CHALLENGING NUPTIAL AGREEMENTS

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As nuptial agreements have and continue to become increasingly popular, we are now seeing more and more financial remedy cases where a nuptial agreement (or indeed, an overseas marriage contract) plays a role to one degree or another when looking at the financial outcome on divorce.

We all know the now famous quote in Radmacher v Grantino *"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 the agreement"* and no doubt advise clients that they should expect to be bound by the terms of any agreement they enter into. Indeed, as well as protecting assets/regulating financial claims, nuptial agreements are intended to remove, or at least, minimise any acrimony, significant legal costs and time incurred should a couple separate in the future. The opposite can occur when a nuptial agreement is challenged.

There has been a flurry of recently reported cases which deal with this topic and demonstrate that the lack of statutory standing for nuptial agreements continues to cause room for negotiation and debate particularly as the court retains discretion as to how much weight to attach to such documents.

The lack of legally binding nuptial agreements puts England and Wales in a rather unique position compared to most of the rest of the world and means there are two main avenues to challenge an agreement:

a) The substantive financial provision that has been provided (substantive fairness); or
b) The circumstances in which the agreement itself was entered into i.e the safeguards we are all familiar with (procedural fairness).

Taking a) first, we all know that at this time agreements must reflect a fair outcome but not necessarily an outcome which the court would order if assessing the same set of facts without an agreement in place. Provided parties and in particular, children, are not left in a position where they are unable to meet their needs (which remains the ultimate trump card though noting a nuptial agreement can act as a depressive factor), then why should parties not have the freedom to negotiate and agree what they wish to happen in the event of separation including an exclusion to the concept of sharing?

Looking at b), whilst the Law Commissions' 2014 report sought to introduce a list of safeguards or requirements that would need to be in place for an agreement to be treated as a 'qualifying nuptial agreement', it remains the case that there are no statutory requirements and much will come down to the particular facts of a case. We can often see this crop up with overseas marriage contacts where there aren't necessarily the same expectations to enter into an agreement a certain number of days prior to a wedding, to take independent legal advice, etc.
A few recent cases demonstrate the discretion the Court still retains though it is clear there is much more of a focus now on autonomy and holding parties to agreements they entered into unless there are cogent reasons to revisit the same.

Take the recent case of BI v EN 2024 as an example- this dealt with a French marriage contract electing separation de beins and was entered into 7 days before the wedding. The wife, who was French herself, argued that she had little memory of entering into the agreement nor understanding of its effect on the divorce. This was not accepted. The wife was intelligent, her parents had entered into the same contract and the agreement had sufficient formality. Notwithstanding the fact that the £115m accrued during the marriage would have been subject to the sharing principles without the marriage contract in place and of which c.£99-100m was in trust under which the wife was a discretionary beneficiary, the wife was awarded c.20% of the total assets on the basis that her needs claims (which were not restricted by the contract) should be generously assessed.

This reaffirms the general view that a nuptial agreement can exclude sharing claims even if the assets built up over a long marriage, though a word of caution, reference was made to the fact that despite a valid contract an element of sharing may still be required to achieve fairness in all the circumstances of the case.

There have been other examples where nuptial agreements have been challenged (e.g TRNS v TRNK 2023 where the lack of material disclosure from the husband when entering into the agreement meant the wife couldn't be held to it) but again, caution should be applied before simply going ahead and challenging an agreement if there are not good reasons for doing so. In Helliwell v Entwistle 2024, a cost order was made against the husband where the wife issued a notice to show cause as to why the prenuptial agreement should not be upheld.

Whilst we have seen private members' bills pushing for reform and the Law Commission is due to publish a scoping report in December 2024 assessing the reform options for the law governing finances on divorce which is expected to include a comment on the 2014 report looking at matrimonial property agreements, it remains the case that the present law enables nuptial agreement to be challenged. So what can we as lawyers do now (pending any change in the law) to avoid such a situation arising in the future?

At this time, we will all have to continue to advise clients that whilst they should expect to be bound by such agreements, there remains a discretion for agreements to be revisited in the event of separation so it is imperative to ensure that any provision included is sufficiently fair and that as many as the safeguards as possible can be ticked off. The former can of course pose problems as it is difficult to predict the future so that comes down to us as lawyers when drafting to ensure, as far as possible, that a degree of flexibility or at least consideration of a change in circumstances is accounted for. The use of a default needs clause, carefully defining the needs in questions, can also give a fail-safe that may assist. Meanwhile, the debate continues, including for some individuals who sought to self-regulate their claims and avoid the courts in the first place.

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