

# 'TILL DEATH US DO PART?' –

## A LOOK AT THE CURRENT LAW ON PRE-NUPTIAL AGREEMENTS

### What are pre-nuptial agreements?

1. A prenuptial agreement is a document in which a couple set out their rights to any property, debts, income and other assets purchased together or acquired individually, and how such aforementioned assets shall be shared in the event that the marriage comes to an end.

### What is the current status of pre-nuptial agreements?

2. The court when considering granting ancillary relief is not obliged to give effect to nuptial agreements – whether pre-nuptial or post-nuptial. The parties cannot oust the jurisdiction of the court. The court will conduct an assessment under section 25 of the Matrimonial Causes Act 1973. However the court must give appropriate **weight** to the agreement. The case of *Radmacher* raises the issue of the principles to be applied by the court when deciding the weight to attach to the pre-nuptial agreements.

### Will the pre-nuptial agreement stand in court?

3. The court will consider several factors, summarised as follows:
  - a. Did the parties understand the implications of the prenuptial agreement?
  - b. Did the parties have independent legal advice?
  - c. Were any of the parties under pressure to sign or agree?
  - d. Was there full financial disclosure?
  - e. Would an injustice be done if the prenuptial agreement were upheld?



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This is not an exhaustive list and the court would consider the facts of the individual case.

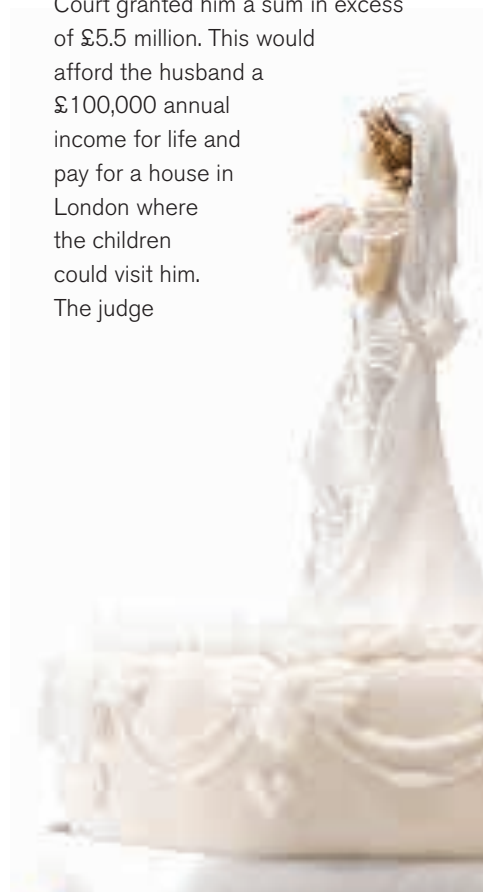
### The landmark case:

4. The judgment of the Supreme Court in *Radmacher v Granatino* [2010] UKSC 42, stands as a landmark in the history of English matrimonial and divorce law. This case established that pre-nuptial agreements were now to be given effect to so long as the parties entered into it freely and with a full understanding of the agreement's consequences.
5. The facts of *Radmacher* are as follows. The parties were married in London in 1998. The husband is French and the wife is German. They entered into an ante-nuptial agreement before a notary in Germany three months before the marriage at the wife's behest,

to whom the family's substantial wealth would be transferred if an agreement were signed. The agreement was subject to German law and stipulated that neither party was to acquire any benefit from the property or assets of the other during the course of the marriage or after its termination. The husband at the time was working as a banker; he declined the opportunity to take independent advice on the agreement. The parties separated after 8 years of marriage in 2006. They had two daughters in 1999 and 2002. By the end of the marriage the husband had left his career in banking and embarked upon research studies at Oxford University.

### The High Court:

6. The husband applied to the High Court for financial relief. The High Court granted him a sum in excess of £5.5 million. This would afford the husband a £100,000 annual income for life and pay for a house in London where the children could visit him. The judge



took into consideration the ante-nuptial agreement but reduced the weight she attached to it due to the circumstances in which it was signed.

#### Court of Appeal:

7. The wife successfully appealed to the Court of Appeal. The Court of Appeal held that the agreement should have been given full weight. The husband should only be granted provision in his role as father to the two children and not for his long-term needs. The husband appealed to the Supreme Court.

#### The Supreme Court:

8. The Supreme Court by a majority of 8 - 1 dismisses the husband's appeal.
9. Paragraph 68 to 74 of the *Radmacher* judgment sets out the range of factors the court would take into consideration. Importantly in paragraph 61 of the judgment it is noted that the **first** question will be whether any of the standard vitiating factors are present: duress, fraud or misrepresentation. These factors will negate any effect the agreement may otherwise have had.



10. Secondly in paragraph 73 of the judgment it is stated obiter, that "If the terms of the agreement are unfair from the start, this will reduce its weight". The concept of fairness will be assessed in the light if the agreement operates unfairly at the time of the breakdown of the marriage.

