

“Love is a Pre-Nup”

An essential contract or the death of
romance?

Family Law Seminar



Silverman Sherliker LLP – 19 May 2011



INTRODUCTION

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MAIN POINT OF PRINCIPLE IN *RADMACHER:*

“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.”





THE CURRENT LAW & PROPOSALS FOR REFORM

Michael Gregory
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SUMMARY of CURRENT LAW:

- Prenups are not strictly enforceable/legally binding in England and Wales.
- Prenups cannot exclude the jurisdiction of the court to deal with financial issues on marriage breakdown/breakdown of civil partnership.
- A PNA is one of the circumstances a court will take into account when exercising its discretionary powers to achieve fairness between a couple.



SUMMARY of CURRENT LAW (2):

HOWEVER -

- Main principle established by the Supreme Court decision in *Radmacher v. Granatino* in 2010:
“*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.*”



SUMMARY of CURRENT LAW (3):

- Rebuttable presumption that a PNA (and any other marital agreement) freely entered into with understanding of its implications will be upheld by the Court unless it would be unfair.
- This case takes the current law as far as is possible in favour of upholding PNAs: to go further would require new legislation.



SUMMARY of CURRENT LAW (4):

- All marital agreements - whether made before or during a marriage, or following a separation now have the same effect in law.
- The old rule that PNAs are void as being contrary to public policy has gone.



HOW DID WE GET HERE?

Since November 1998 there have been various proposals for reform of PNA's:

1998	Government Paper: "Supporting Families"
2005	Resolution: "A more certain future: Recognition of Prenuptial agreements in England & Wales"
2009	The Centre for Social Justice: "Every Family Matters"
2009	Further Resolution paper: "Family Agreements: Seeking Certainty to Reduce Disputes"



DEVELOPMENTS IN CASE LAW:

- *F v F* in 1995 to *Radmacher v Granatino* in 2010
- Over last 15 years increasing weight attached to PNAs by the courts
- Court's approach changed from “entrenched caution, bordering on hostility, to a growing acceptance” where “agreements are treated with respect” (Law Commission consultation paper, January 2011)
- In *F v. F* (1995) Mr Justice Thorpe: stated of PNAs “in this jurisdiction they must be of very limited significance” but
- The same judge, now Lord Justice Thorpe, in the CoA in *Radmacher* in 2009: “I would not be so dismissive if such a case were now to come before this court on appeal”.



RADMACHER v. GRANATINO 2010

“The culmination of this story of the evolution of judicial views”: (Law Commission)

The facts:

- 8 year marriage between German heiress wife and French husband.
- Entered a PNA drawn up by a German notary, providing that neither would have a claim on the other's wealth if they divorced.
- No formal disclosure (although husband well aware wife very wealthy) and without husband having independent legal advice (although he had plenty of opportunity to do so).
- Couple lived mainly in London and had two daughters. Husband had enjoyed high income but became disenchanted towards the end of the marriage and started research at Oxford. Wife worth about £100 million at time of divorce. Husband had no assets and debts of £700,000. Husband sought £7 million, to meet his needs.



RADMACHER v. GRANATINO 2010

OUTCOME:

- High Court judge, Mrs Justice Baron, awarded husband about £5.6 million (to buy a £2.5 million house, generate an income for life of £100,000 pa, pay off his debts and a car) plus the use of a home abroad to spend time with his children, who had relocated with their mother to Germany.





RADMACHER v. GRANATINO 2010

OUTCOME:

- The Court of Appeal held the award did not attach sufficient weight to the PNA and upheld the wife's appeal, greatly reducing husband's award. They made an award for his role as father, not his long-term financial needs: a fund to provide income plus the use of a £2.5 million house on a trust arrangement until his children have finished university.





RADMACHER v. GRANATINO 2010

OUTCOME:

- Husband appealed to the Supreme Court, who (8 out of 9) upheld the decision of the Court of Appeal, with a strong dissenting judgement from Baroness Hale.





THE FUTURE

Law Commission project to consider whether PNAs should be made legally binding:

- Began work 2009;
- Published Consultation Paper January 2011;
- Now considering responses and will formulate proposals in 2012;
- Any new legislation unlikely until 2013.





THE FUTURE (2)

- Research by Professor Anne Barlow and Janet Smithson at Exeter University on people's attitudes to prenuptial agreements from April 2010 to April 2011 (funded by Nuffield foundation) will inform the Law Commission's final proposals to Government.



"Your wife's lawyer was damn good.
Your prenup is still in effect down here."



