



CHRISTIE'S BULLETIN  
FOR PROFESSIONAL ADVISERS

*Winter 2006*

VOLUME 11 No. 1

## CHATELS AND RELATIONSHIPS THE CONSEQUENCES OF MARRIAGE, CIVIL PARTNERSHIP, CO-HABITATION AND RELATIONSHIP BREAKDOWN



by Christopher Butler and Richard Hogwood

Speechly Bircham LLP  
6 St Andrew Street, London EC4A 3LX  
Tel: (0) 207 427 6400 Fax: (0) 207 427 6600  
Email: Christopher.Butler@speechlys.com  
Richard.Hogwood@speechlys.com



Christopher Butler heads the Family Law group of Speechly Bircham's Private Client practice. He specialises in advising on complex financial negotiations arising in family law and civil partnership matters including prenuptial agreements, judicial separation, co-habitee disputes and divorce settlements. Christopher is a Deputy District Judge at the Principal Registry of the Family Division and is often invited to speak at conferences on the subject of wealth protection and divorce.

Richard Hogwood is a solicitor within Speechly Bircham's Private Client practice. He specialises in family work and tax planning for UK and non-UK domiciliaries, often for high net worth individuals with complex estates. He is a specialist on the new Civil Partnerships Act and is often invited to speak at conferences and events on the subject across the country. Richard also contributes articles for a variety of publications and has provided expert comment for The Times, The Telegraph and the FT.

It is a sad fact that currently, according to National Statistics, each year 1.3% of married people will divorce. Similar statistics are, unsurprisingly, not known for the numbers of co-habiting couples who break up, and civil partnerships are yet to have been with us long enough for the first dissolutions. However, suffice it to say, relationship breakdown is now a common occurrence.

It is also surely a fact that, whatever the nature or duration of the romantic relationship, the "pot" of assets to be divided between the parties as they go their separate ways will often include chattels. Such chattels could comprise small personal items, more of a sentimental than economic value, but could also range to valuable works of art and heritage property.

This article attempts to review the treatment of chattels of all descriptions in the event of the breakdown of marriage, civil partnerships or co-habitation. It seeks to consider not only the legal setting but also the practical approach that should be adopted when dealing with such assets with a view to defusing the tension at what is inevitably a pressured and emotional time for those involved.

## DIVORCE

The case of *White v White*<sup>1</sup> in 2000 heralded the start of what has become a turbulent period in matrimonial law culminating just this year in the seminal cases of *Miller v Miller; McFarlane v McFarlane*<sup>2</sup> (which were heard together by the House of Lords) and *Charman v Charman*<sup>3</sup>. Prior to 2000, the general approach of the divorce courts was to attempt to provide for (often) the wife's needs but no more. *White* established what is now something of a mantra: "the yardstick of equality". Subsequent cases, particularly where they have involved "long" marriages (those in excess of 12-14 years, including prior periods of cohabitation that lead seamlessly to the marriage), now begin with an assumption of an equal split between the parties of all the assets. Only exceptionally will judges exercise the discretion granted to them by the Matrimonial Causes Act 1973 to deviate from this division, perhaps as a result of a "stellar" contribution by one party (as demonstrated by John Charman in the insurance world or by Sir Martin Sorrell<sup>4</sup> in the field of advertising), or where assets were acquired before the marriage or by way of gift or inheritance thereafter.

How any split is ultimately achieved, bearing in mind the make-up of the assets, is very much left to the parties to agree, failing which the Court will make the decision. The Court has power<sup>5</sup> to order lump sum or periodical payment provision, secured or unsecured, for the other party or a child, property adjustment (including transfers of chattels between the parties), property sale (including sale of chattels) and pension sharing.

The standard of living of the parties prior to separation is often a critical guide for a divorce judge when ascertaining an appropriate level of provision for each of the parties post-divorce. For example if a couple is used to living in a large property surrounded by objets d'art, there may well be an assumption that, finances permitting, both husband and wife should expect a similar lifestyle when they are independent of each other.

As part of the financial process upon divorce (the "ancillary relief proceedings") parties will each complete a Form E which sets out in minute detail each party's financial and employment position. This provides an opportunity to detail any chattels held by either party. Small value items can often be cumulated into one total, but where there are items of significant value there is often merit in specifying them on an accompanying list.

