Articles

Pre-nups and Second Look States – not so different after all?

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'There is not much doubt that the law of marital agreements is in a mess. It is right for systematic review and reform'. So said Baroness Hale in her dissenting judgment in *Radmacher (Formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900. Some nine years on and notwithstanding a detailed and comprehensive report from the Law Commission (Law Com No 343) on *Matrimonial Property, Needs and Agreements*, published on 27 February 2014, there is no sign of legislative reform or even government interest.

So *Radmacher* remains the law with its central premise that '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'. The mantra for family lawyers when asked to advise on a prenuptial agreement must remain that they are not binding on the courts and whereas the emphasis has shifted in favour of upholding them, the line of authorities post *Radmacher* and the most recent Court of Appeal decision in *Brack v Brack* [2018] EWCA Civ 2862 tell us that a court can and will change the terms made by the parties if it would not be fair to hold them to their agreement.

It is also clear post *Radmacher*, that both the content of the prenuptial agreement and the circumstances in which it is drafted, negotiated and signed will be very much under the judicial microscope as and when it is challenged. As Roberts J said in *KA v MA (Prenuptial Agreement: Needs)* [2018] EWHC 499 (Fam), [2018] 2 FLR 1285, at para [59] 'it is fundamental that every case has to be looked at through the prism of the facts which underpin it' when looking to see whether effect should be given to a prenuptial agreement and whether or not it was fair to hold the parties in that case to their agreement.

Of course every draft prenuptial agreement should contain a clause to the effect that its provisions are 'fair, just and reasonable' and that each party is fully aware of the rights they may be acquiring or surrendering pursuant to its terms. However, often as the draft agreement moves back and forth between solicitors (and sometimes between counsel) the word 'fair' is deleted, or diluted and the lawyers who are being asked to sign the Lawyer's Certification at the end of the draft will no doubt delete any suggestion that he or she has proffered an opinion as to whether it is fair, but after all, there would be no point in having a prenuptial agreement if it accords entirely with what a fair outcome would be if a judge did not have to have regard to its terms at all.

The burden is on the party who has changed his or her mind and who no longer wishes to be held to one, some or all of the terms to show that it would not be fair to hold him or her to their agreement. In discharging that burden the following factors, in particular, are relevant:

(a) It is the court and not the parties that decides the ultimate question of what provision is to be made.

(b) The overarching criteria remains the search for 'fairness'.

(c) An agreement should be given weight which may vary from slight to decisive in an appropriate case.

(d) The weight to be given to an agreement may be reduced or enhanced by various factors.

(e) There is therefore, at least a burden on the claimant to show that the agreement should not prevail.

(f) Whether it will not be fair to hold the parties to the agreement, will necessarily depend upon the facts but two factors are very important

(i) The prenuptial agreement cannot prejudice the reasonable requirements of any children.

(ii) Respect for autonomy, including a decision as to the manner in which their financial affairs should be regulated, may be particularly relevant.

(g) There is nothing inherently unfair in an agreement making provision dealing with existing non-marital property, including anticipated future receipts.

(h) The longer the marriage, the more likely it is that future events may render what may have seemed fair at the time, to be considered unfair now.

(i) It is unlikely to be fair if one party is left 'in a predicament of real need' while the other has 'a sufficiency or more'.

(j) Where each party is able to meet his or her needs, fairness may well not require a departure from the agreement.

(k) The court must be scrupulous to avoid gender discrimination or gender bias.

The desire for certainty

Clients crave certainty yet we struggle to find a sentence or two that encapsulates the law when explaining the present operation and effect of a prenuptial agreement, whilst at the same time trying to promote our belief as to why they are worthwhile. The latest Court of Appeal decision in *Brack* only underlines that even where there is an effective prenuptial agreement, the court will still look at all the s 25(2) Matrimonial Causes Act 1973 factors.

The case concerned an appeal from an Order of Mr Justice Francis, in December 2016. The parties were Swedish nationals who had spent time living in the US, Belgium and the UK. They married on the 29 December 2000 and the marriage lasted for some 14 years. The husband had been a racing driver and the wife a homemaker. They had two children and assets amassed during the marriage worth approximately £11m. They had signed a series of three prenuptial agreements, namely the 'Niagara agreement' on 10 July 2000, the 'Ohio agreement' on 11 December 2000 and the 'Gothenburg agreement' on 26 December 2000. They provided that each party would retain property acquired independently before, during and after the marriage and that there would be no maintenance upon separation. The Ohio agreement contained a maintenance prorogation clause conferring jurisdiction on the City Court of Stockholm in the event of a separation. Francis J found that the three prenuptial agreements were valid, including the prorogation clause and that there were no vitiating factors. He found that the wife had ignored independent legal advice she had received in the US which was that she should not sign the Ohio agreement. However, he then found the prenuptial agreements to be unfair in that they did not meet the wife's or the children's needs and he therefore limited his determination to providing for the wife's needs and did so by recourse to Sch I of the Children Act 1989. The wife appealed on the grounds that there was no valid prorogation clause and that the Judge had been wrong to restrict his discretion in confining her award to needs after holding that the prenuptial agreements were valid but unfair. The Court of Appeal agreed with the wife finding that the prorogation clause was not sufficiently complete or clear and that the existence of a valid prenuptial agreement did not necessarily lead to a needs only based outcome. The case was sent back for assessment.

