

HOW THE ENGLISH COURTS VIEW PRE-NUPTIAL AGREEMENTS

Introduction

1. I am advising on more pre and post nuptial contracts than ever before. Yet, my first warning to my client has to be that the pre-nuptial agreement may not be binding! So, why are more and more clients choosing to enter into them?

The Common Law Approach

2. Whereas in France the law is codified, in England we have a system of legislative statutes and common law, which has developed through the decisions of the courts.
3. The common law rule is that pre-nuptial agreements (unlike ante-nuptial settlements or deeds of gift) are not enforceable per se. As a result, a party to a pre-nuptial agreement cannot sue on it as if it was a valid contract. That remains the case today. As we will see, however, the courts have increasingly adopted stratagems to allow them to be taken into account.

The early court decisions

4. When I started my career in law, I was taught that pre-nuptial agreements were void for public policy. The leading case which endorsed this view was *Hyman v Hyman* (1929) AC 601; although it actually relates to a deed of separation made in 1919. The wife agreed not to institute proceedings for more than the payment of two lump sums and £20 per week for the rest of her life. In 1923, wives were given the right to

divorce on the grounds of their husband's adultery. The wife duly petitioned and applied for maintenance. The husband's argument that the wife had entered into a binding contract failed. Lord Hailsham said:

"...the power of the court to make provision for a wife.....(is) conferred not merely in the interests of the wife, but of the public and the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction."

5. There were three main reasons why it was felt that pre-nuptial agreements could not be enforceable.
 - Firstly, it was argued, pre-nuptial agreements undermined the very institution of marriage by contemplating divorce.
 - Secondly, there was a public interest in ensuring that divorcing spouses receive appropriate financial provision which should be addressed by the judiciary in the absence of agreement.
 - Lastly, the courts have been vehement in protecting their control and would not allow parties to oust the jurisdiction of the courts.
6. This view was further endorsed by Mr Justice Thorpe in the case of *F v F (Ancillary Relief: Substantial Assets)* (1995) 2FLR 45. Here, pre-nuptial agreements had been entered into according to Swiss and German law, but the divorce was determined in England. Mr Justice Thorpe refused to place any weight on the pre-nuptial agreements, despite evidence

from the husband that the pre-nuptial agreements would have been strictly enforced against the wife in Germany.

7. The argument was still effective in 1999, when the case of *N v N* (1999) 2FLR 745 was determined. The wife had tried to argue that part of a pre-nuptial agreement relating to a Get was enforceable as a contract. Mr Justice Wall said:
“One cannot, in my judgment avoid the fundamental proposition that each (term) is part of an agreement entered into before marriage to regulate the parties’ affairs in the event of divorce. The public policy argument, therefore, continues to apply.”

Ancillary relief procedure

8. It is probably helpful if at this stage I explain how the English courts deal with financial applications on divorce.
9. The procedure is defined by the Family Proceedings Rules 1991, SI 1991/1247.
10. One party, who may be the Petitioner or the Respondent in the main divorce suit, files an application with the court, known as Form A. This triggers automatic directions from the court. The first is that both parties must file and exchange financial information in a standard affidavit known as Form E. The parties are required to disclose prescribed documentation with Form E, including bank statements for the last 12 months and one’s last 3 payslips. The Rules are quite clear that no-one should request any information not required in Form E by way of disclosure prior to the first hearing, known as the First Directions Appointment (the “FDA”).

11. At the FDA, the judge looks at the chronology of events, statements of the issues between the parties and draft questionnaires of the additional information and documents that each seek of the other. The judge indicates what he or she considers is proportionate given the facts of the case and gives directions as to the filing of evidence prior to trial. Throughout the process, there is an overriding objective to deal with the case expeditiously and fairly.
12. The Rules are also very concerned to ensure that costs are curtailed and that a case is concluded as quickly as possible. Before a case can be listed for trial, therefore, there has to be another hearing which is called the Financial Dispute Resolution hearing (the “FDA”). Sometimes this can be amalgamated with the FDA. At the FDR, the judge hears where any without prejudice negotiations have reached and gives a view as to how the court may deal with outstanding issues. The parties are warned as to the level of costs which they have incurred and are likely to incur if they proceed to final hearing and are urged to settle. A final hearing is generally only listed if the FDR fails, although I am aware of one court which unusually lists the FDA, FDR and final hearing at the outset.

