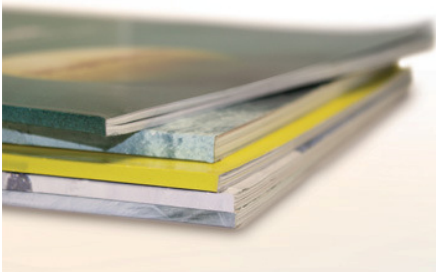


Pre-Nuptial Agreements – Binding in Jersey?

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The outcome in the recent decision of the Supreme Court in the case of *Radmacher v. Granatino* [2010] UKSC 42, has had far reaching significance regarding the weight which will be attached to pre-nuptial agreements, and has shone the spotlight once again upon the extent to which parties are able to determine the division of their assets upon divorce prior to entering into marriage. There is no Jersey authority on this issue to date but it is anticipated that a test case will be heard this summer, it is likely to follow the principles set out in *Radmacher*.

The parties entered into a pre-nuptial agreement at the instigation of the wife and at her father's insistence three months before their wedding in England in 1998. The agreement was signed in Germany and the husband was shown a draft in German only one week before. He did not receive a translation or independent legal advice, the terms were not negotiated and there was no disclosure of

assets. It provided for neither party to benefit financially from the other in the event of divorce.

The wife hailed from a wealthy German family and her assets at the time of their divorce proceedings nine years later were approximately £100 million, with an income of £2,600,000 net per annum. The husband was French and at the outset of their marriage commanded a substantial income as a successful banker. During their marriage they had two children and the husband gave up his career in the City to study biotechnology. At the time of their divorce his earning capacity was £30,000 per annum.

At first instance the husband was awarded a lump sum of £5.56 million. Baron J reasoned that the agreement was not determinative. The nationalities of the parties were relevant because the agreement would have been enforceable in their countries of origin. However, the English courts determine asset division by reference to the criteria laid down by the

Matrimonial Causes Act 1973, rather than contractual principles and although such agreements can be taken into account, in this case the absence of disclosure, independent legal advice, opportunity for negotiation, provision on even a “needs” basis, or provision for the children reduced its weight.

The wife’s appeal to the Court of Appeal was allowed and the husband’s award was varied such that his housing fund of £2.3 million and maintenance would be available only until the youngest child reached the age of 22.

Mirror Other Jurisdictions

The Court of Appeal sought to mirror more closely the treatment of such agreements in other jurisdictions and held that significant weight should be accorded to arrangements parties had previously entered into. The Court held that Baron J had been wrong to find that the circumstances in which the agreement had been reached reduced the weight to be attached to it.

The husband appealed to the Supreme Court and despite the lone dissenting voice of Baroness Hale, the decision of the Court of Appeal was upheld, laying down the following test in respect of both ante and post nuptial settlements:

“The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.”

While no agreement can oust the jurisdiction of the court, Section 25 of the **Matrimonial Causes Act 1973** obliges the judge to have regard to all the relevant circumstances of the case in the exercise of his broad discretion as to how to divide the assets upon divorce. Jersey’s **Matrimonial Causes (Jersey) Law 1949**, as amended, is devoid of a similar provision but imports Section 25 of the English statute via case law. A pre-nuptial agreement constitutes one such Section 25 circumstance and the weight to be accorded to it will be decided on a case by case basis. The Supreme Court specifically disapproved of the distinction drawn by the Privy Council between pre-nuptial and post-nuptial contracts in **Macleod**, which had accorded binding status only to the latter, confirming that whether an agreement was signed before or after the wedding was not material.

Rather than according binding status, **Radmacher** has confirmed that the court’s discretion to determine the fairness of a pre-nuptial agreement remains pivotal to its impact and accordingly no such agreement can be considered to be iron-clad. **Radmacher** has emphasised the following:

1. *“The agreement must be freely entered into. The existence of fraud or misrepresentation will be fatal. Undue influence or duress may dilute or dissolve it.*
2. *Disclosure and independent legal advice are significant to defend subsequent allegations of unfairness at the time of signing but if a party*

chooses not to seek legal advice or request detailed disclosure but is fully aware of the implications of entering into the agreement, its weight may not diminish.

3. *The length of the marriage and the extent to which the agreement provides for unforeseen events will be significant.*
4. *Seeking to exclude family and pre-acquired assets and inheritances is legitimate.*
5. *It is likely that agreements which leave one spouse without provision for their relationship-generated “needs” will be considered unfair and similarly an absence of “compensation” for spouses who have by joint decision given up careers to care for the children are likely to be unfair.*
6. *Agreements must not prejudice the reasonable requirements of children of the family.”*

Baroness Hale considered that such momentum should derive from the legislature alone. Indeed, a Law Commission consultation paper published on 11 January 2011 examined their status and enforceability and questioned whether the law should go further by allowing some agreements to exclude the jurisdiction of the court to grant ancillary relief and to allow couples to enter into binding agreements.

Qualifying Nuptial Agreements

It considers the introduction of qualifying nuptial

agreements, which by complying with various safeguarding formalities would be capable of excluding the court’s discretionary power. and so by-passing the law of ancillary relief and permitting the agreement to be enforced as a contract. Full financial disclosure would constitute one such safeguarding formality and any assets not disclosed would be dealt with not by reference to the agreement but by the award of traditional ancillary relief. Other proposals include limiting the ambit of such agreements to pre-acquired, gifted or inherited property. However, even if such reforms are adopted in England and Wales, it will be some time yet until anything similar is adopted in Jersey. Meanwhile, litigation of asset division upon divorce will continue to occupy both the Family Division and Jersey’s Royal Court.

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