How do the needs of children affect the Court's consideration of a pre-nuptial agreement where:

1. **It does not foresee children; or**
2. **It produces an unfair result?**

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10th May 2016

Introduction

When advising a party to a pre-nuptial agreement, it is always difficult to know:-

1. Whether the agreement will stand the test of time: will the stronger party be adequately protected from claims or is the weaker party signing away their rights?
2. Whether the party you are advising is under pressure: the weaker party who fears the wedding will be called off unless they sign;
3. How to provide for the needs of any children in the future, especially where the parties are relatively young and have no clear agreement as to if and when they might have children;
4. How to address the issue and form of disclosure, to ensure that the agreement reached is one which takes into account all of the assets and provides a clear picture of both parties' financial circumstances.

Turning specifically to the question posed, namely how the needs of children affect the court's consideration of pre-nuptial agreements where no children were foreseen or the provision made for them would produce an unfair result:-

The Law

1. **Section 25(1) Matrimonial Causes Act 1973** ***"it shall be the duty of the court in deciding whether to exercise its powers under Section 23 etc. above, and if*** **so**, ***in what manner, to have regard to all the circumstances of the*** **case**, ***first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18 years"***

The court's jurisdiction cannot be ousted by a pre-nuptial agreement.

As the Supreme Court put it in ***Radmacher (Formerly Granatino) v Granatino*** **[2010] UKSC 42** (at para 77),

"A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family."

Nonetheless, significant weight will be attached to pre-nuptial agreements provided that there are no vitiating factors, there is a no lack of understanding and the agreement is fundamentally fair.

In ***Luckwell v Limata*** **[2014] 2 FLR 168** the court concluded that a nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children. However, the agreement was given substantial weight.

This was echoed in ***WW v HW (Pre-Nuptial Agreement: Needs: Conduct)*** **[2015] Fam. Law 1060** more recently, in circumstances where the parties had, in any event, agreed - as part of their pre-nuptial agreement - that the agreement was without prejudice to their right to make a claim in respect of a child. Despite the husband's conduct, provision was still made for him for the benefit of the children, on a reversionary basis, with his housing need "stepping down" when the youngest child reached 22 and his income needs being carefully assessed on a needs basis.

The Case Law

It might be helpful to have a gallop through the relevant case law in this area. The judgment in ***Macleod v MacLeod*** **[2008] UKPC 64** is probably the starting point but, as a post-nuptial agreement case (and one with which we are all familiar), I have not mentioned it (likewise ***Hopkins v Hopkins [*****2015] Fam. Law 1053 -** Caroline Hopkins being a member of "the First Wives Club" - and it appearing to me to have been somewhat of a hopeless case from the start). I have, however, mentioned ***Kremen v Agrest (Financial Remedy: Non-Disclosure: Postnuptial Agreement)*** **[2012] 2 FLR**

414 below. Perhaps the most relevant for the question posed are those of ***Radmacher*** and ***Luckwell*** but see too ***WW v HW***. There are nuggets in each of the cases listed below which might be helpful.

***Radmacher (formerly Granantino) v Granatino* [2010] UKSC 42**

- "*A court when considering the grant of ancillary relief is not obliged to give effect to nuptial agreements…The parties cannot, by agreement, oust the jurisdiction of the court. The court must, however, give appropriate weight to such an agreement."*

- "*The approach of English law to nuptial agreements differs significantly from the law of Scotland, and more significantly from the rest of Europe and other jurisdictions*".

- "*Under English law it is the court that is the arbiter of the financial arrangements between the parties when it brings a marriage to an end. A prior agreement between husband and wife is only one of the matters to which the court will have regard*".

- "*In 1998 the Home Office published a consultation document "Supporting Families" which [stated] … The Government is considering whether there would be advantage in allowing couples either before or during their marriage to make written agreements dealing with their financial affairs which would be legally binding on divorce. Para 4.23 sets out that agreements should be subject to 6 safeguards. It would not be legally binding:*

- *Where there is a child of the family, whether or not that child was alive or a child of the family at the time the agreement was made*".

