The future of wealth protection: pre and post-marital agreements

Pre- and post-marital agreements have been the subject of much consideration by the courts of England and Wales over the last year. This briefing sets out our advice for wealth protection and takes stock of the current position by looking at the two most important recent court decisions (*MacLeod v MacLeod*, and *Granatino v Radmacher*).

Our advice for wealth protection

Don't get married – or have a pre-marital if you do

The best protection from an unwanted divorce settlement is not to get married.

A pre-marital is the only, and therefore the best, way of gaining a level of protection *before* entering a marriage, but there is no guarantee that it will provide protection, even if all the safeguards are adhered to.

Whether or not you have a pre-marital, do have a post-marital

Any agreement signed after the marriage which contains financial provisions will – assuming it is contractually valid – be a maintenance agreement under Matrimonial Causes Act 1973, s34, and therefore only strictly variable in the circumstances set out above (under s35 of that Act).

It is, however, important to note that the agreement upheld in *MacLeod* was signed when the parties had been together for nearly 20 years, and was just 13 months before the relationship finally ended. Although the wording of s35(2) of the Matrimonial Causes Act 1973 is rather opaque, and there is little illuminating case-law, it must be correct to assume that the greater the passage of time between the agreement and the marital breakdown, the more scope there is for a change in circumstances giving the court the opportunity to vary the agreement.

The ideal course might be to negotiate the agreement before marriage, and confirm that agreement in a pre-marital agreement, then revisit it and sign a separate post-marital agreement after marriage (if appropriate in similar terms), and keep reviewing and re-executing it every few years to take account of any changed circumstances. Not romantic, but certainly the most effective way of ensuring that the agreement is as likely as possible to stand up when it needs to. This could be critical to the subsistence of a family business, or the preservation of an inherited family asset.

Where an agreement is contemplated freely by both parties, it offers the best opportunity for a married couple to set proper parameters for a subsequent division in the event of divorce, which are likely to be respected by the court.

A marital agreement sandwich?

Ideally plan to have a pre- and a post-marital agreement. All clients with an existing pre-marital agreement should enter into a post-marital agreement as well. The terms may be very similar, but the documents must be separate documents, and should not be contractually linked. The post-marital should not be signed on the day of the marriage. If a pre-marital is followed by a valid post-marital agreement, the court is likely to hold the parties to its terms as long as they consider it just to do so in the light of any changed circumstances.

Make generous provision for children

In order to avoid court completely with a post-marital that contemplates separation, clients should be prepared to make fairly generous provision for any children. However, child-related housing funds can be provided by way of trust rather than by an outright allocation to the other parent. The *MacLeod* case makes clear that there is no expectation that parents, even wealthy ones, should continue to provide housing or support for their children once they are independent.

If there is a dispute

If the terms of the agreement are considered just, any party seeking to go behind a clearly valid post-marital may run a serious risk of a costs order in financial proceedings on divorce.

The birth of post-marital agreements - *MacLeod v MacLeod*, December 2008

The case

Mr and Mrs MacLeod were US citizens who executed a pre-marital agreement on their wedding day in 1994. He was a wealthy middle-aged businessman and she was a young student. They subsequently moved to the Isle of Man and had 5 sons. In 2002 the marriage was in difficulties and the parties reviewed the pre-marital, making its terms more generous to W both during marriage and in the event of separation. Both parties signed up to the agreement again, and Mr Macleod made the payments to which he had contracted.

The marriage subsequently broke down. Mrs MacLeod asked the court to ignore the agreements she had signed and hear her ancillary relief claims in full. The husband sought to apply the agreement, except that he agreed the children should have a better home with the wife and so offered more generous housing provision during the children's education by way of a trust. The wife wanted the extra provision outright. Having worked its way through the Manx courts, the case reached the Privy Council. As the law in the Isle of Man is equivalent to English law, the decision can be treated as if it were a decision of the House of Lords.

The decision

The Board of the Privy Council upheld the post-marital agreement between the parties, and confined Mrs MacLeod to her entitlement under it. However they agreed that the provision for the children's housing was insufficient and upheld the court's order of an extra £1.25m from Mr MacLeod in that respect. The Board agreed with the husband that further provision for housing should be made by trust rather than outright to the wife. Mr MacLeod had said in the lower court that the trust monies would revert to him when the youngest child had attained the age of 23.

The effect of this decision

- Post-marital agreements (i.e. agreements made during the marriage or after the marriage is dissolved, so including separation agreements) are enforceable according to usual contractual principles (broadly construed), as long as there has been no improper use of the inevitable unequal bargaining power. This means that each party should be separately advised as to the implications of signing the agreement, and the courts may take a broad view of what constitutes duress, fraud or undue influence (see the earlier cases of *Edgar* [1982] and *NA v MA* [2007]). Fundamentally, the Board said "We must assume that each party to a properly negotiated agreement is a grown up and able to look after him- or herself. At the same time we must be alive to the risk of unfair exploitation of superior strength. But the mere fact that an agreement is not what a court would have done cannot be enough to have it set aside."

- An agreement cannot oust the jurisdiction of the court, however, and the court can vary it using current statutory powers (Matrimonial Causes Act, ss34-36) if either:

    - the circumstances have changed since those in the light of which the original agreement was made (including foreseen changes, like separation) and it is therefore unjust to hold the parties to the agreement, or

    - insufficient provision has been made for any children.