With a view to avoiding litigation and agreeing a financial settlement without the need for successive Court hearings, this is also a good time for the parties to indicate which assets they

would most like to retain after the division. In this way any potential conflicts can be spotted early and dealt with. If the parties cannot informally agree valuations for assets between them, the judge at the First Appointment<sup>6</sup> can order, as part of the case management process, the appointment of an expert or experts.

Ordinarily it is the Family Proceedings Rules 1991 that apply to ancillary relief proceedings and not the Civil Procedure Rules 1998. However, unusually, CPR ss 35.1 to 35.14 do apply (save for ss 35.5(2) and 35.8(4)) as these relate to expert evidence. These sections are supplemented by Practice Direction 35 – Experts and Assessors and by the President of the Family Division's Practice Direction of 25 May 2000. The President's Practice Direction encourages the agreement of a single joint expert with a view to minimising cost and states that if the parties themselves cannot agree then the Court may be minded to use its powers under s 35 to appoint a single joint expert.

If there is a risk of a tax charge on the transfer of chattels between the parties, setting out an estimate of this liability at the time of exchange of the Form E is also likely to be productive. It can then be agreed at the First Appointment whether a single joint expert, usually an accountant, can be appointed to assess the quantum of any such liability officially. The tax consequences of divorce regarding chattels will be discussed in more detail below.

There is often a tendency to view chattels as a secondary part of the ancillary relief process, to be dealt with some time after other assets such as real estate, cash and investments, pensions, business interests and the like. However there is a severe danger, if this approach is adopted, of ultimately extending the entire process and, consequently, increasing costs. The case of *K v K*<sup>7</sup> exemplifies this. This matter was heard by Mrs Justice Baron and it is perhaps worth quoting directly from her judgment on this point:

*"In my experience the division of chattels can often be problematic, particularly where items of sentimental value are concerned. Consequently, I was surprised that no steps had been taken in this case to resolve this issue (or even narrow it) prior to the commencement of the trial. This is an (all too) frequent occurrence. I believe that it is important that all outstanding issues are resolved at (and I emphasise this phraseology) the final hearing. The costs in this case are enormous and the prospect that there might have to be another round of litigation dealing with chattels is unacceptable. Solicitors must not forget chattels. As a matter of practice, the division of chattels must be accomplished prior to trial (with a clear schedule denoting the destination of items). If the parties*

*cannot agree, then a Scott schedule must be completed with the items marked as agreed or remaining in dispute. The schedule should set out in very short form the reasons why any particular item is sought*<sup>8</sup>.

The Married Women's Property Act 1882 contains, at s 17, provision enabling a husband or wife (or those formally engaged) to apply to the Court for a declaration in respect of any property as to whom it belongs. Such an application can be made at any time up to three years after the date of annulment or dissolution of the marriage. However such applications are rarely made as this Act does not enable the property ownership to be varied (unlike the Matrimonial Causes Act 1973 as discussed above).

### **PRE-MARITAL, INHERITED AND GIFTED ASSETS**

Whilst the starting point with long marriages is now an equal division of assets between husband and wife, this is not necessarily so in respect of pre-marital, inherited and gifted assets, including chattels. If the intent of ancillary relief proceedings is to enable each party to "[share] the fruits of the matrimonial partnership"<sup>9</sup>, arguably such assets were not part of the partnership.

This area is still very much in flux. The cases earlier this year have added to the debate but have certainly not resolved all the outstanding questions. Lord Nicholls in *Miller v Miller; McFarlane v McFarlane* considered this point. He noted that the Matrimonial Causes Act 1973 makes no specific delineation between matrimonial and other property. However, he also observed that judges could bear in mind when exercising their discretion the differing sources of the assets in the marriage. Lord Nicholls posited that, in a short marriage, parties may not be entitled to a share of the other's non-matrimonial property. *"With longer marriages the position is not so straightforward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to remain in specie"*<sup>10</sup>. Baroness Hale in her judgment also discussed similar issues<sup>11</sup>.

