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Matrimonial Finance: Shaping New Law into Solution-Focused Advice for Your Clients

Nuptial agreements: What is the interaction of valid prenup and postnup agreements (PNAs) with s.25(2) MCA 1973?
What are the drafting pitfalls? What about cohabitation agreements?

A. Can PNAs be binding?

1. In no circumstances can a PNA be binding in this jurisdiction. The court is in every case obliged to consider the s.25 factors and exercise its discretion; and the existence of a PNA will be one factor to which the court pays regard when conducting that exercise.

2. The obligation of the courts to apply s.25 in all cases was stressed by Lord Phillips in *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. …

3. That principle has been reiterated often in the post-*Radmacher* jurisprudence:

   a. *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.

b. *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). …

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

> Family courts have developed specific procedures for the determination of certain types of financial application. The obvious example is the determination of an application on a summons to a respondent to show cause why the order should not be in the terms with which, prior to an attempt to resile from them, she or he had agreed either following the separation (*Dean v Dean* [1978] Fam 161) or prior to the marriage (*Crossley v Crossley* [2008] 1 FLR 1467). In both cases, however, the court stressed that the show-cause procedure did not obviate the need for the court to discharge its duty under section 25 of the 1973 Act, powerful though the effect of the agreement would, within that exercise, probably prove to be.

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

> I am reinforced in that view by the fact that *Radmacher* in recognising PMAs carries within it a safety net through its expectation of both fairness [para 73] and that needs will be provided for.

B. What extent of analysis is required when applying the s.25 criteria in the context of a PNA?

4. Although the court has an obligation to consider the s.25 factors in every case, that does not require it to hear a full final hearing ventilating all of the s.25 factors in detail. A PNA is one factor of the case; but it can be a magnetic factor in the right circumstances, and accordingly play a leading role in the court's analysis:

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

> [14] The wife seeks to persuade the court to make directions in the ancillary relief proceedings, albeit on a slightly more limited basis than would be normal given the concession made by the wife as to the proportions in which the assets should be held (although requiring replies to her questionnaire). The husband submitted that the court should stay the ancillary relief proceedings and hear the notice to show cause, with a view to making an order in the terms he submitted had been agreed [at a round table meeting]. This course would leave open to the court the possibility of reinstating the ancillary relief proceedings in the event that the court was not satisfied that (i) there was an agreement; and (ii) the wife should be held to its terms.

[23] The following propositions drawn from the authorities referred to by counsel, seem to me to be of particular relevance on the facts of this case:

(ii) The court when considering whether there is an agreement and its effect if there is, does so against the backdrop of s 25 […]

Mr Pointer relies on *Smith v Smith* [2000] 3 FCR 374 in support of his submission that the issue of an agreement should not be dealt with as a preliminary issue *in isolation* by way of a notice to show cause. *Smith v Smith* is an example of a case where the court at first instance fell into the trap of considering an agreement as a preliminary issue in isolation without any consideration of the s 25 factors. As a consequence an order was made holding a wife to an agreement which singularly failed to meet her basic needs. Thorpe LJ said: (at 381f)

> *"My greatest criticism of this judgment is one that is perhaps not directed against the judge himself. I believe that the omissions in the judgment are probably the product of the way the case was presented and argued. It seems as if it was almost presented to the judge as a preliminary issue for him to decide whether the existence of the contract in September 1996 disentitled the wife, as a matter of either law or discretion, from an investigation of her statutory claims. That was simply not the judicial function. As Ormrod LJ had made clear first in the unreported case of* Brockwell v Brockwell *[1975] CA Transcript 468 and then in* Edgar*, when a wife brings to the court her statutory claims for determination the existence of an earlier contract is only one of the considerations to which the judge must give weight. In the application of the statutory criteria to the case, Ormrod LJ said that it should be brought in under the head of conduct: s 25(2)(f) of the Matrimonial Causes Act 1973."*

I do not take *Smith v Smith* to be saying that the court must always hear a case as a full blown ancillary relief hearing where there is an alleged agreement, but rather as a trenchant reminder that an agreement forms part of all the circumstances of a case and that, even if such an agreement be found to be of magnetic importance, the court should only ever consider such an agreement against the backdrop of all the s 25 factors.

There is no reason why in an appropriate case, the status of an alleged agreement should not be dealt with as a notice to show cause determined against the backdrop of a consideration of the s 25 factors. Such an approach is in my judgment, fundamentally different from one where the court embarks on a consideration of evidence as to the existence of an agreement as a preliminary issue, in a vacuum, with no consideration of the surrounding circumstances or s 25 factors.

I therefore accept Mr Pointer's submission to the extent that I agree that it would be wrong to 'stay' the ancillary relief proceedings and to list the issue of the agreement as a preliminary issue isolated from a proper consideration of the s 25 factors.

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.