- "*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*".

- "*The issue that lay at the heart of the proceedings was the weight that should be given to the ante-nuptial agreement."* At first instance Baron J found that the circumstances surrounding the conclusion of the agreement fell foul of a number of the safeguards set out in para 4.23 and for that reason the weight attached to it should be reduced as the award needed to make provision for the two children who had not been anticipated in the agreement.

- The Court of Appeal held that Baron J was wrong to find that the weight of the agreement should be reduced. In the circumstances the agreement should be given decisive weight and any award should only make provision for the husband's role as the father of the two children and not for his own long term needs.

- Section 25 still prevails, in that all the circumstances of the case fall to be considered, with first consideration being given to the welfare of any minor children. A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family.

- "*Where the ante-nuptial agreement attempts to address the contingencies, unknown and often unforeseen, of the couple's future relationship there is more scope for what happens to them over the years to make it unfair to hold them to their agreement*".

- The Supreme Court confirmed that approach of the Court of Appeal who limited the award of a house to the husband, instead ordering that he was entitled to the home for the period generously assessed, during which he could be expected to provide a home for the children.

- "*In cases where there are no vitiating or other factors that negate or reduce the weight and effect of a nuptial agreement … it cannot be allowed to prejudice the reasonable requirements of the children of the family*".

- Lady Hale (dissenting) "*A couple who assumed that each would run their own independent professional life and keep their finances entirely separate may find this quite impossible when they have children, especially if they have more than one or one of them has special needs*".

***Luckwell v Limata* [2014] 2 FLR 168**

- Has had mixed/mildly negative judicial treatment, in relation to hearing family cases in public.

- Despite the husband having signed a pre-nuptial and two supplemental agreements to the effect that he would not make any claim either during or after his marriage in relation to his wife's separate property or to gifts made or to be made to her by her family, it was nonetheless fair in the circumstances to order the wife to make capital provision for him.

- The order provided for the wife to purchase a property which she would lease to the husband at a nominal rent. The property would belong to the wife and the husband would have no proprietary interest in it. When the parties' youngest child reached the age of 22 the property would be sold, in order to release some capital back to the wife. Under the order, 55% of the net proceeds of sale were to be applied in the purchase of a second property for occupation by the husband and 45% to be retained by the wife.

- There was no doubt that great weight should be given to the agreements. There were no vitiating factors, such as duress or non-disclosure. H had received legal advice. It was highly significant that the husband had signed three agreements and the court found that the husband, when he signed the agreements, intended to be bound by them. If any award was to be made to the husband, the wife would have to sell her home, which would inevitably be destabilising for the children. However, the couple had moved from a jointly-owned property, to one solely owned by the wife and the husband had become completely dependent on the wife for the

provision of his home. He was in a "*predicament of real need*" (***Radmacher***). He had no home, current income, capital or borrowing capacity and had considerable debts.

- The wife was unemployed and had not worked since marriage. Her source of income was an allowance from her parents of £51,000 per year plus school fees. The husband was made redundant in April 2012 and remained unemployed for the rest of the marriage. Wife's father had no intention of providing an allowance to wife to pay to husband. Wife's father said that if the family home that he had purchased for the family was sold, he would cease to pay the allowance and school fees.

- Submissions from both parents that they would not have purchased the property for the family or provided the allowance if the agreements entered into by the husband had not been binding.

- Again primary consideration was given to the s.25 factors. A highly relevant circumstance of the case was the fact of the agreements.

- "*There is no doubt that the decision in Granatino v Radmacher represented, and now requires, a significant shift in the approach to, and weight to be given to, negotiated, drafted and freely signed nuptial agreements on the kinds in the present case when there is no vitiating factor*".

- "*Such agreements must always be given weight and often decisive weight as part of the circumstances of the case. They may affect not only whether to make any award at all, but also the size and the structure of any award*".

