Research findings on nuptial agreements

Synopsis: The application of the current law on unreported pre- and post-nuptial agreements – research findings.

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This research, by Sharon Thompson of Cardiff University's School of Law and Politics, uses new interview data to fill a knowledge gap around how the current law on nuptial agreements is applied (or even if it is applied) outside the context of the 'big money' case, i.e. to get insight into whether couples even have a nuptial agreement when they are not, for example, millionaire businessmen, footballers, or wealthy heiresses. The point being that the landscape of the 'everyday' small money divorce is not represented by big money cases, since these cases are unlikely to go to court and will not be reported.

Pre- and post- nuptial agreements are not binding in England and Wales. Instead, they are given effect as part of a judge's discretion to determine the financial consequences of divorce. Pursuant to Radmacher v Granatino, a valid nuptial agreement must comply with a two-step test. First, the agreement must have been freely entered into by the parties. Secondly, the agreement will not be upheld if the court determines that it would not be fair to do so.

The Supreme Court has described circumstances in which it would be unfair for an agreement to be given effect as follows...

The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned.

As a result, the court typically refuses to give effect to an agreement because the judge does not consider sufficient provision to have been made for the parties' needs.

Pressure is mounting for reform, because it is not always clear when the court will determine when an agreement is unfair. However, says the author, circumspection is needed before introducing legislation that would make such agreements binding. There are gaps in what is known about pre- and post-nuptial agreements on the ground, and a lack of data on how the current law is being applied.

The research attempts to find out whether the reported cases provide an accurate representation of those cases that do go to court but are either unreported or settled at the Financial Dispute Resolution Appointment (FDR), which is a court hearing that follows a divorcing couple's application for a financial order. Between November to December 2024, the author interviewed 23 barristers, FDR judges

and Private FDR judges from various locations around England about their experience of nuptial agreements.

The paper presents six findings derived from these unreported nuptial agreements that reveal much that is not apparent in big-money cases...

- nuptial agreements are no longer the preserve of the rich. Not only are pre-nuptial agreements more common, but they are also entered into when the parties have relatively modest assets. This appears to be partly due to professional people's attitude to financial independence, but also partly due to the increasing importance of inheritance.

- fairness, at the time of enforcement of the pre-nup, normally means meeting needs, but the meaning of needs varies. Almost all interviewees said pre-nups are being used to 'lower the bar' of needs, suggesting that in FDR hearings, the scope of needs is being tightened substantially in many cases. Others said the needs assessment, and the judicial indication more broadly, could depend critically upon the judge, and the outcomes are very unpredictable with no consistent approach being deployed.

- the legal status of nuptial agreements influences how they are drafted, with lawyers increasingly including language to safeguard the financially weaker party where the moneyed spouse is trying to use the nuptial agreement to limit their needs claim. Some respondents said that compliance with the rule that agreements must not be unfair on divorce helped make their client more reasonable during the drafting process than they otherwise would have been.

- It is becoming clearer that nuptial agreements are increasingly difficult to challenge in the FDR process, and are likely to be more enforceable than they ever have been following a series of reported cases handed down from the High Court Bench. The practical consequences of limited court resources and time may be a reason for this, said some respondents.

- inequality of bargaining power is widely used, with power imbalance having come to be accepted as an inevitable feature because most nuptial agreements are one-sided with one party ring-fencing their assets from the other. However, there are some indications that this is largely unimportant where the parties have had independent legal advice.

- the 'autonomy' rationale underpinning nuptial agreements can be 'intellectually dishonest'. With limited court time and sometimes little inclination to examine the autonomy of the lesser-moneyed spouse, judges feel increasingly more and more pressured to try and follow whatever is written down, so that nuptial agreements are given effect to avoid further litigation and associated costs, and to promote certainty rather than autonomy.

This is a timely review, because it is more than 15 years since the UK Supreme Court in Radmacher v Granatino gave nuptial agreements the maximum possible

judicial weight without further parliamentary intervention, so it's likely that many couples who signed pre-nups and post-nups in the aftermath of Radmacher will now be getting divorced. It may, therefore, become clearer how these agreements are affecting financial settlements and judicial indications in FDRs.

Also, legislative reform of nuptial agreements is currently under consideration by the Law Commission of England and Wales, as part of its more general review of financial remedies law. The Law Commission published its scoping report published on 18 December 2024.

It stated: "In this scoping report, we explore the current law of financial remedies with a view to answering the question central to our Terms of Reference: ascertaining whether the law requires reform. Our conclusion is that it does, although the form that reform should take is a matter for Government to decide. that reform of nuptial agreements will depend upon whether there is a commitment, by Government, to pursue broader reform of financial remedies, and the shape this new law will take."

It added: "It is now for Government to consider and respond to our scoping report. Under the Protocol between the Lord Chancellor (on behalf of Government) and the Law Commission of England and Wales, the responsible Minister will respond as soon as possible, and in any event with an interim response within six months of publication of the report and a full response within a year."

The six-month deadline for an interim response to the Law Commission's report has now passed.

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