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ALL THAT I HAVE I SHARE WITH YOU

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The law concerning ante-nuptial and post-nuptial agreements received scrutiny by the Supreme Court in England & Wales during 2010 and by the Privy Council, on appeal from the Isle of Man, during 2008. This paper analyses the current position in Jersey in light of these developments and discusses the likely grounds upon which any reform or development in Jersey might be based.

1 The English Supreme Court gave a ringing endorsement to ante-nuptial and post-nuptial agreements in England and Wales in October 2010 in *Radmacher v Granatino*.[1] Jersey is therefore now surrounded by jurisdictions (save for Guernsey), which all recognise, one way or another, the potential for a married couple to regulate their financial affairs in the event of divorce.

2 In the absence of either legislation or judicial opinion on this topic, the door is wide open for the Family Division of the Royal Court to follow suit. But would it or should it? This article will examine the decision in *Radmacher v Granatino*[2] and compare it with the conclusions of a unanimous Board of the Privy Council in *MacLeod v MacLeod*,[3] which recognised the enforceability of post-nuptial agreements, but not ante-nuptial agreements.

3 In concluding that the Jersey Courts are able to follow the decision in *Radmacher*, my view is that Jersey Courts *should* do so. There exists no public policy or legislative bar to prevent Jersey from doing so. By way of contrast, the lack of an equivalent to ss 34 and 35 of the Matrimonial Causes Act 1973 presents a hurdle to Jersey following *MacLeod*. The other option is for Jersey not to develop its law at all. This has the attraction of leaving the matter to be decided by the States if the appetite for legislative reform exists in this area. However, if the Court is faced with considering an ante-nuptial or post-nuptial agreement in the near future, it is submitted that it is well placed to recognise such an agreement as a matter of customary law and that the decision of the majority in *Radmacher* forms a well-reasoned basis upon which Jersey should adopt similar principles.

Public policy—England & Wales

4 Before looking at the decision in *Radmacher*, it is first necessary to understand why there traditionally existed a judicial inability to uphold ante-nuptial or post-nuptial agreements in England & Wales. The reason was public policy, the elements of which were twofold.

1 [2010] UKSC 42.
2 *Supra.*
3 [2008] UKPC 64.

5 The first element of the public policy rule was founded upon the enforceable duty at common law for a husband and wife to live together. Thus, unless the parties entered into an agreement to live separately, this duty to live together could be enforced in two ways. First, a husband could enforce the duty to live together by means of self-help. In *Re Cochrane*[4] a wife was refused habeas corpus, having been lured back to her husband's home by a trick because "the husband hath by law power and dominion over his wife and may keep her by force within the bounds of duty." *Cochrane*'s case was overruled in *R v Jackson*[5] when the Court found that a husband who had seized his wife as she came out of church no longer had the right to confine or imprison her. Secondly, either husband or wife could enforce the duty to live together by petitioning for a decree of restitution of conjugal rights. The right to enforce such a decree by imprisonment was abolished in 1884.[6] Thereafter, a decree could be followed by an order for maintenance. Alternatively, a wronged party could institute proceedings for judicial separation,[7] or petition for divorce after three years on the basis that a failure to obey the decree was deemed to be desertion without reasonable cause. The entitlement to petition for restitution of conjugal rights was abolished by statute in 1970.[8] Thus, in England & Wales, by 1970 any means to enforce the duty on a husband or wife to live together had been abolished.

6 The second element of the public policy rule was that an agreement between a married couple in relation to their future separation or divorce could be regarded as an encouragement for one party to leave the other. If the agreement was sufficiently generous, such that the wife, for example, would do better by leaving her husband than by staying with him, this was regarded as an inducement to live apart. Such an agreement was therefore regarded as contrary to public policy and void because it was inconsistent with the life-long duty of husband and wife to live together.[9] This would of course catch all ante-nuptial agreements, as well as post-nuptial agreements made in the event of a future, but not yet contemplated, separation.