GOOD PRACTICE REQUIREMENTS FOR PRENUPS

Vanessa Friend
Assistant Solicitor



GOOD PRACTICE REQUIREMENTS FOR PRENUPS:

- In writing
- No duress or undue influence
- Legal advice
- Financial disclosure
- Timing requirements
- Reviews
- Fair PNAs
- New wills



1. IN WRITING

- PNA should be in writing and signed by both parties.





2. NO DURESS OR UNDUE INFLUENCE

- Both parties should enter into the PNA freely and not under duress, or as a result of undue influence by the other.

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"COME NOW — SURELY WE CAN
DRAW UP THIS PRE-NUP TIAL AGREEMENT
AMICABLY..."



3. LEGAL ADVICE

- Both parties need to obtain separate independent legal advice about the terms and effect of the agreement so they understand what they are agreeing to, and
- In the case of the economically weaker partner what they are potentially giving up and
- The contrasting alternative of cohabitation (and attendant lack of legal rights).



4. FINANCIAL DISCLOURE

- Needs to be frank exchange of information about each party's financial position.
- Usually summarised in schedules attached to the PNA listing everything they have.



"I'm having a hard-time unwinding during the pre-nup process."



FINANCIAL DISCLOSURE (2)

- Makes clear those assets each party had at the time of marriage.
- Reduces risk later of parties being accused of concealing assets.
- Involves disclosing other issues with a financial implication.





5. TIMING REQUIREMENTS

- Allow enough time to consider and reflect on the proposed terms, with the benefit of legal advice.
- Courts have shown reluctance to uphold PNAs signed close to the wedding date.
- Reform proposals have suggested should be signed not less than 21 to 42 days before the wedding.



TIMING REQUIREMENTS (2)

- The Law Commission suggest fixed time limit inappropriate and unhelpful: could create its own pressure.
- Important point: allow enough time.
- Couples who leave it till the eve of the wedding best advised to have a postup agreement after the wedding instead.



6. REVIEWS

- Periodic and change of circumstances reviews of the PNA, to see if any changes need to be made.
- To try and ensure terms remain fair with the passage of time: what is fair for a short marriage is unlikely to be fair after a long marriage.
- “An agreement made many years before it takes effect is inherently risky because circumstances may change in a way that the couple could not have foreseen when they made the agreement”: Law Commission, 2011.



7. PNA SHOULD NOT BE UNFAIR AND WILL NOT BE UPHELD BY COURT IF IT:

- Fails to meet the needs of children and their parents in their caring role.
- Forces either spouse to rely on state benefits where there are sufficient resources to avoid that (meeting parties' needs probably means more than this).
- Purports to oust the court's jurisdiction to deal with financial issues on divorce.



NEW WILLS

- Marriage automatically revokes an existing will unless made in contemplation of it, so
- Both parties will need to make new Wills.



TYPICAL CLAUSES - PNAs

- Separation of assets and ring fencing of non-matrimonial assets.
- Background information about the parties.
- Stepped provision with amounts to be paid increasing with the length of marriage.
- Index linking related to RPI.



TYPICAL CLAUSES - PNAs (2)

- More generous provision if children born.
- Religious upbringing of any children.
- Private education and how school fees/university costs will be funded.
- Confidentiality.
- Financial provision on death.
- Agreement by husband to obtain a get.



TYPICAL CLAUSES - PNAs (3)

- A review clause: agreement to be reviewed on the happening of specified trigger events and say every 5 years to try and ensure the agreement remains fair.
- A sunset clause: PNA automatically lapses after a specified number of years.



**“You can’t actually have a slice,
haven’t you read the prenuptial?”**



CONTRAST WITH AMERICAN PRENUPS EGs

- Husband to submit to regular drug tests with financial penalties if they failed.
- Agreement by wife to give a dinner party twice a week.
- Husband limited to 1 football game on a Sunday per season.
- \$100,000 payment to be paid on any occasion the other spouse is unfaithful.
- Agreement by wife to maintain weight of not more than 120 lbs subject to a fine of \$100,000 if exceeded.

Such clauses in an English PNA agreement would simply be ignored!



McHUMOR.com by T. McCracken



"Hugh, you know leaving the toilet seat up violates our prenuptial agreement."

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CELEBRITY PRENUPS:

Catherine Zeta Jones
entitled to \$1 million
for every year of her
marriage to Michael
Douglas if they divorce
(according to press
reports).





CELEBRITY PRENUPS:

Denise Richards and Charlie Sheen have agreed for \$1 million penalty for infidelity, payable by the unfaithful partner (according to press reports).





QUESTIONS & CONCLUSION



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