Would introducing legislation cutting back judicial discretion, in the interests of

certainty, be better? Attached to the Law Commission Report Law Com No 343, was a draft bill, the Nuptial Agreements Bill, recommending the use of 'qualifying nuptial agreements' to provide for greater enforceability and presumably therefore, greater certainty in the use and effect of prenuptial agreements. It was back in 2009 that the Law Commission began its work looking at the status and enforceability of marital property agreements. Publication of its final report was delayed, pending the Supreme Court decision in *Radmacher*. However, on publication on 27 February 2014 it recommended legislative reform to make nuptial agreements that are in prescribed form and adhere to certain safeguards, legally binding. Any agreement that met the criteria would be known as a 'qualifying nuptial agreement' and its effect would be to limit the court's powers to make financial orders save on two accounts; the first being in the interests of a child of the family and the second to meet either party's needs. Pursuant to Sch A1 of the Nuptial Agreement Bill, a qualifying nuptial agreement has to meet the following six requirements:

a. The formation requirement – it should be made by deed, validly executed by each party and contain a statement that each party understands that it is a qualifying nuptial agreement.

b. The timing requirement – the agreement must be made at any time other than during the period of 28 days ending with the day on which the marriage is entered into.

c. The disclosure requirement – both parties must disclose such of his or her circumstances as would reasonably be considered to be material to a decision by the other party to enter into the nuptial agreement on the relevant terms contained within it.

d. The advice requirement – each party must receive relevant legal advice from a qualified lawyer before the agreement is entered into.

e. The validity requirement – if, at least so far as the relevant terms are concerned, it is valid and enforceable as a contract.

f. The variation requirement – will be met if the variation meets the above five criteria.

Since 2014, we have worked on the basis that qualifying nuptial agreements should contain provisions to satisfy each party's financial needs but that the court will still be the final arbiter. So a qualifying nuptial agreement will only be binding if those needs are met. The Law Commission did not adopt the *Radmacher* test ie that the agreement would not be fair if it left a party 'in a predicament of real need' when recommending that prenuptial agreements will only be enforceable if the parties' needs are met. In April 2016 the Financial Needs Working Group, a sub-group of the Family Justice Council, published guidance emphasising that the objective of financial orders made to meet needs is to enable a transition to financial independence to the extent possible in the circumstances of the case. The Ministry of Justice is currently developing an online tool to assist separating couples in calculating the maintenance payment required to meet financial needs but as at July 2018, the Ministry of Justice Report on the implementation of Law Commission recommendations said, at para [48], in relation to recommendations that have not yet been implemented, that 'the Government is considering the Law Commission's recommendations on a financial tool for separating couples and on qualifying nuptial agreements as part of a wider consideration of family law and will respond in due course'.

Other jurisdictions

But is more certainty and arguably less flexibility actually what we want or should we be careful what we wish for? What actually happens in those jurisdictions that uphold prenuptial agreements? Is it simply a case of handing in the original prenuptial agreement at the local court office and asking that an order is made reflecting exactly its substantive provisions or when and how can a challenge be made? Some of the answers can be found by a look at the way prenuptial agreements are used in the United States.

Prenuptial agreements are, of course, far more common in the United States than they are here. The general right to form contracts is enshrined in the United States Constitution at Art I, s 10, cl 1. It prohibits a State from passing any law that 'impairs the obligation of contracts'. We tend to think of American prenuptial agreements as wholly determinative but a closer look reveals a considerable diversity of approach and outcomes.

Of the 50 states within the American Union, each has its own statutes made by its own legislature and its common law interpretation of those statutes. Overlaid are federal laws made by central government with its own bank of federal case law. The Uniform Premarital Agreement Act ('UPAA') was drafted by the National Conference of Commissioners on Uniform State Laws in 1983. Its central premise is that a prenuptial agreement must be in writing and will be valid unless one of two limited defences can be established. The first is that it was not executed voluntarily and the second is that the agreement was 'unconscionable' at the time of execution and that before it was executed the party seeking to challenge it did not receive fair and reasonable disclosure of the property or financial obligations of the other party and did not, voluntarily and expressly, waive such disclosure and did not have, or reasonably could not have had, an adequate knowledge of the property and financial obligations of the other party. Each state then adds its own provision to protect against unfairness. There is wide variation in terms of the different requirements adopted, for example: the degree of disclosure; whether a minimum period of time must elapse between signing the prenuptial agreement and getting married; and the actual level of financial provision resulting on divorce. Those states that have not adopted the UPAA apply their own requirements with their own state laws to afford what they see as the necessary protections when the bargaining powers of the two parties concerned may be very different.