Public policy—Jersey

7 Is the same development true for Jersey? There remain two references to the duty on the part of husband and wife to cohabit in legislation. The Matrimonial Causes (Jersey) Law 1949, art 12(2) states, that "where the court … grants a decree of judicial separation, it shall no longer be obligatory for the petitioner to cohabit with the respondent." The Separation and Maintenance Orders (Jersey) Law 1953, art 2(2)(a), makes reference to the ability of the Court to order that "the applicant be no longer bound to cohabit with the other party." Notwithstanding the implication that the duty of a husband and wife to live together may therefore still exist as a matter of Jersey law, the ability to enforce that duty by petitioning for a decree of restitution of conjugal rights was removed from the

[4] (1840) 8 Dowl. 330.
[5] [1891] 1 QB 671.
6 Matrimonial Causes Act 1884.
7 Matrimonial Causes Act 1965, s 12(1).
8 Matrimonial Proceedings and Property Act 1970.
[9] *Cocksedge v Cocksedge* (1844) 14 Sim 244.

Matrimonial Causes (Jersey) Law 1949, by amendment in 1996.[10] Thus if the duty to cohabit still exists for a husband and wife, it is not enforceable by means of a decree of restitution of conjugal rights.

8 In the absence of any Jersey decision specifically finding that a husband may not kidnap, imprison or seize his wife as a means of self-help, an analogy can be drawn with the recognition that a husband no longer has the right of consortium with his wife. Hence in *Jones v Att Gen*[11] a husband was sentenced for sexually assaulting his wife, the Court recognising that the offence was at least as serious as if it had been committed by a stranger. In *Le Feuvre*[12] a husband was convicted of grave and criminal assault on his wife, where an element of the offence included holding her in the bedroom for an hour. It is therefore inconceivable, in my view, that the Court in Jersey would allow a husband to enforce a duty to live together by means of self-help.

9 The position in Jersey seems thus to be that any duty on a husband or wife to live together is no longer enforceable.

Separation agreements—imminent separation

10 Although traditionally the Courts in England & Wales would not traditionally uphold agreements in relation to future separation for reasons of public policy, the common law Courts have, for a long time, upheld separation agreements entered into in relation to a separation that has already taken place or is about to take place. Where the parties agree to live separately (and thus neither can enforce the duty to live together) and enter into an agreement with the specific purpose of regulating their financial affairs when living separately (I will call this "an imminent separation agreement"), the Courts do not regard this as contrary to public policy. Thus in *Hyman v Hyman*[13]—

> "Agreements for separation are formed, construed and dissolved and to be enforced on precisely the same principles as any respectable commercial agreement, of whose nature indeed they sometimes partake."

11 At the time the parties separated in *Hyman* the wife was not able to petition for divorce on the grounds of the husband's adultery alone—an aggravating factor, such as incest, would have been necessary. She therefore entered into a separation agreement, with her husband giving her weekly maintenance. The wife covenanted that she would not institute proceedings to increase the sum of maintenance. When the law changed in 1923, allowing the wife to petition for divorce on the grounds of her husband's simple adultery, she sought an increase in maintenance. The Court held that the wife could not by covenant preclude the Court from invoking its jurisdiction to make provision for the wife on the

[10] Matrimonial Causes (Amendment No 9) (Jersey) Law 1996.
[11] 17 December 1999, Jersey unreported.
[12] 19 June 1996, Jersey unreported.
[13] [1929] AC 601.

dissolution of her marriage. The proposition that an imminent separation agreement cannot oust the jurisdiction of the Court remains good law today.

12 An unforeseen consequence of the decision in *Hyman* was considered in *Bennett v Bennett.*[14] Where a wife sought to enforce a maintenance agreement that she had entered into with her husband in consideration of agreeing not to seek any further Court order for maintenance, the consideration was found void and therefore the whole agreement failed and could not be enforced in its entirety.

13 The consequence of *Bennett* was remedied by legislation in 1957,[15] which is embodied today in ss 34 and 35 of the Matrimonial Causes Act 1973. As well as remedying *Bennett,* so that any provision in the agreement restricting a right to apply to Court is void, but the whole agreement is not thereby voided, s 34 also defines a "maintenance agreement", as containing written financial arrangements, made between parties to a marriage, governing the rights and liabilities towards one another when living separately. By s 35 the Court may alter that maintenance agreement on the application of one of the parties. There is no Jersey statutory equivalent. Thus if the *cause* for a maintenance agreement is an agreement not to seek an increase in maintenance from the Court (and thus ousts the jurisdiction of the Court), then it may be argued the whole agreement would fail for want of valid *cause*.