11. The factors set out in paragraphs 68 to 73 of *Radmacher* are important in the sense they are generally applicable, they are as follows (I have summarised the paragraphs in a few words) :

- a. Paragraph 68: "If an ante-nuptial or indeed a post-nuptial agreement, is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure, and informed of its implications", (*Free will and full awareness of implications*).
- b. Paragraph 69: "...we consider that the Court of Appeal was correct in principle to ask whether there was any material lack of disclosure, information or advice. Sound legal advice is desirable for this will ensure that a party understands the implications of the agreement", (*Full disclosure of facts and independent legal advice*).
- c. Paragraph 70: "It is, of course, important that each party should intend that the agreement should be effective. ...Thus in the future it will be natural to infer that parties who enter into an ante-nuptial agreement to which English Law is likely to be applied intend that effect should be given to it". (*Intention to be bound by the terms of the agreement*).
- d. Paragraph 71: "The first question will be whether any of the standard vitiating factors: duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those

factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it. (*Duress, fraud, misrepresentation or abuse of position would eliminate weight*).

- e. Paragraph 72: "The court may take into account a party's emotional state, and what pressures he or she was under to agree. ... Another important factor may be whether the marriage would have gone ahead without an agreement, or without the terms which had been agreed. (*Party's emotional state, maturity and the importance of the agreement*).
- f. Paragraph 73: "If the terms of the agreement are unfair from the start, this will reduce its weight. (*Unfairness of terms*).

#### Cases post-*Radmacher*

12. Since the *Radmacher* judgment several cases have passed through the English Courts seeking to apply *Radmacher* principles. I shall briefly set out the cases and a summary of the facts below, this will help to illustrate the above principles in application.
13. In *V v V* [2011] EWHC 3230 (Fam): On appeal from a District Judge, Charles J found that the District Judge had failed to attach weight to a Swedish marriage settlement. Charles J exercised the section 25 MCA 1973 discretion and took the statutory factors into account. The marriage was three years in length. Charles J also departed from equality principle to take into consideration pre-matrimonial assets.

14 In *B v S (Financial Remedy:*

*Matrimonial Property Regime)*

[2012] EWHC 265 (Fam) there was a disputed 'tacit' agreement, if it can be called that at all. It was in reality the default matrimonial property regime of separation of goods pertaining to Catalonia. Neither party had taken legal advice as to whether the agreement would be binding nor had they discussed the agreement. Mostyn J afforded "absolutely no weight" to the prenuptial agreement in these circumstances.

15. In *Kremen v Agrest (No. 11)*

*(Financial Remedies: Non-*

*disclosure: Post Nuptial*

*Agreement)* [2012] EWHC 45

(Fam) Mostyn J. The husband and wife were both Russian. At trial Mostyn J found that the husband had not fully disclosed the true extent of his assets. The couple had been married from 1991 to 2007. When their marriage ran into difficulties the couple entered into an Israeli post-nuptial agreement, this was subsequently converted into an order of the Israeli courts. Mostyn J found that there was not a full understanding by either party of the implications of the postnuptial agreement. This agreement also did not fully consider the needs of the children to the marriage. Mostyn J did not attach any weight to the agreement and proceeded with the section 25 Matrimonial Causes Act 1973 exercise.

#### What practical steps should Solicitors take when advising clients?

16. The following tips are designed to assist those who advise clients when entering into prenuptial agreements. The following principles should assist clients reach agreements both pre-nuptial and post-nuptial that will fall within the *Radmacher* principles and be such that the court may attach weight to them:

- a. A pre-nuptial agreement should be drafted and signed as early

as possible; it should not be left to moments before the wedding. The parties should be able to demonstrate that they have had time to consider the agreement in depth.

- b. A full disclosure of the parties' assets and liabilities needs to be made prior to entering the agreement. Solicitors may be able to provide a financial disclosure form with a declaration for the parties to complete and exchange.
- c. Both parties should take independent legal advice, this may be possible within the same firm if Chinese walls are set up between practitioners.
- d. The terms of the agreement should be drafted as precisely and clearly as possible but yet detailed enough. This is a matter for the Solicitors; every term should be drafted as unambiguously as possible.
- e. The agreement should set out any provisions for children. Great thought needs to be applied to this as the courts have demonstrated that they will not uphold an agreement which does not make adequate provision for the children of the family.
- f. The agreement should also set out provisions for other major life events such as illness and unemployment and what terms would apply in such events.
- g. The agreement should take into consideration pensions, insurances, inheritances and the acquisition of further assets.
- h. The agreement should deal specifically with pre-matrimonial assets, those acquired by the parties outside of their marriage or that inherited through their families.

- i. It may be advisable to set reviews within the agreement, as the marriage progresses in time and changes in character certain clauses may become defunct and the need for others may arise. For instance if a second home is acquired, the parties may be advised to review their agreement as seek advice from my instructing solicitors. In the alternative if the parties were to come by a windfall or an inheritance the review clause of the agreement may be activated.
- j. Finally, the agreement should be fair and realistic, if it appears unfair to those instructing me, it will probably appear unfair to the court. Those instructing should advise the clients to reach as fair an agreement as is possible.

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