



ASHLEY MURRAY CHAMBERS

www.ashleymurraychambers.co.uk



Family Finance Flyer No 62

Pre-Nuptials - Quality, Clarity, Practice and Cost.

Introduction:

It is suggested that there should be some concern over the direction pre-nuptial work in practice is taking, the widely differing quality of drafting experienced and the ever rising costs being faced by the client in the process.

Rising Interest:

There will be some who will not be convinced that the uptake in instruction in this area of work is reflective of a genuine need for such agreements in some cases and that in an increasing minority it reflects nothing other than a naked attempt without legal justification to control the weaker financial party to which the latter under pressure succumbs or which, if there is resistance, ultimately undermines the relationship of the couple concerned.

Certainly, my own experience is that over the last 5 years, at least, the frequency of instruction as counsel to advise and draft such agreements or to consider the suitability and content of the drafts of others has increased considerably from the level of such instruction before. Obviously, *Radmacher v Granatino* was the catalyst for this change

and the interest was then further fuelled by the Matrimonial Property, Needs and Agreements Report (Feb 2014) which followed from the Law Commission.

There is no doubt that the use of the pre-nuptial agreement is an effective wealth planning tool where there is a need to protect family asset value, company shareholding, potential trust benefits or where the pending marriage involves mature parties who may have been previously married and who wish to protect pre-accrued money for the children of their earlier relationship. There are, obviously, other entirely laudable examples where the existence of a pre-nuptial agreement is a prudent choice.

The prospect of the introduction of the Law Commission's proposed Qualifying Nuptial Agreement, which would radically entitle couples to opt out of the Court's resource distribution jurisdiction, subject to need, upon a breakdown of the marriage, only serves to strengthen the attraction of such agreements further in this respect.

Whilst the populist banner of giving couples greater autonomy of outcome has fuelled the attraction also of the pre-nuptial, to most divorcing couples, as has already been well rehearsed by other commentators upon this subject, their needs remain the driving basis of the fair division of resources upon marital breakdown and the existence or otherwise of a pre-nuptial agreement should be academic to this exercise.

However, the family solicitor will now be prepared to fully advise any client who is intent on marriage or remarriage or whose offspring may be planning such an event as to the merits or otherwise of a pre-nuptial being in place.

Unsuitability

I suggest that experience is now showing that there is a small but not insignificant uptake of interest in the subject of a pre-nuptial agreement in relationships where the expectation of wealth is less than obvious. Of course, with the exception of a budding Mr and Mrs Bill Gates, experienced family solicitors, can be expected to steer such clients, who otherwise have no special reason for having such financial protection in place, away from the idea of the pre-nuptial agreement and thus avoiding an expensive and potentially futile exercise.

However, realistically this best practice will not be universal and whilst the proposed reforms would still mean in such circumstances, the needs of the parties will prevent an ultimate loss of intervention by the court, the nature of any such reform is as yet unknown and the extent of retained protection for such couples therefore uncertain.

Undue Pressure

Even for those with good reason for requiring a pre-nuptial agreement in place, the exercise is not to be embarked upon lightly and without careful early consideration as

to its potential impact upon the often, as yet, unsuspecting partner and the costs of any prolonged debate of the framework of any agreement. A number of such clients will have already canvassed the subject with their other half before seeking out legal advice, but this preliminary sounding out is no guarantee of a problem free reaction once the full terms of the first draft become apparent and have been fully explained by another solicitor engaged in the process on behalf of the recipient partner.

Again, experience has taught that this can become a most difficult area where both family solicitors engaged are anxious not to undermine the intended marriage, but on the one hand the solicitor for the party with wealth or such expectations has firm instructions for achieving a minimum financial 'line in the sand' level of wealth protection, whereas the other solicitor strongly advises the weaker financial party for good legal reason not to accept the proposals being made.

For those family practitioners who have an established experience of such situations, there will be examples where a client has simply and despite the best of advice not to do so, eventually 'caved in' to the emotional pressures exerted. A step, no doubt, influenced by the distress his or her opposition is causing in the run up to the marriage ceremony to the other party or that party's wider family who are, of course, to be the client's future in-laws. Frequently too, the client holds a genuine, albeit mistaken, belief at what is the start of the relationship that the other party would not see the client go without should divorce strike, irrespective of the terms which are being promoted as part of a pre-nuptial agreement. These are, of course, all considerations requiring the employment of the skills of the experienced family solicitor to navigate around in the overall best interests balance of the client's potential financial future and the intended marriage.