Although it is clear that there remains substantial uncertainty regarding such assets (be they chattels or other assets), there is at least a suggestion that they will be dealt with differently to

those assets accumulated by the parties during the marriage. It is for this reason that such assets tend to be the focus of pre-nuptial agreements.

### **PRE-NUPTIAL AGREEMENTS (PNAS)**

When PNAS are mentioned the common reaction is "What's the point? They don't work, do they?". In fact they both do and they don't.

PNAs are not enforceable as contracts in the English Courts. Statute has reserved to the divorce courts an ultimate discretion as to how they divide the assets of the parties and parties cannot contract out of this discretion. However, this is not to say by any means that PNAS are valueless. Instead they can and have proved persuasive to the Court, constituting conduct of the parties, one of the factors that the Court is directed to consider when exercising its discretion.

The case of *K v K*<sup>12</sup> is the definitive case in this area. In his judgment Rodger Hayward Smith QC, sitting as a deputy High Court judge, set out a "checklist" of factors to take into account when considering the persuasiveness of a PNA. Chief amongst these were the following:-

1. Each party should have "proper" advice, which is generally thought to mean good quality, independent legal advice;
2. Each party should give full disclosure of their finances, which should include assets, income and an indication as to the quantum and timing of any future inheritance;
3. It should not be unjust to hold either party to the terms of the PNA. In other words, the terms should be fair and reasonable. This relates to point 2. above in that, were there not full disclosure by one party, it would not be clear to the other party what rights they might be giving up by entering into the PNA; and
4. Neither party should be under pressure to sign the agreement, either by the other or by third parties (such as family of the other). Pressure can include pressure of time and the recommended "cooling off" period between signing a PNA and the wedding is 21 days.

Agreements which fulfil these criteria stand a much better chance of proving persuasive to a Court. Best practice now also suggests that the terms of a PNA should be reviewed on a regular basis, generally upon the birth of any child and in any event every five years. This ensures that the terms of the agreement remain fair to the parties.

PNAs can be drafted to say whatever the parties agree (bearing

in mind the factors listed above). Commonly the parties will set out, each in a separate schedule to the PNA, a list of their assets, including chattels, liabilities, employment and income details and inheritance prospects. Often the items listed will be defined as "Pre-Marital Property", with a view to the PNA itself then ring-fencing these items in the event of separation or divorce. Chattels of any significant value should therefore be included at this point.

Some practitioners take the view that formal valuations should be conducted at this stage in proceedings, thereby providing as full a disclosure as possible. Others though, and many clients, feel that the cost of instructing valuers at this stage is unnecessary bearing in mind the hope that the PNA will itself never be required. Which option is preferred may to some extent depend upon the way in which the growth in value of any asset (including a chattel) is to be dealt with. If the item itself, including any gain or diminution in value, is to remain with the party who owned it prior to the marriage then arguably valuation is less important.

However, if it is the intention that the value of the chattel is "frozen" at the date of the marriage and any growth thereafter split between the parties, then clearly valuation becomes more important. In this situation it is undoubtedly going to be easier and therefore cheaper to obtain a formal valuation, which both parties can agree, at the date of the marriage than to have to carry out a retrospective valuation exercise in the event that the parties split up potentially many years later and want to calculate what is and is not in the marital "pot".

Chattels that are inherited or received by way of gift during the marriage are also often ring-fenced in a PNA (often defined as "Post-Marital Property"), preserving them for the party who first receives them. In addition it can be prudent to provide that chattels that are bought to replace other ring-fenced chattels which have themselves been sold will also be afforded the same protection, or where there has been a substitution or exchange.

Where the parties themselves purchase chattels during the marriage, it is commonplace for them to agree how they will be dealt with upon a divorce or separation in two different manners, dependent upon value. They might, for example, agree that items purchased for less than, say, £10,000 (depending on the wealth and standard of living of the parties) shall be considered to be jointly owned by the parties and therefore available for equal division. However, where items are purchased for more than this amount, they will be deemed to belong to the parties in the proportions in which they each

contribute to the price or as otherwise agreed in writing.

