

Nuptial Agreements : Practicalities

Preface

The following is not intended as comprehensive nor (where this remains an evolving area of law) is it set in stone. Rather it seeks to summarise those elements essential to context and the making of a valid Nuptial Agreement.

Glossary

Nuptial Agreement : An agreement made between two spouses which may seek to exclude or limit the Court's powers over their assets on either divorce, separation or nullity. If such an agreement is made in contemplation of a marriage it is known as a Prenuptial Agreement. If after the parties have wed, it is a Postnuptial Agreement. For the purposes of what now follows such agreements may be taken to include pre-civil partnership agreements or post-civil partnership agreements.

MCA 1973 : The Matrimonial Causes Act 1973 which *inter alia* governs the financial claims which may be made by a spouse in proceedings for divorce, separation or nullity.

Section 25 MCA 1973 : Section 25 includes a list of all factors to which a Family Court **must have regard** when deciding how best to provide for a spouse's needs arising from divorce, separation or nullity.

Such factors comprise, for instance, the age of the parties to the marriage, the duration of it and any contribution in money or moneys-worth. They also include any contribution made by a spouse to the home, welfare and upbringing of any child or children of the family which cannot readily be quantified (but which may have operated to improve the earning capacity of the **working spouse**).

Financial Remedy Claims : Financial remedy claims are those which a spouse may bring in divorce proceedings *et al* to provide for their reasonable financial needs.

Reasonable Financial Needs : These ordinarily will comprise:

- 1) A need for income to enable a spouse to subsist including meeting bills and the usual necessities of life;
- 2) A housing need: the need for the provision of a secure roof over one's head;

- 3) Possibly, long term security. This likely to be relevant after a long marriage and when each spouse is in their later years. Such provision may entail the transfer from one spouse to another of all or part of a pension fund.

1. Nuptial Agreements : main objectives

The majority of Nuptial Agreements aim to obviate the stress and cost of arguments over assets and income as might arise in the event of divorce, separation or nullity. The most common purposes are these:

- (1) **Clarity** : the essential aim is to set out how the parties are to conduct their financial obligations and needs during the currency of their marriage or civil partnership. By these means each should have a clear view as to what is intended in the event of, say divorce. Such arrangements may well assist the spouse or partner who is the less financially robust.
- (2) **Certainty**: the provisions ought to set out in plain terms how the parties will deal with their assets in the event of separation, divorce or nullity.
- (3) **Protection**: the essence of many Nuptial Agreements are to seek to ring-fence parties' non-matrimonial assets from later financial claims by the other.

No Nuptial Agreement of itself is of itself necessarily sacrosanct or ultimately binding. The reality is that Family Courts retain an overriding power to set aside a Nuptial Agreement or certain of the provisions in it under the wide-ranging powers contained within Section 25 MCA 1973.

That being said, providing that the Nuptial Agreement contains those elements essential to giving it life and force, then a case may be made for its terms to be upheld in the event of matrimonial proceedings.

2. Nuptial Agreements : legal status

In summary, until Autumn of 2010 the perceived wisdom was that a Nuptial Agreement lacked force and validity in the context of financial remedy claims under English matrimonial law. The reported case of *Radmacher v. Granatino* (October 2010 UKSC 42) comprised a veritable watershed. It upheld a Nuptial Agreement for the first time in English law. However, the Court laid down a three-stage test to assess whether or not any Nuptial Agreement should properly be viewed as binding and enforceable.

3. *Radmacher* : three-stage test

The three essential criteria laid down in *Radmacher* are these:-

- (1) The Agreement must be made by each party off their own free will. In other words there must be no improper pressure or influence brought to bear in making the Agreement.
- (2) Each party must have a full appreciation of the implications and consequences. In order to satisfy this criterion the author respectfully views it as essential that each party must make full

and clear financial disclosure of their respective assets, liabilities and resources within the body of the Agreement or by way of Appendices thereto. Moreover if legal advice is taken by each party on the Agreement as to what is intended on assets and income, this would seem to satisfy the condition that each party should be aware of the consequences of what they have chosen to agree.

- (3) A holistic view is also taken: it must be *fair* to hold the parties to their bargain.

It follows that provided that a Nuptial Agreement satisfies the three-stage test a Family Court is more likely than not to give weight to its contents and accordingly treat it as a *relevant circumstance* which must be taken into account in the exercise of the Court's discretion over financial remedy claims under Section 25, when apportioning assets in marriage or partnership, as the case may be.

4. Nuptial Agreements and fairness

The Supreme Court in *Radmacher* provided the following guidance on how the essential criterion of fairness might properly be interpreted or assessed.

