Pre-nuptial agreements: How Radmacher has changed the landscape

Claire Gordon | August 2012

Since the case of Radmacher, there has been a flurry of cases in the English Courts in which pre-nuptial agreements and post-nuptial agreements have played a pivotal role – so where are we now and what might it mean for those with international private wealth, and of course those advising them?

Professionals working with international high and ultra-high-net-worth individuals and families will most likely have come across pre-nuptial agreements in some context. Whilst marital property regimes and agreements before marriage have been standard fare across Europe for a considerable time (indeed in some countries signing up to a marital contract is a legal requirement on marriage), England has been lagging behind in this area for many years, However, it is, at last, catching up with its more progressive cousins, and not a moment too soon.

Why might one need a pre-nup?

Divorce can wreak havoc with the most carefully crafted tax planning and trust or business structures in a way that can seem nothing short of horrifying for those faced with a divorce petition in the UK. The English Court has wide ranging powers to redistribute (some might say "attack") family or inherited wealth, determining a “fair division of the assets”, which is one reason why England has the (perhaps deserved) reputation as the divorce capital of the world. A pre-nuptial agreement can provide crucial protection.

It is important to bear in mind that even if England does not appear to be the most natural place for a couple to divorce, for example if they have stronger connections to another country, there could well be jurisdiction for proceedings to be brought in England as well, whether now or in the future. The risk of your client having to face an English Court on divorce can be a very real one.

Radmacher

Historically, English judges were reluctant to give weight to agreements entered into by parties prior to marriage. The sea change in approach started in October 2010 when the Supreme Court gave their decision in the much publicised case of Radmacher v Granatino. A brand new, and many would say long-awaited, principle was established:

Pre-nuptial agreements that are entered into freely and with a full understanding of the implications are to be given effect unless it would be unfair to hold the parties to it.

This case fundamentally changed the position in relation to pre-nuptial agreements in England, giving them far greater strength and impact than ever before.

However, after a seminal case such as Radmacher the real interest lies in seeing how such new principles are put into practice. In the last eight months High Court judgments have been published in respect of five different cases (Z v Z, V v V, Kremen v Agrest, B v S and GS v L). Each case involved either a pre or post-nuptial agreement and whilst the decisions are, as always, fact specific, the principle set down in Radmacher has been applied and explored further, with clear guidance emerging as set out below. Overall, it is clear that real weight is now being afforded to pre and post-nuptial agreements.

Application of the Radmacher principle – what more do we now know?

1 Has the agreement been “freely entered into with a full appreciation of its implications”? There is no black and white rule regarding disclosure and independent legal advice. The question is whether there is a material lack of disclosure, information or advice. Each party must have the information that is material to his or her decision that the agreement should govern the financial consequences of the marriage coming to an end.
2 Even if the couple have a “foreign” pre-nup, i.e. one not prepared in England, the case will be governed exclusively by English law (contrary to the approach in many other jurisdictions). The “foreign-ness” may be regarded as evidence of the couple’s intentions when they signed the agreement – for example that they had elected a particular property regime, understood what that meant and expected it to be binding under the law of the country where the pre-nuptial was prepared - but no more.

3 Duress, fraud or misrepresentation will negate any effect of the agreement. Undue pressure will likely eliminate the weight to be attached and exploitation of a dominant position will reduce or eliminate the weight to be attached. The court may take into account emotional state, age, maturity, and foreign elements.

4 “In the circumstances prevailing, would it be fair to hold the parties to their agreement?”
   - The agreement cannot be allowed to prejudice the reasonable requirements of any children of the family.
   - A distinction is drawn between marital and non-marital property. (In simplistic terms, marital property is generally regarded as property created during the marriage, with pre-marital property or funds received by gift from family or inheritance comprising non-marital property.) Respect should be given to the decision made by the couple to regulate their affairs, particularly where the agreement deals with existing circumstances and not the contingencies of an uncertain future (i.e. where the agreement protects pre-marital property) as this can alter what is “fair”.
   - If the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it may well be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she earned.
   - It is likely to be unfair to leave a party in a predicament of need while the other enjoys a sufficiency or more.

The impact of Radmacher has filtered swiftly down to the lower levels of Court and English judges are willing to hold agreements to be “effective”.

What does all this mean in practice for your clients?

With clear case law showing the weight now being afforded to pre-nuptial agreements by the English Court, considering a pre (or indeed post) nuptial agreement should become a key part of an individual's or trustees' financial planning for the future. Although in the past pre-nuptial agreements in England were often regarded as deeply unromantic and rather un-English, the widespread coverage of the recent cases in the British media together with, perhaps, a new pragmatism regarding the challenges of marriage, mean that clients are generally more open than ever before at least to consider having such an agreement as part of their arsenal of wealth preservation strategies and must certainly be advised to have one.

It remains key when thinking about a pre or post-nuptial agreement to consider carefully each jurisdiction which might be relevant to the couple. Not just where they are currently living and where they intend to marry (or married), but also where they are domiciled and where they may live in the future. This may require a little crystal ball gazing, but taking advice in each of the possible, or at least the most likely, jurisdictions should give a client the very best protection possible. High net worth individuals will increasingly have homes all over the world, and it may be advisable to consider preparing a "portmanteau" agreement ie something intended to be binding in two or more jurisdictions.

When is the right time?

It may already be on your radar as part of your role as a trusted adviser to suggest a pre-nuptial agreement to your clients when hearing of an impending wedding or that of one of their family members or perhaps a trust beneficiary. But do not forget that other scenarios may also sensibly trigger a discussion about a post-nuptial agreement, for example:

- Dynastic wealth planning - a parent may be keen to pass assets down to the next generation of adult children, but before doing so would like to ensure that so far as possible the wealth will not be dissipated outside the family if the child and their spouse were to have marital difficulties and divorce.
- Setting up or restructuring trusts - thought should be given to the class of beneficiaries - is automatically including a spouse a good idea? Or will any tax benefits be outweighed by the risk of a divorce in the future?
Nuptial settlements can be varied by the English Court which can transfer property out of a trust; order capital or income provision out of a trust; and remove or appoint trustees or protectors. A trust being offshore does not necessarily provide the protection your client may be hoping for.

- To complement a foreign pre-nuptial agreement - whilst you may breathe a sigh of relief on being told by the client not to worry as they entered into a pre-nuptial agreement when they married, as far as the English Court is concerned, not all pre-nuptial agreements are created equal. Whilst the agreement may give perfect protection in e.g. Spain, the weight given to the agreement in England will depend entirely upon the circumstances surrounding it. If it looks as though the necessary criteria may not be met, your client may well benefit from taking advice on the extent to which they are protected and consider having a post-nuptial agreement.

There can be little doubt that pre-nuptial and post-nuptial agreements will continue to become increasingly prevalent and feature far more prominently in England than they have to date. The case law will undoubtedly continue to evolve and refine the principles espoused so far, but pre and post-nuptial agreements are now without question an essential consideration for those wishing to preserve their wealth.

If you require further information on anything covered in this briefing please contact Claire Gordon (claire.gordon@farrer.co.uk; 020 3375 7000) or your usual contact at the firm on 020 3375 7000.

This note is intended as a general summary of the law. It should not replace legal advice tailored to your specific circumstances.

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