- The *MacLeod* case indicates that

    - the court is unlikely to vary on the basis of a change in circumstances if that change was foreseen, ie if the agreement contemplated a separation and this has occurred, and the time between the agreement and separation is short (here, 13 months); and

    - if variation is permitted because of insufficient provision for children, only the provision for the children may be varied and the parties' entitlement in the longer term should remain untouched.

- Pre-maritals are not enforceable on public policy grounds, and this will not change unless Parliament intervenes. The position was not affected by the decision in *MacLeod*, which makes clear that they are an

entirely different species of agreement from the post-marital, and are not within the statutory ambit of 'maintenance agreements'.

The endorsement of pre-marital agreements - *Radmacher v Granatino*, July 2009

The Court of Appeal in the case of *Radmacher (formerly Granatino) v Granatino* [2009] EWCA Civ 649 had gone further in practice in relation to pre-marital agreements The case suggests that agreements entered into before the marriage can, where fairness dictates that they should, be such a relevant factor that their terms are decisive in determining the outcome of financial proceedings on divorce. This is despite the fact that, as the Board made clear in *MacLeod*, as a matter of public policy, pre-marital agreements are still currently unenforceable contractually in this country.

The background facts

Ms Radmacher and Mr Granatino met in November 1997 in London when they were both in their 20's. Ms Radmacher comes from a wealthy German family and owns shareholdings in family companies with a value of about £52m, generating an income of some £2.7m. Ms Radmacher also had other liquid assets of around £54 million.

Mr Granatino, who is French, was earning £50,000 in the emerging markets sector of J.P. Morgan & Co at the time that he and Ms Radmacher met. His earnings peaked at £300,000 in 2001, but he gave up his financial career to pursue an academic life. He is now studying for a D. Phil at Hertford College, Oxford and is heavily in debt.

The parties became engaged in 1998 and immediately agreed, at the instigation of Ms Radmacher, to enter into a pre-marital agreement. Ms Radmacher's motives were two-fold: her father wished to protect the family wealth and threatened to disinherit her if she married without an agreement in place; and she wanted to be sure that Mr Granatino was marrying her for love rather than for her money.

The agreement

The pre-marital agreement was drafted by the Radmacher family notary and provided that:

- neither party would have any interest in any property brought into the marriage by the other;
- any resources built up by either party during the course of the marriage would remain theirs and theirs alone;
- both during and after the marriage, neither party would have any claim on the property and/or income of the other even in the case of extreme hardship; and
- in the event of either party's death during the marriage, the survivor would have no rights against the deceased's estate save as provided for under German law.

The decision

In the High Court Mrs Justice Baron awarded Mr Granatino £2.5m for a house, £700,000 towards his debts, £25,000 for a car and £2.335m as a lump sum to cover maintenance for the rest of his life. She also awarded him €600,000 for housing in or near Dusseldorf, although the property was to be owned by Ms Radmacher and placed on trust, returning to her when the parties' daughters were grown up.

Ms Radmacher appealed Mrs Justice Baron's decision on the basis that the pre-marital agreement had not been given sufficient weight in the court's decision. The Court of Appeal held that this was a case in which "decisive weight" should be given to the agreement as a part of the judge's discretionary exercise. The judge had failed to give sufficient weight to the fact that the parties were French and German by nationality and that pre-marital agreements are standard practice in both jurisdictions. Mr Granatino, furthermore, could not validly plead that the contract was unfair as he had been involved by way of profession in the financial world at the time that he had entered into it, he had had ample opportunity to take independent legal advice in respect of it but had chosen not

to do so, he had known from the outset that Ms Radmacher was from a "significantly rich family", and he had chosen not to initiate negotiations. The Court also said that it had to be assumed that the young couple had expected at the time that they entered into the agreement to start a family, so the birth of the two children had not impacted upon the validity of the agreement. The agreement had never purported to make financial arrangements in respect of any children – it related solely to the adults.

The award made by the court was therefore amended so that:

- Mr Granatino's fund for housing remains at the same level (£2.5m), but he will have to give it back to Ms Radmacher after his "home-making duties" in respect of the children are over – when the younger daughter reaches 22, or on an earlier trigger event. It will not be his to keep for life; and

- the £2.335m maintenance award was referred back to the High Court to be reformulated to cover only his expenses as a home-maker for the children rather than be an award for life.

The effect of this decision

- The case makes it clear that the higher judiciary in England is concerned that the unenforceability of pre-marital agreements as a matter of public policy is becoming increasingly unrealistic and out of step with the rest of Europe. Whilst it is accepted that it is for Parliament and not the courts to change public policy, reform is urgently needed to uphold the rights of individuals to exercise autonomy over their financial affairs.

- For those currently seeking to exercise that autonomy, the judgment makes it very clear that all the circumstances surrounding an agreement need to be taken into account when assessing whether a pre-marital agreement is fair. It may be, therefore, that a lack of independent legal advice where the party in question has had ample opportunity to take it but has chosen not to do so, or the absence of financial disclosure where the approximate scale of the wealth is clearly apparent may not be as damaging to the creditability of an agreement as may once have been the case. The birth of children need not be fatal to an agreement which does not seek to provide for them, and an agreement cannot prohibit provision from being made for a claimant in his or her capacity as a parent rather than a spouse. The judgment points also to the requirement of the courts to consider the actual personal circumstances of the parties. To what extent should they, for example, have understood the terms and consequences of the agreement? Did they grow up in a jurisdiction where pre-marital agreements are enforceable and constitute an integral part of society?

- The overriding aim is to achieve fairness and, if fairness dictates that decisive weight should be given to a particular pre-marital agreement, then so be it.

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