(Emphasis added)

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

> Where, in contrast, one of the parties seeks to resile, the court has long sanctioned use of the abbreviated 'notice to show cause' procedure utilised in *Dean v Dean* [1978] Fam 161, *Xydhias v Xydhias* [1999] 1 FLR 683, *X and X (Y and Z Intervening)* [2002] 1 FLR 508 and *S v S (Ancillary Relief)* [2009] 1 FLR 254. The approach here was well captured by Thorpe LJ in *Xydhias v Xydhias* [1999] 1 FLR 683, 692:
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> > *"If there is a dispute as to whether the negotiations led to an accord that the process should be abbreviated, the court has a discretion in determining whether an accord was reached. In exercising that discretion the court should be astute to discern the antics of a litigant who, having consistently pressed for abbreviation, is seeking to resile and to justify his shift by reliance on some point of detail that was open for determination by the court at its abbreviated hearing."*
>
> 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).

5. In short: it is right that the court must consider s.25, but in a given case, that analysis may be dominated by the terms of the PNA.

6. The application of that proposition was subject to detailed scrutiny by King LJ in *Brack v Brack* [2018] EWCA Civ 2862. What is the impact of *Brack* on the interplay between (i) the court's obligation to apply s.25, and (ii) the perception that, absent vitiating factors and any failure to meet needs, the courts will tend to afford such significant weight to a PNA that they are *effectively* bound by it?

> 98. In the judgment, it is clear that the judge took the view that, having found there to be an effective prenuptial agreement, he could only (to use the judge's own, phrase) "invade the husband's assets" to the extent necessary to provide for the wife's needs, and that payment of additional funds (by way of the sharing principle) was not open to him. The judge decided this notwithstanding his finding that *Radmacher* left him with a wide discretion as to what is fair in any given case. Having found himself unable to make an award providing for the wife's needs as a consequence of what he had held to be a valid MPC, the judge was left with no other option within the financial remedies proceedings other than to make declarations in relation to the parties' strict property rights.
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> 99. In summary, therefore, the route followed by the judge in relation to the prenuptial agreements was that: i) He found there to be no vitiating features which would preclude the implementation of the agreement; ii) He was aware from *Radmacher* that parties to such agreement are able to "contract out" of sharing; iii) In *Z v Z* and *Luckwell*, where the agreements had been held to be valid, the courts had made only

needs-based orders; iv) He concluded said that [62] "the effect of the above is... that I am now to approach the case on a needs basis".

100. In my judgment, this analysis cannot properly be characterised as an exercise of discretion by the judge on the facts of the case; rather it is clear from the totality of the judgment that he felt himself to be in a straitjacket and that on the authorities, he was driven inexorably to conclude that he only had power to make a needs-based order.

101. In my judgment, the judge did fall into error in going so far as to conclude that the effect of *Z v Z* and *Luckwell* meant that the wife had inevitably "lost" her sharing claim by reason of the prenuptial agreement.

102. It is undoubtedly the case that since the Supreme Court's decision in *Radmacher*, and up to and including Roberts J's judgment in *KA v MA* in March of this year (2018), the courts at first instance have resolved cases where there is a valid prenuptial agreement which does not meet the needs of the wife by interfering with the agreement only to the extent necessary to ensure that those needs are satisfied. In doing so, the courts have honoured the sentiment in *Radmacher* [75] by respecting the autonomy of the parties and by giving effect to the nuptial agreement which has been freely entered into to the extent that it is fair to do so.

103. In my judgment, **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. Even where there is an effective prenuptial agreement, the court remains under an obligation to take into account all the factors found in s25(2) MCA 1973, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children**. Such an approach may, albeit unusually, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of an agreement, provides a settlement for the wife in excess of her needs. It should also be recognised that even in a case where the court considers a needs-based approach to be fair, the court will as in *KA v MA*, retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs.

104. It follows that the appeal must also be allowed in relation to Ground 1, given that, in my judgment, the judge was in error in regarding himself as being precluded, consequent upon the prenuptial agreements, from making an order in favour of the wife that was not based on her needs.

105. I should emphasise that in allowing the appeal, the court is not advocating an award in excess of the wife's needs, nor is it saying that having considered the case, and taken into account all the circumstances of the case, the judge will not reach the same conclusion as he did before, namely that this is a "needs case". All this court is doing is remitting the case to the judge, now absent a valid MPC, in such a way as to leave him in a position to exercise his broad discretion, to make such order as he deems to be fair in all the circumstances.

(Emphasis added.)

7. *Brack* does not row back from the position that if a PNA has been agreed freely and is not encumbered by vitiating factors then its terms will usually (but, strictly speaking, not inevitably) be honoured in the outcome of the s.25 analysis.