Matrimonial Causes Act 1973, s25

13. It is also important that you are aware as to how statute requires the court to deal with ancillary relief applications on divorce.
14. Section 25 of the Matrimonial Causes Act 1973 (the “MCA”) sets out the factors which the court must take into account in

deciding the outcome of a financial application. The major obligation is to consider **all of the circumstances of the case**. These include specific factors, which are:

- the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
- the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- the standard of living enjoyed by the family before the breakdown of the marriage;
- the age of each party to the marriage and the duration of the marriage;
- any physical or mental disability of either of the parties to the marriage;
- the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

- the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
- the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

The court's approach

15. We do not have a regime of community of property.
16. The court must look at the statutory factors in section 25 and apply or distinguish case law to reach a solution. This does not necessarily produce an equal division of assets, even though the influential case of *White v White* talks of the “yardstick of equality”.
17. If parties reach an agreement, an application is lodged with the court, together with a brief statement of the main factors in the case, such as the ages of the parties, whether there are children, the length of the marriage, capital, income, pension funds and future intentions. The court is required, wherever possible, to facilitate such agreements and to make the order; although it retains its discretion to refuse if the agreement is unfair.
18. Back in 1997, in *S v S (Divorce: Staying Proceedings)* (1997) 2FLR 100, Mr Justice Wilson was concerned that, whilst the English courts cannot decide matters under foreign law,

“Where other jurisdictions, both in the USA and in the European Union, have been persuaded that there are cases where justice can only be served by confining the parties to their rights under pre-nuptial agreements, we should be cautious about too categorically asserting the contrary. I can find nothing in section 25 to compel a conclusion, so much at odds with personal freedoms to make arrangements for ourselves”.

K v K (2003) 1FLR 120

19. The arrangements made by the parties in the case of K v K ((2003) 1FLR 120 in their pre-nuptial agreement were, in the main, upheld. The wife, a former model, had become pregnant prior to the marriage and the husband, who had assets worth £25million, agreed to marry her under pressure from her father, as long as there was a pre-nuptial agreement. The father was himself wealthy and the wife had a trust of about £1million from which she derived an income. Under the terms of the pre-nuptial agreement, the wife was to receive £100,000 increased by 10% per annum compound and no maintenance if there was a divorce within 5 years. The pre-nuptial agreement was signed the day before the wedding, which had been brought forward by the father as he did not want signs of the pregnancy to be visible at the ceremony.
20. The marriage failed after 14 months and the wife was held to the terms of the pre-nuptial agreement insofar as it related to capital. This must have been the right decision. It was the

husband and not the wife who had been under pressure to marry and the wife had known that a child was expected.

21. The wife was not, however left without maintenance as the court took the view that was unjust. A figure of £15,000 per annum was awarded, taking into account the wife's income from her trust. Interestingly, the court refused to capitalise the maintenance payments as that would have given the wife additional capital by the back door and was not within the spirit of the pre-nuptial agreement. The husband also had to provide housing for the wife and child, but on a trust which would revert to him.

Crossley v Crossley (2008) 1FCR 323

22. Crossley v Crossley is an interesting case as it relates to an appeal about procedure; but the wife did not pursue her claims in the light of the comments made about the enforceability of her pre-nuptial agreement.
23. Mrs Crossley had married and subsequently divorced three wealthy men and by the time of her marriage to Mr Crossley was worth some £18million. Mr Crossley, who had been married once before, was worth about £45million. The couple met in June 2005 and became engaged that September.
24. They both instructed experienced lawyers to settle the terms of a pre-nuptial agreement which they signed in November 2005 before their marriage in January 2006. As Mr Justice Bennet recorded at first instance:

“The critical part of the pre-nuptial agreement is.....that both of them should walk away from the marriage with whatever they brought into it.”

25. The marriage was very short and the parties had separated by March 2007. Mrs Crossley filed for divorce that August and in the September issued a financial application. This, as I explained earlier, triggered the usual automatic directions as to the filing of evidence and the listing of the FDA.
26. Mr Crossley attempted to short circuit the standard procedure and immediately issued a summons for an order that Mrs Crossley show cause why her claims should not be resolved in accordance with the pre-nuptial agreement. She argued that Mr Crossley had not given full disclosure at the time of the pre-nuptial agreement and that there should be full disclosure under the Rules. This did not find favour and the parties were ordered to file affidavits in which Mr Crossley was to deal with his alleged failure, but without exhibiting the usual prescribed documents.
27. Mrs Crossley appealed, arguing that the usual procedure under the Rules was mandatory and could not be ignored. The Court of Appeal rejected her arguments saying that the overriding objective of the court was to deal with cases expeditiously and fairly. The court was not persuaded that the “individual rules were intended to be some sort of straightjacket precluding sensible case management”.
28. Lord Justice Thorpe delivered the main judgment. He noted that this was a childless marriage of short duration, for a substantial portion of which the parties had lived apart. His Lordship continued:

“If ever there is to be a paradigm case in which the court will look to the pre-nuptial agreement as not simply one of the peripheral factors in the case, but as a factor of magnetic importance, it seems to me that this is just such a case.”

