This suggests that a second lesson should be learned from *Webster*, namely the danger of courts granting public law adoption orders too readily or too quickly without fully exploring alternative options. Wall and Wilson L.JJ. described the judge's decision to free the Webster children for adoption as "cursory", but the Court's own treatment of this critical issue was no less cursory. After all, on one view, it was the central issue in the case. Had those adoption orders not been granted, there would almost certainly have been a rehearing, an opportunity for the Websters to clear their name and be reunited with their children.

We now have the Adoption and Children Act 2002 and Wall L.J. regretted the fact that the judge in *Webster* did not have the advantage of reading the Court of Appeal's interpretation of it in *Re P (Placement Orders: Parental Consent)* [2008] 2 F.L.R. 625. In that case, the Court emphasised the lifelong implications of adoption; that since adoption is the most extreme interference with family life cogent justification must exist for parental consent to be dispensed with; that it must be demonstrated that the child's welfare *requires* adoption as an imperative to other orders; and that judicial rigour needs to be deployed where an application to place a child for adoption follows on quickly from a care order. In other words, the fact that a care order is warranted does not mean that adoption is. Moreover, the statutory principle which militates against delay (Adoption and Children Act 2002, s.1(3)) should be applied with caution where adoption is part of the care plan. Indeed it can be argued that there ought always to be a respectable interval between care orders and placement orders given the magnitude of the adoption decision.

In the future the Webster children might exercise their statutory rights to access their birth certificates and take steps to re-establish contact with their birth parents. In the meantime Strasbourg may be the Websters' last refuge. But the implications of this case go well beyond the Websters. Given the fallibility of the family justice system, there should be urgent reconsideration of the doubtful official policy which prefers public law adoption as the best long-term option for "looked after" children.

ANDREW BAINHAM

AGREEMENTS FOR GROWN-UPS?

THE Privy Council decision in *MacLeod* v. *MacLeod* [2008] UKPC 64 on Manx law identical to the Matrimonial Causes Act 1973 provides valuable clarification of the law relating to various types of agreement between spouses concerning the financial consequences of divorce, and

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their relevance in subsequent proceedings under the 1973 Act for financial ("ancillary") relief on divorce, initiated despite the existence of such an agreement.

The MacLeods, American veterans of one divorce apiece, were married for 10 years, with five children. The husband's considerable wealth was protected by a pre-nuptial agreement, binding under Florida law, concluded in the US before their wedding there. They then moved to the Isle of Man. After protracted negotiations and with independent legal advice, the parties concluded a post-nuptial agreement confirming the pre-nuptial agreement but varying it substantially to provide more generously for the wife both during the marriage and at its end, whether that should be by divorce or the husband's death. Shortly afterwards, the parties divorced and the wife sought ancillary relief more generous than that agreed. The judge's order was closer to the husband's offer (which included increased provision for the children), but required him to pay the wife outright a housing fund for her and the children, rather than to purchase on trust a house for their occupation that would revert to the husband when the youngest child completed full time education. The husband successfully appealed on the ground that this improperly gave the wife greater provision than their post-nuptial agreement permitted. The essential question on appeal was the validity and effect of that agreement. Several important propositions emerge from Baroness Hale's speech.

It remains the law that, as a matter of public policy, pre-nuptial agreements are not binding. They are just one factor to be considered in the exercise of the court's discretion under section 25 of the 1973 Act in granting ancillary relief. Occasionally, pre-nuptial agreements (so-called "pre-nups") will have "magnetic importance" in that exercise (e.g. *Crossley* v. *Crossley* [2007] EWCA Civ 1491). But fundamental reform is for Parliament (*MacLeod*, [31]–[35]).

By contrast, separating and separated spouses have long been able to reach valid separation agreements. Although such agreements cannot exclude the court's jurisdiction to grant ancillary relief, they are not deprived of binding force by any public policy objection akin to that applying to pre-nups (*Hyman* v. *Hyman* [1929] A.C. 601; section 34(1) of the 1973 Act). *MacLeod* goes further in holding that post-nuptial agreements making financial provision for a hypothetical future separation should no longer be regarded as void on public policy grounds ([38]–[39]).

Sections 34–35 of the 1973 Act, which do not apply to pre-nups, govern both separation agreements and post-nuptial agreements making financial arrangements for any future separation ([37]). So provided the agreement is in writing and valid under the general law of contract, a post-nup (unlike a pre-nup) will now bind the parties under section

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34. Such agreements can be varied on the grounds set out in section 35: change of circumstance (including one foreseen by the parties at the time of the agreement) in light of which the agreement should be altered; or failure of the agreement to make proper provision for any children of the family.

