Barristers' Chambers

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# Case Update – Issue 9
# NG v KR (Pre-nuptial contract) [2008] EWHC 1532 (Fam)

**Introduction:**

**1.** The decision of Baron J. in **NG v KR (Pre-nuptial contract) [2008] EWHC 1532 (Fam)** is an absolute feast for any matrimonial lawyer wishing to clearly evaluate the present approach of the Courts of England and Wales to the effectiveness and impact of a pre-nuptial agreement in an ancillary relief application in which the fairness of the deal struck is set against the recognised factors of disclosure and independent advice, the birth of children, the Human Rights of the parties to the agreement and their respective needs.

**2.** In a 'tour de force' fifty page judgment, at an appropriate juncture at which the Law Commission embark upon its consideration of such agreements, this very highly regarded family Judge with a reputation for plain speaking and a real sense of the practicalities engaged in a family case as honed by her own substantial matrimonial practice at the Bar, thoroughly surveys the existing law in relation to pre-nuptial agreements and provides very clear guidance as to the appropriate resolution to the many practical considerations, which arise in this area and which were skilfully deployed by the very experienced counsel appearing before her.

**Basic Facts:**

**3.** The parties (H-37 and W-39 ) were married in 1998 and separated almost 8 years later in 2006 (decree absolute July 2007).They had two children aged 9 and 6 years. After expensive contested residence proceedings, the parties had shared residence with the children spending 70% of their time with the mother living at her home in Germany and 30% of their time in England with the father (paras 1 & 65 of Judgment).

**4.** In 1998, shortly before their marriage, the parties signed a pre-nuptial agreement, which provided for a separation of their property on marriage and made no provision for either on a divorce (para 2).

**5.** The Wife had gained considerable wealth from her family in Germany and was estimated to be worth, at least, £54.3m net without her family company interests and overall, taking into account a net annual income from all sources of £2.6m, her probable fully capitalised position was over £100m. She could live as she chose for the future and would be wholly financially responsible for the children (para 138).

**6.** The Husband had been a high City earner, but during the marriage had by his own choice (2003) decided, albeit without criticism, to enter academic life at Oxford with a view, which was no longer realistic, thereafter, to re-entering the financial world and returning to high income. His income had fallen to 10% of what it had been and his anticipated income was assessed at £30k pa as a researcher. He had debts of £800k (£740k arising from the residence contest). His outgoings were, at least, £131k pa with another £84k pa for his rent (para 138).

**Parties' Stances:**

**7.** The Husband had brought the application for ancillary relief upon the divorce.

**8.** The Wife's revised open offer was, primarily, that the Husband should receive nothing by reason of his consent to the nil provision pre-nuptial agreement, which would be recognised as binding in both Germany and France, the respective birthplaces of the parties and, therefore, any derogation from that position was in breach of the Wife's Human Rights (para 3). Further, the Husband had innate abilities to earn a considerable income and there was a contradiction of wishing to continue to live 'a millionaire's lifestyle' at her expense within the more frugal expectations of academic life (paras 4 & 5). By way of concession overall, it was argued on her behalf that the Husband should have a £1m home in this jurisdiction during his lifetime to revert back to the Wife thereafter; on the same terms, but only during the childrens' minority, a home in Dusseldorf at a value of E500k and child maintenance of £18k pa each, mainly to cover his and the children's necessary travelling costs between homes. Further, as a secondary position only, if the Court accepted his 'income needs' case, an additional £35k pa in maintenance to him to meet the shortfall between his net income as a researcher and his reasonable personal outgoings, but only until the youngest left secondary school to reflect the fact that he had consented to the prenuptial agreement and his reduction in income was self inflicted (para 6).

**9.** The Wife argued that the award should be so restricted, notwithstanding the size of her personal wealth, by reason of the interplay of a number of well recognised factors in the case. These were, his consent to the agreement, that there would otherwise have been no marriage, all the Wife's assets were separate and inherited, there was no 'matrimonial property' or owned matrimonial home involved, her present asset value had, on the basis that the pre-nuptial agreement was effective, been considerably added to by further gifts of shares and monies from her father during the marriage and the Wife would be the primary carer and alone the financial provider for the children. (para 7).