- (1) It will not be fair for a Nuptial Agreement to contain provisions which might be to the detriment of the reasonable financial needs and requirements of any child or children of the family.
- (2) The autonomy of the spouses (that is, the right to make decisions freely and fairly as to what is to be done with their assets on, say divorce) is to be respected. A Court should not interfere solely upon the footing that it somehow "*knows best*".
- (3) There is nothing patently unfair within a Nuptial Agreement that seeks to ring-fence non-matrimonial assets. (For these purposes non-matrimonial property may comprise assets owned by one spouse before the marriage or received by them from a third party during the currency of it – for instance, a lifetime gift or an inheritance.)
- (4) The longer the duration of a marriage following a Nuptial Agreement, the greater the possibility that it may ultimately not be fair to bind the husband and wife to their bargain. With the passage of the years and a long marriage for instance, spouses in their later years may well find that their earning capacity considerably reduced. There may be financial changes for the worse in a spouse's assets. A case for long term provision may carry force.
- (5) If the effect of the Nuptial Agreement might be to leave one spouse with less than proper provision for their financial needs (whereas the other spouse's needs are more than comfortably met), then this will be treated as unfair.
- (6) A Nuptial agreement should not seek to limit or prohibit a spouse's right to claim a compensatory element in any future financial remedy claims. An argument for compensation may arise where, for instance, a spouse has lost their earning power as a result of a jointly-made decision earlier in the day for them to surrender their career opportunities in order to stay home and to care for their family.

- (7) It follows that provided each party's financial needs are met within the Nuptial Agreement, and the right to maintain a claim for compensation element in suitable circumstances exists, then there is a case at first sight to assert the validity and enforceability of such a Nuptial Agreement.

It is viewed as essential that any Nuptial Agreement should properly take into account each party's needs, contemplate the sharing of assets and resources and make provision for a compensatory element too.

5. The Law Commission

In January 2011 the Law Commission published a consultation paper. This recommended legislative reform to render Nuptial Agreements (and separation agreements) legally binding.

On the 27th February 2014 the Commission published its Final Report entitled "*Matrimonial Property, Needs and Agreements*" together with a draft Nuptial Agreement Bill.

This Report recommended the introduction of Qualifying Nuptial Agreements (QNAs) whose provisions **would restrict** the Court's Section 25 powers to make financial orders on divorce, separation or nullity. The recommendation was that the Court would be prohibited from making any financial remedy orders inconsistent with the terms of the QNA - unless it was necessary to meet a party's needs or was in the interests of any child of the family.

The Government responded. However other political imperatives then intervened, and the legislation intended has been shelved.

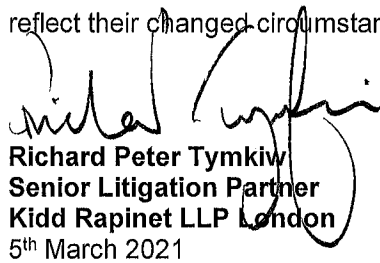
The Report stated that a QNA must meet the following criteria in order for it to be given credence in English family law:

- (1) It must be contractually valid (the enforceability requirement). In other words, it must be devoid of any suggestion that the Agreement was made other than with the free will of the parties and founded upon full and candid financial disclosure by husband and wife. Any matter evidencing or tending to show mistake or improper pressure might weaken the Agreement or cause it to fail.
- (2) It must be validly executed as a Deed. It needs to contain a "*relevant statement*" signed by both spouses. That statement in turn should record the spouses' understanding that the QNA removes the Court's discretion to make any orders in relation to financial claims on divorce – save to permit a party's reasonable financial needs to be met where the Nuptial Agreement may be wanting.
- (3) If a Prenuptial Deed, it must not have been made prior to 28 days before the wedding.
- (4) There must have been clear and full disclosure of financial information.
- (5) Both spouses must have received legal advice upon the Agreement before signing it.

- (6) It must not prejudice any child or children of the family, for instance by failing to make sufficient provision for their needs, and
- (7) It must make provision for each spouse's needs arising from divorce, separation or nullity. Those needs in turn need to be assessed by reference to the standard of living enjoyed by husband and wife during the marriage.

6. Regular Reviews

As the years advance, the financial situation, circumstances and outlook of both husband and wife will necessarily change, and those factors and considerations which informed the original Nuptial Agreement may have altered or no longer be supportable. It is therefore viewed as helpful (if not essential) to build into Agreements regular reviews at, say, 3-year intervals or following upon the occurrence of a particular event (say the birth of a child). On such occasions husband and wife may properly review the terms of their Agreement and decide what, if any, changes should be made to it to reflect their changed circumstances and new responsibilities.



Richard Peter Tymkiw
Senior Litigation Partner
Kidd Rapinet LLP London
5th March 2021