- The court adopted the principles from ***Radmacher***:

  1. It is the court, and not the parties, which decides the ultimate question of what provision is to be made;

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). But an agreement is capable of altering what is fair, including in relation to ‘need’;

3. An agreement (assuming it is not ‘impugned’ for procedural unfairness, such as duress) should be given weight in that process, although that weight may be anything from slight to decisive in an appropriate case;

4. The weight to be given to an agreement may be enhanced or reduced by a variety of factors;

5. Effect should be given to an agreement that is entered into freely with full appreciation of the implications unless in the circumstances prevailing it would not be fair to hold the parties to that agreement. There is at least a burden on the husband to show that the agreement should not prevail;

6. Whether it will ‘not be fair to hold the parties to the agreement’ will necessarily depend on the facts, but some guidance can be given:

    - A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children;
    - Respect for autonomy, including a decision as to the manner in which their financial affairs should be regulated, may be particularly relevant where the agreement addresses the existing circumstances and not merely the contingencies of an uncertain future;
    - There is nothing inherently unfair in an agreement making provision dealing with existing non-marital property including anticipated future receipts, and there may be good objective justifications for it, such as obligations towards family members;

- The longer the marriage has lasted the more likely it is that events have rendered what might have seemed fair at the time of the making of the agreement unfair now, particularly if the position is not as envisaged;
- It is unlikely to be fair that one party is left in a predicament of real need while the other has 'a sufficiency or more';
- Where each party is able to meet his or her needs, fairness may well not require a departure from the agreement.

- Paragraph 6(1) stresses that part of the express statutory duty of the court under s.25(1) is to give first consideration to the welfare while a minor of any child of the family who has not attained the age of 18. The children can spend time with each of their parents and the financial circumstances of each of their parents are likely to impact upon their welfare.

- No doubt that great weight should be given to the agreements in this case: no vitiating factors such as duress or non-disclosure. The agreements each contemplated that there would be one or more children.

- On the facts of the case, there is only one consideration capable of having the effect that the agreement should not rigorously be applied and that is current and likely future need. It is not a case that "needs trump an agreement", but they may outweigh the fact of an agreement in the overall circumstances. In this case the husband had no home, no income and considerable debts (the wife had net worth of £6.7 million, husband had debts of £226,000). "*In his role as a committed husband he has a pressing need for secure accommodation in which he can accommodate all three children together and which does not demean him too much relative to Wife*".

- "*The need to provide an adequate home in which the children can visit and stay with the father is very important and, insofar as the balance of welfare considerations in concerned, does outweigh the upheaval"* [of making an order which effectively meant that Wife would have to sell the FMH].

- "*It would not be right or fair to leave H homeless and a burden on the state at age 65 … parenthood does not end at 18 or even 22. H will need a home where the children can visit him, but it can be a smaller and perhaps less well located one*".

Z v Z (No 2) (Financial Remedy: Marriage Contract) **[2012] 1 FLR 1100**

- Interprets ***Radmacher*** as having the view that it would be easier to show that an agreement was not unfair if it excluded sharing but did not prevent the court from providing for the reasonable needs of the applicant. At para 81 of ***Radmacher***, it states that "*needs and compensation which can most readily render it unfair to hold the parties to an ante-nuptial contract*".

- Reference to a "*suitable departure from equality to reflect the Agreement*".

B v S (Financial Remedy: Marital Property Regime) **[2012] 2 FLR 502**

- Neither party had entered into the default matrimonial property regime with a full appreciation of its implications in the sense described in ***Radmacher***. Therefore no weight was attached to the agreement in the assessment of a fair award to the wife (para 34).

- The capital division was determined by the application of the principles of sharing and need. The principle of compensation was not applicable and was only likely to be applicable in exceptional cases as exemplified in ***Miller v Miller; MacFarlane v MacFarlane*** **[2006] UKHL 24**.

- A compensation based PP award would only arise exceptionally. Generally adjudged by reference to principle of need alone. Sharing should not apply to income claims.

- Where children equally divide their time between parents and husband is paying

more childcare costs and the school fees, it was neither fair nor reasonable for him to be required to pay a separate allowance to the wife for the children.