**10.** The Husband conceded that because the Wife's wealth had entirely emanated from her family, his claim was not percentage based but limited to his 'reasonable needs'. He further accepted that he had consented to the pre-nuptial agreement, but that the same should be disregarded, because he had not had independent advice or disclosure of her wealth beforehand and there was no provision for the birth of children nor for any financial provision upon divorce. In regard to the human rights points, he argued that the agreement pre-dated the Human Rights Act, which was not retrospective and the Court in adjudicating fairly in a private law dispute could not be in breach of the Human Rights legislation (para 8).

**11.** Accordingly, his open position was for a total of £9.2m which was, by the end of the hearing, amended to £6.9m. This included claims for £2.8m for London/Oxford housing, £800k debts (mainly residence application costs) and £3.1m for a Duxbury capitalisation acknowledging a £30k pa earning capacity (para 10).

**The Pre-Nuptial Agreement:**

**12.** The Wife, it was found, had used the threat of possible disinheritance by her father as the more amenable approach to her husband-to-be as the basis for her wanting him to sign a pre-nuptial agreement before their marriage. Her real reason appeared to be out of her concern that anyone may marry her for money alone. The Husband, on the other hand, had no wish for her to be disinherited, wanted to marry and could not envisage making a claim. Whilst the Court accepted that the parties agreed to an agreement being drawn up so neither could gain financially on a divorce; contrary to the Wife's assertion, it was held that the signing of the prenuptial agreement had not been demanded as a precondition to marriage (para 23).

**13.** The final draft of the pre-nuptial, because of the Wife's insistence to the notary for her father to approve the same, was not produced to the Husband until 7 days before the same was signed. Even then, due to the Wife's specific instructions and the notary's incorrect assumptions, it contained incomplete statements as to the level of the Wife's wealth (paras 29 to 31). Although, it was held that the Husband was aware of the basic terms of the agreement, he had not had sufficient time to have the document translated or to take separate legal advice (para 33). He had had no time for mature reflection and because of the Wife's economical explanation for its need, he had 'been lulled into 'a false sense of security' over its importance (para 34).

**14.** The Court reflected (paras 37 to 39) upon the six safeguards (emboldened below) which were highlighted in the Government's Green Paper entitled 'Supporting Families' (4th November 1998) as needing to be in place before a pre-nuptial agreement should be enforceable and found the agreement wanting as italicised below:-

**• where there is a child of the family, whether or not that child was alive or a child of the family at the time the agreement was made;**

*There was no provision for either party in the event of the birth of a child. Such an event alters the relationships and priorities of both sexes and was here one reason for the Husband wanting to enter academic life so as to spend more time with his family and, of course, impacted upon his income. The complete absence of consideration of such an event flawed this agreement and made it, prima facie, unfair.*

**• where under the general law of contract, the agreement is unenforceable, including if the contract attempted to lay an obligation on a third party who had not agreed in advance;**

**• where one or both of the couple did not receive independent legal advice before entering into the agreement;**

*There had been no realistic opportunity for the Husband to take independent legal advice within the time frame allowed of 7 days and where he had had no input as to the contents of the agreement and such explanation as he received had been given by a notary paid by the Wife's family and who himself had expressed dissatisfaction as to the inadequate information afforded to the Husband . Whilst, the Husband had a commercial background familiar with such contracts and realised the agreement made no provision under German law on divorce, '...neither that knowledge, his background nor the information he was given are the same as understanding the full legal consequences of his decision or its later enforceability'.*

**• where the court considers that the enforcement of the agreement would cause significant injustice (to one or both of the couple or a child of the marriage);**

*There was obvious unfairness in the lack of any provision in the agreement in the event of real need of either party. '...In this case the agreement, its validity under another (and chosen) system of Law and the parties' actions/nationalities are all dynamic factors, but the reality of injustice (if any) is always fact specific and must be considered carefully'.*

**• where one or both of the couple have failed to give full disclosure of assets and property before the agreement was made;**

*There was no disclosure on the deliberate instruction of the Wife and such statements as to value which appeared were incorrect. Whilst lack of disclosure would not undermine the validity of the agreement in Germany, it was relevant under English law as without full knowledge of the assets, it was impossible for a party to make a fully informed decision.*

**• where the agreement was made fewer than 21 days prior to the marriage (this would prevent a nuptial agreement being forced on people shortly before their wedding day, when they may not feel able to resist).**

The Court further accepted that the standard contractual vitiating factors of mistake, misrepresentation, undue influence, duress or fraud could affect such an agreement, although the same were not applicable in this case (para 136).