During the course of the marriage, a PNA will generally reserve to each party the power to deal with their separate assets (the Pre-Marital and the Post-Marital Property) as they so wish, with the ability to sell, lease, mortgage or otherwise dispose of such items. The parties may also agree not to make any claim against these items during the course of the marriage.

Trust interests, including where chattels are held in trust for a party, can be ring-fenced in a PNA in the same manner as other assets. How effective this is, however, is likely to depend upon the manner in which the trust assets are used. This is discussed below.

## **TRUST INTERESTS**

---

Just because assets are held in trust rather than outright does not mean that they escape the consequences of divorce. The English Courts have the power, which they are willing to use, to vary *“for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil ) made on the parties to the marriage”*<sup>13</sup>. Further, they have power to make an *“order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement... ”*<sup>14</sup>.

The Family Court will interpret “settlement” very widely, including not only strict settlements but also such arrangements as a mere covenant to pay periodic amounts, and the settlement can comprise any form of document. The key, as set out in *Prescott (formerly Fellowes) v Fellowes*<sup>15</sup>, is that the settlement should provide for the financial benefit of one party and make reference to their married state.

The “huge money” case of *Charman v Charman*<sup>16</sup>, heard in the High Court earlier this year, focussed practitioners’ attention back on the topic of trust interests. Mr Charman had established Dragon Holdings Trust in 1987, having married Mrs Charman in 1976. The marriage effectively ended in late 2003. Dragon Holdings Trust was worth about £68 million at the time of the hearing in 2006 and it was initially a conventional discretionary trust (settled in Jersey but later moved to Bermuda) of which both Mr and Mrs Charman and their children and remoter issue were beneficiaries. Mr Charman asserted that this was a “dynastic” trust, from which he did not benefit but future generations would, and therefore it should be left out of account for the purposes of the divorce.

The judge, Mr Justice Coleridge, disagreed. He noted that *“the*

*failure to indicate any such dynastic plan on the face of any of the letters of wishes drafted at any time since Dragon’s inception is, quite frankly, incredible if it underlay the trust’s true purpose”*<sup>17</sup>. Accordingly he kept the value of the trust in the marital “pot” for division between the parties.

This may not, though, be the end of Mrs Charman’s struggle as Mr Charman appears likely to appeal the decision. Furthermore she may also face difficulty enforcing an English Court order, bearing in mind that the trust, many of the trust assets and Mr Charman himself are based in Bermuda, a jurisdiction which has in place legislation specifically to prevent the enforcement of foreign divorce orders.

As mentioned above, parties can attempt to ring-fence trust interests in a PNA. Such a tactic is more likely to be successful if the trust is not depleted to support the standard of living of the parties during the marriage. Were it to be so it is more probable that the trust would thereby be drawn into the marital “pot”. Where a trust holds cash and investments, the advice to clients is to use income if they wish, but, for this reason, not to use capital if possible. Where a trust holds chattels, the corollary would seem to be to enjoy and benefit from those chattels during the marriage but not to sell or mortgage them or to depend upon other trust capital to support the marital lifestyle.

It should, though, be remembered that the law in this area is unclear and largely untested. Many matrimonial cases never reach a full trial, and of those that do only a small minority are ever reported. Accordingly PNAs in general, and those raising issues relating to trusts and chattels in particular, are relatively unproven. That said, PNAs are becoming increasingly popular and the case law in this respect is moving on apace.

## **CIVIL PARTNERSHIPS**

---

The Civil Partnership Act 2004 introduced civil partnerships to the United Kingdom as from December last year. Couples of the same gender who, as with those wishing to marry, are not within the prohibited degrees of relationship with each other, may register their civil partnership and thereby acquire benefits and burdens almost identical to those who marry.

So far as the potential burdens are concerned, this includes all the consequences of divorce (called, instead, “dissolution” for civil partners) referred to above. The same powers to vary settlements and order the sale and transfer of chattels and other property will be available to the dissolution judges and, mindful of this, prospective civil partners are and will be considering pre-registration agreements (equivalent to PNAs) to ring-fence

certain assets.