***Kremen v Agrest (Financial Remedy: Non-Disclosure: Postnuptial Agreement)* [2012] 2 FLR 414**

- Post-nuptial agreement, but there was a finding that there was no full appreciation by the parties of the implication of the post-nuptial agreement and that the agreement seriously prejudiced the reasonable needs of the parties' children. No weight was accorded to it and Mostyn J conducted the usual Section 25 exercise.

- There were also issues in relation to non-disclosure of assets when the post-nuptial agreement was entered into.

***SA v PA (Pre-Marital Agreement: Compensation)* [2014] 2 FLR 1028**

- Pre-nuptial agreement in Amsterdam the day before the wedding, excluding community property. Both parties were solicitors at the time (the wife ceased working; the husband was a successful magic circle lawyer at time of trial). Marriage of 18 years and four children aged between 13 and 19. Wife (48- English), Husband (50- Dutch). The wife asserts that no advice provided (contrary to notaries' attestation) and that she did not attend the office. The husband seeks to rely on the pre-nuptial agreement. The wife seeks alternative provision.

- Court should give effect to a nuptial agreement freely entered into by the parties with a full appreciation of its implications unless it would be unfair- irrespective of contractual status.

- The wife knew what she was signing up to- equal division of jointly created capital, together with its growth, capital acquired from external sources kept separate provided not mingled. No provision for maintenance.

- The wife's maintenance - not a compensation case (developing theme in ***B v S***) - wife had no appreciable track record when she gave up work.

- Sharing exercise did not stop with sharing provisions prescribed by the pre-nuptial agreement. Under both Dutch and English law any division was subject to augmentation to reflect need.

***AH v PH (Scandinavian Marriage Settlement)* [2014] 2 FLR 251**

- Pre-nuptial agreement in Scandinavia, short marriage, husband's substantial inherited wealth. Parties lived in UK during marriage, children aged 4 and 5.

- Both parties received legal advice on the pre-nuptial agreement (marriage settlement) and respective separate property agreed. Provision to the wife to enable her to purchase a property in Scandinavia which was where she asserted she would live in the future. No provision for maintenance for the wife or future children.

- Settlement (pre-nuptial agreement) sent for registration, declined. Further draft following the birth of first child, never signed. Second child born, home sold for £1.782 million, new property purchased for £6 million. Very high standard of living.

- Separation after 4 years. Both parties in rented accommodation. Wife petitioned for divorce and sought financial remedies on basis that she would remain living in the UK. Husband sought to implement terms of the pre-nuptial agreement paying wife £1 million from sale proceeds of FMH (net of wife's costs £760,000) just before the final hearing.

- Expert Scandinavian advice: judicially register settlement to protect assets from creditors of other spouse but properly constituted marriage settlement binding on parties even if not registered. BUT this marriage settlement would not be binding

because it included an advance agreement for distribution of assets which was not permitted. Husband's assets gifted to him remained separate property in respect of which wife had no claim.

- Application for financial remedies in English divorce proceedings- court applied English law irrespective of the domicile of the parties, or any foreign connection. Per ***Radmacher***, issues of foreign law relevant to the intentions of the parties.

- No requirement to receive specific advice on operation of English law. Must have intended agreement to apply wherever they might be divorced, if divorced in regime where discretionary equitable distribution applies. The other party's adviser should insert a clause dealing with this in the final agreement (para [53], following ***B v S***).

- Pay some regard to the agreement even if not held to it, the pre-nuptial agreement (marriage settlement) was one of the circumstances of the case.

- Although wife did not have full appreciation, relevant to pay some regard to the intentions of the parties at the time of the pre-nuptial agreement as one of the circumstances of the case. Intention: to protect husband's inherited wealth and provide wife with £850,000 to satisfy housing need. Those housing needs had changed. Change only to reflect the changed housing need. Short marriage, young ages, origin of husband's wealth. Husband's inherited capital should only be invaded to meet changed housing need.

- Wife received £7.75 million (£5.25 million for housing needs to include all associated costs, £2.5 million for income). House to subject to a charge in husband's favour on Mesher terms (£2 million). Wife could decide how she allocated resources. Wife to give credit for £760,000 already received.

