

PRE-NUPTIAL AGREEMENTS WHERE ARE WE NOW?

A lot of media attention has surrounded the recent case of Radmacher and Granatino which has been heralded by some as a victory for pre-nuptial agreements. This article explores the case in more detail to see if it really does mark the recognition of pre-nuptial agreements in England and Wales.

In this case, three highly respected Court of Appeal Judges ruled that a pre-nuptial agreement made between Karin Radmacher, a German national, and Nicolas Granatino, a French national, was a decisive factor when determining the division of the matrimonial assets on divorce.

Mrs Radmacher won a landmark appeal to enforce a pre-nuptial agreement that protected her personal wealth from a claim by her former husband. The Court of Appeal found that the English court should give weight to a pre-nuptial agreement between Ms Radmacher and Mr Granatino, entered into in 1998 in Germany, prior to their marriage in England. Mr Granatino agreed not to make a claim against his wife in any future divorce proceedings. This agreement would have been fully enforceable in Germany and France.

Pre-nuptial agreements are not legally binding in England and Wales but may have evidential weight when the terms of the agreement are relevant to an issue in court proceedings for divorce and may prove to be one of circumstances that the court will take into account.

On an application for financial relief in divorce proceedings under the Matrimonial Causes Act 1973, the court can take a pre-nuptial agreement into account when exercising its discretion under section 25(2) of the MCA 1973, either as one of the circumstances of the case, or possibility as “conduct” which it would be inequitable to disregard.

How much weight the court will give to the terms of the pre-nuptial agreement will depend upon the facts of the case and the circumstances surrounding the making of the pre-nuptial agreement. The court may attach more weight to the pre-nuptial agreement if certain conditions have been satisfied before the pre-nuptial agreement was signed by the parties.

It is becoming more and more popular for parties to put an agreement into place that deals with the division of the assets in the event that the marriage was to fail.

Last July Mrs Radmacher was ordered by a High Court Judge to pay around £5,500,000 to her estranged husband despite the pre-nuptial agreement. The High Court Judge took the view that it was manifestly unfair to hold the husband to the agreement. This decision was overturned by the Court of Appeal.

Lord Justice Thorpe, giving the opening speech in the Court of Appeal, said that adults should be able to govern their financial agreements:

"...due respect for adult autonomy suggest that, subject of course to proper safeguards, a carefully fashioned contract should be available as an alternative to the stress, anxiety and expense of a submissions to the width of the judicial discretion..."(para 27).

Thorpe LJ stated:

"In so far as the rule that such contracts are void survives, it seems to me to be increasingly unrealistic. It reflects the laws and morals of earlier generations. It does not sufficiently recognise the rights of autonomous adults to govern their future financial relationship by agreement in an age when marriage is not generally regarded as a sacrament and divorce is a statistical commonplace..." (para 29(i)).

Thorpe LJ explained further:

"Thus, pending the report of the Law Commission, in future cases broadly in line with the present case on the facts, the judge should give due weight to the marital property regime into which the parties freely entered. This is not to apply foreign law, nor is it to give effect to a contract foreign to English tradition..." (para 53).

Although the judgement is hailed as a victory for pre-nuptial agreements the Judges have made it clear that it is for Parliament and not the Judges to change the law, but that the courts should continue to use their discretion to give effect to pre-nuptial agreements in certain circumstances.

The judgement has not changed the law for pre-nuptial agreements. The Court of Appeal has further limited the effect of the Judgement to cases "broadly in line with the present case on the fact" (para 53), i.e. cases involving foreign nationals and from countries where pre-nuptial agreements are valid.

The ruling has, however, highlighted the long overdue need for the Government to introduce new legislation to end the present uncertainty and make pre-nuptial agreements binding.

Until new legislation has been introduced the uncertainty as to whether on divorce a pre-nuptial agreement made between the parties will be taken into account by the courts will continue. The general view, from the recent cases, is that a properly drafted pre-nuptial contract prepared in circumstances where the parties have made full financial disclosure and both parties have received independent legal advice, appears to have a bearing on how the court will deal with the parties' assets on divorce, particularly in short childless marriages.

The Court of Appeal ruling may be challenged in the House of Lords, although the law lords have said they would wait for the outcome of the Law Commission's review before ruling on the enforceability of pre-nuptial agreements.

The Law Commission has embarked on an examination of the status and enforceability of agreements between spouses and civil partners considering their property and finances. The report is anticipated in 2012.

It is anticipated that the parties will be required to show that:

- (a) the contracts were entered into freely and voluntarily and without duress and undue influence, and that it was entered into a minimum of 28 days prior to the marriage;
- (b) both parties had the benefit of independent, competent legal advice; and
- (c) full disclosure was made of all relevant, financial and other circumstances.

It is also likely that the court will be able to exercise their wide discretion if a significant event, such as the birth of a child, supersedes the agreement. As the law stands at the present time, the jurisdiction of the court cannot be excluded.

Should you require any further advice or information please speak to Michael Gillman or Monika Pirani (who is fluent in German and English).

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