

'Til divorce do we pay

Spencer Clarke examines the significance of pre-nuptial agreements in the light of a recent case



Spencer Clarke is a solicitor in the family group at Forsters LLP

'Radmacher is certainly the strongest statement yet that, in the right circumstances, a pre-nuptial agreement can reduce or even prevent an award, even in circumstances where one party, is in real need.'

The issue of pre-nuptial agreements has become increasingly prominent over the past few years. For an indication of how far we have come, 14 years ago, in *F v F (Ancillary Relief: Substantial Assets)* [1995], Thorpe J (as he then was) said that pre-nuptial agreements 'must be of very limited significance'. By 1997 the tide already appeared to be on the turn, with Wilson J (as he then was) holding that a pre-nuptial agreement was significant in *S v S (Divorce: Staying Proceedings)* [1997].

Since then *White v White* [2000] has revolutionised the field of high-net-worth ancillary relief, meaning that the less wealthy spouse may now receive up to 50% of the assets, particularly after a long marriage, subject to arguments for a departure from equality. This has provided a further impetus to parties seeking to protect their assets from such a claim by using a pre-nuptial agreement. In *K v K (Ancillary Relief: Pre-nuptial agreements)* [2003], from the post-*White* era, the pre-nuptial agreement again had a significant effect on the award. Reviewing the authorities, this case also set out a list of factors that a judge should take into account when deciding what weight to accord to a pre-nuptial agreement (as Baron J did at first instance in *Radmacher v Granatino* [2008]).

The House of Lords' judgment in the (joined) case of *Miller v Miller* and *McFarlane v McFarlane* [2006] has also contributed to the increasing acceptance of pre-nuptial agreements, because of their Lordships' discussion of the need to recognise both different categories of assets (pre-marital and inherited) and the different ways in which a couple may organise their

finances, and to consider how these should be treated in the context of financial relief on divorce.

In 2007 the Court of Appeal case of *Crossley v Crossley* [2008] received significant publicity. It concerned two independently wealthy people (the husband being worth about £45m and the wife around £18m) who had been married previously. The case was not directly on the point of whether the pre-nuptial agreement was decisive (as the judgment concerned a point of procedure) but the Court of Appeal took the opportunity to state that:

... if ever there is to be a paradigm case in which the court will look to the pre-nuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case.

Thorpe LJ's thinking has clearly moved on from the days of *F v F*, as the outcome of the appeal in *Radmacher* demonstrates.

Background to Radmacher

Radmacher came to court again this year, following its first appearance in the High Court last summer (as *NG v KR* [2008]). Katrin Radmacher, originally from Germany, and Nicolas Granatino, of French origin, met in London in 1997 and were married a year later. They had two children aged seven and nine at the time of judgment.

Ms Radmacher is a member of one of the wealthiest families in Germany and Mr Granatino was, at the time they met, a successful investment banker, although he later gave up his £320,000

a year job to undertake a PhD and become a biotechnology researcher at Oxford University. The husband also came from a relatively wealthy background, although not the same level of wealth enjoyed by the wife's family. The couple separated in 2006 and the wife relocated to Germany with the children, following a contested hearing.

High Court judgment

Following the separation the case came before Baron J, who has heard many of the leading cases of recent years. In making a decision on the financial award to be received by

gross income of £2.7m per year, which was said, by the husband's QC, to show that the shares had a capital value of at least £52m.

Given the very high level of the wife's wealth, together with the presence of the two children, the husband might, despite this not being a long marriage, have expected to receive a higher award than he did, were it not for the pre-nuptial agreement which the parties signed (although the Court of Appeal judges differed from Baron J on this point). The agreement provided that the husband was to receive no award for himself in the event of the

- a lack of independent legal advice regarding the pre-nuptial agreement to the husband;
- absence of disclosure of the wife's means;
- absence of negotiations;
- the birth of the children; and
- that the pre-nuptial agreement precluded the husband from making a claim even in circumstances of real need.

In rebutting the above factors the Court of Appeal judges held that:

- even if he did not know exactly how wealthy Ms Radmacher was, Mr Granatino was well aware that she was the daughter of a very rich family;
- the husband did have the opportunity to seek independent legal advice even if he did not take that up, and was very well aware (as Baron J herself found) that he was signing a pre-nuptial agreement that meant that, on divorce, he would receive nothing for himself;
- the parties had expected to have a family when they entered into the pre-nuptial agreement; and
- the lack of negotiations was immaterial.

Interestingly, the factors to which the judge at first instance drew attention in her judgment are those which lawyers generally advise their clients would be likely to significantly reduce or even negate the effect of a pre-nuptial agreement (being drawn from *K v K*, (above)).

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the husband, the facts that the husband and wife had entered into a pre-nuptial agreement and that they were, respectively, French and German, were pivotally important.

