Barristers' Chambers

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Current Position of the Prenuptial Agreement ('PNA')

Introduction:

In recent instructions to draft a number of prenuptial agreements, I have provided to the solicitor a Summary of the present developed position concerning the approach to prenuptial agreements. I have been told the Summary was found useful and so I have included the same now as a Flyer to at least provide a quick aide memoire of the up to date law on this subject.

The PNA Summary:

1. Although not strictly enforceable as contracts, they may be regarded as very relevant to the correct resolution of financial and property matters between the separated couple.

2. The leading decision is ***Radmacher (formerly Granatino) v Granatino [2010] UKSC 42*** in the Supreme Court (by a majority of 8 to 1). The substantive judgment was given by Lord Phillips (President), with an additional judgment from Lord Mance. Lady Hale dissented.

3. Lord Phillips stated:

> 'The court should give effect to a (PNA) 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 PNA.

4. In deciding what weight should be given to a (PNA) three issues were considered by the Supreme Court:

(1) Were there circumstances attending the making of the PNA which should detract from the weight which should be accorded to it?

> If a PNA is to carry full weight, both parties must enter into it of their own free will, without any undue influence or pressure and must be informed of its implications.
>
> If a party is fully aware of the implications of the PNA, but indifferent to detailed particulars of the other party's assets, then there is no need to accord reduced weight to the PNA because that party is unaware of those particulars.

Neither independent legal advice nor full disclosure are pre-requisites. The test is that both parties were fully aware of the implications of the PNA and that they each intended that the PNA should govern the financial consequences of the marriage coming to an end

It is important that each party should intend the PNA should be effective and that it is to govern the financial consequences of the marriage ending. It is now the case that it is natural to infer that parties who enter into PNAs under English law intend that full effect should be given to the same

(2) Did the foreign elements of the case enhance the weight that should be accorded to the PNA.

Previously, greater weight had been given to PNAs where there had been a foreign element and where such agreements were either binding or common practice in those jurisdictions. But now the intention that the agreement should be binding will be inferred.

(3) Did the circumstances prevailing at the time the court made its order make it fair or just to depart from the PNA.

The test in English law is fairness. A PNA is an important factor to be weighed in the balance and the court should give effect to a PNA unless it would not be fair to hold the parties to that agreement.

The Supreme Court expressly stated that:-

(i) Children: A PNA cannot be allowed to prejudice the reasonable requirements of any children of the family.

(ii) Autonomy: a court should give weight to PNA in respect for individual autonomy, particularly where a PNA may address existing circumstances as opposed to the contingencies of an uncertain future.

(iii) Non-matrimonial property. Often PNAs are intended to deal with specific non-matrimonial property.

(iv) Future circumstances. Where a PNA attempts to address what may happen in an unknown and unforeseen future, then there is more scope for what happens to them over the years to make it unfair for the parties to be held to that PNA in the future. The longer the marriage has lasted, the more likely it is that this will be the case. The court stated that the parties were unlikely to have intended that the PNA should result in one partner being left in a predicament of real need following on from a divorce. By contrast, where such considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from the PNA.

5. The Law Commission published its report on Marital Property Agreements in relation to pre-nuptial, post-nuptial and separation agreements on 27 February 2014 and recommended that statutory confirmation of the contractual validity of marital property agreements and that legislation be enacted to introduce 'qualifying nuptial agreements 'Qualifying nuptial agreements' would be a new form of contract, subject to requirements as to their formation including the provision of legal advice and financial disclosure.

6. Such QNA's would enable couples to make contractual and enforceable, arrangements about the financial consequences of divorce or dissolution. They could not, however, be used to enable one or both parties to contract out of any responsibility to meet each other's financial needs.

7. The recommendation is that a QNA, if it should become available by a change of the law, can only exist if it meets certain requirements as to its formation:

(a) it must be a valid contract;

(b) a contract made as a result of undue influence is voidable;

(c) it must be made by deed;

(d) it must contain a statement signed by both parties (in addition to their execution of the document as a deed) stating that they understand that the same is a QNA and that it will remove the court's discretion to make financial provision orders, save in so far as the QNA leaves either party without provision for their financial needs;

(e) in relation to PNA the QNA should be made at least 28 days before the wedding or civil partnership;

(f) both parties must have received, at the time of the making of the agreement, disclosure of material information about the other party's financial situation and it was recommended that parties to a QNA should not be able to waive their rights to disclosure;

(g) both parties must have received legal advice at the time that the QNA was formed.

8. For present purposes, awaiting any change to the law by Parliament, in **Kremen v Agrest (No 11)** and **B v S (financial remedy: marital property regime)** [2012] EWHC 265 (Fam) Mostyn J considered it important that it was clear in a PNA where a jurisdiction such as England and Wales may apply on divorce that the parties had received advice as to the same and that they intended the PNA to operate under such a system of discretionary equitable distribution prior to entering into the agreement,

'it is wise for the other party's adviser to insert a clause dealing with this in the final agreement'.

9. But now see **Versteegh v Versteegh [2018] EWCA Civ 1050 – Lewison LJ .**

> '182. In my judgment, with all respect, this sets the bar too high. In the case of a globe-trotting couple it would require the giving of advice about multiple possible matrimonial regimes all over the world. That seems to me to be both impractical and prohibitively expensive. Moreover, if the move from one country to another is not anticipated at the inception of the marriage, why should a couple seek such advice on the off-chance that one day they might move? It is also, in my judgment, inconsistent with the Supreme Court's discussion of "the foreign element" in *Radmacher*. In that case the French husband and the German wife saw a notary in Germany, although they married and lived in London. There was no suggestion that the husband ought to have had the opportunity to take advice about the law of England and Wales.'

