

MARRIAGE CONTRACTS SHOULD BE ENFORCEABLE: THE LIBERTARIAN CASE AGAINST NO FAULT DIVORCE

INNES FLEMING

Was anyone else puzzled by the inclusion in the last Libertarian Alliance mailing of a flier advertising the memoirs of the Conservative MP and Hyacinth Bucket lookalike Dame Jill Knight? I wondered whether I had missed some connection between Dame Jill and the libertarian cause so I consulted my BBC-Vachers *Biographical Guide* for enlightenment. If Dame Jill's entry in the "Key Votes" section revealed anything it was a tendency to vote against the kind of measures of which libertarians might approve.¹

My perception of Dame Jill is that she is precisely the type of Tory MP who puts libertarians off the Conservative Party. She may be fairly keen on free markets² but like so many of her colleagues she could never bring herself to grant people the same level of freedom in their social relationships and with their bodies as she'd be prepared to grant them with their money. If I ever wanted to work out whether some piece of legislation going through Parliament was a good or a bad thing from a libertarian point of view, I could either spend ages trying to understand it or I could find out Dame Jill's position on it and adopt the opposite stance.³

Being short of time, I took the latter option with the Family Law Bill when it was published last November.⁴ I had heard that Dame Jill and a bunch of other right wing (mainly Christian) authoritarians intended to oppose the Government's latest proposals on divorce and decided that the Family Law Bill must be the kind of measure that as a libertarian I probably ought to support. I, rather crudely, saw the argument thus: the Tory right wants to force people to stay in relationships they want to end whilst we, the defenders of individual liberty, should argue for their freedom to go their separate ways.

How wrong I was, both about the Family Law Bill and, on this occasion, about Dame Jill. When I had a chance to find out what this bill was really about I realised what a threat it posed to an important libertarian principle, namely freedom of contract. Or, to be more precise, the right to enforce contracts (in this case the marriage contract) voluntarily entered into.⁵ What's more, as I followed the bill's passage through the Commons I noticed that Dame Jill was one of the few MPs to understand or care about this important issue.

THE LAW AS IT CURRENTLY STANDS

When I sat down and really thought about the way the law on divorce has been heading in this country I realised that freedom of contract now hardly exists as far as the matrimonial contract is concerned. If

a husband or wife decides he or she wants a divorce, the state's interpretation of the couple's marriage vows turns out to be at odds with the promises they actually made. The Family Law Act (as it now is) makes this situation even worse.

The law as it currently stands (i.e. before the Family Law Act comes into force) permits divorce:

- (i) after 6 months if one (or both) of the parties to the marriage claim their spouse is guilty of desertion, adultery or unreasonable behaviour ("fault divorce");
- (ii) after 2 years if neither party alleges fault but the couple have been separated for 2 years and both want to divorce; or
- (iii) after 5 years if only one party wants a divorce but the couple have been separated for 5 years.⁶

As a libertarian I have several complaints about the law as it currently stands. As far as (i) is concerned, if one party to the marriage breaks one of the terms of the marriage contract, for example by committing adultery rather than sticking to the "with my body I thee honour" vow, why should the wronged party even have to wait six months to have a court declare that he or she is free of their spouse?

Similarly, if both parties to the contract no longer wish to be bound by it, why should the state prevent them bringing it to an end then and there? Why should the courts even have to get involved? In other areas of the law, bringing a contract to an end by mutual agreement is usually a private matter or no concern to the judges.

In the third case (where one party to the marriage wants a divorce but isn't alleging fault on the part of the spouse resisting the break-up) I can't see how the courts could realistically order the couple to stay married when one party has decided they want to live a separate life. However, what the law should be clear about in this case is that *the party seeking the divorce is in breach of contract*, and not just any old contract, but probably the biggest deal they've entered into in their lives. A contract that was considered so important that all the couple's closest friends and family were invited to witness it and a huge party was thrown to celebrate. This contract, almost uniquely, was meant to bind them for the rest of their lives. The party who unilaterally decides that he or she no longer wishes to be bound by the "till death us do part" clause is as guilty of breach of contract as the wife beater or adulterer.

ENFORCEMENT AND COMPENSATION

The law as it currently stands does at least distinguish between marriages ended by breach of contract and marriages ended by voluntary agreement. However, unlike virtually every other area of English contract law, the law as it relates to divorce doesn't seek to force those in breach of their obligations to compensate the party who kept their side of the bargain. As far as the common law of contract is concerned the party in breach must put the other person back in the position they would have been in had the other person kept their word. For example, I might, buy a raincoat labelled "guaranteed one hundred per cent waterproof" which when I wear it lets in water. In this case I would not just be entitled to my money back but to compensation for, say, my suit which was ruined by rainwater coming through the coat. I am thus put back in the position I would have been in had the raincoat been one hundred per cent waterproof.