8. The point made by King LJ in the paragraphs cited above is that the court's jurisdiction cannot be fettered, or bound by a straightjacket, when exercising its discretion. That must be right: the court must in all cases consider and apply the s.25 factors. However, that does not have the effect of driving 'a coach and horses' through the body of jurisprudence which indicates that 'legitimate' PNAs will almost always lead to the conclusion that it is fair to assess the claim on a needs basis. *Brack* clarifies that such an approach is not inevitable, because it cannot be inevitable; but it is still logically and legally bound to be the outcome in those circumstances, save in an exceptional case. That is consistent with King LJ's comments at [103] and [105].

9. In other words; there will be cases in which a PNA will "*necessarily dominate the discretionary process*" (per Eleanor King J, *S v S*).

10. The husband has sought permission to appeal from the Supreme Court. A decision is awaited. If permission is not granted then the case has been remitted back for hearing before Francis J. A hearing is currently listed for October 2019.

C. <u>How does the court establish the weight to be attributed to a PNA?</u>

11. How is it determined where the balance is struck between a full and detailed s.25 analysis, and a discretionary exercise dominated by the PNA?

12. *Radmacher* remains the starting point as the principal authority in this area of law. Lord Phillips identified three heads for consideration when determining the weight to be attributed to a PNA:

    a. **factors detracting from the weight** to be accorded to the agreement [68 – 73]: Parties must enter into an ante-nuptial agreement voluntarily, without undue pressure and be informed of its implications. The question is whether there is any material lack of disclosure, information or advice;

    b. **factors enhancing the weight** to be accorded to the agreement: the foreign element [74]; and

    c. **fairness** [75]:

> An ante-nuptial agreement may make provisions that conflict with what a court would otherwise consider to be fair. The principle, however, to be applied is that 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 to hold the parties to their agreement.

13. In the years following *Radmacher* there has been no shortage of jurisprudence which seeks to summarise and expand the interpretation and application of those principles, notably *Kremen v Agrest (No. 11) (Financial Remedy: Non-Disclosure: Post-Nuptial Agreement)* [2012] 2 FLR 414, FD per Mostyn J at [72], *BN v MA* [2013] EWHC 4250 (Fam), per Mostyn J at [26-30], and *Luckwell v Limata* [2014] 2 FLR 168, FD.

D. Fairness: how is it assessed? How should the court treat an unfair PNA?

14. When applying *Radmacher*, in lieu of vitiating factors and foreign elements, how does the court determine whether it would be fair to hold the parties to the terms of the agreement? How does the analysis of fairness differ from a case with no PNA?

a. *Kremen v Agrest (No. 11) (Financial Remedy: Non-Disclosure: Post-Nuptial Agreement)* [2012] 2 FLR 414, FD per Mostyn J:

> [72] In *Granatino v Radmacher* [2011] AC 534 the Supreme Court gave definitive guidance as to the treatment of a nuptial contract in proceedings for ancillary relief following a domestic divorce. The guidance contained in the judgment of the majority delivered by Lord Phillips of Worth Maltravers PSC can be summarised as follows:
>
> […] (iv) In determining whether *"in the circumstances prevailing it would not be fair to hold the parties to their agreement"*:
>
> (a) The agreement cannot be allowed to prejudice the reasonable requirements of any children of the family (para 77).
>
> (b) Respect should be accorded to the decision of a married couple as to the manner in which their financial affairs should be regulated particularly where the agreement addresses existing circumstances and not merely the contingencies of an uncertain future (para 78). **This is likely to be so where the agreement seeks to protect pre-marital property (para 79). By contrast it is less likely to be so where the agreement leaves in the hands of one spouse rather than the other the most part of a fortune which each spouse has played an equal role in their different ways in creating** (para 80). 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 (para 81).

(c) **Is likely to be unfair to hold the parties to an agreement which leaves one spouse in a predicament of real need, while the other enjoys a sufficiency or more (para 81). However, need may be interpreted as being that minimum amount required to keep a spouse from destitution**. For example, if the claimant spouse had been incapacitated in the course of the marriage, so that he or she was incapable of earning a living, this might well justify, in the interests of fairness, not holding him or her to the full rigours of the ante-nuptial agreement (para 119).

(Emphasis added.)

b. *Luckwell v Limata* [2014] 2 FLR 168, FD per Holman J at [130]:

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:

i) A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children;

ii) 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;

iii) 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;

iv) 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;

v) 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';

vi) Where each party is able to meet his or her needs, fairness may well not require a departure from the agreement.

131. In elaboration of proposition 6 i) above, I should stress that part of the express statutory duty of the court under section 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 eighteen. As in *Granatino v Radmacher*, the children in the present case spend time with each of their parents, and the financial circumstances of each of their parents are likely to impact upon their welfare. The facts of the two cases differ markedly – Mrs Radmacher was far, far richer than is Victoria – but in *Granatino v Radmacher* quite significant financial provision was made for the husband, in his role as father, until the younger child attained 22. In that case, however, the children were broadly evenly residing with each of the parents.