14 The final case that deserves mention on the subject of imminent separation agreements is *Edgar v Edgar.*[16] In holding a wife to a deed of separation, the Court held that "the general proposition [is] that formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to their terms of their agreement."

15 The Court has regard, *inter alia*, to the conduct of the parties before and after signing the agreement, the circumstances surrounding the signing of the agreement, including any undue pressure, exploitation of a dominant position, inadequate knowledge on the basis of non-disclosure/fraud/misrepresentation, bad legal advice, or any important change in circumstances, unforeseen or overlooked at the time of making the agreement.

16 The Family Division of the Royal Court routinely endorses separation agreements reached between parties by consent and has cited with approval the principles set out in *Edgar v Edgar*.[17] Given that currently the only grounds for a "no-fault" divorce are separation for one year, with the consent of both parties, or separation for two years, the importance of separation agreements in the context of an amicable divorce remains

[14] [1952] 1 KB 249.
[15] Maintenance Agreements Act 1957.
[16] [1980] 1 WLR 1410.
[17] *J v K* [2001/209A]. Judicial scrutiny is now addressed by the obligation of each party to file a statement of information, r 52 Matrimonial Causes Rules 2005. See also *JEL v MSD* [2004] JRC 164, albeit *Edgar* is not cited.

particularly important in Jersey if couples wish to agree their finances at the time of separation, rather than re-open matters a year or two down the line at the time of petitioning for divorce.

Ante-nuptial agreements

17 The decision in *Radmacher* can perhaps be seen as an inevitable culmination of judicial development towards ante-nuptial agreements in England & Wales. In 1995[18] the Court gave an ante-nuptial agreement "limited weight"; by 2003[19] the Court held that an ante-nuptial agreement was properly to be taken into account; and by 2007[20] the Court held an ante-nuptial agreement was a factor of "magnetic importance".

18 Mr Granatino was a French national who, at the time of marriage, was working for JP Morgan and earning about £120,000 per annum. Ms Radmacher was a German national, whose assets derived from family wealth in the paper processing business. The parties entered into an ante-nuptial agreement at Ms Radmacher's family's insistence. The Radmacher family German notary, Dr Magis, was appointed to draft the agreement.

19 When Dr Magis sent a first draft of the agreement to Ms Radmacher, Dr Magis made it clear that she should obtain a translation for her husband into his native language. The first draft contained a clause for both parties to insert the value of their assets. This latter clause was removed before the final draft was seen by Mr Granatino on 24 July 1998. The meeting to sign the ante-nuptial agreement was scheduled for 4 August 1998. When Dr Magis discovered no translation of the agreement had been provided to Mr Granatino he wanted to postpone the meeting. The parties persuaded him to continue and he therefore went through it, albeit not *verbatim*, in English, of which the husband had a good understanding. The parties subsequently married in November 1998.

20 The ante-nuptial agreement was therefore signed in circumstances where Mr Granatino had not taken independent legal advice, had not seen a French translation and was not aware of the value of his intended's assets. The agreement provided for a regime of separation of property, typically used in second marriages in Germany where both parties already have children. In addition each party waived any claim for maintenance against the other. The agreement contained a German law clause, although Dr Magis explained to both parties that foreign legal systems might not apply German law and recommended they obtain advice from a lawyer qualified in the jurisdiction in which they chose to reside.

21 By the time of the divorce in 2008, circumstances had changed slightly. There were two children born of the marriage, then aged 9 and 7 years. The family were resident in England. Mr Granatino had given up his job as a banker and was pursuing a DPhil at

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[18] *F v F(Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45.
[19] *K v K* [2003] 1 FLR 120.
[20] *Crossley v Crossley* [2007] EWCA Civ 1491.

Oxford. On completion of his dissertation he intended to take up a research post, which would earn him income of approximately £30,000 *per annum*. At the time of the divorce, Ms Radmacher was estimated to be worth about £100 million with an annual income from her shareholding in the family business of approximately £2.7million.

The High Court decision

22 Baron J at first instance[21] decided that the ante-nuptial agreement was flawed as a matter of English law due to the failure to take legal advice, failure to disclose the value of the wife's assets, and the lack of translation. In addition the birth of the children had deprived the agreement of much of its effect. That said, Baron J held that the award should be circumscribed to a degree to reflect the fact that Mr Granatino had signed the agreement and, as a man of the world, understood what he was signing away. Mr Granatino was awarded £2.5 million for a property, £700,000 to clear his debts, £25,000 for a car and a lump sum of £2.3 million (giving him an income for life of £100,000 per annum). A contact home in Germany would remain in the wife's name but be available for his use and he was to receive £35,000 *per annum* per child by way of child maintenance until each child ceased full-time education.