For libertarians this should be an important principle. *There is no point in having the freedom to enter a contract if one cannot enforce the agreement or demand compensation for its breach.*

However, with breach of the far less trivial contract of marriage, the courts make no attempt to compensate the wronged party. Although the courts do have power to take into account the conduct of the parties when they divide up the matrimonial property,⁷ in practice the division is usually done on the basis of contribution and need. Now I can see that money may not compensate for the hurt and possible loneliness caused by the desertion of the person who promised to be one's partner for life, however, it could go some way to alleviate knock-on financial problems often experienced by deserted spouses.

DESERTED SPOUSES

Take for example one divorced couple I know. They lived quite modestly but comfortably together for thirty years whilst they brought up their two daughters and both worked as school teachers. She was a loyal wife. She cooked for the family every night, kept the house and made clothes for herself and the children. Her husband always had an expensive car and went out a lot, but she was of a generation of women who didn't much mind about that — she'd stay at home



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FOR LIFE, LIBERTY AND PROPERTY

getting on with her chores or visit her friends who lived nearby. She looked forward to their retirement — not only would they have more time to spend together but their pensions (his being the more generous) and their savings would be enough to allow them to stay in the house she'd made so comfortable for them. Her husband, however, had other plans. He went off to spend his twilight years with his mistress of ten years standing. The mistress was a younger career woman who owned her own house and hadn't had the expense of bringing up children. He was definitely "trading up" — younger woman, higher standard of living. Nevertheless, his loyal wife was forced to give him half of their joint property. The house had to be sold, she needed to find somewhere smaller in a cheaper area, she'd have to pay all the bills herself, she'd have to buy herself a car. In other words, her standard of living fell. Not only that, if her husband died before her, she could no longer expect to inherit from him. In a case like this, surely money would go some way to putting her back in the position she would have been in had her husband stuck to his wedding vows.⁸

THE RIGHT WING BUFFERS ARE RIGHT

Enough of the law as it now stands. What difference is the Family Law Act going to make? Unfortunately, the Family Law Act diminishes the meaning of the marriage contract even further. The government's latest proposals would do away with the distinction between divorces which come about through breach of the marriage contract and divorces by mutual agreement. The new law will be based on *the fiction that divorce can never be said to be anyone's fault*, a legal pretence which will come as a huge insult to people like the loyal wife I've just described, or women forced to flee their husbands in fear of violence.

It pains me to say it, but for once all those old right wing buffers on the Tory backbenches are right — the Family Law Act destroys the concept of marriage. Why should this matter to libertarians? Because we should not only be free to enter into any voluntary contract we wish to, but we should also have the right to enforce it or demand compensation. The Family Law Act still leaves an old fashioned girl like me free to exchange promises with someone to stay together till death us do part, but it doesn't leave me free to enforce that contract or demand recompense for its breach. *The contract is therefore devoid of meaning.* Marriage in any true sense will no longer be an option under English Law. Brides can still have the white dress, couples can still make the traditional promises at the altar but it will be no more than a piece of theatre. The law doesn't allow you to rely on anyone any more than if you had merely agreed to cohabit.

Don't misunderstand me — as a believer in freedom of contract I believe people ought to be free to agree to lesser arrangements than marriage if they want to.⁹ I'm not saying cohabitation outside marriage should not be allowed. But it's just not for me. I'd prefer to have the choice of opting for something more permanent.¹⁰

OPTING FOR A PRIVATE CONTRACT?

You may say that even under the law as it is likely to be under the Family Law Act there's nothing to stop me making a separate private agreement with my intended before we get married. However, it is doubtful whether such an agreement would be enforceable. The English courts tend to ignore private, albeit voluntary, agreements made as a means of avoiding statutory provisions.¹¹

