interviewee 17 and interviewee 13
[70] *Royal Bank of Scotland Plc v Etridge (No. 2)* [2002] UKHL 44.
[71] E Rowan, 'Independent Legal Advice in (Re)Mortgage Transactions 20 Years on from RBS v Etridge (No.2)' (2023) 2 Conveyancer and Property Lawyer 166.
[72] B Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Oxford University Press, 1997).
[73] Interviewee 17.

parties have entered into the agreement freely and with autonomy, and that was one of the issues that caused it to fall apart.[74]

In the second example, the couple did marry, but did not sign a nuptial agreement:

He wanted to protect his businesses, his property. She had no problem with that. He'd sent her maybe six months prior to the marriage, a proposed draft [nuptial agreement] via solicitors and said, you know, go and take legal advice, and I'll pay for it, and so on and so forth. And I was asked to come in and give that legal advice … It provided for her to have a maximum of £2 million over the course of however long their marriage lasted … And I said to her, you can't live long enough to get to the £2 million cap … It was patently an unfair agreement in the first place.
The point … when she's getting advice was two months prior to the marriage, and so once I'd pointed all of this out to her, I said: if you do sign up to this, you have had comprehensive legal advice now. So you need to be aware that you are probably going to be held to it. But you haven't had a real, proper opportunity to negotiate it.
You haven't had an opportunity to exercise autonomy because you're presented with something … you're not being given the full picture, and you're not being given the opportunity to think, and to consider all the outcomes and what's likely to happen in the future.
Well, I said, the question for you is, how receptive is he going to be to you saying, actually, can we put this off and talk about a post nuptial agreement? And let's just get married. Because we want to do this properly, starting from the start, rather than starting from a position where you've already him saying this is what should happen. And she did go away and speak to him, and the last set of instructions I had were that … she wasn't going to be obliged to sign it prior to the marriage.[75]

The importance of these interventions perhaps underscores why, in interviewee 17's view: 'surely the lawyer then prevents [undue influence], because the lawyer will then say, "this is a bad deal. You should never sign that"'.

Of course, not every person signing a nuptial agreement will have such considered and thorough legal advice. Yet the '*Etridge* approach' requires only a certificate of independent legal advice, not evidence that advice has been competent. An internet search for 'prenup England and Wales' returned several results offering fixed fee nuptial agreements that offer independent legal advice. Wenup.co.uk can provide a package that includes a certificate of independent legal advice for £1380. The length of that advice is one hour. Divorce Online charges only £849 for a nuptial agreement including a 'legal advice statement'. They note: 'We can arrange for your fiancée[76] to get legal advice for £399+ VAT'.[77] For £1200, Co-op Legal Service will provide a prenup package provided the couple's assets do not exceed £1,000,000.[78] These are clearly not aimed at high-net-worth couples. When my interviewees mentioned the cost of a nuptial agreement the figure tended to be north of £3000. In the cases referred to above, where the marriage did not go ahead, and the agreement was not signed, the advice provided by those interviewees was based upon substantial amounts of

[74] Interviewee 3.
[75] Interviewee 6.
[76] Note the feminine use of 'fiancée' here. This aligns with what almost all of interviewees told me: it is still usually the husband who tends to want the nuptial agreement.
[77] https://www.divorce-online.co.uk/family-law/prenuptial-agreement-service/
[78] https://www.co-oplegalservices.co.uk/family-law-solicitors/pre-and-post-nuptial-agreements/

time and effort. It is absurd to suppose such work could be completed within the one hour provided by Wenup.co.uk.

Thus, budget nuptial agreements should provoke alarm. They can mislead parties and distort expectations in lower income cases. One respondent, who routinely acted as counsel in small money divorces, said they had 'never been at an FDR with [a nuptial agreement] that's sophisticated and reliable', underscoring the problem of badly drafted agreements in needs-based cases.[79] They used the following example to explain the nature of 'budget' nuptial agreements:

> Basically, there was a document, probably a page or two saying in the event of a divorce I keep what's mine, you keep what's yours. We accept that anything given to us during the course of our marriage by our respective parents is to remain with the relevant spouse who's the child of that family. These were relatively ordinary people, it was set in the context of the parties themselves not having much money and not earning, you know, anything more than the average. But basically, that was never going to get anywhere because there's never been any disclosure. It was totally inflexible in that it made no provision for either party, no matter what. My client, he was really wanting to stick by this, and he was totally outraged that that this wasn't, you know, a shut and closed case. It was really shoddy. It was very unsophisticated and lacked any nuance.[80]