The husband, who had no capital by the time of the hearing, due in part to his legal expenses, was awarded a lump sum of £5.56m, to be paid by the wife on a 'clean break' basis (meaning that they would have no ongoing financial claims on each other), to meet his housing needs, pay his debts and provide him with a sum to invest to produce an income of £100,000 per year. The wife was also ordered to pay the husband child maintenance, as Mr Granatino had shared residence of the children, and to purchase a house in Düsseldorf, near to where she was to be living with the children, to enable the husband to have contact with the children in Germany at weekends.

The full extent of the wife's fortune was not clear, but there was £54m held in various investment accounts together with a shareholding that produced a

couple divorcing, as distinct for any award to him for the benefit of the children.

On appeal

Ms Radmacher appealed Baron J's order on the basis that she had not taken sufficient account of the effect that the pre-nuptial agreement should have on any award to the husband. This is despite the fact that the judge at first instance did explicitly state that she had taken account of the presence of the pre-nuptial agreement, but reduced the depressing effect it would have on the award by pointing to a number of factors that, to her mind, decreased its significance.

The Court of Appeal (Thorpe, Rix and Wilson LJJ) agreed with the wife and allowed her appeal. Their Lordships considered that Baron J had erred in law by not giving sufficient weight to the effect of the pre-nuptial agreement. They considered the factors that the High Court judge said should reduce the impact of the pre-nuptial agreement, which were:

by the fact that in Europe the parties would have been held to the agreement, and they gave significant weight to that. Generally, all three judges felt that, despite her statements to the contrary, Baron J had not sufficiently reduced the husband's claims pursuant to the effect of the pre-nuptial agreement. Thorpe LJ says:

... thus, despite the appearance of the ante-nuptial agreement as a factor, the overall impression is of a negligible resulting discount.

Effect of the judgment

This will perhaps be surprising to family lawyers, as there certainly appeared to be scope at first instance for the husband's award to have been higher than it was if the pre-nuptial agreement had not existed. Given the foreign element to the case, it is possible that one effect of this judgment will be that a pre-nuptial agreement will be seen to have a potentially greater depressing effect on the level of an applicant's award where both (or perhaps just one) of the parties are from a country where pre-nuptial agreements would be followed.

Rix LJ recognises this potentially discriminatory effect in his judgment when he says that the parties':

... circumstances [nationality] make it particularly propitious... for the English court to give even decisive weight to the parties' agreement.

But he also states:

... it is hard to articulate why an agreement made in similar circumstances between English nationals should not receive more or less equal treatment; although it has to be recognised that English law has not prepared the groundwork for such a conclusion.

'Contrary to public policy' argument

It is particularly significant in the judgment that the old maxim that pre-nuptial agreements are said to be 'contrary to public policy' is disputed by all three judges who, collectively, seemed to feel that this is no longer a valid argument. In doing so they disagree with the judgment of the

Privy Council in *Macleod v MacLeod* [2009], in which post-nuptial agreements were held to be enforceable, subject to variation by the court, but in which these were distinguished from pre-nuptial agreements, which were still said to be contrary to public policy. The fact that the Court felt able to disagree with the Privy Council (essentially the House of Lords in another guise, and therefore a higher court) is significant, although Privy Council judgments are only persuasive, not binding.

Pre-nuptial agreements after *Radmacher v Granatino*

The current approach of the courts would therefore seem to be that

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while pre-nuptial agreements may no longer be regarded as contrary to public policy they cannot (within the current limits of the law) be regarded as a complete defence to an application for ancillary relief, without legislation. Instead, pre-nuptial agreements are, as was already the case, one of the factors to be taken into account by the court when adjudicating on financial relief, falling under the heading of 'all of the circumstances of the case'.

Therefore *Radmacher* can be seen as the continuation, or perhaps even culmination, of the recent trend in English family law towards greater weight being given to the effect of a pre-nuptial agreement on a financial award. The case is certainly the strongest statement yet that, in the right circumstances, a pre-nuptial agreement can reduce or even prevent an award, even, it would appear, in circumstances where one party, like Mr Granatino, is in real need (comparatively speaking of course!)

That said, Mr Granatino need not worry too much, at least at present, as under the terms of their Lordships' judgment he is still to receive both a lump sum of capitalised maintenance, this time calculated on the basis that the maintenance will cease when the youngest child reaches 22 rather than continuing for his life, and a lump sum of £2.5m to meet his housing need as the girls' father. On this point their Lordships did not alter the amount that Baron J decided was appropriate, but have provided that he is not to receive this sum outright but instead is to be the beneficiary of a trust arrangement, with the house to revert to the wife when the youngest child reaches 22. Mr Granatino will

therefore have to consider his long-term security over the coming years. After the judgment of the Court of Appeal, he has effectively been left in the same position he would have been in had he and Ms Radmacher never been married but had still had two children. We will have to see whether he seeks to appeal to the House of Lords (soon to become the Supreme Court).

