

WENDY HOPKINS FAMILY LAW PRACTICE

Pre and Post Nuptial Agreements

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PRE-NUPTIAL AGREEMENTS

- It is not possible to say that Pre-Nuptial Agreements are enforceable here in England and Wales, and there is no guarantee that the Court would follow a Pre-Nuptial Agreement in the event of a divorce. However, there are certain things that you can do to improve the chances of having the Pre-Nuptial Agreement followed by the Court and these **are**:



PRE-NUPTIAL AGREEMENTS

- i. For there to be full and frank disclosure of the financial positions of both parties
- ii. For the agreement to be signed at least 28 days before the wedding
- iii. For both parties to receive independent legal advice about the agreement and the effect that it will have in any future divorce.
- iv. The agreement must be fair
- v. The needs of both parties and any children must be catered for.



PRE-NUPTIAL AGREEMENTS

Over recent years the popularity of premarital agreements have steadily risen. This may be due to

- couples getting married later in life
- couples having previously been divorced
- parents wanting to protect assets that have been gifted to their children



PRE-NUPTIAL AGREEMENTS

Over 10 years since landmark case of *Radmacher v Granatino* [2010] UKSC 42

Katrin Radmacher, the wealthy German heiress of a hugely successful paper manufacturing business, and Nicholas Granatino, a French banker, married in 1998. At Radmacher's request, the couple entered into a pre nuptial agreement, which was drawn up in Germany (where pre nuptial agreements are legally binding), stating that neither spouse would make a claim on the other's assets in the event of a separation.



PRE-NUPTIAL AGREEMENTS

In 2008, the High Court ordered Granatino to be paid a sum of £5.85 million in respect of ancillary relief. Dissatisfied with the verdict, Ms Radmacher took her argument to the Court of Appeal, saying that the pre nuptial agreement should be taken into consideration. The appeal court judges agreed, and Granatino's settlement was reduced to just £1 million.



PRE-NUPTIAL AGREEMENTS

However, the Supreme Court's judgment held that Radmacher was still required to provide for her ex-husband in his role "as a father rather than his role of a husband". As a result, it was ruled that Granatino should receive £2.5 million for housing, but this sum would only be applicable while bringing up the children. The court ordered that the money should return to his former wife on his youngest daughter's 22nd birthday.



PRE-NUPTIAL AGREEMENTS

In 2014, the Law Commission released a report entitled [Matrimonial Property, Needs and Agreements](#), which prominently featured the case. The report recommended that "qualifying nuptial agreements" should be legally binding as long as certain safeguards were met, such as the ones discussed above.



PRE-NUPTIAL AGREEMENTS

Radmacher (formerly Granatino) v Granatino [2010] UKSC 42

From that the Law Commission set out its guidance in 'Marital Property, Needs and Agreements'

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/286308/HC_1089_Web_only.pdf

This sets out the main principles to provide the best chance of the pre-nup being considered as the way to divide assets on divorce.

When approaching parties about a pre-nup there is often one party that would really benefit from having an agreement (the party with the assets) and a real disadvantage to the other (the party without any assets).

What must be remembered is that the starting point for marital assets on divorce is 50/50 and therefore if the pre-nup goes against that, one party is losing some of the automatic rights.



PRE-NUPTIAL AGREEMENTS

It may be possible to circumvent the full financial claim process by making an early application for the court to determine whether any settlement should start and end with any Pre-Nup - Crossley Applications



PRE-NUPTIAL AGREEMENTS

Crossley [2007] EWCA Civ 1491

- H was 62; W was 50
- H had approx. £45mill; W had approx. £18mill
- W had been married 3 times previously

They signed a prenuptial agreement some 7 weeks before they married which essentially said “*Both of them should walk away from the marriage with whatever they had brought into it*”.



PRE-NUPTIAL AGREEMENTS

Crossley ..cont'd

- W made an application to the Court to have her full financial position considered.
- H issued a cross-application seeking to hold her to the terms of the prenuptial agreement.

The judge agreed with H and said that its terms were of such “*magnetic importance*” that it assumed greater significance than all the other factors the Court had to consider and was determinative of the position.



PRE-NUPTIAL AGREEMENTS

- **KA v MA (prenuptial agreement: needs) [2018] EWHC 499**

Summary: Roberts J applied the law on PNAs and made a needs-based award of £2.95M; Consideration given to circumstances surrounding the PNA and application of s.25 MCA factors.

- Cross applications between W & H. W sought financial remedies and advanced a needs-based claim for £6M. H had applied for notice to show cause why an order should not be made in the terms of a PNA, saying its implementation would result in the award of £1.6M to W.
- Roberts J examined the circumstances at the time the parties entered into the PNA. Roberts J found both H & W had considered that the PNA had been a condition of their marriage, and that both had received legal advice and intended to be bound by its terms. W had been advised by her solicitor at the time that she would be 'substantially better off' under either the MCA 1973 and/or Schedule 1 of the CA 1989. W claims that she was 'extremely uneasy about signing the agreement and under immense pressure to do so'. The parties had argued about the terms of the agreement shortly before signing it.
- In her decision Roberts J considered Radmacher and the test set out by Lord Phillips (para 75 of his judgment).

PRE-NUPTIAL AGREEMENTS

- Para 75 :
- "The court should give effect to a nuptial agreement 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."

Roberts J did not regard H's position that there would be marriage absent a signed PNA to be capable of constituting duress or exploitation of a dominant position. Judge said W and H were mature, consenting adults, each of whom had been married for a number of years prior to meeting one another. Roberts J rejected the submission that W could not be taken to have intended to be bound by the terms of the agreement when she signed because her solicitors had told her it was unenforceable as a matter of English law.

W's evidence was that she intended to abide by the terms of the PNA when she signed it. W had chosen to reject the professional advice when she received it.

PRE-NUPTIAL AGREEMENTS

- Roberts J considered the tests and provisions set out in:
- *Luckwell v Limata* [2014] EWHC 502 (Fam), [2014] 2 FLR 168
- *H v H* [2008] EWHC 935 (Fam)
- *Kremen v Agrest (Financial Remedy: Non-Disclosure: Postnuptial Agreement)* [2012] EWHC 45 (Fam), [2012] 2 FLR 414 (Mostyn J)
- *WW v HW (Prenuptial Agreement: Needs: Conduct)* [2015] EWHC 1844 (Fam), [2016] 2 FLR 299

- **The housing need was ultimately assessed in the global sum of £1.35M and income needs were determined to be best met by a Duxbury fund of just under £1.6M. W had been seeking £6M in total and H's open position prior to FH, had been £750K for housing, in addition to £300K already afforded to W for legal fees. H also willing to capitalise maintenance at £537K and W would keep her assets. Clear that Judge was not willing to start from equality due to the PNA.**

POST-NUPTIAL AGREEMENTS

- It is not uncommon for a pre-nup not to be completed at least 28 days before a wedding
- In those circumstances, there is a choice about whether or not to proceed with the wedding.
- Possible to have a post-nuptial agreement which has the same effect as a pre-nuptial agreement and can be entered into at any point during a marriage.



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ANY QUESTIONS?

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