Even when procedural elements normally viewed as helping to counteract inequality of bargaining power are not satisfied—such as independent legal advice or a cooling off period—nuptial agreements still tend to be difficult to vitiate. More than one interviewee noted that the court's assessment goes beyond the procedural requirements provided in the Law Commission's 2014 Nuptial Agreements Bill[81]:

> The court was against us on vitiation. And I think the pattern that you will have seen from the authorities is it's very hard to see a set of circumstances now where you're going to get to vitiate … That was a case where he was a lot older than her. All his wealth was pre-matrimonial. It was a six- or seven-year marriage with one child.
>
> She was asked to sign [the nuptial agreement] in a [car]. She thought she was signing something else. Now there were issues about credibility with her, and ultimately the judge didn't believe her. But when I first picked up that case, even on the husband's account, it was a day before the wedding. She'd had very little, if no, legal advice. So, I had thought that we might have a shout at vitiation, but the courts are trying to close that door. So, my experience is, even if it's signed at the last minute, even if there's been low legal advice … you're not necessarily going to get a vitiation. And I think that's a move away from where we were at when the Law Commission … said these are the factors we would want to see in a qualifying nuptial agreement: [signed] 28 days [before the wedding] … all of that is the paradigm, the ideal. But judges are very loathe now to find vitiation. If there's a prenup, my experience on the ground is you have to look very critically about whether you're going to be able to properly contest [the agreements and argue] vitiation.[82]

Instead, these agreements are varied to ensure that the parties' needs are met. The FDR judge uses needs provision as a way of altering the effect of the agreement, but when based

[79] Interviewee 7.
[80] Ibid.
[81] This Bill included several procedural safeguards, such as a 28-day cool off period and a requirement of independent legal advice. The Bill also provided that a qualifying nuptial agreement could not contract out of spousal need.
[82] Interviewee 1.

upon their own personal—and as we have seen, sometimes inconsistent—assessment of needs, the wishes of the lesser-moneyed spouse become less relevant. This begs the question as to how accurate it is to say that nuptial agreements truly are given effect out of respect for individual autonomy.[83]

6. Finding 6: The 'autonomy' rationale underpinning nuptial agreements can be intellectually dishonest

Since nuptial agreements have become increasingly ironclad, this has poured cold water on the ability of the lesser-moneyed spouse to voice how her ability to exercise autonomy has been constrained. As one interviewee put it: 'judges feel increasingly more and more pressured to try and follow whatever is written down'.[84] With limited court time and sometimes little inclination to examine the autonomy of the lesser-moneyed spouse, it is more accurate to say that nuptial agreements are given effect to avoid further litigation and associated costs and promote certainty rather than autonomy. Thus, it is perhaps unsurprising that Interviewee 1 remarked: 'the state of the law on prenups is intellectually dishonest'.[85]

Consequently, the concept of autonomy is reduced to its most superficial, atomistic and unrealistic level. And this can be especially damaging in domestic abuse cases. One interviewee was unable to persuade the court that evidence of domestic abuse was relevant, because they could not show abuse at the precise moment the agreement was signed:

> Where I often find the power imbalance being raised is in the context of domestic abuse. So, it's like this is a controlling and coercive relationship. There were subtleties of that going on at the time and it's even more so now. It's difficult to argue that because, you know, an agreement was drawn at a point in time'.[86]

This strict approach to evidence was confirmed by one of the judges I interviewed:

> if you've got a vulnerable wife, generally, who's behind screens and that sort of thing, then of course, it's very hard for them to negotiate against a strong (A) opponent and (B) barrister.
>
> [Women sitting behind screens] is what we see on a more or less daily basis … And of course, the position now can be very, very different to what it was then. The power dynamics in a marriage can change significantly. So, what you're seeing at the time [of divorce], it would be very dangerous to move that back in time to what was happening 20 years ago, 10 years ago, whatever. And I'd like to think we wouldn't do that. We shouldn't do that, because you should be evidence driven. And if the evidence is that at that time there was a power imbalance and coercive control or whatever, then that would be different. The only evidence you can take into account is what was at the time of the agreement.[87]