132. To counsel's propositions of law I add one other, which needs no citation of authority. The court must be scrupulous to avoid gender discrimination or gender bias. Of course gender may, and often does, impact heavily on outcome. If in fact a

wife, in her role as mother, is the primary carer for the children, then her need for secure and suitable accommodation may outweigh that of the husband. If a wife, due to her commitments to caring for the children, is less able to work than is the husband, than that is likely to impact upon maintenance needs. So, too, if it is a fact of a case that a wife has lower earning capacity because of gender discrimination in the relevant employment markets. But there must be no discrimination or bias based on gender alone, nor on any stereo–typical view that a wife may be dependent upon her husband but not vice versa.

c. *DB v PB* [2016] EWHC 3431 (Fam) per Francis J:

58. In argument, however, Mr Chamberlayne persisted in his submission that a very unfair prenuptial agreement should be "ripped up" even if not contaminated from the outset by one of the vitiating factors and even if apparently fair when entered into. I disagree. The effect of this would be that an agreement properly entered into but which turns out, with hindsight, to be unfair, would be completely disregarded when it reached a particular tipping point. It would have the effect that a relatively unfair agreement would be binding whereas a very unfair agreement would be treated as if it never existed. It would place legal advisers in a most precarious position of having to advise their client of the moment at which the tipping point would be reached. In *Radmacher* itself the Supreme Court found the agreement to be unfair and intervened to provide additional housing and income for the husband, albeit on a limited basis, both in terms of amount and timing. If Mr Chamberlayne's submission is correct then why did the Supreme Court not simply disregard the prenuptial agreement altogether? The answer, it seems to me, is to be found in the fact that the court paid substantial regard to the concept of autonomy in saying, at paragraph 78, "the reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated."

59. I recognise that in *Radmacher*, the husband's sharing claim was of a very different nature since the overwhelming part of the fortune concerned derived from the wife's family and did not constitute what we might these days regard as matrimonial property. In the instant case, I have already noted that the overwhelming majority of the assets were generated during the marriage and so the wife's sharing claim is clearly made out. This makes it easier for me to find, as I do, that the agreement is unfair. But that does not, as a matter of law, drive me to disregard it altogether.

60. What is the correct approach of the court when a prenuptial agreement has been found to be unfair? […] Where, as here, a valid agreement has been entered into and there are no vitiating factors present, then **in my judgment it would be wrong simply to disregard the agreement; rather it is the court's duty to step in to alleviate the unfairness. That will not usually be simply to restore the parties to the position that they would have been in absent the agreement.** In the instant case the parties agreed to a regime of separate property, so the starting point here is that, apart from the matrimonial home, the husband owns everything. Where assets are available (as here) to meet the wife's needs, these should be met by invading the husband's separate property. The extent to which need is "generously" or otherwise interpreted will of course vary from case to case.

61. This is the approach which was taken by Moor J in *Z v Z* [2011] EWHC 2878

(Fam) where the court upheld a French *separation de biens* insofar as it excluded sharing but the court went on to meet the wife's reasonable needs. A similar approach was adopted by Holman J in *Luckwell v Limata* in 2014.

(Emphasis added.)

d. *Versteegh v Versteegh* [2018] 2 FLR 1417, CA per King LJ:

77. Mr Bishop submits that once a husband chooses to make an offer in excess of that to which a wife would be entitled under the strict terms of a PMA, then that PMA (and its agreed intention) must be ignored and the case become a pure 'sharing' case entitling the wife to a full half share of the assets (subject only to any allowance for non-matrimonial assets). With respect to Mr Bishop, I cannot accept the logic of that argument.

78. Such an approach runs against the fundamental tenet of *Radmacher*. 'Fairness' does not, in my judgment, require a court to ignore the precept upon which the parties have governed their affairs for over 20 years, anchored as they were to a PMA, simply because the husband, for whatever reason, chose not to hold the wife to that agreement in its entirety.

[…]

82. **In my judgment, the case was a 'sharing case' in that the provision made went beyond that which would provide for the needs of the wife. That that was the case does not, in my view, catapult a court to the conclusion that the only fair distribution of the assets is now an equal division of the assets, subject only to an appropriate adjustment to reflect the pre-marital assets of the husband.** In my judgment, an effective PMA is another example of a case where, upon a proper consideration of all the circumstances of the case (per s.25(1) MCA 1973), a court can conclude that (notwithstanding that the husband does not seek to enforce the PMA in full, and that there is now a sharing element to the case, needs having been exceeded) the assets should be divided unequally. This to use the words of Lady Hale in *Radmacher* represents a "modification of the sharing principle"[178].

(Emphasis added.)

15. It is evident from the jurisprudence above that:

a. any minor children remain the court's first consideration (*Kremen*, *Luckwell*);
b. 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*);
c. leaving a party in a predicament of real need is unlikely to be fair (addressed in more detail below) (*Kremen*);
d. respect should be afforded to the parties' autonomy (*Luckwell*);
e. an unfair PNA need not be discarded: instead the court may alleviate the unfairness (*DB v PB*); and
f. 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*).