Since dissolutions in England and Wales cannot occur within the first twelve months of the civil partnership, the first dissolutions are yet to occur. Accordingly the division of assets upon dissolution and the weight afforded to pre-registration agreements are completely untested. Nevertheless, the same judges who deal with divorce and PNAs will also deal with dissolutions and pre-registration agreements and it is therefore inconceivable that the treatment afforded to married couples and those in civil partnerships will be in any way different.

## **TAX AND CHATTELS**

---

The tax consequences of the division of assets upon a divorce or dissolution are, perhaps surprisingly, frequently overlooked or improperly understood. This may perhaps be because few matrimonial lawyers have tax training and few tax lawyers have matrimonial training, and only rarely will these two disciplines exist in the same department or even in the same firm. However the tax consequences should be considered properly and early in the process as, in the context of capital gains tax in particular, timing is everything.

### **Stamp Duty and Stamp Duty Land Tax**

So far as chattels are concerned these taxes are anyway irrelevant. Despite this, in a matrimonial context exemption is provided from stamp duty and stamp duty land tax on the transfer of assets pursuant to a divorce or dissolution order<sup>18</sup>.

### **Inheritance Tax**

The spouse and civil partner exemption from inheritance tax (either the unlimited exemption or the £55,000 exemption in respect of transfers from a UK domiciled to non-UK domiciled person) remains available until decree absolute is pronounced. Thus separation of the parties is of no consequence for inheritance tax purposes.

Even were such an exemption not to apply (perhaps because the £55,000 exemption is exceeded or, where assets are put in trust for the benefit of the other, as a result of changes introduced by the Finance Act 2006) it is arguable that inheritance tax would not be chargeable as there is no intention to confer a gratuitous benefit on the other party<sup>19</sup>.

In the context of transfers made pursuant to a Court order and following the granting of decree absolute these are not believed to be transfers of value. This is because the making of the order

prior to decree absolute reduces the value of the estate of the person against whom the order is made but is not accompanied by a disposition. Conversely, when the disposition later occurs, there is no transfer of value as the disposition is made to discharge a pre-existing liability and does not diminish the value of the estate.

Exemption from inheritance tax is also available regarding dispositions for maintenance of a family<sup>20</sup>. This will only rarely be needed, for example, where the value of the disposition exceeds the liability imposed by a Court order pursuant to which the disposition is made.

If one or both of the parties holds heritage property which has benefited from a conditional exemption from inheritance tax, additional care should be taken. The potential tax and disposal costs that would arise were such an item to be sold to fund a financial settlement should be calculated early on and should be included on the Form E financial disclosure. This is irrespective of any argument as to whether such an asset should be left out of account by dint of it being, for example, a family heirloom. The same comments regarding the appointment of a single joint expert will apply as set out above.

There may, of course, be some difficulty with calculating the potential tax charge as, amongst other factors, this will depend upon who is considered to be the "relevant person" and, at the time of the posited non-exempt transfer or disposal in the future, whether they are alive or dead (and, if dead, when they died). One may therefore be left with a situation in which a range of several possible tax charges could apply with the parties then negotiating between them (or, in the absence of agreement, a judge ultimately deciding) what compromise amount is appropriate.

A similar calculation will need to be made if it is instead proposed that the heritage property in question be transferred to the other party as part of the divorce settlement. The recipient spouse or civil partner will have to enter into the necessary undertakings described in IHTA 1984 s 31 to enable conditional exemption still to be claimed on the transfer. However, although such a transfer may not itself thereby engender a charge, the recipient and their advisers should be mindful of the lack of freedom that the recipient will have to deal with the asset going forwards. It might therefore be suggested that a suitable discount be applied against the face value of the asset to reflect the likely inheritance tax (or capital gains tax – see below) charge arising on any subsequent disposal. This would be no different in essence from the

arguments and discounts suggested by the transferor party were it instead proposed that the asset remain with him or her as part of their entitlement.

### Capital gains tax

Similar rules as regards conditional exemption apply to capital gains tax as to inheritance tax. These are contained in the Taxation of Chargeable Gains Act 1992 s 258. Accordingly, whether the owner seeks to retain the heritage property asset in question or whether instead it is proposed that it be transferred to the other spouse or civil partner, arguments will again arise as to the potential tax cost of a subsequent non-exempt sale or disposal and the discount that should therefore be applied to the current valuation.