- Wife's budget: £200,000 pa capitalised until youngest child completed secondary education rounded up to £2.5 million (full-life would be unfair having regard to length

of marriage, ages). Disregard wife's remarriage prospects despite husband's arguments on ***Dixon v Marchant*** **[2008] 1 FLR 655**. Welfare of children whilst minor first consideration. Section 25 (2) MCA need for fairness: length of marriage, ages of parties, assets all inherited and non-matrimonial and the existence of the pre-nuptial agreement is a circumstance of the case.

- Husband to pay school fees and reasonable extras. Live-in nanny costs to be shared to reflect caring arrangements for children (husband to have use of nanny when children with him). Child maintenance £20,000 pa per child, index-linked (CPI) (wife contended for £25,000 pa per child).

Y v Y (Financial Remedy: Marriage Contract) **[2014] EWHC 2920 (Fam)**

- With reference to a pre-nuptial agreement entered into in 1991: "*In 1991 no one knew how long the marriage would last. It could have endured for two years, twenty years, or a lifetime. It might have produced a single child or many more children. Her expectation as to her ability to survive independently from the husband within the financial structure of her own career might or might not have been realistic, depending upon circumstances as they unfolded through the years*".

- "*Needs is a concept which is both elastic and adaptive in its application*".

- "*I take the view that some contribution from the husband towards the wife's expenses relating to the children is appropriate*".

WW v HW (Pre-Nuptial Agreement: Needs: Conduct) **[2015] Fam. Law 1060**

- Discusses a step-down in property for the applicant parent when the children have reached 23. The order needs to remain needs focussed and when the children have left home, he will no longer need a 4 bedroomed house. As such the W is entitled to reduce the housing fund available at this point. Husband's conduct also considered.

I cannot complete this paper without mentioning:-

The Law Commission: "Matrimonial Property, Needs and Agreements", 26 February 2014

- Recommends statutory confirmation of the contractual validity of marital property agreements. However, it accepts that this will only make a difference in a small proportion of cases, as despite contractual validity, marital property agreements cannot take a couple's arrangements outside the scrutiny of the family courts; they will be upheld only if they are not unfair in accordance with Radmacher v Granatino.

- "*The SC in Radmacher has gone as far as it is possible for the courts to go in endorsing the validity of marital property agreements without an amendment to the statutory framework*."

- Recommends that legislation be enacted to introduce qualifying nuptial agreements – these cannot be used to enable one or both parties to contract out of their responsibility to meet each other's financial needs.

- "*The introduction of qualifying nuptial agreements would enable couples to have confidence that carefully negotiated agreements about the future sharing of assets would be upheld and enforced, without compromising either their responsibilities for their children. If circumstances changed and any arrangements made in the agreement for either party's living arrangements proved to be inadequate, the door to the court would remain open*".

- "*Qualifying nuptial agreements will be helpful in circumstances where the parties to a marriage have been in a relationship before and wish to safeguard a house or other assets for their children from previous relationships*".

- The current position in relation to pre-nuptial agreements is that it remains impossible for a marital property agreement to oust the court's jurisdiction to make financial orders, so where one party does not wish to abide by the agreement it is open to them to apply to the court for financial provision. However, only if it would be unfair to hold the parties to it, will the court instead make a different order.

- Where there are children who must be cared for and limited resources available, the parent who primarily cares for those children should be securely housed in priority to the other parent.

Practical Considerations

The Drafting Process

The Child(ren)'s Needs

A pre-nuptial agreement should not prejudice the needs of a child of the family. Such an agreement would not be upheld by the court and might risk the balance of the agreement. The parties cannot contract out of their financial responsibilities and obligations to any child of the family.

With the passage of time, the child's or children's needs are likely to change. None of us has a crystal ball…how do we overcome this issue (and protect ourselves from negligence claims)? What do we do if the agreement is silent as regards the children, makes unfair and inadequate provision for them (or, has happened in a recent case of mine, the agreement provided for a review on the birth of children but it just never happened)?