**Choice of Law:**

**15.** In this context, there had, at the outset, been an issue between the parties as to whether the pre-nuptial agreement contained a choice of law clause or a jurisdiction clause following the use of certain wording, namely '*...that the effects of our marriage in general terms, as well as in terms of the law of matrimonial property and the law of succession shall be subject to the Law of the Federal Republic of Germany'*. The Wife had argued that the clause in favour of the German courts was a jurisdiction clause which invoked Art 23 of Brussels I (Regulation No 44/2001) and, therefore, all questions of maintenance (and property) was within the exclusive jurisdiction of the German courts. This point was, effectively, resolved following the evidence of the German notary who confirmed he had intended the same to be a choice of law clause and when account was taken of the fact that other parts of the agreement clearly referred to the possibility of the law of other countries gaining a jurisdiction over the parties' affairs (see paras 40 to 43 and 137). In the event, as the parties were married, had mostly lived and had their children in this jurisdiction this was the place with which the marriage was most closely connected (para 46).

**Comparisons of Law:**

**16.** Within both the German and the French jurisdictions the pre-nuptial agreement in question would be considered valid and binding on the parties with very limited powers available to meet exceptional maintenance needs of the Husband, in such circumstances. The consensus of foreign expert evidence given was that the Husband would not be granted any provision and it was also considered that under the terms of the family company's Articles of Association there was a risk that the Wife's shares may be taken back if any English court order included a share transfer in favour of the Husband. However, the Court considered this had never been a risk, given the size of the Wife's wealth (paras 77 to 80).

**17.** The Court reminded itself that, being the jurisdiction in which the divorce was granted, the case was to be decided 'in accordance with English Law and tradition', being bound by the terms of the Matrimonial Causes Act 1973 as it has been interpreted in the House of Lords and the Court of Appeal and in the light of any relevant decisions of 1st Instance judges. Taking account that the Court's first consideration was the two children of the family, regard was to be had to all the circumstances of the case and the factors set out in Section 25 of the Act to produce a result which was fair, just and did not discriminate against either party on the grounds of gender or for any other reason (see ***White* [2000] AC 596** and ***Miller /McFarlane* [2006] AC 618** and also paras 82 & 87).

**18.** Whilst, the Court acknowledged that the UK Government had opted out of any obligation under the Maastricht Treaty and 'Rome III' in relation to the application of any foreign law as the 'applicable law' to persons seeking divorce or maintenance (para 88), nevertheless, the English court

does not act in a blinkered fashion and any foreign elements involved must be weighed in the balance (see ***Otobo*** **[2003] 1FLR 292;** ***A v T (Ancillary Relief: Cultural Factors)*** **[2004] 1 FLR 977** and ***C v C*** **[2004] Fam. 141**). This meant that the fact of the validity of the prenuptial agreement in both Germany and France, under 'all the circumstances of the case' would be discounting factors to the Court's approach (paras 89 to 94).

**19.** Accordingly, the Husband's claim in such circumstances was to be based upon his reasonable needs set against the parties' relationship lifestyle and the fact that he, plainly, agreed to no provision on divorce. Because there were 'vitiating factors' in relation to the pre-nuptial agreement (as above), the terms of the same would not, in this case, be precisely mirrored in the Court's order, but the fact of the Husband's consent to the no provision pre-nuptial agreement, albeit without legal advice or disclosure etc., had to be taken into account in the appropriate disposal of his claim (para 95).

**Human Rights Act:**

**20.** The Court concluded there had been unnecessary attention to and resources spent on this aspect by the Wife, notwithstanding her revised position, whereby she was no longer contending that the Court should declare section 34 as applied by section 25 of the 1973 Act as incompatible with the Wife's human rights in restricting her from entering into binding contractual relations in the form of a pre-nuptial agreement. The Wife's contention remained that the Wife's human rights in this regard were of upmost importance and should emphasise the importance of the pre-nuptial agreement and make it the starting point and focus of the discretionary exercise under section 25 (paras 96 & 97).

