MATRIMONIAL AGREEMENTS: IS IT TIME FOR CERTAINTY IN AN UNCERTAIN WORLD?

Authored by: Scott Sharp (Barrister) – Westgate Chambers

More than ever the Courts are encouraging parties to come to agreements to resolve disputes between themselves for a variety of reasons; be it to reduce delay, costs, or manage the sheer volume claims proceedings through the Courts. It therefore seems to raise the questions of why pre and post nuptial agreements (matrimonial agreements) still are not deemed legally binding within the UK legal system.

Historically, it was viewed that one party could not by their own covenant prevent themselves from 'invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction'[1] This of course being said in the context of the era, but it would appear the law, whilst advancing, has not done so in the line of the views of an ever-developing society.

Radmacher (formerly Granatino) v Granatino[2] was determined over a decade ago and yet remains the highest authority for marital agreements to date. Within the same, the UK Supreme Court made it clear that no matter the time at which agreement was entered into, pre or post nuptial, upon separation the Courts should apply the same principles when considering such agreements.

Further, the UK Supreme Court demonstrated that enforceability of matrimonial agreements was retained as a judicial exercise, the Court only being bound to have regard to them. 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.[3]

For further information on Radmacher and the key principles that followed I refer the reader to my colleagues, Ms Cerys Sayer, article in issue 12 of ThoughtLeaders4 HNW Divorce Magazine titled 'Will you be attaching a prenup to your proposal this Valentine's Day?'

Case law since Radmacher has continued the discussion on matrimonial agreements. The Courts application of the principles set out by the Supreme Court, and the circumstances in which a matrimonial agreement; will be adhered to, won't be adhered to, or might be given some weight remains open.

1 Hyman v Hyman [1929] AC 602

2 Radmacher (formerly Granatino) v Granatino [2010] UKSC 42

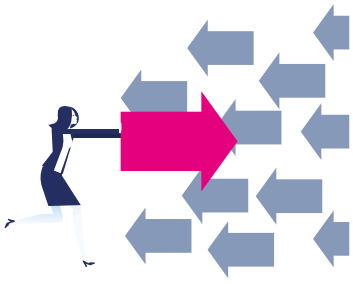
3 Radmacher (formerly Granatino) v Granatino [2010] UKSC 42 para 75

Mostyn J provided a judgement that it would only be in an unusual case that a party will be taken to have freely entered into a matrimonial agreement with a full appreciation of its implications without legal advice and full disclosure.[4] However, more recently Peel J said that sound legal advice was desirable but not essential, and absence of legal advice is not a vitiating factor.[5] The Court have been willing to afford no weight to an agreement where it viewed the party had no understanding of it, nor given any thought to the implications of it.[6]

The Court of appeal further added to the plethora of following guidance in setting out that the Court was still obliged to take into account all the section 25(2) factors even if a binding agreement had been established save for meeting the needs of one party. The Court could interfere with the terms of an agreement to satisfy those needs.[7] It remains an exercise of the Court to consider all the section 25(2) criteria when making a financial remedies order.[8]

A cursory review of the published cases since Radmacher would appear to demonstrate the Court still have a reluctance to enforce, in part or full, matrimonial agreements. They either do not meet the principles as set out in Radmacher, or they do not achieve the Court's fundamental view of fairness even when the agreement can be found to have no vitiating factors against it, and the party received full legal advice.[9]

It is notable that matrimonial agreements are becoming ever more popular. Recent studies report that since the early 2000's a fifth of first-time marriages with the UK have a pre-nuptial agreement in place, one could only adduce this demonstrates the social attitude and desire for certainty upon separation.[10]



Moor J has also expressed 'These agreements are intended to give certainty. Those signing them need to know that the law in this country will provide certainty.[11] It is therefore surprising that the law on matrimonial agreements and the judicial application of enforceability remains uncertain. Whilst an agreement is not legally binding, it remains in the ethos of interpretation of the judicial exercise under the section 25(2) and may be deemed enforceable. Until matrimonial agreements are deemed by default enforceable, a need which the social position may be more inclined towards, a different approach to secure some certainty is needed.

Simplifying the application of the Courts, the enforceability of a matrimonial agreement often boils down to the questions of time since the signing of the agreement, and the circumstances under which it was made, relative to the circumstances presented to the Court when an order is being sought.

Unfortunately, matrimonial agreements are often signed and forgotten about for many years until separation which dilutes the terms drastically.

For anyone considering a matrimonial agreement the need to regularly update and review them would appear fundamental, and a period of five years springs to mind as a useful milestone. It may be advisable to build into the agreement a 'end date' or review period and if not renewed or updated the parties do not seek to present it to the Court seeking enforcement of those terms, whilst it still may be relevant on some factors as intent of the parties during the course of the marriage.

If enforceability is important for either party, renewing or updating whilst incurring additional expense would appear to be the most critical way of being able to best secure the Courts support for the same. It would also likely save expense of protracted litigation that matrimonial agreements tend to currently attract, as practitioners should

be able to take a narrower view for their clients on the presented facts given the limited time that the facts would present since signing of the agreement.

Whilst it can be very difficult to approach your partner and discuss the possible end of the relationship and financial circumstances, once that conversation has been had and understood by both parties a continued dialogue through the length of the relationship is the best open way to deal with the unpredictable. If a matrimonial agreement is right for you and your partner do not allow the position to be, or believed to be, a one-time deal.

4 Kremen v Agrest (Financial Remedy; Non-Disclosure: Post-Nuptial Agreement) [2012] EWHC 45 (Fam)

5 HD v WB [2023] EWFC 2

6 D v D (Financial Remedies: Pre-martial agreements and unequal shares) [2020] EWHC 857 (Fam)

7 Brack v Brack [2018] EWCA Civ 2862

8 §25(2) Matrimonial Causes Act 1973

9 DB v PB (Pre-nuptial Agreement: Jurisdiction) [2016] EWHC 3431 (Fam)

10 Press Release from Marriage Foundation Release Date: Sunday 29 August 2021. Supporting research paper by Harry Benson, August 2021

11 MN v AN [2023] EWHC 613