Perhaps it depends largely on which party you are instructed by at the time but to opine on strategy in any detail in this paper (and in isolation) would be dangerous. Assuming that we want to ensure the agreement will be upheld:-

- Periodical payments should be paid (whether by reference to the CMS or, if a maximum assessment, determined by the court). Remember that the court has jurisdiction if a child is a step-child treated as a child of the family, the child is 20 and in full-time education or either parent is habitually resident abroad.

- Reasonable housing needs would be one of those requirements including a home for both parents and not just the primary carer.

- At the time the pre-nuptial agreement is examined (often many years later), the court is likely to be critical of those agreements which fail to address the needs of children adequately or at all.

- Each party should be fully aware of the terms and understand them, they should be aware of their legal rights, there needs to be time for reflection having taken advice. The existence of other children should be taken into account and the agreement should provide that additional claims for them will not invalidate the agreement.

- The parties should acknowledge the potential for changes in the law but confirm that such changes will not invalidate the agreement.

- The terms of the agreement should be severable from each other and the agreement should state that the agreement will survive the invalidity of any other term, whether or not such invalidity is determined by any competent jurisdiction anywhere in the world.

- The safest answer to maximise the chances of the agreement being upheld might be to refrain from setting out a specific figure for the child (ren)'s capital/income needs. Or, like in ***WW v HW***, practitioners might consider expressly leaving open the ability for either party to make a separate claim in relation to provision for children.

- An amount could be included to be index-linked in accordance with CPI. The term and structure of the agreed payments should possibly be considered to provide more certainty.

Sample wording might be as follows:-

"The parties agree that financial provision for any child of the parties at the time of the permanent breakdown of the marriage, whether for capital or income, will be determined fairly in accordance with the law as it stands at the relevant time, taking into account all relevant circumstances including the resources available to each party from their share of the joint estate and their separate property and any resources (including trust funds) that can be applied for the benefit of any child of the parties".

"The parties acknowledge that it is premature at the time of this agreement to make specific agreement for maintenance and education for any children which are born to the parties. They acknowledge that they will share this obligation when it arises and they accept that:-

- The cost of any nanny or childcare arrangement to enable the primary carer to be employed will be paid pro-rata by each party according to their gross income as appears on their tax return or P60.

- The parties agree that private education will be provided for any child or children born to the marriage and if both parties are employed in their careers as……, they will contribute towards the school fees pro-rata according to their gross income as it appears on their tax return or P60.

- The parties agree that any children will benefit from private medical insurance, use of …..facilities".

CMS Interplay

CMS jurisdiction cannot be ousted by agreement between the parties - immediate CMS application on separation (***Dickson v Rennie*** **[2015] 2 FLR 978** to secure maximum assessment in relevant cases.

"*Provision for periodical payments for the children should be at the rate applicable at the time of the breakdown of the marriage under the relevant statutory formula assessed by the CMS. Consideration should be given to the payment of school fees in addition".*

Unfairness/ possible duress

In circumstances where the client is adamant that they wish to accept terms which you consider unfair, warn them. Consider ……to what extent this might assist your client though should the complete file of papers be required to be disclosed ?- (***Hopkins***)- have in mind the potential for waiving privilege should the client later seek to rely on the terms. Consider whether the collaborative process might be appropriate and weed out any potential signs of duress that could be recorded. I am aware of cases where solicitors have tape recorded (by agreement and obviously not to be recommended surreptitiously) a meeting between the two parties and the solicitors when negotiating terms / drafting a pre-nuptial agreement where duress was suspected.

Having a review clause might be useful: e.g. a review on the birth of children. Where no such review happens this might render the agreement invalid. However, reviews are generally now to be considered uncommon and were perhaps used as a temporary measure/ phase some years ago.