E. How does the court assess needs in the context of a 'valid' PNA?

16. Self-evidently an important component of any analysis of 'fairness' is whether the party's needs are met. How are those needs assessed? Is that analysis of needs any different than that ordinarily undertaken by the court in a case without a PNA?

17. 'Needs' are infamously flexible. Mostyn J has recently described in *FF v KF* [2017] EWHC 1093 (Fam) at [18] that the concept of 'needs' is inherently flexible and arbitrary:

> So far as the "needs" principle is concerned there is an almost unbounded discretion. [...] Like equity in the old days, the result seems to depend on the length of the judge's foot.

He adds:

> The main rule is that, save in a situation of real hardship, the "needs" must be causally related to the marriage. [...] The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise.

18. That is the backdrop against which the court forms a view as to needs. Since the exercise is discretionary, there is a bracket within which needs can be assessed generously or stringently without straying into 'unfairness'.

19. Post-*Radmacher* the court has sought to express the relationship between a PNA and the appropriate interpretation of needs thus:

    a. *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] 2 FLR 533, FD per Mostyn J:

> [16] An interesting question is whether the assessment of 'needs' can be affected by factors other than the scale of the available resources and the marital standard of living. Specifically, can the assessment of need be informed by the fact that there is present in the case a deal of pre-marital property? Mr Dyer QC says certainly so; Mr Amos QC strongly disagrees.
>
> [17] Just as there are 'inheritances and inheritances' there are 'needs' and 'needs'. In *McCartney v Mills McCartney* [2008] 1 FLR 1508 the wife's award was calibrated solely by reference to her 'needs' in the sum of £24.3m. This is, of course, worlds away from 'needs' as most people would understand them to be, even needs 'generously interpreted'. However, the needs in that case were assessed only by reference to the vast scale of the husband's resources, and the marital standard of living. **But there have been instances of needs being informed by factors other than these. … in *M v***

M (Prenuptial Agreement) **[2002] 1 FLR 654 Connell J pared the wife's needs down because she had signed a pre-nuptial agreement (see para [44]). This is what Baron J did in *Granatino* at first instance (*NG v KR (Prenuptial Contract)* [2009] 1 FLR 1478) …**

[18] **Thus the husband's needs were cut right down to a level that would have been inconceivable had there been no pre-nuptial agreement.** One of the reasons that public policy demanded such rigour to be imposed on the husband was that the pre-nuptial agreement was intended to preserve the wife's non-matrimonial property, as explained by Lord Phillips of Worth Matravers thus ...

[19] **So if an agreement to preserve non-matrimonial property can have the effect of assessing need more conservatively (indeed in *Granatino* far more conservatively) than would have been the case absent that factor,** why cannot the presence of pre-marital property simpliciter not have an equivalent or similar effect? I accept, of course, that in *Jones* at para [31] Wilson LJ has stated that …

I do not take this passage to suggest that assessment of need is an insulated metric uninformed by factors that are centrally key to the performance of the sharing principle, for the reasons I have stated above.

(Emphasis added.)

b. *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). **But an agreement is capable of altering what is fair, including in relation to 'need'**;

[…]

[138] On the facts of this case there is only one consideration which is capable of outweighing the above considerations and capable of having the effect that the agreements should not be applied rigorously and to the letter. That consideration is current and likely future need. During the course of his oral argument Mr Marks submitted that 'needs trump the agreement(s)'. I profoundly disagree with that submission. **There is no question of needs being a 'trump card'. They may, however, outweigh the fact of an agreement in the overall circumstances of a particular case**.

(Emphasis added.)

c. *Kremen v Agrest (No 11) (Financial Remedy: Non-Disclosure: Post-Nuptial Agreement)* [2012] 2 FLR 414, FD per Mostyn J at [72]:

(c) Is likely to be unfair to hold the parties to an agreement which leaves one spouse in a predicament of real need, while the other enjoys a sufficiency or more (para 81). **However, need may be interpreted as being that minimum amount required to keep a spouse from destitution.** For example, if the claimant spouse had been incapacitated in the course of the marriage, so that he or she was incapable of earning a living, this might well justify, in the interests of fairness, not holding him or her to the full rigours of the ante-nuptial agreement.