The biggest bear-trap so far as tax and divorce and dissolution is concerned relates to the spouse/civil partner no-gain no-loss rule and capital gains tax. Ordinarily, spouses and civil partners can transfer assets between each other free of a capital gains tax charge. The recipient spouse/civil partner is deemed to receive the asset at such value as ensures that the donor spouse/civil partner makes neither a gain nor a loss on the disposal.

Unlike inheritance tax, where the spouse and civil partner exemption remains available until decree absolute is pronounced, for capital gains tax the no-gain no-loss facility ends at the end of the tax year in which the parties cease living together (assuming decree absolute has not first occurred). The parties are considered to be "living together" unless *"they are separated under an order of a court of competent jurisdiction, or by deed of separation, or they are in fact separated in such circumstances that the separation is likely to be permanent"*<sup>21</sup>.

Accordingly, where it is likely that assets standing at a capital gain are likely to be transferred from one party to the other upon a divorce or dissolution, it is vital to be aware of when the parties have separated or are likely to separate. Should they separate permanently on 4 April there will only be one day in which then to make use of the no-gain no-loss facility, whereas separating instead on 6 April will give 364 days' leeway.

The usual capital gains tax exemption for disposals of chattels (i.e. tangible, movable property) worth less than £6,000 (or sets of chattels worth less than £6,000<sup>22</sup>) should be borne in mind. So too should the exemption for tangible movable property which also constitutes a "wasting asset" for the purposes of TCGA 1992 s 44 (for example certain wines, and various other assets with a predictable lifespan of 50 years or fewer).

### COHABITATION

---

So far this article has examined the role of chattels in divorce and dissolution and some of the issues thereby raised. However, increasingly couples are choosing to co-habit rather than to marry. In fact, the Government Actuary's Department in its 2005 report<sup>23</sup> predicted a rise from 2 million cohabiting couples in 2003 to 3.8 million in 2031. The legal issues that this alternative status raises are many and varied.

First, the common myth of the "common law spouse" should be exploded. Cohabitants, regardless of the length or nature of cohabitation, do not acquire any spousal or civil partner rights. Thus there is no process akin to divorce or dissolution, no exemption from inheritance tax, no no-gain no-loss facility in respect of capital gains tax and no automatic entitlement upon intestacy.

Any entitlement that one partner has against the other upon relationship breakdown must be founded in land or trust law. The starting point is that the person who is a legal owner of an asset will keep that asset. There might, though, be an express declaration of trust by which that legal owner previously declared that the legal title was held beneficially, as to part or all, for the other party.

If there is no express declaration of trust, a resulting trust may arise where some or all of the purchase price was provided by the non-legal owner. Unless there is evidence suggesting another intention, the beneficial ownership is presumed to be shared in proportion to the financial contributions. This presumption can be rebutted, though, if there is evidence of the money being provided as a gift or a loan or even a payment of rent. Whilst there is a presumption of advancement between married couples and those engaged to be married (i.e. an intention to make a gift is assumed where one party is under an equitable obligation to provide for the other), there is no such presumption with co-habitees.

A constructive trust could also be alleged in respect of particular assets. To succeed in such a claim the non-legal owner would have to demonstrate, as established in *Gissing v Gissing*<sup>24</sup>, that it would be inequitable for the legal owner to claim sole beneficial ownership. They would do this by showing that there was both a common intention to share the beneficial ownership and the non-legal owner had acted to their detriment in reliance upon that common intention.

Common intention will need to be demonstrated by clear evidence of an agreement to this effect, or it can be inferred by the Court. The case of *Lloyds Bank Plc v Rosset*<sup>25</sup> established that

it is doubtful that anything less than some financial contribution towards the asset in question would suffice.

Where a resulting trust is proven, the proportions allocated to each party are generally a matter of arithmetic based upon contribution. Contrastingly, with a constructive trust the Court will adopt a broad brush approach to produce a fair outcome.

To reduce the need to debate the presence or not of resulting trusts, many co-habiting couples are now attempting to formalise their arrangements in a written document, similar to PNAs for those marrying or registering a civil partnership. Such a document is often called either a Living Together Agreement (LTA) or a Cohabitation Agreement.