When the parties separate

Mitigating the Effects of a Pre-Nuptial Agreement which purports to exclude provision for Children

Where an agreement specifically excludes claims against separate property and other resources, and a claim for the financially weaker party for provision for capital will have little prospect of success, there will still be scope for such a party to claim a lump sum under the guise of a claim for maintenance: see ***Luckwell***

Maintenance extends not just to capitalised payments (a Duxbury) but also to provision for housing and capitalised provision for school fees. So, unless the agreement specifically excludes a claim for maintenance (as in ***Radmacher***) consideration should be given to pursuing a claim for maintenance, applying the principles derived from **Van den Boogard v Laumen (Case C-220/95) QB 759** (see too ***Kremen***).

When your client wants to avoid the terms

Following ***Radmacher*****,** the party wishing to escape the terms of the pre-nuptial agreement will need to establish:-

1. The existence of contract vitiating factors, thereby undermining the impression that the agreement was entered into freely; or
2. An absence on his/her part of a full appreciation of the agreement's implications; or
3. That it would not be fair to hold him/her to the agreement.

Practical Measures

- Obtain the complete file(s) of papers from when the pre-nuptial agreement was drafted and agreed, to include all legal and other advice, such as accountancy advice, property advice etc. Avoid relying on the client's instructions, even if some correspondence is produced.

- Obtain other contemporaneous information/ documents which may provide a comprehensive picture of intention at the time.

- Inform the other party immediately of the client's intention to not be bound by the agreement.

- Check whether the other party has fulfilled their obligations pursuant to the agreement and if not, whether the client has acquiesced in any non-compliance on the other's part.

- Any award which is negotiated (and which does not follow the terms of the agreement) should be marked without prejudice to their contention that the agreement has no effect and does not reflect an award taking into account the agreement and its terms.

- If dealing with a foreign agreement, establish how the agreement would be treated in the country where it was made and whether there would be available remedies there to challenge its terms. Expert advice from a matrimonial specialist there will be required.

- Avoid saying that the agreement should not be upheld and should not be taken into account at all: a repudiated agreement will still be "one of the circumstances of the case".

Where a claim cannot ostensibly be made

Consider a Schedule I, Children Act 1989 claim, which is not limited to unmarried parents. The claims of a child cannot be estopped notwithstanding concluded matrimonial claims between divorced parents ***MB v KB* [2007] 2 FLR 586**. Pursuant to paragraph 16(2) Schedule I, the power extends to making orders against a party to a marriage (or civil partnership) if the child is a child of the family (see Section 105 (1) CA 1989, where this is a child of both parties, or any other child who has been treated as a child of their family although foster children are excluded).

In a claim under Schedule I, statute dictates that the court must have regard to the resources of both parents but not to their standard of living. Therefore the assessment of need is still likely to be given to the standard of living or lifestyle likely to be enjoyed by the wealthier party seeking to uphold the terms of the pre-nuptial agreement; and the extent of the resources of the wealthier party. Remember that Schedule I claims might include carer's allowance (acknowledged by Mostyn J in ***KS v ND (Schedule I: Appeal: Costs)***

[2013] 2 FLR 698 see also Macur LJ's comments in ***Re A (A Child: Financial provision)*** **[2015] 2 FLR 625** - until conclusion of the child's dependency) but beware "back door maintenance" arguments .

How to limit exposure to negligence claims

- ***Radmacher***: the SC did not make it an absolute pre-requisite that, to give weight to a pre-nuptial agreement, the parties had legal advice prior to the agreement being signed. Instead, the test was "*whether the agreement was "freely entered into by each party with a full appreciation of its implications*".

- ***Kremen v Agrest***: Despite SC's reluctance to set formal pre-requisites for giving an agreement decisive weight, Mostyn J suggested that in practice the law would normally demand both disclosure and that both parties received legal advice.

- Since ***Radmacher***, there has been an increased interest in the use of nuptial agreements.

- A lawyer advising one party to the agreement may be negligent if he or she does not advise their client to ensure that the other party also takes independent legal advice or at least has a reasonable opportunity to do so.

- However, the nature of the advice to be provided and the adviser's duties are not spelt out in matrimonial case law. As such we perhaps need to consider other areas of the law.