Thus, the court does need to be satisfied of the lesser-moneyed spouse's autonomy, but only in a very basic sense, in that she signed something presented to her and knew what she was signing. There appears to be little scope for a more relational assessment of autonomy that could acknowledge, for example, the impact abuse might have on the opportunity to

[83] *Radmacher* [78].
[84] Interviewee 3.
[85] Interviewee 1.
[86] Interviewee 19.
[87] Interviewee 20.

review an agreement during the marriage, given that domestic violence can only be considered if proven at the time the agreement was signed.[88]

Sometimes, however, issues of abuse or power imbalance are not raised for pragmatic reasons that benefit the lesser-moneyed spouse. When a more straightforward needs argument would produce the same outcome anyway, that spouse can avoid the trauma of presenting evidence of her abuse in court:

> It's not worth the anxiety. It's not worth the fear that that you'll give bad evidence on the day. It's not worth the judge having a bad day and trying to unravel a real mess.[89]

Nevertheless, it is concerning that these attitudes might point towards a more general trend of excluding domestic abuse and other conduct from financial remedies more broadly, with section 25(2)(g) slowly becoming all the more redundant.[90] If FDRs provide little space for these arguments to be heard, there could be serious consequences for the spouse suffering abuse if the contractual enforcement of nuptial agreements is pushed much further, as the next section explores.

IV. REFORMING NUPTIAL AGREEMENTS

There have long been calls for nuptial agreements to be reformed. Lady Hale perhaps put it best when she argued extra judicially that the status of nuptial agreements currently represents 'the worst of all worlds',[91] since the judiciary has limited its own discretion in giving decisive weight to such agreements, but without gaining the legal certainty that would normally flow from this. A major contributing factor to the uncertainty with nuptial agreements is, of course, that circumstances can—and often do—change dramatically between the time the agreement is signed and the divorce. As Interviewee 13 put it: 'It's virtually impossible to anticipate needs down the line and that's the real problem actually'.

But most of the interviewees I spoke to were relatively comfortable with this uncertainty. Some were of the view that the law is quite settled in this area (including financial remedies law more generally). Others felt the current approach should be retained not because it is certain, but because flexibility is vital to ensure fairness.

Some thought the breadth of discretion available to the judge to come up with an outcome that neither party has agreed is unjust:

> A further fudge in that process … is [for the judge] to say: "right, I'm not satisfied that the pre-nup is fair or that it was properly formed. But wait a minute. The parties sat down and did sign it so I'm going to give her less than she should have if that prenup wasn't there". Well, where does that come from? How did that fit in? How is the poor solicitor in the humble office in the High Street going to interpret that to a bewildered client? I mean, it just blows the imagination and that's why it's unfair in our system to have this wide discretion.[92]

[88] For more on relational approaches see S. Thompson, 'Feminist Relational Contract Theory: A New Model for Family Property Agreements' (2018) 45(4) *Journal of Law and Society* 617.

[89] Interviewee 4.

[90] *N v J* [2024] EWFC 184. See also E Gordon-Bouvier, 'Domestic Abuse in Financial Remedy Proceedings—A Missed Opportunity?' (2024) 7 *Journal of Social Welfare and Family Law* 1.

[91] B. Hale, Keynote speech, Resolution's 30th Annual conference, Bristol, 20 April 2018, at <https://www.supremecourt.uk/docs/speech-180420.pdf>.

[92] Interviewee 4.

Despite this interviewee's view that reform is needed, they also recognised how paradoxically, the law's *un*certainty could encourage settlement:

> I think it's not good to have wide discretion … but in a strange kind of way, it feeds into the FDR process because the client sits back and thinks, well, goodness, if this is what they're arguing here, what's it going to be like when it gets to the trial?

