

PRESCRIPTION: PRENUP

by Victoria Myerson

Prenuptial agreements may soon have the weight of an enforceable contract if Parliament adopts the recently published recommendations of the Law Commission in their Report on Matrimonial Property, Needs and Arrangements. The effect of this will be to pour statutory cement on the foundations already laid by the Courts in a number of landmark cases. Once void on public policy grounds for fear they would encourage separation or divorce, prenuptial agreements have gained increasing prominence in recent years as society evolves and the English Courts have attempted to keep pace.

In *Crossley v Crossley* [2007] EWCA Civ 1491, the parties (each worth several millions and for whom it was not their first marriage) entered into a prenuptial agreement which provided that they each keep their own assets and claim nothing from each other in the event of their divorce. On the breakdown of their marriage, the wife asked the Court to ignore the prenuptial agreement but the court held the agreement to be of “magnetic importance” and rejected the wife’s attempt to obtain a further settlement.

The seminal case of *Granatino v Radmacher* [2011] 1 AC 534 neatly demonstrated the impact of a prenuptial agreement even where the court elected not to adhere to its terms. In that case the wife was worth £100 million yet the husband received only £1 million for himself and £2.5 million towards a house which was to be returned to the wife when the youngest child reached the age of 22. In contrast, Heather Mills and Paul McCartney did not sign a prenuptial agreement and following their infamous divorce Ms Mills was awarded £24 million after her short marriage to the Beatles star who had a net worth of approximately £400 million.

As the law currently stands in England and Wales, the Courts retain a discretion whether to uphold the terms of a prenuptial agreement. The Courts are likely do so if its terms are considered fair, but they are not bound to do so and may simply take it into account when having regard to all the circumstances of the case by imposing a lower award.

The Treatment

The Law Commission recommends that legislation should be enacted which will limit this discretion so that provided an agreement makes reasonable provision for the needs of the parties and the interests of any minor children, the courts will be prevented from making any orders which are inconsistent with its terms. Upon divorce, such agreements will be treated as enforceable contracts and any financial arrangements could be claimed as a debt.

Various formalities will have to be complied with, for example, the agreement must be in writing and accompanied by a statement signed by both parties confirming that they understand that the agreement will partially remove the Court's discretion to make financial orders. The agreement must not

- have been entered into as a result of duress, undue influence or misrepresentation;
- be made within 28 days immediately preceding the wedding or civil partnership;
- attempt to contract out of providing for the needs of the parties or their children.

In addition, both parties must have:

- had the benefit of independent legal advice prior to entering into the agreement; and
- have received all material information regarding their partner's financial situation at the time of entering the agreement.

The main benefit of these recommendations is that they will provide couples who have assets which exceed their needs with more certainty regarding the protection of their family property, inheritance of businesses. They will provide a powerful tool for high net worth couples or those who are already financially independent or are likely to acquire wealth during their marriage, either by way of inheritance or through their own endeavour. Equally they will provide peace of mind for couples embarking on a second marriage who wish to protect specific assets for their children from a previous relationship.

Prognosis: The Future of the Prenuptial Agreement

Prenuptial agreements are yet to be tested in the Jersey Courts. However, as the Jersey statute is based on English legislation, and English cases are often referred to in Jersey divorce proceedings, it is highly likely that if the Law Commission's recommendations are enacted by Parliament, similar provisions may be adopted in Jersey.

Many couples will welcome the Law Commission's recommendations, particularly those who wish to start their marriage or civil partnership with a shared understanding of the financial consequences of any future separation. Such prenuptial agreements will not provide a cure for the difficulties which ensue following the breakdown of a relationship but where parties have come to an understanding regarding the division of their assets on divorce, the likelihood of complex, protracted litigation will be much reduced. This will at least limit the emotional trauma of court proceedings and the money which would otherwise be spent on lawyers' fees can be retained by the parties in the manner outlined in their agreement. Like an inoculation when one is enjoying good health, it may be very wise indeed for parties to enter into a prenuptial agreement enabling them to agree in the best of times what will happen in the worst of times.

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