**21.** The Court automatically accepted that Article 6 (fair trial) applied and, under sections 3 and 6 of the HRA, the Court as a public body had to interpret the 1973 Act in a way which was compatible with Convention rights. Further, the Court accepted that, in general terms, Article 1 of the First Protocol 'A1P1' (protection of property etc) was also engaged in that a transfer of property order or a lump sum, if made, would be capable of affecting an individual's peaceful enjoyment of their possessions and that no person should be deprived of their property, unless it was in the public interest and, thereby, any transfers should only be undertaken upon the proper and fair application of law (see ***Wilson v First County Trust (No 2)*** **[2004] 1 AC 816** and paras 100 to 104).

**22.** The Wife, however, maintained that A1P1 was specifically engaged in relation to the pre-nuptial agreement, which, itself, constituted 'property' as a valid contractual right and, thereby, the effect was to make the agreement the Court's central focus resulting inescapably in its enforcement and the dismissal of the Husband's claims. The Husband's response was that the pre-nuptial agreement was neither a valid contract or affected by the non retrospective A1P1, which it pre-dated (paras 105 & 106).

**23.** In approaching this issue, the Court conducted a comprehensive review of the modern case law relating to the applicability of pre-nuptial agreements under the law of England and Wales (paras 109 to 118). The Judge concluded, therefrom, that the Courts under the section 25 exercise were '...increasingly minded to look at the precise terms of agreements and [to] seek to implement their terms provided the circumstances reveal that the agreement is fair'.

**24.** However, the existence of a pre-nuptial agreement under section 25 of the 1973 Act was, in any given case for financial relief, but one of the factors in the process, albeit, sometimes, a compelling one and under the common law, it remained the position that a party to a pre-nuptial agreement could not sue upon it as a valid contract so as to strictly enforce its terms (see ***X v X (Y and Z Intervening)*** **[2002] 1 FLR 508** Munby J). This was because the enforceability of the parties' agreement under

matrimonial law results from the Court order and not from the agreement itself (see ***de Lasala v de Lasala*** **[1980] AC 546**).(see para 119).

**25.** The Court rejected the Wife's contention that pursuant to ***Soulsbury*** **[2007] EWCA Civ 969,** a pre-nuptial agreement was to be seen as a valid and binding contract between the parties irrespective of an order being made endorsing its terms. The Court was of the clear view that **Soulsbury's case** had not engaged the Court's matrimonial jurisdiction but was an action relating to a will. Further, the Court of Appeal in **Soulsbury** had, expressly, recognised that there was a duty to seek the Court's approval, where there have been negotiations leading to a deal compromising existing or future claims for financial relief upon a divorce. Accordingly, as such a type of deal, a pre-nuptial agreement remained unenforceable per se for public policy reasons and was not valid in Law unless there was a specific statutory expression to that effect (See Section 34 of the Act) (see paras 120 to 127).

**26.** Similarly, the Court rejected the submission that a pre-nuptial agreement was a valid 'maintenance agreement' under section 34 of the 1973 Act, since the very words of that section referred to such an agreement 'being made between parties to a marriage' and 'made during or after the dissolution or annulment of the marriage' (see section 34(2) and 34(2)(a)) (see paras 130 & 131).

**27.** It followed that the pre-nuptial agreement did not constitute an enforceable right under English law and as such, not being 'property' as so defined under the A1P1, then the latter Protocol had no application (para 132).

**28.** The Court further rejected the argument for the Wife that the provisions of the 1973 Act, including section 25, infringed the A1P1. Certainly, infringement may occur 'where a domestic court's interpretation of a legal act appeared "unreasonable, arbitrary or ... inconsistent ... with the principles underlying the Convention' (see ***Pla and Puncernau v. Andorra*****, no. 69498/01, § 59, ECHR 2004 VIII**). However, the 'margin of appreciation', whereby a Contracting State is entitled to evaluate its own public policy decisions and make such laws are appropriate to fit its particular state needs was engaged where there was a difference between traditions and approaches of civil and common law jurisdictions. The Court did not accept that because section 25 only highlights a number of specific factors then this, necessarily, results in an element of uncertainty, whereby the parties can never be sure what the outcome of the statutory exercise will be so that this may lead to arbitrary results, which in turn infringes A1P1 (para 134).