The case is set to return to court whatever Mr Granatino chooses to do about this most recent judgment, as, following Ms Radmacher's recent move from Germany to Monaco with the children, Mr Granatino has cross-appealed on the specific issue of the house that she was to have purchased for him in Germany, saying that the sum agreed for the purchase of that house will not be sufficient in Monaco. Their Lordships have remitted this point to Baron J, who will now have to deal with the thorny issue of the housing fund for the husband in these new circumstances.

Conclusion for trusts and estates practitioners

Following *MacLeod* some practitioners had been advising that, as a post-nuptial agreement appeared to be enforceable (subject to variation), in contrast to pre-nuptial agreements, parties should consider a post-nuptial agreement after the wedding, having entered into a pre-nuptial agreement before (the two agreements being essentially the same, subject to dealing with any change in circumstance in the intervening period). After *Radmacher* practitioners may want to consider whether it is really necessary to adopt this approach, weighing that against the possibility that post-nuptial agreements may be an unwanted source of tension in the

increased recognition of pre-nuptial agreements. In *Ella v Ella* [2007] a clause conferring jurisdiction on Israel in the event of separation meant that the case was dealt with there, it being acknowledged by the Court of Appeal that, without the agreement, England would have been the appropriate jurisdiction.

Where there is an international aspect to any pre-nuptial agreement it is vitally important for the practitioner to take good-quality legal advice from a lawyer (or lawyers) qualified in the relevant foreign jurisdiction(s). It will also be necessary to give thought to whether it is necessary to have an agreement in more than one jurisdiction, and to which should be the 'lead' agreement. As practitioners

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first few months of marriage. Much will depend on how the law develops post-*Radmacher*, and whether there is a judicial resiling from what appears to be quite a bold decision by the Court of Appeal.

In the meantime, anyone considering entering into a pre-nuptial agreement should still take early and comprehensive expert advice on whether to enter into a pre-nuptial agreement and, if so, what its terms should be. It would be dangerous to make an assumption that, following this judgment, a pre-nuptial agreement will automatically determine the outcome of financial relief on divorce, even in circumstances where there has been neither proper disclosure of the parties' assets nor independent legal advice.

International aspect

As is abundantly apparent in *Radmacher*, the internationalisation of family law is also bolstering the

will be aware, there is a gulf between the civil law jurisdictions of Europe, which make use of matrimonial property regimes, and England's common-law system, which does not recognise such formal property regimes. Thought will need to be given by the English and foreign lawyers to how to address these legal differences when attempting to produce a coherent set of pre-nuptial agreements across jurisdictions.

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In relation to disputes between two EU countries (save for Denmark, which is not a Brussels signatory) the effect of Brussels II (revised) (EC Council Regulation 2201/2003) is that such jurisdiction clauses will not be

Crossley v Crossley
[2008] EWHC 1532
Ella v Ella
[2007] EWCA Civ 99
F v F (Ancillary Relief: Substantial Assets)
[1995] 2 FLR 45
K v K (Ancillary Relief: Pre-nuptial agreements)
[2003] 1 FLR 20
Macleod v MacLeod
[2009] UKPC 64
Miller v Miller; McFarlane v McFarlane
[2006] UKHL 24
NG v KR
[2008] EWHC 1532 (Fam)
Radmacher v Granatino
[2009] EWCA Civ 649
S v S (Divorce: Staying Proceedings)
[1997] 2 FLR 100
White v White
[2000] 2 FLR 981

able to trump the operation of the Council Regulation on deciding the jurisdiction for divorce. However, such clauses are still likely to be worth including, particularly if there is any possibility of a split between divorce proceedings (over which Brussels II has jurisdiction) and financial proceedings (which it does not). As trusts and estates practitioners may be aware, the draft Rome III Regulation on applicable law on divorce will allow couples to choose the country that is to have jurisdiction on divorce, subject to certain criteria. The UK has not opted into this Regulation but it will still be of significance (if it comes into force) where the pre-nuptial agreement in question concerns an EU jurisdiction, and UK citizens could find themselves affected.

Outside the courts, the Law Commission is about to start a project to examine the status and enforceability of pre-nuptial and pre-civil partnership agreements (and agreements between spouses or civil partners), but a report and draft Bill is not expected until late 2012, leaving further time for the law to develop judicially in the interim. In the meantime, while it will not be open to the courts, in the absence of legislation, to make pre-nuptial agreements binding or enforceable as of right, their rise in popularity looks set to continue following the decision in *Radmacher*. ■