Bad Practice

Regrettably, there are examples of where the financially stronger party's solicitors instead of adopting a 'cards on the table' approach in relation to the discussions over what level of protection is desired by a pre-nuptial agreement, treat the position as akin to that to be adopted in negotiations where a divorce petition has already been filed and, therefore, seek to achieve greater financial advantage than is required. This will in most cases be bad practice and contrary to the overall and broader interests of the client. Not infrequently such an approach is coupled with a cap imposed on the offer of the payment of the costs of the other party's legal advisors and/or demands for full time clock details of the costs submitted for payment under such an offer.

Similarly, some circumstances permit the solicitor for the party suggesting the pre-nuptial agreement to over influence the outcome of the negotiations by being able to propose through his or her client to the recalcitrant other party to the process that legal

advice is to be obtained by another solicitor who may previously in some other pre-nuptial negotiation have shown themselves to be less than astute as to pre-nuptial process or the terms being advanced.

Even with a successful outcome and signatures obtained, emotional wounds may have already been inflicted upon one of the parties which may fester as the relationship develops. It is, therefore, particularly important that the negotiation is kept as straightforward and the terms proposed as simple and clear as possible to avoid unnecessary misunderstanding and conflict.

Standardisation

In this respect, it is highly regrettable that there is no standard and universally approved base precedent available – most practitioners in this area will still use their own pre-nuptial agreement format which will have been honed over the years by a mixture of some original thought, some cut and paste from other agreements seen and also developed experience of deficiency in other cases. Such a process, I suggest often leads to a clash of styles and misunderstanding within negotiation which can lengthen the process at the emotional and financial cost of the client. It also often leads to an overlong document replete with language that only a lawyer can actually interpret or understand. This should not be and avoidance of areas for misunderstanding is particularly paramount.

The pre-nuptial agreement should be in plain and unambiguous language and fully capable of being understood in one complete reading without the need for a law degree as an aid to interpretation. There really should not be the need for phrases such as ‘for the avoidance of doubt’ or for multiples of sub division alternatives of the definition of what is meant by eg. separate or joint property or the meaning of property itself or an excessive series of cross referencing to different parts of the document.

Certainly, there are examples in usage in practice which even now appear still to give no recognition in language used to the Radmacher decision or the Law Commission’s report at all, or which, at the other extreme, are over abbreviated so as to omit certain considerations which could undermine a later court’s interpretation of the parties’ actual intent and understanding or which are hopelessly legalistic in terminology and excessively lengthy and by their prolix content are open to several future interpretations.

Fees and Costs

This lack of uniformity of precedent and over use of complex as opposed to plain language also reflects the fact that the cost of providing the pre-nuptial agreement and the process of negotiation which precedes such an agreement differs considerably from

lawyer to lawyer both locally and nationally. The client expects and should be provided with a fixed fee for the exercise. Many now do provide fixed fees. Others still resist such an approach, no doubt acutely sensitive to the fact that it is because of the difference in approach and format and the lack of uniformity in this area that a fixed fee can be particularly non profitable. However, this is not the client's problem and he or she should not be forced to pay for the profession's short comings in this respect.

Of course, there are many other organisations via the internet and otherwise who offer basic fixed fee alternatives for the sale of a so called standard pre-nuptial agreement form coupled with a very brief timed offer for any accompanying advice. It cannot be known what number of such so called standard agreements may have been entered into by couples and only time will tell as some of these relationships breakdown to what extent if at all any of the prescribed steps eg disclosure etc have been adhered to.

Certainly, many such off the shelf agreements will prove irrelevant by reason of the lack of independent legal advice before they were signed. However, their uptake is reflective in major part to the alternative prospect of the often prohibitive costs of the family lawyer professional's involvement. In the event of a marital breakdown, there will be some of these initially cost conscious couples, who would have been genuinely assisted by a family lawyer's pre-nuptial drawn agreement being in place.

The Law Commission's own limited research into the costs charged for a pre-nuptial agreement revealed a very wide range of charges (£200 to £25,000 plus vat) by both family law solicitors and counsel specialising in such work (see A study of the views and approaches of family practitioners concerning marital property agreements - Research report for the Law Commission- by Emma Hitchings School of Law, University of Bristol 2011 p 50 and following). Five years on from that straw poll, there would be every reason to suspect from experience that the fee range could now be a great deal wider.

Suggestion

Love it or hate it - as with the Orders Project which produced the Financial Remedy Omnibus, the drafting and negotiation process concerning the content and language of the pre-nuptial would benefit from the introduction of a similar universally recognised standard format. This would probably also have a much needed impact upon the costs chargeable for the service by the Profession and in turn encourage more couples to engage a family lawyer in the exercise.

Ashley Murray

08.01.2017.