**29.** On the contrary, there was nothing arbitrary in the application of the 1973 Act in financial proceedings. Most cases settle just because there are established principles laid down under the guidance of the House of Lords and the Court of Appeal and section 25 'strikes a fair balance between existing property rights and the entitlement of the claiming party to share, to receive compensation or have his needs met. This fair balance was well within 'the margin of appreciation' afforded to this country' (para 135).

**<u>The Section 25 Exercise:</u>**

**30.** The Wife's resources were vast and the Husband's claim properly limited to his needs. He required a home in England and a base in Germany during his weekend stays with the children together with sufficient income to pay for the children whilst they were with him and to make up the shortfall between his earnings and his reasonable needs. It was noted that their standard of living had been at a very high standard, although not extravagant. The Wife's financial contributions in the marriage and for the future had been and would be the greater, albeit each wanted to contribute as much as possible for the children's' benefit (para 138).

**31.** Further, the fact that the initial plan for the Husband to return to employment in the financial world had failed and in ordinary circumstances such a position would require necessary reductions to his lifestyle was a matter which should inform the Courts approach as to his needs (para 73). Likewise, whilst the Husband's reduced lifestyle compared to those of the Wife should not be marked out in the eyes of their children, it was also relevant that the Husband will spend much of his time in academic environment where luxury items are not a priority (para 74).

**32.** The signing of the pre-nuptial agreement in the knowledge that he was agreeing to no provision on divorce, notwithstanding the agreement being flawed, had been a circumscribing event in relation to the Husband's financial claim (para 139).

**33.** After 8 years of marriage, the Husband was entitled to a home of his own. £2.5m would be provided for this purpose, inclusive of furnishings and costs. His voluntary proposal to leave the equity involved upon his death to the children would be a recital to the order. To avoid the wasted cost of renting, the Wife would, with her consent, provide a property, inclusive of furnishings and attendant costs, in Germany at a cost of E630k as the base for the Husband, any future partner of his and the children when he was there with them and which would revert to the Wife after the children became independent (para 140).

**34.** His substantial litigation debt, whilst arising in part from the residence proceedings in which, other than his unsuccessful appeal, each had been responsible for their own costs, was a still a need which had to be met and would be provided for in the award, albeit excluding the costs of the appeal (para 68). There would, therefore, be payment to the Husband, in this respect, of £700k and £25k for a replacement car (para 140).

**35.**The Husband claimed a maintenance budget for himself of £125k pa, whereas the Wife's position was that he should have nothing or if a need was accepted £35k pa taking account of his own modest earning capacity. Balancing '...the need to produce a result which takes into account the [pre-nuptial agreement], the Wife's extensive fortune and the Husband's entitlement under English Law, the award would be £100k pa which in Duxbury terms would be capitalised at £2.335m. A total award to the Husband of £5.56m.

**36.**The Husband wanted £105k pa for the two children's maintenance whilst with him, whereas the Wife wanted only to pay £36k pa. The appropriate figure was £70k pa index linked.

**Commentary:**

**37.** The clear test of the journey taken by both parties to the signing of the pre-nuptial agreement against the six safeguards as set out in the Government's Green Paper entitled 'Supporting Families' (4th November 1998) is a welcomed development and one which is likely, following this Judgment, to find increasing favour as an industry standard in this area.

**38** The Court accepted that where the six safeguards were satisfied, it was likely that the agreement would become the magnetic factor in the Court's approach and its terms would be mirrored in the Court order. In this context, it is suggested that it must be advisable to ensure that the fullest of notes of attendance and discussion are kept and, if at all possible, each side should agree upon a joint signed statement to be attached to the agreement specifically setting out the way in which each of the safeguards have been met.

**39.** It is likely that many practitioners will need to review any recent pre-nuptial agreements, which they have drawn or been party to, in the light of this decision, to ensure that so far as their instructions

permitted, the signed document ticks the six safeguards checklist and where it does not to advise the client in question of this Judgement and, where it is perceived there is a need, to advise amendment.

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