Some favoured a strict approach to reform, where it would be possible to contract out of needs:

> The Law Commission report should be accepted, but it should go further than that, and it should actually say that needs can also be excluded, and these agreements should then be binding, provided you've had lawyers and disclosure.
>
> I actually think that the certainty of it is more important than that sort of extreme example [of the agreement where she gets nothing] because that is a pretty rare situation. And of course, I would cope with that by saying that cohabitees should have greater rights than they have at the moment.[93]

The experiences of other interviewees help explain precisely why the more 'extreme' example is 'pretty rare'. For as we saw earlier in this article, the needs safeguard is the very thing that prevents such extreme agreements, since the lawyer drafting the agreement will advise it is unlikely to carry much weight. Put simply, it is not that unreasonable spouses are few and far between, but that the law is currently preventing them from drafting and enforcing agreements Interviewee 17 would consider to be extreme. For example, on the day of our conversation, Interviewee 18's chambers were asked about:

> a prenup that gives my client, but not her kids, the airfare back to the Philippines only. It's ridiculous and it's not worth the paper it's written on, but it just goes to show the heartlessness and the callousness of people.

'Callous' individuals aside, those couples who have pre-nups despite having relatively low or modest levels of wealth would be bound by these agreements if needs were able to be excluded, which could leave families in a position of significant hardship. As a result, the study on which this article is based shows the unforeseen, potentially drastic consequences that could result from ironclad nuptial agreements absent of substantive fairness-based safeguards. The Divorce (Financial Provision) Bill is an example of such reform.[94] Clause 3 of this Bill provides that a nuptial agreement will be binding provided it complies with tick-box requirements, such as a 21-day cooling off period, proper disclosure, adequate opportunity to receive independent legal advice, and compliance with general contractual rules. These safeguards might help to facilitate the exercise of autonomy in some cases, but the Bill leaves no scope to recognize unfairness at the point of divorce.

When asked about the Law Commission's 2014 Nuptial Agreements Bill,[95] several interviewees felt it would not do much to change outcomes, with others suggesting the law has moved on since this Bill was first published. For example, procedurally, independent legal advice is not currently required (although the opportunity to receive advice is considered

[93] Interviewee 17.
[94] This Private Members Bill was first introduced in 2014.
[95] Law Commission (n 10).

important); adequate disclosure can be fit onto one side of an A4 page[96]; and a valid agreement can be signed on the eve of the wedding, without a 28-day cooling off period.[97] Substantively, the Nuptial Agreements Bill provides that needs cannot be excluded, but as we have seen, nuptial agreements are already ringfencing the scope of needs in some cases, following Mostyn J's interpretation of 'predicament of real need' as meaning enough to avoid destitution.[98]

Conversely, this supports arguments in favour of legislative reform, since in the absence of legislation, the approach towards nuptial agreements is becoming increasingly contractual. If made binding under legislation, nuptial agreements could be carefully and clearly distinguished from contracts made in the course of everyday business. Legislation could require judges to be more receptive to the relational, familial context of such agreements. This would require an approach that goes beyond the Nuptial Agreements Bill, because although this Bill provides that a nuptial agreement cannot contract out of needs, it does not set out what 'needs' encapsulates. Without such guidance, needs risks being interpreted restrictively, as interview data referred to in this article have shown. It would be wholly undesirable to be left with a public welfare exception to the enforcement of nuptial agreements—one that looks only to absolute need and ignores parts of our system of financial remedies that are vital to ensuring fairness, such as redressing relationship generated disadvantage or recognizing the impact of an abusive relationship upon needs.[99]

Thus, reform could take inspiration from some of the drafting techniques currently being employed. For instance, Interviewee 3's use of the 'needs-shortfall' provision could be incorporated into statute, stipulating that the calculation of needs is no less generous than it would be without a nuptial agreement.[100] This would mean a judge could not sideline the contextual importance of other section 25 factors, such as age and standard of living in order to leave the recipient spouse in a position just above her most basic needs.[101]

V. CONCLUSION

Exploring the adjudication of unreported nuptial agreements reveals so much about the operation of financial remedies law that is not apparent in the big money judgments. In reported cases, we do not see pressurised FDR judges hearing four or five potentially complex cases in one day, where there is little time to read the relevant paperwork, and the nuptial agreement is simply cross-checked against the parties' needs and given effect accordingly.[102] We do not see how parties settle and let go of their version of a fair outcome on divorce in order to avoid the gamble of costly litigation that might go against them in any event (often referred to as 'litigation risk'). We do not get a clear sense of the significance of 'your client coming across as reasonable and sensible'[103] or, as Interviewee 21 put it, that 'shits lose'. We do not understand that individuals sometimes get agreements in full

[96] Interviewee 8.