29. Perhaps unsurprisingly, Mrs Crossley decided to abandon her claim leaving the pre-nuptial agreement intact. For our purposes, however, it is important to note that the court took the opportunity to reinforce its overall discretion. Lord Justice Thorpe emphasised that a pre-nuptial agreement does not oust the jurisdiction of the court and the court’s obligation to carry out its own investigations and to apply all of the section 25 criteria.

NG v KR (2009) 1FCR 35

30. This reasoning was followed by Mrs Justice Baron in NG v KR. Here it was the wife, Katrin Radmacher, a German paper industry heiress, who held the assets. The husband, Nicolas Granatino, a French banker, met the wife in 1997 and they became engaged in 1998. At the wife’s request, the husband signed a pre-nuptial agreement written in German, one week before the wedding in November 1998. There was no disclosure of the wife’s assets and the husband had no legal advice.
31. The parties had two children. In 2003, the husband gave up his banking career to follow an academic life. Three years later they separated and their divorce was made final in July 2007. It was agreed that the children would reside with both parents, although they would spend $\frac{2}{3}$ of their time in Germany.

32. The husband argued that the pre-nuptial agreement should be ignored and sought a payment of £6.9million to include housing in England and Germany and capitalised maintenance based on a net spendable income of £125,000 per year. The wife offered him a property in England for life, a property in Germany for his use whilst the children were minors and maintenance until the children completed their secondary education. She successfully argued that a transfer of property order or a lump sum order was an order capable of affecting her peaceful enjoyment of her possessions contrary to article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and article 1 was engaged in a general way in the case, but not in relation to the pre-nuptial agreement which was not an enforceable right and therefore not property as defined in article 1.
33. It was held that the husband had understood the basic premise of the pre-nuptial agreement that he would not be entitled to anything if the parties divorced. Further, he had chosen an academic life in place of the lavish lifestyle of a banker and it would be unfair to make the wife fund the difference for life.
34. The court emphasised that it would look at all the circumstances of the case, including the pre-nuptial agreement. The latter was a compelling factor, which reduced the husband's award. He did still receive, however, £2.5million for a home in England, £700,00 for his debts, £25,000 for other capital items and £2.335million by way of capitalised maintenance. The wife was also to give him

€630,000 for housing in Germany and £70,000 per annum for the children. Katrin Radmacher is appealing this decision. As the Privy Council have endorsed the comments of Baroness Hale, it is questionable whether or not she will be successful.

MacLeod v MacLeod (2009) All ER (D) 32

35. Baroness Hale gave the eagerly anticipated judgment in the case of MacLeod v MacLeod in December 2008. Although it is a decision of the Privy Council, it is akin to that of the House of Lords.
36. The parties were both American and had both been married before. The wife was aged 27 and the husband, who was very wealthy, aged 49, when they married in February 1994. They had entered into a pre-nuptial agreement on their wedding day, having both been independently advised. This declared regardless where they might live, the pre-nuptial agreement should be construed under Florida law and there was unchallenged evidence that this and a subsequent agreement were valid in that jurisdiction. Under the agreement on divorce each retained the property which they brought into the marriage, jointly owned properties were to be divided equally and there were to be no maintenance claims. The husband would also pay the wife £25,000 for every full year that they were married. This was less than the wife might have expected on divorce, but she signed willingly.

37. The couple moved to live in the Isle of Man in 1995, when the first of their five sons was born. They entered into a second agreement in 1997 which lapsed in 1998.
38. In early 2001 the parties began negotiations using independent lawyers to agree the terms of a post-nuptial agreement which was eventually signed in July 2002, when the marriage was already on the rocks. This confirmed the 1994 pre-nuptial agreement but varied some provisions. These included £250,000 for the wife to invest, an annual allowance of £25,000 (to be adjusted for inflation), her expenses up to £100,000 to obtain a degree, funding her grandmother in the USA, transferring a property to her and paying for planned improvements to it and giving the wife £1million should the husband die. Each parent would pay the expenses of the children whilst they were living with them. The agreement was said to be “the full and fair settlement of the rights of both parties”; although again it was less than the wife could have achieved. The evidence was clear that she had chosen not to follow the legal advice which she had been given.
39. The husband complied with his immediate obligations, but by August 2003 the marriage had broken down and ancillary relief proceedings commenced in October 2004.
40. The wife argued that the agreements should be totally disregarded and sought £5million for herself and £600 per month for each child although the children were dividing their time equally between their parents. The husband accepted that the wife needed a larger lump sum to house herself and

the children, but offered a further £1,250,000 to that in the post-nuptial agreement in trust to revert to him.

41. The Privy Council took the view that:

“..it is not open to (it) to reverse the long standing rule that ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense....There is an enormous difference in principle and practice between an agreement providing for a present state of affairs which has developed between a married couple and an agreement made before the parties have committed themselves to the rights and responsibilities of the married state purporting to govern what may happen in an uncertain and un-hoped for future”.