- The requirements of independent legal advice have received considerable judicial consideration in the course of the development of the doctrine of undue influence. ***Smith v Cooper*** **[2010] 2 FLR 1521** defined independent legal advice as:

"*advice to and for the benefit of the one party alone given by an adviser whose duty it is to consider the position of that party and to advise them so that they can give thought, free of any influence or dependence on the other party, as to whether they really do want to enter into the transaction, bearing in mind its full implications from their point of view*".

- The commercially available precedents for pre-nuptial agreements contain a certificate to be completed by each party's adviser, along the following lines:

- Prior to [ ] entering into this Deed, I have provided to [ ] independent legal advice as to the following matters:

    - The effect of the agreement on his/her rights;
    - Whether, at the time my advice was given, it was to his advantage, financially or otherwise to enter into the agreement;
    - Whether, at the time, it was prudent for him to enter into the agreement; and
    - Whether, at the time and in the light of such circumstances which were reasonably foreseeable the terms of the agreement were fair and reasonable.

- This has been drawn from Australian legislation.

- The Australian experience of Binding Financial Agreement legislation was that many family lawyers refused to offer this advice and provide the suitable certificate.

- As a result, Australian law was amended so that the legal advice requirement was satisfied by providing a certificate stating that the lawyer had advised on the "effect of the agreement on the rights of [the party] and about the advantages and disadvantages at the time the advice was provided, to that party of making the agreement".

- Often such advice goes beyond the qualifications or expertise of a family lawyer and may extend further than the scope of a family lawyer's indemnity cover (consider financial/commercial advice as opposed to legal advice).

- Taking on board the Australian experience, the Law Commission's recommendation for the legal advice requirement for the proposal "Qualifying Nuptial Agreement" was for a statement to be signed by both lawyer and the client to the effect that the client had been advised:

- That the agreement is a qualifying nuptial agreement that will prevent the court from making financial orders inconsistent with the agreement, save so far as financial needs are concerned.

- Of the effect of the agreement on the rights of the party being advised.

- However, this limited format will still expect the lawyer to evaluate the particular circumstances of the case and consider what the consequences of the agreement might be for the court in the future, not only based on what is known at the time the agreement was entered into, but also anticipating foreseeable changes in circumstances in the future.

- The duty of care: the standard of the reasonably competent practitioner undertaking the type of work in question.

- Limiting liability:
  - Decline to draft agreements or to advise clients in relation to them;
  - Take out adequate professional indemnity insurance and consider a sharing of risk/ insurance between solicitor and counsel;
  - Require a waiver or indemnity from the client and/or limit liability by contractual terms.

Also, might it be possible to consider Before the Event Insurance, if an insurance provider can be identified?

Conclusion

Pre-nuptial agreements which do not foresee children or make provision which would produce an unfair result for children do not necessarily affect the court's consideration of the agreement itself, provided that they are drafted in such a way as to ensure that the balance of the agreement is not invalid. The court's power to make decisions regarding financial provision for the benefit of children cannot be fettered, despite the more significant weight which is now attached to pre-nuptial agreements following ***Radmacher***.

Ensure that there can be no suggestion of duress, nor any factors which might vitiate an agreement, and that it is evident that both parties fully understand the terms they are agreeing.

The provisions in a pre-nuptial agreement might give rise to an award which is similar in structure to one which one might expect for a parent in Schedule I cases, with a step down both in terms of income and housing. Schedule I might be an alternative route in respect of children in any event.

If drafting an agreement where your client wishes to maximise the possibility of the agreement being upheld, ensure that there is adequate provision for some discretion to take into account all of the needs of the children and consider indicating that provision for their benefit should include those aspects but in more general terms, resisting any attempt to limit need for the children. Ensure that clauses are severable to avoid arguments which might give rise to an agreement being given significantly less weight. Nonetheless, it is not the child or the children who might be penalised as this would be unfair (***Luckwell***). In all cases, remember that intention must be clear and that, as advisers, we must also bear in mind the need to be cautious when advising on the terms (and ensure adequate

insurance provision). Remember too that we should always consider any potential moves away from the jurisdiction (or a change in legislation) and factor this into our advice.

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