Zoom Seminar for Thought leaders 21 May 2020

Jonathan Tod, Nuptial Agreements - 'War Stories/ Get Creative'

Brief overview

1. Following the Supreme Court's decision in the case of *Radmacher v Granatino* in 2010, the courts and practitioners' approach to nuptial agreements has changed forever. It is unthinkable that the courts will reverse the tide and decide that nuptial agreements should have no weight.

2. The Courts have made clear that will give some or possibly significant weight to the autonomy of the parties and their freedom to negotiate the financial terms of their marriage and the consequences of its breakdown. However, the courts will still provide a 'safety net' so that the needs of the weaker party and any children are properly met. Further, so that agreements which are tainted through impropriety are either struck out or given significantly less weight.

3. Crucial Matters Relevant to Nuptial Agreements in the United Kingdom

There are 4 crucial points which you must be aware of and you must advise clients:

A. Nuptial agreements are not binding in English law.

B. Nuptial agreements will be considered by the Court based on the state of the law at the time of relationship breakdown and not at the time the agreement is entered into.

C. Nuptial agreements will be considered by the court based on the family make-up and assets at the time of marital breakdown. These cannot be known at the time of the marriage.

D. There is still no statutory reference to pre-nuptial agreements.

War Stories

i) In one sense, any case that has been litigated and/or reported is by its very nature 'a war story'.

ii) Nuptial agreements should provide financial clarity and certainty for both parties; stop expensive litigation, and reduce anxiety at a most upsetting juncture in peoples' lives. Something has gone wrong in this process, if litigation follows.

iii) In most instances, nuptial agreements are not entered into with a view to achieve fairness between the parties. They are entered into at the behest of the richer party (or one who will likely become very rich) to protect their assets from attack by the weaker party.

iv) It follows that most agreements are not fair.

v) This is apparently different from 'unfairness' – and this is the test adopted by the Supreme Court in Radmacher.

vi) Most of the reported cases that have come before the court are those in which one party makes no or very little financial provision for the other party.

vii) It follows that there is inherently a 'needs claim' which needs to be agreed or considered by the court. Needs claims are by their nature subjective, fact specific, discretionary and judge dependent. This provides the usual cauldron of arguments and inherently litigation.

a) It follows that to try and avoid future litigation, provision should be set out in the agreement which, at the very least, provides for the weaker party's housing and income needs.

b) Generally, provision should increase as the duration of the marriage advances.

There has appeared a dichotomy of approach to needs claims in cases in which there is a non-vitiated agreement:

I) Meeting basic needs and providing housing by way of Mesher charge/ Schedule 1 type housing settlement.

a) This was the approach of the Court of Appeal and Supreme Court in Radmacher;

b) It is the approach adopted by Charles J in V v V (2011) – Mesher Charge
c) Holman J in Luckwell v Limata (2014)
d) Nicholas Cusworth QC sitting as a HC judge in WW v HW (2015) Mesher charge – limited maintenance
e) Francis J in Brack v Brack (2018) mesher charge (will return to this case later)

II) A more generous approach to both housing and income provision has been adopted by other judges such as:

- Moor J in Z v Z (no 2) (2011) – wife understood fully French marriage contract. However, he went on to assess needs at £6million which was 40% of the parties assets.
- Roberts J in KA v MA (2018) – award £2.95million – which was £1.35million outright for a house, and Duxbury of £1.6million.

  The court of appeal's only recent word on needs assessments is by Lady Justice Black in the case of Brack v Brack.

  Lady Justice Black in her lead judgement states that it is for each court to consider what an appropriate award should be in every case based on the section 25 criteria. However, she gives a clear steer towards more generous and outright awards rather than Mesher charges/ and housing settlements.

With this dichotomy of approach, there are authorities that support a very full range of need based outcomes, litigation is inevitable unless the provision made in the agreement is sufficient to meet needs and reasonably generously.