(Emphasis added.)

d. *Hopkins v Hopkins* [2015] EWHC 812 (Fam) per Nicholas Cusworth QC (sitting as a Deputy High Court Judge):

> [78] Real need in this context is not to be equated to "reasonable need", as the decision in *Radmacher* made clear. **As Mostyn J in *N v F* [2011] EWHC 586 (Fam), [2012] 1 FCR 139, [2011] 2 FLR 533 confirmed at 18, in *Radmacher* "the husband's needs were cut right down to a level that would have been inconceivable had there been no pre-nuptial agreement."** Lord Phillips description of a circumstance where the court may have intervened was stark indeed "119 . . . Had the husband been incapacitated in the course of the marriage, so that he was incapable of earning his living, this might well have justified, in the interests of fairness, not holding him to the full rigours of the ante-nuptial agreement. But this was far from the case."
>
> […]
>
> [89] I bear in mind as well that the wife's case before me has been principally for a generous needs based assessment. This in itself must be a reflection of the fact that this agreement represents an acknowledgment by both parties that needs based quantification is fair to the wife. **The difference between their two positions has essentially been whether those needs should be generously or more realistically assessed. That therefore is where the existence of the agreement has made a difference. That is fair.**
>
> (Emphasis added.)

e. *WW v HW (Prenuptial Agreement: Needs: Conduct)* [2016] 2 FLR 299, FD per Nicholas Cusworth QC (sitting as a Deputy High Court Judge):

> [53] **So, should the husband's need here necessarily be interpreted as the minimum amount that is required to keep him from destitution? This will not invariably be the case, even where an agreement would otherwise produce such an extreme situation**. **As Lord Phillips confirmed in *Granatino v Radmacher (Formerly Granatino)* [2010] 2 FLR 1900 at [75]: 'The fact of the agreement is capable of altering what is fair'. However, even where there is an agreement, fairness will not necessarily equate to near destitution. The level at which a party's needs should be assessed, if they are not met by an agreement which might otherwise be binding upon them, must surely depend upon all the circumstances of the case, amongst which the fact of the agreement may feature prominently as a depressing factor. But each case will be different.**
>
> [54] In *Radmacher* itself, having rejected the view adopted by Wilson LJ in the Court of Appeal that the agreement should be binding irrespective of need, the Supreme Court went on to find that in that case the husband's needs were in fact met by the award made, albeit it not at the level he might have expected absent the agreement. Given the earning capacity which they were inferentially able to attribute to him, this could hardly be equated to 'destitution'. In *Luckwell v Limata* [2014] 2 FLR 168, Holman J found of the husband in that case at para [143] that: 'He has no home, no current income, no capital, considerable debt and absolutely no further borrowing capacity'. He justified further

provision on the basis at para [148] that: 'the need to provide an adequate home in which the children can visit and stay with their father is very important'.

[55] Unlike *Luckwell*, and more closely like *Radmacher*, this is a case where any provision which W makes will have a significant effect on the quality of the children's lives whilst they are with her. There is thus no need to balance the effect on the children of losing their home with one parent to provide adequate accommodation in which they can stay with the other. **However, it should be borne in mind that any award to meet need, even absent the agreement in this case, is being made from non-matrimonial assets; and here those assets were specifically protected by the agreement which H willingly entered into. There is consequently no obvious basis for any generosity in the interpretation of these needs**.

(Emphasis added.)

f. *KA v MA (Prenuptial Agreement - Needs)* [2018] 2 FLR 1285, FD per Roberts J:

[110] In the context of a claim which proceeds from a clean sheet in terms of an assessment of 'need', this statement of her housing needs would be entirely unobjectionable in the circumstances of this case and the resources available to the husband. However, in the light of my findings in relation to the prenuptial agreement, I do not start with that clean sheet.

[111] I am satisfied that a fair outcome in the assessment of both housing and income needs in this case must reflect the fact that this wife agreed to restrict the ambit of her financial claims should the marriage end in divorce.

g. *Ipekci v McConnell* [2019] EWFC 19 per Mostyn J:

[27] I have no hesitation in deciding on the facts of the case before me that it would be wholly unfair to hold the husband to the agreement that he signed. This is for the following reasons: […]

iv) The agreement does not meet any needs of the husband. **I do not take the language used by the Supreme Court, namely "predicament of real need" as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play should be markedly less than needs assessed in ordinary circumstances. If you have reasonable needs which you cannot meet from your own resources, then you are in a predicament. Those needs are real needs.**

v) In the circumstances of this case I attribute therefore no weight to the prenuptial agreement.

(Emphasis added)

20. As such the court's analysis of needs in the context of a PNA will be informed by the following:

a. a PNA can alter what would otherwise be fair, which includes how generously a party's needs should be assessed (*Luckwell*);
b. a PNA may feature prominently as a depressing influence on that analysis (*WW v*

HW);

c. 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*);
d. 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
e. 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*).

F. Prenuptial and postnuptial agreements

21. This document has not distinguished between prenuptial and postnuptial agreements; they are for the most part discussed interchangeably in the jurisprudence. Per Lord Phillips in *Radmacher* they will usually be treated identically by the court:

> 57. Is there a material distinction between ante-nuptial and post-nuptial agreements? Wilson LJ was not persuaded that there is (paras 125-126) and nor are we. The question should be tested by comparing an agreement concluded the day before the wedding with one concluded the day after it. Nuptial agreements made just after the wedding are not unknown and likely to become more common if the law distinguishes them from ante-nuptial agreements.
>
> […]
>
> 61. This is not to say that there are no circumstances where it is right to distinguish between an ante-nuptial and a post-nuptial agreement. The circumstances surrounding the agreement may be very different dependent on the stage of the couple's life together at which it is concluded, but it is not right to proceed on the premise that there will always be a significant difference between an ante- and a post-nuptial agreement. Some couples do not get married until they have lived together and had children.