The Court of Appeal decision

23 The Court of Appeal[22] gave "decisive weight" to the ante-nuptial agreement. The Court held that Mr Granatino was an established banker at the time of the agreement, and was not a naïve young individual who had been taken advantage of; the precise asset value of the wife had been excluded, but Mr Granatino knew she was very rich; he had not seen a translation of the ante-nuptial agreement nor taken independent legal advice, but four months had elapsed between his signing the ante-nuptial agreements and the wedding, during which time he could have taken legal advice. In addition the Court took into account the fact that in both France and Germany it was standard practice for a couple to enter into a property regime when entering into marriage, so that culturally both parties were well placed to understand the effects of such an agreement. Finally, although children had been born during the marriage, the Court of Appeal held that the birth of children would have been within the contemplation of the parties at the time of marriage.

24 The £2.5 million for a house in London would therefore be held on trust, to revert to the wife on the youngest child's 22nd birthday. Whilst the sum to clear Mr Granatino's debts and the sum for a new car were left untouched, the Court of Appeal refused any lump sum to Mr Granatino in his capacity as husband. Child maintenance was, however, to be capitalised by reference to the youngest child's 22nd birthday.

The Supreme Court decision

25 By a majority, the Supreme Court endorsed the Court of Appeal's approach.

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[21] [2008] EWHC 1532.
22 [2009] EWCA Civ 649.

26 The Supreme Court found that Courts are bound to have regard to ante-nuptial agreements as part of "all the circumstances of the case".[23] The test will be—

> The Court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications, unless in the circumstances prevailing (*ie* at the time of divorce), it would not be fair to hold the parties to their agreement.

27 In deciding what weight to give to the ante-nuptial agreement the Court will look at the following—

(1) Did the parties intend the agreement to have legal effect? In *Radmacher*, the parties expressed the ante-nuptial agreement to be governed by a German law clause. Had the parties resided in Germany the agreement would have been binding. This, the Court said, was a good indication that the parties intended it to be binding.

(2) Are there any factors that would make the agreement voidable on the usual contractual principles of fraud, duress and misrepresentation, as well as on wider principles of unfair advantage or undue pressure. Typical indicators the Court would look for to indicate the absence of any such factors are mutual disclosure of assets; independent legal advice; time between signing the agreement and the wedding (21 days is probably advisable).[24] The Court would also consider the maturity of the parties and their age.

(3) Is it fair to give effect to the ante-nuptial agreement in the circumstances as they are now? The Court would look at the welfare of any children of the family first. However, the Court should also respect the autonomy of individuals to be able to regulate their financial affairs, particularly with respect to non-matrimonial property (*ie* property brought into the marriage, or acquired by inheritance during the marriage).

(4) Overall one party should not be left in a predicament of real need so that it is unfair to hold the parties to the ante-nuptial agreement.

(5) Conduct in relation to the agreement. If one or both parties had conducted themselves in a manner consistent with the ante-nuptial agreement, this might increase the weight to be given to it. In *Radmacher*, Ms Radmacher's father had transferred assets into her name, which he would not have done if there had not been an ante-nuptial agreement.

28 The Supreme Court held that public policy grounds no longer exist for refusing to give effect to ante-nuptial agreements, because the enforceable duty of a husband and wife to live together had been abolished and the rule against future separation agreements should therefore disappear. In the Supreme Court's view this applied with equal force both

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[23] Section 25, Matrimonial Causes Act 1973.
[24] 1998 Consultation Paper—"Supporting Families".

to ante-nuptial agreements and to all post-nuptial agreements, whether they be post-nuptial agreements providing for imminent separation or for future separation (*ie* that was not contemplated at the time of signature).

Post-nuptial agreements

29 The decision in *Radmacher* to abolish the public policy rule in relation to ante-nuptial agreements, as well as in relation to post-nuptial agreements differed from the unanimous decision of the Board of the Privy Council in *MacLeod v MacLeod.*[25] On appeal from the Isle of Man, the Board upheld, with minor variations, a post-nuptial agreement entered into, with the benefit of legal advice, when the marriage was on the rocks and specifically addressing what the parties' financial arrangements were to be in the event of divorce.