[97] Interviewee 8 explained this can be made more iron-clad through a post-nuptial agreement confirming the terms. See also *Helliwell v Entwistle* [2024] EWHC 1298 (Fam).

[98] *Kremen v Agrest (No 11)* [2021] EWHC 45 (Fam), [72].

[99] Pursuant to s.25(2)(g) MCA 1973. See also *Traharne v Limb* [2022] EWFC 27; *DP v EP (Conduct; Economic Abuse; Needs)* [2023] EWFC 6. E Gordon-Bouvier, 'Domestic Abuse in Financial Remedy Proceedings–A Missed Opportunity?' (2024) 7 *Journal of Social Welfare and Family Law* 1.

[100] Other suggestions for statutory reform included legislative demarcation of notarized 'marriage contracts' and '*Radmacher*-style' agreements. Procedurally, some interviewees felt that a more structured approach to drafting nuptial agreements would be helpful.

[101] Interviewee 3.

[102] Interviewee 23.

[103] Interviewee 21.

awareness they will not be given effect in order to deliberately and strategically reduce the amount they will have to pay to meet their partner's needs. We do not see that nuptial agreements can feature in smaller money cases. While still very uncommon in such cases, the rise of DIY and budget online agreements in recent years could precipitate a surge in nuptial agreements in needs-based cases within the next decade, once these couples reach the point of divorce.

Moreover, the reported cases give the impression that the spouse wishing to use a nuptial agreement to deprive his future spouse of virtually everything in the event of divorce is a rather mythical entity. Yet these individuals do exist. Indeed, perhaps the most important finding from the study on which this article is based is the invisible, yet powerful nudge of the second prong of the *Radmacher* test—that nuptial agreements must not be unfair. This is one of the only sources of power currently available to the lesser-moneyed spouse, because it provides her with leverage to negotiate, while incentivizing the moneyed spouse to agree to reasonable terms.

My findings also confirm what we already know from reported judgments: needs operates as the primary safeguard for adjustment when circumstances have changed, and power imbalances are only considered a factor against the broader context of whether the court considers the actual terms to be fair.

Legislation can provide clarity, protection, and flexibility. The Nuptial Agreements Bill could help row back some of the more hardline approaches currently adopted, whereby agreements signed on the eve of the wedding are still considered to be procedurally sound. But the Bill's substantive safeguard of needs should be defined more precisely to avoid this being interpreted as a public welfare exception.

While side-stepping arguments relating to power imbalance and coercion might appeal to those who seek certainty and efficiency amidst increasingly strained court resources, one interviewee was adamant that we do not lose sight of the importance of fairness in these cases:

> The very senior financial remedies judiciary go around lecturing all of us that we shouldn't be running arguments about whether or not autonomy has been exercised because there aren't enough resources to do so. I don't care. *I do not care.* These are matters of law. They are within the statute, or they're within the case law, and we should be running it. You can't put an impermissible gloss on a statute. And that in my view applies to Section 25(2)(g) conduct, and it also applies to these issues of running these arguments about whether or not you've had independent legal advice. But was [that advice] good enough? You've got to run it because an injustice results. And it's no good for courts to say, well, we don't have the resources. I don't care. You've got to make those resources.[104]

In conclusion, legislative reform could help push back on a worrying trend, whereby nuptial agreements provide a reason to squeeze the lesser-moneyed spouse's needs more and more. Safeguards based upon fairness will be vital if notions of equal partnership and recognition of non-financial contributions are to be preserved within our law of financial remedies. Indeed, the quest for certainty must not blind policy makers to what an unrestricted nuptial agreements law would mean for families:

> You can see how very easily you would have people signing up to just super unfair prenups and having no option. And, you know, maybe it doesn't matter if they only married for a year or two, but it massively matters if they're married for 20 or 30 years and have three

[104] Interviewee 6.

> kids, and then, suddenly, this piece of paper comes out at the end, and it was never fair in the first place.[105]

It is for the Government to decide what to do next. As the Law Commission stated in its scoping report published in late 2024, reform of nuptial agreements will depend upon whether there is a commitment to pursue broader reform of financial remedies, and the shape this new law will take.[106]

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[105] Interviewee 11.
[106] Law Commission (n 10) 7.94–7.98.

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