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CAYMAN ISLANDS NUPTIAL AGREEMENTS

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What is a nuptial agreement and why would I want one?

At its simplest, a nuptial agreement is a legal agreement made between two individuals before or after (or both) their marriage has taken place. The agreement usually sets out how the couple wish their assets to be divided between them if they later separate or divorce.

The nuptial agreement seeks to avoid the uncertainty as to what a court might award upon a divorce and protect the assets each party brings to the marriage from being given to the other party upon divorce.

Where a party to the marriage has their own wealth or expectations of family wealth which are significantly more than the wealth of the other party a nuptial agreement is considered for these reasons.

Will a court respect my nuptial agreement in England?

As most people involved in family and trusts circles know, in 2010 the landscape for divorce changed radically due to the Radmacher (formerly Granatino) v Granatino [2010] UKSC 42 judgment handed down from the Supreme Court on 20 October 2010. The judgment clearly established that, contrary to the previous line of English cases that pre-nuptial agreements a.k.a. pre-marital agreements ("Pre-Nup") were against public policy, they were now to be given effect if freely entered into by both parties with a full appreciation of its implication unless, in the circumstances prevailing, it would not be fair to hold the parties to the agreement.

In order for a Pre-Nup to be enforceable:

- **it must not seek to avoid responsibility for the financial needs of any children;**
- **each party must disclose to the other sufficient detail of their financial position – to include any pre-existing and/or inherited wealth – and answer any reasonable questions the other may have;**
- **there must be no suggestion of duress, fraud, undue influence, misrepresentation or mistake before entering into the Pre-Nup; and**
- **each party should have obtained independent legal advice before signing.**

It was also decided that the Privy Council in the case of MacLeod v MacLeod [2008] UKPC 64 had been wrong to draw a distinction between the legal status of pre-nuptial and post-nuptial agreements ("Post-Nup"). In that case it was held that no weight would be given to a Post-Nup because it was not by its express terms a formal agreement, it had not been fairly arrived at, it was on its face manifestly unfair to the husband, it contained an untruth and the husband had signed the agreement without competent advice. In the circumstances, the McLeod Post-Nup would not have survived the Radmacher Pre-Nup validity tests anyway and it is clear that the same validity tests apply to both types of agreement.

Is the Cayman Islands different?

In the Cayman Islands ("Cayman") the court will generally start from a basis of seeking to place both parties to the marriage on an equal footing on the path to living independent lives after divorce. This means a 50:50 approach to asset division is the starting point and is usually the most appropriate award but there are a number of factors which can mean that the court considers a departure from that starting point to be justified.

The Cayman Islands case of DJ v BJ 2019 (2) CILR 511 on the status of a Pre-Nup reviewed Radmacher and subsequent English decisions based on that case and stated that:

"… where there is a prenuptial agreement which is valid, in the sense that it is not negated by vitiating factors, a court should have regard to and give weight to the agreement except where it would be unfair to do so…"

The decisions are all clear that a nuptial agreement is not strictly legally binding on the parties in that such an agreement will not override the court's ability to decide how finances and assets should be divided in the event of divorce taking account of the statutory factors and the strands of need, compensation and sharing. However, when considering an application for financial remedy, the court must give appropriate weight to a nuptial agreement as a relevant circumstance of the case and interfere with the agreement only to the extent necessary, usually to ensure needs and compensation are satisfied. In regard to sharing the court is less likely to interfere with or vary a nuptial agreement.

In DJ v BJ the Cayman court enforced the terms of the Pre-Nup which provided for equal sharing of the parties' assets post-separation, which would normally be considered non-matrimonial assets and so absent the Pre-Nup would not be subject to the principle of equal sharing.

The Cayman court has yet to consider a Post-Nup and when it does so it will have to consider whether to follow McLeod which is a Privy Council case based on an Isle of Man divorce and is highly persuasive authority or whether to follow Radmacher which is a Supreme Court of England and Wales judgment and so also highly persuasive authority and which decided that McLeod was wrong.

Given the detailed consideration and whole hearted adoption of Radmacher in DJ v BJ it seems more likely than not that the Cayman court will follow Radmacher when considering a Post-Nup.

However, it has to be remembered that Radmacher does require a consideration by the court of changing circumstances but in DJ v BJ it was made clear that the Cayman court will look at the effect of the changed circumstances and whether they create a situation of "real need" in considering if the Pre-Nup is fair. On that basis, parties to a marriage would be well advised to ensure their nuptial agreement is a living breathing document which changes as circumstances change to ensure their autonomy is respected and their nuptial agreement is given effect to by the Cayman court.