22. As regards the relevance of the distinction between prenuptial and postnuptial agreements, see *BN v MA* [2013] EWHC 4250 (Fam) per Mostyn J:

> 24. Regarding the question of the treatment of a nuptial agreement, there has been definitive guidance given by the Supreme Court in the well known case of *Granatino v Radmacher* [2011] 1 AC 534. I myself attempted to summarise the principles in my decisions of *Kremen v Agrest No. 11* [2012] 2 FLR 414 and *B v S* [2012] 2 FLR 5012. In *Granatino v Radmacher* the Supreme Court analysed very closely the nature of nuptial agreements. They pointed out that nuptial agreements come in numerous shapes and forms and can be entered into at any point before, during or after a marriage. And so our case law has dealt with agreements which have been entered into before marriages, the classic prenuptial agreement, as is the case here; although usually they are longer lived than a mere 15 months, which is the case here. The cases have addressed postnuptial agreements or intranuptial agreements made while the parties are living together and are intending to live together -- that was the case in *MacLeod v MacLeod* [2010] 1 AC 298;

separation agreements made after the marriage has broken down but before divorce proceedings have been launched but made in contemplation of such divorce proceedings - that was the case in *Edgar v Edgar* [1980] 1 WLR 1410; agreements made that compromise a financial remedy claim made in divorce proceedings but which compromise has not yet received the approval of the court. That was the case in *Xydhias v Xydhias* [1999] 1 FLR 683.

25. **The most important difference between these various types of agreement is the chronological point at which they are entered into.** Obviously, in the general run of cases, a prenuptial agreement would be entered into a long time ago, whilst a *Xydhias* agreement will have been reached shortly before the hearing of the financial relief claim in question. **The significance of the effluxion of time is, of course, as the Supreme Court explained in paragraph 65, that with the passage of time circumstances eventuate in a way in which the parties have not apprehended, and this is one of the principal reasons why the courts look most carefully at the fairness of justifying an old, in the sense of it happening a long time ago, prenuptial agreement**. But in this case the prenuptial agreement was very recent, as I have said, a mere 15 months ago.

26. **The Supreme Court has modified the test for the treatment of these nuptial agreements, as expressed in *Edgar* and *Xydhias* and, indeed, in *MacLeod*, so as to provide one single test applicable to all nuptial agreements, which is this**, *"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*". **That now is the test to be applied in every case where a nuptial agreement falls for consideration.**

(Emphasis added.)

G. Looking forwards

23. PNAs will be considered by the court based on the state of the law at the time of relationship breakdown and not at the time the agreement is entered into. This is important as any lawyer advising on a PNA can only advise on the basis of the state of the law and weight given to PNAs at the time they are entered into and cannot know the state of the law at the time that the marriage breaks down. Advice is therefore inherently general and cannot be specific as to the future interpretation and implementation by the court.

24. On 27th February 2014 the Law Commission published its report on Matrimonial Property, Needs and Agreements. It was an extensive piece of work (221 pages) and provided both a detailed summary of how the law of England and Wales has developed to date (in terms of the division of capital and income upon divorce) and an endorsement of marital agreements by suggesting legislation be enacted to give effect to such agreements and ensure they are effective.

25. As its title suggests, a large portion of the report dealt with an exploration of needs and how these might be best be met upon divorce. The discussion of needs extends to PNAs and it is clear that any proposals for legislative change are underpinned by a basic requirement that the needs of the parties and any children of those parties, should be met upon divorce. If an agreement did not address and meet those needs, then the court would retain the jurisdiction to provide a party in need with more.

26. The Law Commission report has not (at least as yet) been fully implemented by government. The Law Commission received two letters from the (then) Minister of State for Justice and Civil Liberties, Simon Hughes MP, dated 8th April 2014 and 18th September 2014 which together stood as the government's interim response to the recommendations. The Law Commission's recommendation that the Family Justice Council produce guidance on needs was implemented. Thereafter the government considered that there was unlikely to be time for the Nuptial Agreements Bill to progress through Parliament before it was dissolved in March 2015 and took the view that the government's final response regarding nuptial agreements should await the next Parliament, giving the new government time to consider the policy recommendations on this topic and the Bill.