Dame Jill Knight tried to get round this possible stumbling block by introducing an amendment to the Family Law Bill which would have made specific provision for the enforcement of marriage contracts made by those who wanted to be bound by the vows they both took.¹² Dame Jill said she envisaged that if her amendment was passed the churches might draw up standard marriage contracts which would bind couples in a way which the ordinary "second tier" marriages wouldn't. The Lord Chancellor's junior minister in the Commons, Gary Streeter, offered all sorts of excuses to Dame Jill as he explained to the House why the Government could not support her ingenious amendment. He said he was concerned about its "outworking in practice" (agh!). He said was worried that those who didn't opt for the private contract might feel that the ordinary marriage contract was something they might opt out of at any time. (So instead he makes all marriages ones which either party can unilaterally opt out of at any time.) He told MPs that he personally believed if he failed to keep his wedding vows he would answer to a higher authority "and I do not mean the Chief Whip" (ha! ha!). And finally he asked whether it wouldn't be cruel to put young people under that sort of pressure. (Of course. Why should a teenage bride have to ask her-

self whether she really means it when she promises "till death us do part"?)¹³

I was surprised to see that Mr Streeter puts "Social and Moral Issues" as one of his three Interests (Political) in the BBC-Vachers *Biographical Guide* and places "Committed Christian" top of his list in the Interests (Personal) section. How can someone with such a poor grasp of one of his three political interests have risen so far in politics? I suppose that any committed Christian who is prepared to defend the abolition of what the church understands as marriage must be ambitious and that ambition can get you a long way in politics.

Paul Boateng, Mr Streeter's opposite number on the Labour front bench, might seem like the kind of person to support Dame Jill on this one. Apart from an instinct to want to disagree with the Government on almost everything, Mr Boateng is a Methodist and, according to his entry in the *Biographical Guide*,¹⁴ Secretary of the Council of Christians and Jews All Party Group. But alas, he could offer her no hope. He wrote off her attempt to retain a real marriage commitment as an attempt to introduce a two-tier system. (So much for "New Labour". Party policy is obviously still about levelling down.)

Having the support of only a handful of MPs, Dame Jill was forced to withdraw her amendment. And thus the right to a meaningful legal commitment to marriage was quietly killed off by our rulers.

WE SHOULD NOT LIMIT OUR CONCERN

My first impulsive response was that this Act should simply be repealed. But then I thought further. What about those who marry while the new Family Law Act is in force? Some of these might only mean to commit themselves to marriage in its new "till one of us gets fed up with the other" sense. It might be unjust to make someone who thought he or she always had the option of a "no fault" divorce pay damages to a spouse who thought they were promising to stay married together "till death us do part". This is the kind of injustice which will always occur when the agreement says one thing but the government says it means something else. The law is a mess which cannot be untangled without the risk of causing as much injustice as it will cause should it remain on the statute books.

For long enough we've had to put up with Parliament passing laws to relieve people of their contractual obligations in the commercial sphere. (For example the Rent Acts gave tenants extra rights by overriding voluntary agreements made between them and their landlords and EC law has allowed employees to acquire rights which were not part of the conditions of employment to which they agreed.) If we libertarians really care about the principle of contracts free from statutory interference then we should care about this latest divorce legislation. If we limit our concern about freedom of contract to the economic sphere and ignore the rest of the social realm then we risk making the same false distinction and becoming as inconsistent as all those old buffers on the Tory backbenches who believe in economic freedom but social authoritarianism.

NOTES

1. For example she voted against reducing the age of consent for homosexual men to 16 and voted for "keeping Sunday special".
2. Although as her record on Sunday trading reveals she isn't even always that keen on free markets.
3. Having read Mark Taha's review of Dame Jill's memoirs in *Free Life* (No. 25, May, 1996), I feel rather guilty about attacking her like this. Despite being unsound on most issues she is, according to Mr Taha, a very nice lady with a great sense of humour. But I'm still not buying her book.
4. The Family Law Bill, introduced by the Lord Chancellor, received Royal Assent in July 1996.
5. Without which contracts become meaningless.
6. S.1(1) Matrimonial Causes Act 1973.
7. S.25 Matrimonial Causes Act 1973.
8. It might also be reasonable in my view to award her damages for her hurt feelings.
9. I also agree with Brian Micklethwait (Political Notes No. 129, Libertarian Alliance, 1996) that gay marriage ought to be recognised in law.
10. All offers gratefully received. Photo appreciated.
11. *Street v Mounford* [1985] AC 809. The court ruled that an agreement between a landlord and tenant that the provisions of the Rent Acts should not apply to the tenancy was unenforceable.
12. *Hansard*, 17 June 1996, col 561.
13. Since the case of *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, the courts when interpreting legislation can look to the content of parliamentary debates to determine Parliament's true intention. Mr Streeter's comments during this debate would probably persuade a court that Parliament opposed private marital contracts which should therefore have no validity in law.
14. My shameless promotion of this book is explained by the fact that I am one of its assistant editors. But it is a very good and useful book so I make no apology.