Barristers' Chambers

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Issue 17 Radmacher – Where now?

Can there really be anything more to be said in advance of the Supreme Court's ruling in the **Radmacher v Granatino** appeal. We have had articles, roadshows, podcasts and blogs and no doubt myriads of legal tweats on the subject. In fact, in every which way and more that any copy can be squeezed out of the issue of pre-nuptial agreements, we have seen the great and the good and the not so good have their shot. Now that nothing more is left unturned about the decisions themselves, we now have even more columns on what the Supreme Court decision may turn out to be. Is there no end to this.

Does this, actually, tell us something more about our profession than the subject of pre-nuptials? Is there more than a little anxiety around that the work increase most of us as ancillary relief practitioners have had over the last two decades is on the decline. Do all these practitioners writing on the subject really have a burning passion to contribute to the jurisprudence of the subject or is it, in reality, more a jockeying for position to attract what is seen as the best bet for a new source of revenue for a decade since **White (2000).**

Within all the hype, we read the noble sounding comments that couples considering whether to get married or not are being put off the marital institution by the present absence of the freedom to contract and the perception that we need greater harmony with the Euro zone on this subject. In fact, as I suspect most working practitioners silently recognise, this is complete rubbish, spoken by those with either little knowledge of dealing with the everyday divorce case or symptomatic of having spent too much time in ivory legal towers several planets away from the everyday life of most of the population.

I confidently guess that most of the population had no idea that they have been deprived for years by the fact that they could not enter into a binding legal agreement concerning their married state in advance of the marriage itself. Most of us have little prospect of real asset value for division at the end of a relationship anyway and the unpleasant truth is that pre-nups are actually, whatever is said to the contrary, a device for the rich to remain rich and usually the male of the species, at that.

If pre-nups are again encouraged in the **Radmacher** appeal, then the great British public will have unleashed upon them a frenzy of legal activity to ensure that in every newly married couples' home, whatever their financial status, somewhere next to the will and the building society book is stored the pre-nuptial agreement. The prediction is that most of these agreements will wither on the vine never to be looked at again unless a divorce occurs and

because they will not be reviewed frequently enough, the experience of many will be soured by the feeling that this was just another con of lawyers and an expensive con at that.

What better way to ensure an argument between two happily married individuals than to have to review a pre-nup every three years. Who in their right mind wants to be getting round the kitchen table to debate about how better to divide what they have just in case things don't work out in the marriage after the wife announces she's pregnant. I suppose the answer is, probably, those couples, who would up to now, without any encouragement, have raised the issue of the pre-nup in the first place and, in this, full circle, we arrive back at the rich and wealthy and in most cases, although, ironically, not in **Radmacher's** case, the male.

It is sadly ironic that a device, originally, used over a century ago to protect the married woman's possessions from the effect of the law of coverture, which gave the husband overall control over her assets, is now typically used by the husband-to-be or his family to protect his possessions from her claims to 'fairness' in divorce distribution.

The current increased awareness of the pre-nup will, if not checked by strong safeguards, progressively expose many more women to an unfair and, at times, overbearing pressure in the run up to the wedding ceremony, when their minds are not, necessarily, focused upon just securing a certainty of financial outcome in the event it all goes wrong. Whilst the woman judge in the first instance decision of **Radmacher's** case (Baron J) and, again, Baroness Hale in **Macleod's** case **(2008)** clearly understood this reality, it appears, the Court of Appeal in **Radmacher** just did not get it, if their, apparently, dismissive approach to the need for independent legal advice is anything to go by. Indeed, it is instructive that for all his commercial experience, the husband in **Radmacher's** case, surely, succumbed to the very pressures of signing up mentioned above, when, with his background, he would have been the first to have warned any of his office associates to get the right advice before doing so.

Women have had a long and tortuous struggle in our family law jurisdiction to complete the reforms started back in the middle of the 19th century for the right to stand shoulder to shoulder with men at the start of the 21st century in the process of the **section 25** statutory exercise in divorce. Of course, reading the Court of Appeal's judgment in **Radmacher**, the more cynical may say that we were witnessing a politically motivated decision with a view to forcing the issue in advance of the Law Commissions report on the subject. Fortunately, for women, Brenda Hale and Florence Baron may yet have the final say.

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