Also at

> '178. The key points in *Granatino v Radmacher* seem to me to be these:
>
> i) Whether a *PNA* is contractually binding or not is irrelevant. The court should apply the same principles whether or not a binding contract has been made: [63]
>
> ii) There is no need for black and white rules about the process leading up to the making of a *PNA*. What matters is whether each party has all the information material to his or her decision, and that each should intend that the agreement should govern the financial consequences of the marriage coming to an end: [69]
>
> iii) Factors which would vitiate a contract will negate any effect that the *PNA* might otherwise have had: [71]. But factors falling short of those which would vitiate a contract may reduce, rather than eliminate, the weight to be given to the *PNA*: [72]
>
> iv) If the terms of the *PNA* are unfair from the start this will reduce (not eliminate) the weight to be given to it: [73]
>
> v) If the parties to the *PNA* are nationals of a state in which *PNA*s are common and binding, that will increase the weight to be given to the *PNA*: [74]
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> vi) In principle, if parties have made a *PNA* there is no reason why they should not be entitled to enforce it: [52]
>
> vii) Thus, the court should give effect to a *PNA* 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: [75]
>
> viii) Typically, it would not be fair to hold the parties to their agreement if it would prejudice the reasonable requirements of any children of the family [77]; or if holding them to the agreement would leave one spouse in a "predicament of real need": [81]
>
> ix) But in relation to the sharing principle, the court is likely to make an order reflecting the terms of the *PNA*: [82], [177] – [178]'

10. In **Luckwell v Limata** *[2014] EWHC 502 (Fam)* Holman J had earlier also considered the appropriate checklist and stated as follows:

> '1) It is the court, and not the parties, that decides the ultimate question of what provision is to be made;
>
> 2) The over-arching criterion remains the search for 'fairness', in accordance with Section 25 as explained by the House of Lords (ie, needs, sharing and compensation) but a (PNA) is capable of altering what is fair, including in relation to 'need';
>
> 3) A (PNA) (assuming it is not 'impugned' for procedural unfairness, such as duress), should be given weight in that process, although that weight may be anything from slight to decisive in an appropriate case;
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> 4) Weight to be given to a (PNA) may be enhanced or reduced by a variety of factors;
>
> 5) Effect should be given to a (PNA) entered into freely with full appreciation of the implications unless in the circumstances prevailing it would not be fair to hold the parties to the same ie, there is at least a burden on the respondent to show that the PNA should not prevail;
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> 6) Whether it will 'not be fair to hold the parties to the (PNA) will necessarily depend on the facts, but some further guidance can be given:
>
> (a) A (PNA) cannot be allowed to prejudice the reasonable requirements of any children.
>
> (b) Respect for autonomy, including a decision as to the manner in which their financial affairs should be regulated, may be particularly relevant where the (PNA) addresses the existing circumstances and not merely the contingencies of an uncertain future.
>
> (c) There is nothing inherently unfair in a (PNA) making provision dealing with the existence of non-marital property including anticipated future receipts, and there may be good objective justifications for it, such as obligations towards family members.
>
> (d) The longer the marriage has lasted, the more likely it is that events have rendered what might have seemed fair at the time of making the PNA unfair now, particularly if the position is not as envisaged.
>
> (e) It is unlikely to be fair that one party is left in a predicament of need while the other has a sufficiency or more.
>
> (f) Where each party is able to meet his or her needs, fairness may well not require a departure from the PNA'

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11. The Government in October 2018 published a Parliamentary briefing paper concerning the introduction no fault divorce legislation (https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01409). This followed a private members bill introduced by both Baroness Deech to reform the existing divorce law and to give statutory effect to any pre or postnuptial agreement signed by the parties which complied with the following provisions: -

> **3 Pre-nuptial and post-nuptial agreements**
> (1) For the purposes of any proceedings to which this section applies, a pre-nuptial or post-nuptial agreement in writing and signed by both parties to the marriage is to be treated as binding on them unless—
>
> (a) the agreement attempts to impose an obligation on a third party who has not agreed in advance to be bound by it (in which case the Divorce (Financial Provision) Bill Page 3 agreement is not binding on the parties insofar as it attempts to impose that obligation);
>
> (b) a party neither received independent legal advice, nor had an adequate opportunity to do so, before the agreement was made;
>
> (c) in the case of a pre-nuptial agreement, the agreement was made less than 21 days before the marriage;
>
> (d) one or both parties failed to make proper disclosure of that party's assets before the agreement was made; or
>
> (e) the agreement is unenforceable under any rule of law relating to the validity or enforceability of contracts generally.
>
> (2) Any non-compliance with subsection (1)(b) or (d) may be relied on only by the party disadvantaged by such non-compliance.
>
> (3) For the purposes of subsection (1)(b), where a person authorised to carry out reserved legal activities (within the meaning of the Legal Services Act 2007) has given a party independent legal advice about the proposed entry into a pre-nuptial or post-nuptial agreement, the certificate of that person to that effect is to be treated as conclusive evidence of the giving of that advice.
>
> (4) Where a pre-nuptial or post-nuptial agreement is to be treated as binding, the court may make a relevant financial order only to the extent to which the agreement does not deal with the matter.

The Bill is still progressing through the Committee stages. In the meantime, Baroness Butler-Sloss has recently introduced another Bill in the House of Lords, which awaits its second reading, requiring a review of the divorce laws to permit, in particular, no fault divorce.

12. As a result, there is now a building momentum in Parliament for new statutory provisions in these areas.

05.10.2018. – Ashley Murray