Rhode Island is one state where the enforceability of prenuptial agreements is governed by the UPAA. In 2006 the Rhode Island Supreme Court heard the case of *Marsocci v Marsocci* 911 A.2d 690 (RI 2006) where the judge at first instance invalidated the prenuptial agreement based on unconscionability, involuntariness and lack of fairness. The husband and wife married in 1995 and signed the prenuptial agreement 4 days before the wedding. The husband was represented by Counsel, the wife was not. They both declared that they had 'fully disclosed' their approximate net worth. The husband listed six parcels of real estate, both developed and undeveloped, three vehicles and a business bank account. No values were given for these assets. The wife had no assets. The agreement was signed and witnessed. The trial judge found that the wife has 'nothing and agrees to end up with nothing after her marriage'. There was one child of the marriage born 6 months after the parties married. The primary reason for the trial judge's decision to invalidate the prenuptial agreement was because there was 'no information contained in this Agreement as to the value of any of Mr Marsocci's assets'. However, the Rhode Island Supreme Court allowed the husband's appeal on the point, holding that he had listed his assets in the addendum to the Agreement and although brief and lacking detail, the wife had acknowledged that he had 'fully disclosed' his approximate net worth and the prenuptial agreement was valid.

Even if the prenuptial agreement complies with all the requirements of local State law and is not unconscionable (ie it does not shock the conscience of the court) at the time it is executed before the marriage, some states will take a 'second look' at the prenuptial agreement at the point when its terms fall to be enforced on divorce. Known collectively as the 'Second Look States' they include Massachusetts, Kentucky, Georgia, Connecticut, New Jersey and Mississippi. The 'second look' test effectively checks again for unfairness or unconscionability. Proving that the Prenuptial Agreement has become unfair is a heavy burden on the proponent but one case where the proponent succeeded was the 2015 case *Kelcourse v Kelcourse* 87 MASS. APP. Ct 33. Massachusetts is a 'second look' State

where the trial judge concluded that enforcement of the prenuptial agreement would be unconscionable and the husband's subsequent appeal was dismissed. The parties were married in 1991. The husband was in his 40s and owned and operated a marina business. The wife was in her mid-20s and pregnant with their second child. She was a homemaker. They had cohabited for 5 years prior to the marriage. The parties signed a prenuptial agreement four days before the wedding. They each had independent counsel. They agreed not to claim against premarital property. The wife had no appreciable assets. The agreement also provided that if a principal residence was purchased during the marriage then it would be deemed the wife's separate property irrespective of how the title was held. The agreement left open the question of spousal support. The marriage lasted nearly 20 years and for some 15 years the parties lived in rental accommodation. A property was purchased in 2006 for $320,000 which required considerable work. On divorce, the marina was valued at around $1.7m but the condition of the residential property had deteriorated further and was in need of extensive repairs and was subject to a mortgage of $256,000. The 'second look' test was applied, ie that a prenuptial agreement will be enforceable if it was valid when executed and is conscionable at the time of the divorce. It will not be enforced if enforcement 'due to circumstances occurring during the course of the marriage . . . would leave the contesting spouse "without sufficient property, maintenance or appropriate employment to support" herself'. Although the agreement was valid when entered into the by parties, upon taking that all-important second look, the judge found that it could not be enforced and the appeal court upheld her judgment.

Whilst we might wince at the outcome in *Marsocci* and the lack of any information as to the actual values of the husband's assets (and possibly suggest some sort of Sch 1 Children Act 1989 provision to address any disparity that the children might perceive between the respective financial positions of their parents), the underpinning effect of Art I, s 10, cl 1 of the US constitution enshrining the right to contract can be felt clearly. The US, with its vastly larger population, offers many more examples of challenges to prenuptial agreements, the vast majority of which are unsuccessful. Our Nuptial Agreements Bill is gathering dust and it is not clear how many prenuptial agreements here are signed a clear 28 days before the wedding and would otherwise fulfil the above criteria making them qualifying nuptial agreements. Baroness Hale's words echo loudly, and whilst we retain flexibility and discretion, we are not making progress towards achieving more clarity as to the effect and operation of prenuptial agreements under the laws of England and Wales.

Looking ahead . . .

With Brexit dominating our political and legislative agenda at the moment, it must be unlikely in the extreme that any Parliamentary time will be found in the next few years to devote to the reform of marital agreements. The government has only just committed to consult on no-fault divorce as a step towards modernising our divorce law after decades of sustained campaigning. It seems that our judges will have to continue to carry the burden in terms of developing the law in relation to prenuptial agreements and watching developments in this area in the US and in particular, the 'Second Look States' could take us closer to a higher degree of respect for individual autonomy and the likelihood of greater enforcement.