If one party to a post-nup or separation agreement instead applies, as Mrs MacLeod did, for ancillary relief inconsistent with the agreement (see *Edgar* v. *Edgar* [1980] 1 W.L.R. 1410), "the same principles should be the starting point" (*MacLeod*, [41]). So the court hearing such an application may decide in the exercise of its discretion under section 25 to depart from the agreement given a change of circumstance – in a gloss added by Baroness Hale, "the sort of change which would make those arrangements manifestly unjust" ([41]) – or where inadequate provision is made for a child. Going beyond section 35, however, the court may also depart from the agreement because of circumstances in which the agreement was made, applying principles from *Edgar* which may extend beyond vitiating factors in contract law (see [42]). But, subject to the court's duty to give first consideration to the welfare of any minor children of the family (section 25(1)), it seems that these agreements, which – unlike pre-nups – are prima facie binding under section 34, should generally be treated as the starting point in the court's pursuit of the fair outcome. This flows from Baroness Hale's apparent endorsement of Ormrod L.J.'s "general proposition" 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 the terms of their agreement" (*Edgar*, at 1417; *MacLeod*, [42]). Certainly, the mere fact that a court would have made different provision will not justify departing from the agreement (*MacLeod*, [42]), though the policy that an obligation that ought to be met by the ex-spouse should not be cast onto the public purse might do so (*MacLeod*, [41]).

For completeness: agreements compromising a claim for ancillary relief but not yet enshrined in a consent order do not create binding contracts (*Xydhias* v. *Xydhias* [1999] 2 All E.R. 386). But they are treated like post-nuptial and separation agreements under *Edgar* principles if one party seeks ancillary relief (*MacLeod*, [26]).

Unsurprisingly, solicitors are now advising clients to confirm existing pre-nups as post-nuptial agreements. But many people, not least the appellant in *Radmacher* v. *Granatino* ([2008] EWCA Civ 1304, from *NG* v. *KR* [2008] EWHC 1532 (Fam)), will be disappointed by the Privy Council's refusal to afford greater significance to pre-nuptial agreements judicially. However, as Baroness Hale observed, pre-nuptial agreements should not be treated as binding contracts without

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statutory safeguards, notably formality requirements and a jurisdiction to set aside or vary agreements given changed circumstances (*MacLeod*, [31]–[35]). She also expressed policy reservations about enforcing pre-nups. When discussing post-nups, she remarked: "We must assume that each party to a properly negotiated agreement is a grown up and able to look after him- or herself." ([42]). By contrast, it seems, yet-to-be newly-weds need looking after: a pre-nup may be "the prize which one party may extract for his or her willingness to marry" ([36]). Implicitly, the other party's desperation to win the prize might so cloud his or her judgement that we ought not to risk treating the parties like "grown-ups" by giving their agreement prima facie binding force on divorce. But as Baroness Hale acknowledges, post-nups are not invariably negotiated in pressure-free conditions ([42]). The current law's distinction between pre- and post-nups is hard to sustain on this basis.

These and other policy questions and the possibility of legislative reform will be explored in the Law Commission's new project on marital property agreements. We shall see whether the Commission – and Parliament – think that English adults, like their counterparts throughout most of Europe and beyond, can be trusted to negotiate prima facie binding pre-nuptial agreements. For the time being, English (and Manx) law on pre-nups, and English private international law's insistence on applying English law to family law matters regardless of the parties' connection with another jurisdiction (see *Radmacher* v. *Granatino*, above), continue to cause irritation, particularly to spouses whose agreements would be upheld elsewhere.

JO MILES

TRAILING A NEW APPROACH TO FREE MOVEMENT OF GOODS?

IT is a truth almost universally acknowledged that ECJ cases with apparently banal facts give rise to some of the most important decisions of EC constitutional law. Senor Costa's refusal to pay his trifling electricity bill caused the Court to pronounce on the supremacy of Community law (Case 6/64 *Costa* v. *ENEL* [1964] E.C.R 585). Italy's refusal to allow motorcycles to tow trailers (Case C-110/05 *Commission* v. *Italy (trailers)*, Judgment of 10 Feb. 2009) led the Court to rule on another aspect of the relationship between EC law and national law: how far can the Treaty provisions on free movement constrain national freedom to regulate?

The *Trailers* case did not fit the standard free movement of goods model: it concerned neither a challenge to national product-requirements to which Case 120/78 *Cassis de Dijon* [1979] E.C.R 649

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