27. As a result there have been (as yet) no legislative changes to the landscape of marital agreements.

28. That being said, the Law Commission set out a draft Nuptial Agreements Bill. If it was subsequently enacted, though, it would provide that:

    a. if the parties enter into a marital agreement with the intention of relying upon it in the event of a divorce, the parties would have to ensure certain requirements were met before it became a Qualifying Nuptial Agreement ("QNA");

    b. in the event a QNA is in force, the court must not exercise any power that is inconsistent with the QNA unless it is doing so (i) to meet the needs of a party to the marriage or (ii) in the interests of a child of the family;

    c. a QNA must meet necessary requirements in terms of formation, timing, disclosure, advice, validity, and variation;

    d. in terms of formation, the QNA must be in the form of a Deed validly executed by both parties and which contains a statement that they understand it will be a QNA and enforceable as such;

e. in terms of timing, a QNA would need to be executed more than 28 days prior to the date of the marriage;

f. in terms of disclosure, each party would be required to disclose such of his or her circumstances as would reasonably be considered to be material;

g. in terms of advice, each party must receive legal advice from a qualified lawyer as to the terms and effect of the QNA and sign a statement to that effect;

h. a QNA would meet the validity requirement if it was valid and enforceable as a contract (i.e. neither party was coerced into it or unduly influenced into agreeing its terms) in England and Wales; and

i. any subsequent variations to the QNA would have to meet same the requirements in terms of formalities as the original QNA.

29. In addition to the above, and as is well known, Baroness Deech has introduced a Private Member's Bill to reform financial provision legislation on a number of occasions. If enacted it will amount to wholesale reform of s.25.

30. The current version of her bill – the Divorce (Financial Provision) Bill – had its Third reading in the House of Lords on 19th December 2018 and its First reading in the House of Commons on the same date. The date for the Second reading in the House of Commons is yet to be announced.

31. If enacted, the Act would provide that pre-nuptial and post-nuptial agreements in writing and signed by both parties to the marriage is to be treated as binding on them unless:

a. the agreement attempts to impose an obligation on a third party who has not agreed in advance to be bound by it (in which case the agreement is not binding on the parties insofar as it attempts to impose that obligation);

b. a party neither received independent legal advice, nor had an adequate opportunity to do so, before the agreement was made;

c. in the case of a pre-nuptial agreement, the agreement was made less than 21 days before the marriage;

d. one or both parties failed to make proper disclosure of that party's assets before the agreement was made; or

e. the agreement is unenforceable under any rule of law relating to the validity or enforceability of contracts generally.

32. Further:
    a. any non-compliance with subsection b. or d. may be relied on only by the party disadvantaged by such non-compliance; and
    b. where a pre-nuptial or post-nuptial agreement is to be treated as binding, the court may make a relevant financial order only to the extent to which the agreement does not deal with the matter.

H. Drafting tips

33. When drafting PNAs is critically important to exercise caution and care. Any omissions or shortcomings with the PNA may only arise many years in the future, and the consequences may pertain to an asset base of a scale not in contemplation at the time of drafting. Those drafting may wish to keep the following considerations in mind:

a. self-evidently, ensure compliance with the *Radmacher* safeguards and address factors which detract from the weight of the agreement; primarily:

    i. timing – enter the agreement at least 28 days before the marriage, and if not, include provision for a postnuptial agreement six months after the marriage; and in any event allow sufficient time for reflection and negotiation;

    ii. disclosure, preferably accompanied by a schedule of assets; and

    iii. independent legal advice, or at the very least the opportunity for it to be taken; for example a provision to fund legal fees for the financially weaker spouse to take advice with a (not unduly restrictive) cap.

b. perhaps obviously, take particular care that the financially weaker spouse's needs are met (with allowance for the flexibility of those needs); and bear in mind that the more generously they are met, the less likely the provisions are to be undermined by the court;

c. rarely, if ever, fix the quantum of child periodical payments, to avoid any potential future perception of being parsimonious in meeting the children's needs; and

d. consider making provisions for a review, either after pre-empted milestones (such as the birth of children) and/or fixed time periods. Despite a PNA by definition seeking clarity and certainty, any such agreement necessarily involves a degree of unpredictability as to future assets and family make-up. Reviews can mitigate the terms of the original agreement becoming unfair over time as circumstances change.

I. Cohabitation Agreements

34. A cohabitation agreement (or 'no-nup') is a binding contract between the two partners that sets out:
    a. how they intend to manage their finances whilst living together; and
    b. what should happen in the event that the relationship breaks down.

35. The agreement can regulate interests in property, bank accounts or the payment of household bills. They can be used to prevent future claims against properties under property and trusts law. They can specify to agree financial provision for one partner in the event they separate. They can provide for who will be nominated for death-in-service benefits. They are legally binding and will be signed as a deed.

36. A simple agreement could specify that:
    a. the couple's incomes remain separate;
    b. assets owned before the cohabitation remain the property of the person who acquired them;
    c. assets acquired jointly after the cohabitation are joint property;
    d. assets acquired by one person after the cohabitation remain the property of that person;
    e. jointly acquired debts are the joint liability of the couple; and
    f. living expenses will either be paid equally (or in agreed percentages).

37. A cohabitation agreement can explicitly agree that its terms survive marriage, or that they terminate on marriage.

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