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Pre-nuptials: The profession's responsibility

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The quality, clarity and cost of pre-nuptial agreements being produced for clients and the varied approaches being adopted to the negotiation process engaged in obtaining the same by some sections of the profession, it is suggested, requires some adjustments to current practice.

INCREASED INTEREST

It remains questionable whether the uptake in instruction in this area of work is truly reflective of a genuine need for such agreements in certain cases and in an increasing minority of cases whether it reflects nothing other than a naked attempt, without legal justification, to control the weaker financial party. Certainly, 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 (Formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900 was the catalyst for this change and interest was then further fuelled by the ensuing *Matrimonial Property, Needs and Agreements Report* (February 2014) from the Law Commission.

There can be 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 potential 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 the breakdown of the marriage only serves to strengthen the attraction of pre-nuptial agreements further in this respect. Especially as, in the light of the guidance given by the Supreme Court in *Radmacher*, there is good reason to anticipate that the introduction of the Qualifying Nuptial Agreement or something similar, in due course, will encourage the courts to approach in like fashion the interpretation and impact of any pre-nuptial agreement which predates such reform but in all other respects is compliant with the qualifying conditions of its suggested statutory equivalent. In the light of the current progress in the House of Lords of Baroness Deech's private members bill (the Divorce (Financial Provision) Bill) it remains possible that eventually a different version of divorce reform and the statutory recognition of the pre-nuptial will be approved. Whichever it is to be, the consequent demand for pre-nuptial drafting is likely only to increase.

The background of the development of the core principles of matrimonial finance law generally is, as is widely recognised, the product in the main of cases involving wealthy couples, who have had the resources to challenge their divorce provision under the s 25 statutory exercise before the higher courts. As such, those principles have artificially emphasised the factor of the 'contributions' of the parties as opposed to their 'needs', which is, of course, otherwise the determining factor in the vast majority of cases before the family courts. Those same forces, it has to be said, have also to date fuelled the approach to the enhanced uptake of the pre-nuptial agreement under the populist banner of giving couples greater autonomy of outcome.

To most divorcing couples, however, 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. Set against this, the fact that nine Supreme Court Justices assembled for the *Radmacher* decision and the Law Commission subsequently undertook a substantial review of the relevance of the pre-nuptial agreement in matrimonial finance distribution could be said to have reflected either a wholly exaggerated approach to the practical relevance of the subject to the majority of couples or that it eloquently reflects the fact that it is the interests of the wealthy few which still over-influences our legal system. Whichever it is, the family solicitor is now entirely familiar with the need 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.

UNSUITABLE CANDIDATES

However, experience is now showing that there is a small but not insignificant uptake of interest in the 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, thus avoiding an expensive and potentially futile exercise. Realistically, however, this best practice will not be universal. While the proposed reforms would still mean, in such circumstances, that the needs of the parties will prevent an ultimate loss of intervention by the court, as the nature of any such reform as yet unknown; then so, too, must the extent of any future retained protection for such couples remain uncertain.

AUTONOMY OR 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 eventual agreement. A number of these 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. This often throws into stark relief why in the matrimonial practice context, it is legally naive to consider that the pre-nuptial agreement is simply yet another form of contractual relationship where each party is exercising his/her individual autonomy whether to be bound by the terms being proposed or not (see the majority view in *Radmacher*).

For those family practitioners who have an established experience of such situations, there will be examples where a client has simply, 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 honed 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 solicitor 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, treats the position as akin to that to be adopted in negotiations where a divorce petition has already been filed and, therefore, seeks 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 client attendance 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.

The process to securing a pre-nuptial agreement and the necessary negotiation engaged concerning the parties' financial position in the event of a marital breakdown remains for most practitioners and clients an entirely awkward one. The experienced family lawyer is acutely aware that the stakes can often be very high for the couple involved and the marriage itself could be in jeopardy dependent upon the outcome. 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.

STANDARD FORMAT

In this respect, it is also 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 refined 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 dealing with other cases. Such a process, it is suggested 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. The drafting of the prenuptial agreement in practice appears to have become a magnet for the use of ten words when one would do. This is unfortunate where the 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 either over-abbreviated so as to omit 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.

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 practitioners 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 those family lawyers who do provide a fixed fee, the same is often subject to additional fees in any set number of circumstances. Of course, by contrast, there are many other organisations via the internet and otherwise which 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 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, such as material disclosure etc have been adhered to. Certainly, many 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.

At the other end of the spectrum is the suggestion by some third party organisations that that there is a legally valid 'confidential' or 'secret' pre-nuptial agreement available through which assets can be unilaterally isolated and protected from the other party's knowledge and the courts' interference upon divorce etc. Such invitations to some form of wealth utopia with claims that these bespoke agreements are capable of being drafted in content beyond the reach of the courts are as lacking in reality as they will prove to be successful in implementation. However, again their claimed existence only serves to emphasise the need for family law professionals to ensure that access to their expertise and advice remains by comparison as cost effective as possible.

The Law Commission's own limited research during its consultation of the profession 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' (a research report for the Law Commission by Emma Hitchings, School of Law, University of Bristol (2011) p 50). 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.

CONCLUSION

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 agreement 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.

The lack of consistency in standards in this area has to be of concern. Historically, in this jurisdiction, both the judiciary and the profession were reluctant participants in the gathering importance of pre-nuptial agreements. In consequence, inconsistent practice has in many instances led principle in this area. This is a potentially toxic position especially against the experience of those other jurisdictions where the rise in professional negligence claims have in certain areas dampened the desire to undertake such pre-nuptial agreement work.

However, despite its lack of early legal nurture within this jurisdiction, the pre-nuptial agreement has shown itself not only resilient but of increasing importance, especially where family wealth planning is required. Other jurisdictions around the world have already embraced the pre-nuptial agreement within their divorce distribution process and many of these have embedded the same within legislation. This is a deep well of experience from which family practitioners in this country can, with the necessary commitment, learn valuable lessons and develop best practice.