30 Whilst the Board held that, for the same reasons set out above in *Radmacher*, the reason behind the public policy rule against agreements providing for future separation had gone and therefore the rule itself should disappear, this should only apply to post-nuptial agreements and not to ante-nuptial agreements. The Board held in relation to ante-nuptial agreements—

> "The Board takes the view that it is not open to them to reverse the long standing rule that ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense. The Board has been referred to the position in other parts of the common law world. It is clear that they all adopted the rule established in the 19th century cases. It is also clear that most of them have changed that rule, and provided for ante-nuptial agreements to be valid in certain circumstances. But with the exception of certain of the United States of America, including Florida, this has been done by legislation rather than judicial decision."[26]

31 The Board drew a distinction between ante-nuptial and post-nuptial agreements; first, because s 34 of the Matrimonial Causes Act 1973[27] provides for "financial arrangements" between the parties to a marriage governing the rights and liabilities towards each other when living separately. This does not distinguish between arrangements providing for separation contemplated at the time of signature (imminent separation agreements) and agreements providing for future separation (*ie* that was not contemplated at the time of signature). Section 34 therefore applies to all types of post-nuptial agreement. Secondly, s 34 applies as between "parties to a marriage". It cannot therefore govern ante-nuptial agreements where the parties are not yet married. Thirdly, the Court has the statutory power to alter such financial arrangements by s 35 of the same Act.[28] The same statutory protection is not afforded to agreements made between people who are not yet parties to a marriage. Thus it would be wrong to regard ante-nuptial agreements as enforceable,

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[25] [2008] UKPC 64.
[26] At para 31.
[27] Its equivalent provision as a matter of Manx law being s 49 Matrimonial Proceedings Act 2003.
[28] Its equivalent provision as a matter of Manx law being s 50 Matrimonial Proceedings Act 2003.

because unlike post-nuptial agreements, the ability to alter them is not provided for in statute.

32 Finally, the Board drew a distinction between ante-nuptial and post-nuptial agreements on the ground that a post-nuptial agreement is entered into after the parties have taken on the obligations of the married state and the agreement is no longer the price that one party may extract for his or her willingness to marry.

The difference between *Radmacher* and *MacLeod*

33 The majority of the Supreme Court disagreed with the distinction drawn by the Board between ante-nuptial and post-nuptial agreements. In relation to the first ground, the Supreme Court disagreed that the relevant legislation applied to *all* post-nuptial agreements. At the time the legislation was drafted (1957) future separation agreements remained contrary to public policy and thus the current legislation can only be referring to imminent separation agreements.

34 The Supreme Court held that it does not matter whether the ante-nuptial or post-nuptial agreement is classed as enforceable, because the Court is not bound to give effect to it. A Court will have regard to ante-nuptial and post-nuptial agreements as part of all the circumstances of the case[29] and may give them due weight, but it is not necessary to categorise them either as contracts or as enforceable obligations. The Supreme Court considered the Board had been wrong to find that post-nuptial agreements were contracts and therefore enforceable but that ante-nuptial agreements were not. The same rules should, in the Supreme Court's view, be applied to both ante-nuptial and post-nuptial agreements. The Supreme Court was not persuaded that there was a material difference between an agreement concluded the day before a wedding and one concluded the day after. If the agreement was a "price" for marrying, the implication was that some sort of duress had been applied, which could be applied as much before a wedding as afterwards. In either case, the duress would mean that the agreement carried little or no weight.

35 Baroness Hale had delivered the Board's judgment in *MacLeod* and she also delivered a dissenting judgment in *Radmacher*. Consistently with the Board's view in *MacLeod*, Baroness Hale maintained that the matter of ante-nuptial agreements is properly one for the legislature following a thorough review of marital property agreements by the Law Commission (which is due to report in early 2011).

