SETTING ASIDE AGREEMENTS AND ORDERS

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SETTING THE SCENE

- Freedom to Contract

- No restriction on provision (or lack thereof)

- No requirement for court approval

Section 16, 1985 Act

- Limited Remit

- The court **may** set aside or vary the Agreement or any provision of it

- Only if satisfied that the Agreement was not fair and reasonable **at the time it was entered into**

Fairness and Reasonableness

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- The agreement was to be looked at from the point of view of both fairness and reasonableness;
- All relevant circumstances at the time should be examined, including the nature and quality of any legal advice given;
- Any unfair advantage taken by one spouse should be examined;
- Agreements should not normally be set aside;
- An agreement is not necessarily unfair or unreasonable simply because assets have been or may be unequally divided.

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Dishonesty/Material Non-Disclosure

- Include explicit wording confirming full disclosure
- If Clause included gives a clear basis for a section 16 claim
- Applies to dishonesty and accidental omission

Bad (or no) Legal Advice

- McAfee v McAfee1993 GWD 28

- Inglis v Inglis 1999 SLT (Sh Ct) 5

- Bradley v Bradley (hot off the press!)

Significant Change of Circumstances

- Not a basis for setting aside
- Contract Law – impossibility of performance/frustration

What if s16 cannot be used?

- Cannot use section 16 post-divorce
- Contract law remedies eg fraud
- Rescinding the contract may not be the right answer
- Claim for damages

Court Orders

- English approach – Sharland and Gohil
- Different approach in Scotland
- Section 18 application (only if the timing is right)
- Reduction

Any questions?

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Summary

Remedies are available
Section 16 will often be the best option
Post-divorce variation is significantly more complex