Unlike with PNAs, LTAs can be legally enforceable as a contract between the parties. This is because the parties are no longer within the matrimonial regime and, accordingly, the Courts are not compelled to exercise their discretion. However, similar principles apply to those established by *K v K*<sup>26</sup> listed above where the parties wish to maximise the prospect of the LTA being enforceable. The agreement should be clear that it is not attempting to regulate the parties' sexual relationship and should also fulfil the essential requirements of contract law. Thus there should be an intention to create legal relations, consideration (not needed if the LTA is in the form of a deed), clarity of terms and no duress or coercion (best shown by each party giving full financial disclosure and having separate legal advice).

Commonly, so far as chattels are concerned, LTAs will include similar provision to PNAs. Thus they might suggest a value below which chattels purchased during the relationship are considered jointly held and above which they are held in proportion to the respective contributions. Furthermore chattels owned prior to the agreement can be set out in a schedule to the LTA and specifically ring-fenced as can those later acquired by means of gift or inheritance.

## CONCLUSION

There is too often a tendency for chattels to be considered in any detail rather late in the day, be the context a divorce, dissolution of a civil partnership or ending of a co-habiting relationship. This risks delaying the conclusion of what, for the parties involved, is inevitably a painful process. It also risks exacerbating the costs. Specialist advice should be taken early and issues, particularly potential tax concerns in respect of no-gain no-loss capital gains tax transfers and the possible loss of conditional exemptions for inheritance tax and capital gains tax, should be raised sooner rather than later.

Parties can also plan ahead with a view to minimising conflict and cost, and creating certainty, were their relationship not to work out. They should consider PNAs and LTAs, the latter often being drafted to become the former if the parties later marry or register a civil partnership. Increasingly family heads are also encouraging younger generations to sign up to a "family protocol", pursuant to which they may, for example, agree to enter into LTAs and PNAs if, in the future, they hope to benefit from family wealth including chattels.

Trustees too should be mindful of being drawn into proceedings when beneficiaries' relationships encounter difficulty, and trustees and beneficiaries alike should be aware before trouble looms of the importance of letters of wishes and the risks of capital as well as income being utilised.

B

## FOOTNOTES

1. [2001] 1 AC 596; [2000] 3 WLR 1571; [2000] 2 FLR 981; [2001] 1 All ER 1; HL.
2. [2006] UKHL 24; [2006] 1 FLR 1186.
3. [2006] EWHC 1879 (Fam).
4. *Sorrell v Sorrell* [2005] EWHC 1717 (Fam).
5. Matrimonial Causes Act 1973 s 23, 24, 24A and 24B.
6. The first hearing in the ancillary relief process.
7. *K v K* [2005] EWHC 1070 (Fam).
8. *K v K*, para 32 of the judgement.
9. *Miller v Miller; McFarlane v McFarlane*, para 20 of the judgment.
10. *Ibid.*, para 25 of the Judgment.
11. *Ibid.*, paras 147-153 inclusive of the judgment.
12. (Ancillary Relief: Pre-Nuptial Agreement) [2003] 1 FLR 120.
13. Matrimonial Causes Act 1973 s 24(1)(c).
14. *Ibid.*, s 24(1)(d).
15. [1958] P 260, CA.
16. See note 4.
17. *Charman v Charman*, para 74 of the judgment.
18. Finance Act 1985 s 83; Stamp Duty (Exempt Instruments) Regulations 1987 Regulation 4H; and Finance Act 2003 clause 3 and 3A to Schedule 3.
19. IHTA 1984 s 10.
20. *Ibid.*, s 11.
21. Income and Corporation Taxes Act 1988 s 282. This definition is incorporated into the capital gains tax legislation by TCGA 1992 s 288(3).
22. TCGA 1992 s 262.
23. 2003-based marital status and cohabitation projections for England and Wales, [http://www.gad.gov.uk/marital\\_status\\_projections/2003/index\\_principal.htm](http://www.gad.gov.uk/marital_status_projections/2003/index_principal.htm).
24. [1971] AC 886.
25. [1990] 2 FLR 155.
26. See note 11.