mon surname. Perhaps the answer, in these days of supposed gender-neutral parenthood, is for children to take the names of *both* parents. Yet the reality is, as with so much of modern family law, that a universally acceptable solution is elusive, if not impossible, because of the sheer diversity of family practices. Moreover, for the law to be prescriptive about the choice of names would itself be a fundamental departure from the traditional English approach.

There is however one issue concerned with the nomenclature used in relation to children on which it might be hoped to achieve something approaching universal acceptance. This is that it is no longer acceptable to refer to a child such as Alexander as "illegitimate". It is therefore disappointing, to put it no higher, that two of the Law Lords found it necessary to do so in this case. And this too, it may be argued, is a matter of "rights".

ANDREW BAINHAM

JUDICIAL PATERNALISM AND PRIVATE ORDERING ON DIVORCE

IT is axiomatic that divorcing spouses cannot by agreement oust the jurisdiction of the court to award ancillary relief: *Hyman* v. *Hyman* [1929] A.C. 601. Finality can only be achieved by obtaining the sanction of the court in the form of a consent order, invoking a procedure which requires full disclosure of all material factors so that the court can exercise its own discretion on the basis of the information put before it: Matrimonial Causes Act 1973, s.33A; *Livesey* v. *Jenkins* [1985] A.C. 424. But out-of-court agreements made by the parties are not without significance. Far from it, they will be treated as a very important consideration should the court subsequently be asked by one of the parties to make an award of ancillary relief, and will not usually be departed from unless there are good and substantial grounds for concluding that injustice will be done by holding the parties to their terms: *Edgar* v. *Edgar* [1980] 1 W.L.R. 1410. Presumptive enforceability has been criticised as "the worst of both worlds", as the parties must go to court to determine whether the agreement they have reached is legally binding: *Pounds* v. *Pounds* [1994] 1 F.L.R. 775, 791, *per* Hoffmann L.J. Either the agreement should bind, or it should be wholly disregarded.

In *Xydhias* v. *Xydhias* [1999] 1 F.L.R. 683, the Court of Appeal, led by Thorpe L.J., gave the *Edgar* principles another twist. The context was negotiations between divorcing spouses, conducted with the assistance of solicitors and counsel on both sides. A few days before the hearing date, substantive agreement had been reached, such that the parties told the court that the matter had been settled, and the date was accordingly vacated. Resolution of the dispute then came to grief on points of detail, notably the timetable for payment of the agreed lump sum. The question arose whether an agreement had been reached which should, according to *Edgar*, be

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enforceable between the parties unless its terms caused substantial injustice. Experienced leading counsel on both sides agreed that in determining this issue, ordinary contractual principles were to be applied. It was necessary to decide first whether there was a contract, and only then could the court decide, exercising its statutory discretion and taking account of all the circumstances including the agreement, whether that agreement should be translated into the order for ancillary relief.

Thorpe L.J. did not agree. Judicial discretion was to be applied from the very outset: "If there is a dispute as to whether the negotiations led to an accord that the process should be abbreviated, the court has a discretion in determining whether an accord was reached". Judges are to be encouraged to be pro-active, to find that an agreement has been reached in substance although minor points of detail may remain unresolved, and in such cases to make an order giving effect to that basic agreement. In this way, the court can seize the opportunity to save expense, and to penalise parties who vacillate and, still worse, retract from previous concessions. Applying such a discretion to the state of negotiations in *Xydhias*, rather than the strict rules of construction, enabled the court to find that there had been an agreement, presumptively binding on the husband, on which basis the court properly made an order for ancillary relief.

The judgment of Thorpe L.J. heralds a new judicial approach in ancillary relief cases. The House of Lords has recently emphasised the need for considering, in the grant of leave to appeal, the proportionality between the amount at stake and the resources which it is appropriate to spend on resolving the parties' dispute: *Piglowska* v. *Piglowski* [1999] 3 All E.R. 632, 644. Although the new divorce process enacted in Part II of the Family Law Act 1996 has been shelved for the time being, any procedural reforms must take account of the increased use of mediation in resolving property disputes between spouses. Exempt until now from the repercussions of the Woolf reforms, the Lord Chancellor has announced the inception, from June 2000, of ancillary relief pilot schemes which will investigate the extent to which greater judicial case management will effect savings in time and legal costs.

But problems remain. Where parties are legally represented, undue judicial enthusiasm will be met by still greater caution from the legal profession. Negotiations will be inevitably prefaced with the usual "without prejudice" disclaimer, and even activist judges will then be slow to intervene and find that an enforceable agreement has been reached. The invocation of contractual principles offers, if nothing else, a degree of certainty on which some reliance can be placed. Most lawyers know when they have passed from negotiation to agreement, and, where they disagree, objective criteria can be applied. Dissatisfied clients can be assured that the lawyers' immunity from suit for advice tendered during negotiations has been significantly eroded and that an action against the solicitor is now seen as

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more appropriate than visiting the sins of one's lawyer on one's former spouse by seeking to deny the validity of the agreement entered into in reliance on bad legal advice: see *Hall & Co.* v. *Simons* [1999] 1 F.L.R. 536, *Harris* v. *Manahan* [1997] 1 F.L.R. 205; *cf. Kelley* v. *Corston* [1998] 1 F.L.R. 986. Ironically, it will be the unrepresented, an ever increasing number in divorce litigation, who are at the greatest risk.

It can also be questioned whether this degree of judicial activism, resulting in a reluctance to surrender the pervasive interventionist powers of the ancillary relief jurisdiction, can be justified. Few agreements presented to the court to be sanctioned as consent orders are in fact rejected, and few consent orders are subsequently set aside. While Thorpe L.J. contends that "the emotional and psychological stresses" experienced by divorcing spouses are one of the factors which the judge can consider in determining whether agreement has been reached, such tenderness as the courts have shown in other contexts towards married women (or for that matter men) is no longer based on the marriage ceremony, but "reflects the underlying risk of one cohabitee exploiting the emotional involvement and trust of the other" (*Barclays Bank plc* v. *O'Brien* [1994] 1 A.C. 180, 198). Agreements to compromise property disputes between unmarried cohabitants, where the emotional and psychological stresses may be just as great, are not required to be sanctioned by the court, and in proving agreement there, normal contractual principles would certainly be applied. The divorce jurisdiction is unique, but is it so special?

STUART BRIDGE

EVERYBODY OUT

THE common law tradition strongly favours witnesses giving evidence in public. In the leading case of *Scott* v. *Scott* [1913] A.C. 417, the House of Lords ruled that at common law, even embarrassing evidence about sexual impotence in a nullity suit must be so given. Public justice is said to be essential to make sure that judges behave themselves and that witnesses tell the truth. For these two purely altruistic reasons, it is always staunchly defended by the media. In consequence, almost every statute passed to enable the judge to clear the court exempts the representatives of the press.

The continental tradition, by contrast, is much more favourable to allowing witnesses to give evidence in private. It is therefore not surprising that Article 6 of the European Convention on Human Rights, which guarantees public justice, allows exceptions which to common lawyers (and journalists) seem rather wide:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public

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