36 Baroness Hale pointed to experience in the US. It was anticipated that ante-nuptial agreements would increase certainty between parties on marriage breakdown and therefore reduce legal costs. Experience had shown that that has not necessarily been the case. In addition she argued that holding couples to ante-nuptial agreements could be seen as a retrograde step. The Courts have, over the past decade, developed the

[29] Section 25, Matrimonial Causes Act 1973.

principles of equality and non-discrimination on marital breakdown;[30] allowing couples to "contract" out of these principles might be regarded as a step backwards. This should be seen in particular in light of the fact that ante-nuptial agreements usually involve the economically weaker spouse waiving financial provision that he or she might otherwise be entitled to. By contrast a separation agreement (be that for future separation or imminent separation) usually awards the spouse something by way of financial provision.

37 Baroness Hale also argued that legislation would properly address factors such as whether the need for independent legal advice or disclosure of the value of each party's assets is mandatory.

The effect in Jersey

38 Jersey upholds separation agreements as a matter of customary law. However, neither ante-nuptial agreements nor post-nuptial agreements providing for future separation have received judicial consideration in the Jersey Courts. Jersey may opt to follow *MacLeod* and Baroness Hale's dissenting judgment in *Radmacher*, or it may decide to follow the majority decision in *Radmacher*. Not being bound to regard either decision as in any way binding, it may decide to follow neither.

39 As set out above, in my view, any enforceable duty on a husband and wife to live together has been abolished in Jersey, as it has in England and Wales. If the argument is accepted that the rule against future separation agreements was founded upon the enforceable duty of a husband and wife to live together, which itself no longer exists, the rule against future separation agreements should also disappear. There would therefore be no public policy reason for the Family Division of the Royal Court not to recognise ante-nuptial or post-nuptial agreements.

40 However, a note of caution. In *Sim v Thomas*,[31] as recently as 2001, the Royal Court upheld a claim for damages for breach of promise to marry, holding that—

> "Although the action for breach of promise of marriage had been abolished in many countries on the grounds that it was against public policy and anachronistic, no action would be taken by the court to abolish the action at common law because, as a matter of public policy, it was for the States to consider and change, rather than the courts. Until such legislative action was taken, breach of promise remained a valid cause of action in Jersey."[32]

41 The Royal Court might rely on public policy grounds to refuse to have regard to ante-nuptial agreements, or post-nuptial agreements providing for future separation, finding that it is properly a matter for the States to determine by legislation. Indeed, if one accepts

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[30] *White v White* [2001] AC 596; *Miller v Miller* [2006] UKHL 24.
[31] 2001 JLR 460.
[32] At p 461.

what, in my view, is a common-sense proposition, that in deciding whether to follow *MacLeod*, *Radmacher* or neither, it would make good sense for the Family Division to at least take into account the findings of the report of the Law Commission of England & Wales on ante-nuptial and post-nuptial agreements due in 2011, then one implicitly accepts that this is properly a matter for legislation and not the judiciary.

42 That said, there are good arguments to say that the Jersey Courts are well placed to follow *Radmacher*. It is trite law to say that the Jersey Courts have traditionally placed primary importance on the concept of *la convention fait la loi des parties.* But in general Jersey contract law does look to the subjective intent of the parties when determining consent.[33] Thus the autonomy of the individual in deciding to regulate his or her financial affairs should arguably trump a now out of date and defunct public policy rule against ante-nuptial and post-nuptial agreements.

43 A wife is able to disclaim her right of dower and a husband his right of *viduité*. This can be done by *lettres merchées* before the Royal Court, but not invariably so. In *Ferchal v Ferchal*[34] a widow was held to have abandoned her *usufruit* orally (although she already had use of it at time of abandonment). The Court relied on Pothier[35]—

> "*Notre droit français n'ayant pas adopté les formalités du droit romain, la douairière, de même que les autres usufruitiers, peut faire remise au propriétaire de son droit d'usufruit par une simple convention*."[36]

44 Drawing an analogy, why should a spouse be bound by an agreement to waive a future interest in immoveable property which was historically designed to protect his or her financial position on the death of the other party to the marriage, but not on separation? If the analogy holds good, Jersey has recognised the ability of a spouse to waive the financial protection afforded to him or her as a matter of customary law for hundreds of years. The recognition of ante-nuptial and post-nuptial agreements would be a development of the same principle.

45 The majority of Jersey's neighbours now recognise the ability of couples to arrange their financial affairs on the termination of marriage, in Europe by entering into a notarised marital property regime, and now in England & Wales by agreement. Arguably Jersey's citizens are at a disadvantage, lacking the legal certainty such an agreement might provide. Similarly those couples that choose to reside in Jersey having entered into an agreement in a different jurisdiction thereby forfeit the legal certainty they signed down to previously.