Other war stories fall into categories:

i) Where a party does not fully understand the agreement (Y v Y Roberts J) and the recent case of AD v BD (2020) EWHC 857 Cohen J – which has paid a few bills for me during lockdown.
ii) Where both of the parties have been found not to have intended that the agreement should govern the financial consequences of the marriage coming to an end – B v S (2012) Mostyn J. and Gray v Work (2015) Holman J.

iii) Where there are vitiating factors – such as Kremen v Agrest (No 11) (2012) Mostyn J.

iv) In Brack v Brack where the prorogation clauses were not 'clear complete and unequivocal' if the party seeking to rely on the clause is to be successful.

v) A recent case settling at FDR before Holman J in which the assets had increased very significantly since the agreement was entered into and that increase had not been taken into account in the terms of the agreement.

The answer is applying **best practice** in every instruction you receive – suggest the Law Commission's 2014 recommendations should be followed:

a.) *Legal Representation* - Both parties should have legal representation.

b.) *Full Disclosure*

c.) *Set out the reason for the agreement*
This should be set out in clear, complete and unequivocal terms. If the reason for the agreement is to contract out of sharing say so and early in the preamble to the agreement.

d.) *Assets generously valued*

e.) *Make increased financial provision and flag up clearly likely future increases in the parties' assets.*

Example preambles include *'Peter expects the value of his business to double in the next 10 years, and under the terms of this agreement he will retain all of this increase in value and Rita agrees that Peter will retain these assets subject to paying the sums set out in this agreement to her'* OR *"Michael intends to float the company on the Stock Exchange in the next 5 years and he anticipates his shareholding, currently valued in this agreement at £10million net, will then be*

worth over £30million net. Under the terms of this agreement Michael will retain all of this increase in value and Sandra agrees that he should do so".

f.) *Arms length Negotiation*

g.) *Time* – it is good practice to enter into a pre-nuptial agreement at least 28 days before a marriage (see the Law Commission's recommendations below) or 21 day per the Divorce (Financial Provision) Bill. However, this is not essential. Weight has been given by the courts to pre-nuptial agreements entered into the day before a marriage {see *K v K* [2003]}. <u>If the agreement has been entered into close to the marriage, you must advise in the strongest possible terms to enter into a post-nuptial agreement within 6 months of their marriage</u>. A letter can be written asking the other side to agree that their client will enter into an agreement in similar terms at that time.

h.) *Further agreements* - In my view, due to the pressures on a payee party prior to marriage, even if entered into well outside the 28 day time frame, I advise client's to enter into a post nuptial agreement shortly after marriage. This is best practice. The rationale is that the pressure, possibly undue pressure, leading to marriage is no longer a relevant consideration.

i.) *Review* – some professionals advise that unless there is a review clause any agreement is flawed and no weight will be given to it. I do not agree with this. I consider review clauses are not consistent with good marriage. Do either party want lawyers to be involved every 5 years of their marriage or in the event of the birth of a child, one party's disability, purchasing a new property, the death of a loved relative, etc?

Best practice dictates that you advise that each party informally review the terms of their agreement regularly, say every 5 years, AND in the event of any significant change in circumstances. If the agreement is no longer appropriate or requires amendment, they should then seek legal advice and potentially seek different financial provision by way of a post nuptial agreement which will replace the earlier agreement.

Make clear to clients and set out in the preamble to an agreement that the parties are free to negotiate and enter into different terms at any time so long as they are recorded as a Deed. The higher courts are clear that the closer to the end of a marriage an agreement is entered into, the more likely it will be given significant weight as the parties circumstances will be better known at that time [see *MacLeod v Macleod* (Privy Council) and *Hopkins v Hopkins* (High court) – both referred to below].

j.) *Records* – A file should be retained with copy documents supporting the disclosure provided. Any correspondence should be retained together with copies of the various agreements and amendments to it, in order to be able to evidence that the parties have negotiated. Own client records should of course also be retained which sets out all advice given to the client in writing and detailed attendance notes, including any written advice from counsel.

k.) Make appropriate financial provision that meets the weaker party's needs.

l.) Consider 'Schedule 1 housing settlement' as opposed to outright provision in an appropriate case.

m.) Consider sunset clauses – say after 20 years of marriage the agreement be treated as null and void ab initio.

n.) Give clear advice to enter into mirror agreement in the event of any plan to live abroad.

o.) Give clear advice to seek advice to seek further advice if ever in the future considering moving abroad – and take advice in the country that you intend to move to.