



# PUMP COURT

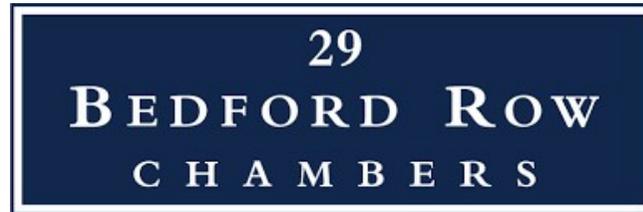
CHAMBERS

**Nuptial agreements: What is the interaction of valid prenup and postnup agreements (PNAs) with s.25(2) MCA 1973?**

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# WHITE PAPER CONFERENCE



This presentation is based on a paper by Nicholas Allen QC who was initially to have presented this talk today

# Can PNAs be binding?

No, a PNA can never oust the jurisdiction of the court

S25 always applies

***Radmacher (formerly Granatino) v Granatino [2010] 2 FLR 1900, SC:***

*“7. There can be no question of this Court altering the principle that it is the Court, and not any prior agreement between the parties, that will determine the appropriate ancillary relief (financial provision on divorce) when marriage comes to an end, for that principle is embodied in the legislation. ... “*

# Will an unfair PNA have any effect?

Yes, even a PNA ruled to be unfair may effect the outcome.

***AH v PH (Scandinavian Marriage Settlement)*** [2014] 2 FLR 251,  
FD per Moor J at [54]:

*“I have already indicated that, even where it is not fair to hold a party to an agreement, it may be that it is right to pay some regard to the agreement. I say this as I am not dealing here with strict contract law. I am applying s 25 of the MCA 1973 which requires me to consider ‘all the circumstances of the case’. The existence of the marriage settlement is undoubtedly one of the circumstances of this case.”*

## Fairness remains the goal

***Luckwell v Limata*** [2014] 2 FLR 168, FD per Holman J [130.2]:

*“The over-arching criterion remains the search for 'fairness', in accordance with section 25 as explained by the House of Lords in Miller/McFarlane (i.e. needs, sharing and compensation). ... “*

**See also:**

***Wyatt v Vince*** [2015] 1 FLR 972, SC per Lord Wilson [29]

***Versteegh v Versteegh*** [2018] 2 FLR 1417, CA per King LJ [66]

## Can a PNA shorten the proceedings?

Yes. In appropriate circumstances a court in applying the S25 factors may decide that a full hearing is not required.

A PNA may be a “*magnetic*” factor:

***S v S (Ancillary Relief)*** [2009] 1 FLR 254, FD per Eleanor King J:

*“I do not accept however that there may not be circumstances in which there is a factor of such magnetic importance that it must necessarily dominate the discretionary process. In such a case the vehicle of a ‘notice to show cause’ can appropriately be regarded as the proportionate and just route by which to determine the extent to which that factor should be determinative of the action.”*

## Is the Notice to Show Cause process alive?

Yes, and also other case management powers:

***S v S (Financial Remedies: Arbitral Award)*** [2014] 1 FLR 1257, FD per Sir James Munby P [14]:

*“Moreover, in such a case the court, if need be of its own motion, can always, by the appropriately robust use of its case management powers, limit the ambit of the issues to be considered at the hearing; for example, as was done in both Crossley v Crossley [2008] 1 FLR 1467, and S v S (Ancillary Relief) [2009] 1 FLR 254, by focusing the hearing exclusively on those issues relevant to the magnetic factor(s). “*

## Is a valid PNA only unfair if there are unmet “needs”?

No, see dicta of King LJ in ***Brack v Brack*** [2018] EWCA Civ 2862:

*“In the ordinary course of events, where there is a valid prenuptial agreement, the terms of which amount to the wife having contracted out of a division of the assets based on sharing, a court is likely to regard fairness as demanding that she receives a settlement that is limited to that which provides for her needs. But whilst such an outcome may be considered to be more likely than not, that does not prescribe the outcome in every case.”*

# What weight should to be given to a PNA?

*Radmacher* is the starting point:

- factors detracting from the weight
  - duress
  - undue pressure
  - fully informed and advised
- factors enhancing the weight
  - foreign element
- fairness

*“a 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”*

## Fairness: how should the court treat an unfair PNA

If the court is to have regard to the PNA how does it assess whether to hold the parties to its terms?

How does the analysis of fairness differ from a case with no PNA?

- ***Kremen v Agrest (No. 11) (Financial Remedy: Non-Disclosure: Post-Nuptial Agreement)*** [2012] 2 FLR 414
- ***Luckwell v Limata*** [2014] 2 FLR 168, FD per Holman J
- ***DB v PB*** [2016] EWHC 3431 (Fam) per Francis J
- ***Versteegh v Versteegh*** [2018] 2 FLR 1417, CA per King LJ

## Fairness: summary 1

- any minor children remain the court's first consideration (*Kremen, Luckwell*);
- the origin of the protected asset is relevant: i.e. is it (on a traditional analysis) 'non-matrimonial' (*Kremen*); and the longer that has elapsed since the agreement, the more likely it is to be unfair (*Luckwell*);
- leaving a party in a predicament of real need is unlikely to be fair (addressed in more detail below) (*Kremen*);

## Fairness: summary 2

- respect should be afforded to the parties' autonomy (*Luckwell*);
- an unfair PNA need not be discarded: instead the court may alleviate the unfairness (*DB v PB*); and
- a partial departure from the PNA by the financially stronger party does not render the document otiose; not every sharing case is necessarily an equal sharing case (*Versteegh*).