46 Article 27 of the Matrimonial Causes (Jersey) Law 1949 states as follows—

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[33] *Marett v O'Brien* [2008] JCA 178, *per* Pleming JA, para 55.
34 1990 JLR 117.
[35] *Op cit* at p 515 (1827) ed.
[36] *Op cit* at p 123.

"(1) Where a decree of divorce or of nullity of marriage has been made, the court may, upon the application of either party to the marriage which is the subject of such decree, or upon the application of any person beneficially interested, cancel, vary or modify, or terminate the trusts of, any marriage contract, marriage settlement, post-nuptial settlement, or terms of separation subsisting, between the parties to the marriage, in any manner which, having regard to the means of the parties, the conduct of either of them insofar as it may be inequitable to disregard it or the interests of any children of the family, appears to the court to be just.

(2) The court may exercise the powers conferred by this Article notwithstanding that the marriage was contracted, or the marriage contract, marriage settlement, post-nuptial settlement or terms of separation was made or entered into, in an extraneous jurisdiction."

47 No interpretation is provided in the statute of the meaning of "marriage contract, marriage settlement, post-nuptial settlement or terms of separation subsisting." Nor can guidance be obtained from previous English Acts upon which the Law is based. The interpretation of "post-nuptial settlement" was considered in *J v M*,[37] but the interpretation of the remainder of the terms has not been considered judicially.

48 It could be argued that this leaves it open to a Court today to apply a wide construction to the article, such that "marriage contract" be interpreted to refer to a modern day ante-nuptial agreement and "terms of separation" to refer to all post-nuptial agreements, *ie* both to imminent separation agreements and future separation agreements. Adopting the argument in *MacLeod*, because the Court therefore has the power to vary the agreements, they can be treated as enforceable.

49 Some support for this wide interpretation might be found in the case of *Warn v Conetta*.[38] A separation agreement, entered into at arms length with the benefit of legal advice (albeit the legal advice was ignored) was varied by the Court, the Court finding it had the power to vary the separation agreement by virtue of art 27.

50 However, it is extremely unlikely that the interpretation offered above was the legislative intent behind art 27. First, the Law was enacted in 1949 when an enforceable duty on husband and wife to live together still existed. The article would not have been intended to apply to the modern day concept of ante-nuptial and post-nuptial agreements. Secondly, the article allows an application to be made by either party to the marriage or "any person beneficially interested" for the Court to cancel, vary or modify "or terminate the trusts of, any marriage contract …". The placing of the comma after "trusts of" may be significant and could be read as meaning that it is only *the trusts* of any marriage contract, marriage settlement *etc* that can be cancelled, varied, modified or terminated; an

[37] 2002 JLR 330.
[38] [2009] JRC 202.

interpretation which is supported by the reference to “any person beneficially entitled”. Finally, *Warn v Conetta* was properly a case about the binding nature of a separation agreement. There was no discussion as to whether or not there was in fact any necessity for the Court to rely on art 27, the Court having found the separation agreement not to bind the parties.

51 A less tortuous route would be for the Family Division, as in *Radmacher*, simply to regard an ante-nuptial agreement or post-nuptial agreement as part of “all the circumstances of the case” to have regard to in making financial provision for a party to the marriage.[39]

Conclusion

52 The *MacLeod* decision was based upon a distinction drawn between ante-nuptial and post-nuptial agreements on the basis of ss 34 and 35 of the Matrimonial Causes Act 1973. Jersey does not have a legislative equivalent to ss 34 and 35. Therefore, in my view, it would be difficult for the Jersey Courts to follow the decision in *MacLeod*. Jersey is therefore left with treading the *Radmacher* path or leaving the law as it currently stands in relation to separation agreements and finding that any recognition of ante-nuptial and post-nuptial agreements is properly a matter for legislation. Legislative reform may take years. In my view the matter is likely to trouble the Courts before it troubles the States and the arguments made in *Radmacher* for recognising ante-nuptial and post-nuptial agreements stand up to scrutiny as much in Jersey, if not more so, than in England & Wales.

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[39] Article 29, Matrimonial Causes (Jersey) Law 1949.