Whilst some jurisdictions had changed that rule

“..with the exception of certain states of the USA, including Florida, this has been done by legislation rather than judicial decision.”

42. The Privy Council confirmed that the court could look at a pre-nuptial agreement as one of the section 25 factors, and possibly the most compelling factor, in a case. They approved the words of Mrs Justice Baron in NG v KR that the terms of a pre-nuptial agreement may be implemented “provided the circumstances reveal that the agreement is fair”

43. The post-nuptial agreement was more successful. The Privy Council considered that to be a valid and enforceable agreement; albeit one which was capable of variation by the court under section 35 of the MCA. There would only be a variation if there was

“a change in the circumstances in the light of which the financial arrangements were made, the sort of change which would make those arrangements manifestly unjust, or for a failure to make proper provision for any child of the family. On top of that, of course, even if there is no change in the circumstances, it is contrary to public policy to cast onto the public purse an obligation which ought properly to be shouldered within the family.”

44. The post-nuptial agreement made provision for the wife as a mother, but did not provide properly for the children. The agreement could be altered to provide for the children “to give them the best start in life, rather than to endow them for ever” and the husband’s proposals were preferred. So, at present, a post-nuptial agreement may be more attractive than a pre-nuptial agreement – but you have to trust your spouse to agree to the terms after the marriage has taken place!

An unreported case

45. My own firm was involved in an unreported case concerning a pre-nuptial agreement, where judgment was deferred pending the decision on *MacLeod v MacLeod*. This was the third marriage for the husband and the second for the wife. They had become engaged in 1998 with no specific marriage plans. In 2002 the husband ran into financial difficulties. The wife made it clear that she would only marry if the husband entered into a pre-nuptial agreement. We were instructed in 2003 and, I am pleased to say the court confirmed that we had taken all of the necessary steps in

concluding the agreement. I will elaborate on that shortly. The agreement was signed in November 2003 with mirror wills, the husband transferred a property to the wife as required and they married 25 days later.

46. Unhappily by 2005 the marriage was in difficulties. Despite counselling and an attempt at reconciliation, the marriage ended in 2007, when the parties had actually only lived together for some two years.
47. The husband tried to argue that he had entered into the pre-nuptial agreement as a result of undue influence and mistake. The court, however, found that he was intelligent and worldly wise and fully understood what he was doing and the consequences of his actions, The judge, however, followed the rationale of MacLeod and the earlier cases and found that the pre-nuptial agreement was only one of the section 25 factors which he had to take into account. The terms of the pre-nuptial agreement did not prevail in their entirety.

The future

48. In 1999, our Government produced a consultation paper called "Supporting Families", which suggested that it will "consider making pre-nuptial written agreements about the distribution of money and property legally binding, for those who wish to use them". It acknowledges that the current "lack of certainty may well discourage couples from making such agreements".
49. It suggested that a pre-nuptial agreement might not be enforceable if:

- where there is a child of the family, whether or not the child was alive or a child of the family at the time the agreement was made;
- where under the general law of contract the agreement is unenforceable, including if the contract attempted to lay an obligation on a third party not agreed in advance;
- where one or both of the couple did not receive independent legal advice before entering into the agreement;
- 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);
- where one or both of the couple have failed to give full disclosure of assets and property before the agreement was made; and
- where the agreement is made fewer than 21 days prior to the marriage (this would prevent a pre-nuptial agreement being forced on people shortly before their wedding day when they may not feel able to resist).

50. I am pleased to say that our pre-nuptial agreement in the unreported case met all these criteria.

51. I would suggest that other factors which a prudent practitioner might wish to consider when advising and drafting a pre-nuptial agreement are:

- any inequality in bargaining power
- any duress at the time of making the pre-nuptial agreement

- whether the terms are within the parameters of what is “fair”. If not, the court is likely to try to vary the terms, come what may
 - to replace a pre-nuptial agreement with a post-nuptial agreement in the light of the decision in MacLeod.
52. Clients also have to be advised that a pre-nuptial agreement may not have force as a section 25 factor if the marriage is a long one or if there is an important change in circumstances which could not have been foreseen when the pre-nuptial agreement was entered into.
53. In June 2008 the Law Commission announced that it is considering making pre-nuptial agreement legally binding as part of a raft of legislation under consideration. A draft parliamentary bill on the issue is proposed for 2012.
54. Resolution (formerly the Solicitors Family Law Association), of which I am a member, takes the view that it is unfair that couples wishing to marry or enter into a civil contract cannot protect themselves with a pre-nuptial agreement, whereas cohabiting couples can enter into a binding living together agreement.

The law is stated as at 26.04.09