# Valid PNA: assessment of needs 1

How are needs assessed? Is this analysis different from a case without a PNA?

- ***F v KF*** [2017] EWHC 1093 (Fam) Mostyn J: the concept of needs is inherently flexible and arbitrary. “*..the length of the judge’s foot*”

Cases where the PNA shapes the assessment of needs:

- ***N v F (Financial Orders: Pre-Acquired Wealth)*** [2011] 2 FLR 533, FD per Mostyn J
- ***Luckwell v Limata*** [2014] 2 FLR 168, FD per Holman J
- ***Kremen v Agrest*** No 11) (Financial Remedy: Non-Disclosure: Post-Nuptial Agreement) [2012] 2 FLR 414, FD per Mostyn J

## Valid PNA: assessment of needs 1

- ***Hopkins v Hopkins*** [2015] EWHC 812 (Fam) per Nicholas Cusworth QC (sitting as a Deputy High Court Judge)
- ***WW v HW (Prenuptial Agreement: Needs: Conduct)*** [2016] 2 FLR 299, FD per Nicholas Cusworth QC (sitting as a Deputy High Court Judge)
- ***KA v MA (Prenuptial Agreement - Needs)*** [2018] 2 FLR 1285, FD per Roberts J
- ***Ipekci v McConnell*** [2019] EWFC 19 per Mostyn J

## Assessment of needs: summary

- a PNA can alter what would otherwise be fair, which includes how generously a party's needs should be assessed (*Luckwell*);
- a PNA may feature prominently as a depressing influence on that analysis (*WW v HW*);
- the floor of that analysis may be the minimum to keep a spouse from destitution (*Kremen*); specifically, to a level inconceivable had there been no PNA (*N v F* commenting on *Radmacher*);
- that floor is not necessarily the floor to be applied in every case – that will depend on the circumstances of each case (*WW v HW*); and
- alternatively, and *prima facie* contrary to the preceding line of jurisprudence, Mostyn J's very recent contribution is that he does not consider the analysis of need to be any different than an ordinary case (*Ipekci*).

# Prenuptial and postnuptial agreements

## Will they be treated differently?

**Radmacher**: per Lord Phillips: usually they will be treated identically

See also **BN v MA** [2013] EWHC 4250 (Fam) per Mostyn J:

- effluxion of time may have led to unforeseen and unconsidered circumstances which might render an agreement unfair
- the *Radmacher* test applies to all nuptial agreements:  
*"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 their agreement"*

## **PNAs: Looking Forwards**

- When drafting PNAs advice can only be given on the present state of the law
- When a court considers a PNA it applies the law at that time – this may be different from the law at the time of signing
- Any advice should be general and non-specific as to how a court might interpret the agreement at an unknown time in the future

## Law reform

- Although the 2014 Law Commission report on *Matrimonial Property, Needs and Agreements* suggested legislating to give effect to agreements no such bill is planned.
- The Law Commission's draft bill would set out the requirements for a QNA "Qualifying Nuptial agreement" if it was to be relied on in a later divorce
- A valid PNA will limit a court's power to interfere
- Requirements will include terms as to formation, timing, disclosure, advice, validity and variation.

## **Divorce (Financial Provision) Bill**

Baroness Deech's bill:

- Has passed through House of Lords and first reading in the House of Commons
- Date of second reading yet to be announced
- Bill would make nuptial agreements binding so long as certain conditions as to formation, timing, disclosure and legal advice conditions met.
- If valid court's powers would then be curtailed

## Drafting tips 1

### Consider carefully:

- Timing – 28 days before marriage or post-nup?
- Disclosure – add a Schedule of Assets?
- Independent legal advice – ensure it is taken?
- Deal with reasonable needs – even if limiting scope of court's determination
- Avoid attempting to limit scope of child provision

## Drafting tips 2

- Perhaps exclude sharing or particular non-matrimonial assets
- Cover potential future events – childbirth, length of marriage etc.
- Provide for a review? Might mitigate an unfair PNA
- Include recognition that law may change and nothing is certain

## Cohabitation agreements

The “*no nup*”:

- could regulate interests in property, bank accounts, payment of bills etc. while the parties live together
- could regulate how any separation is effected and limit TOLATA or other claims
- could agree terms if the parties then marry – does the “*no-nup*” become a “*pre-nup*”?

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**"Here's our new retirement plan —  
At age 65, we'll get divorced then marry  
other people who planned better."**

  
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