

#### AGREE NOW OR FOREVER HOLD YOUR PEACE

Is the pre-nuptial agreement a passing phenomenon or here to stay? Whatever happened to 'with all my worldly goods I thee endow' and, 'till death do us part'? Sadly, the cynic might surmise that those entering the civil or holy state of matrimony now have their eyes firmly focused on the possibility – or even probability – that it might all end in the divorce courts.



However, at the time of writing, and even with high profile cases of pre-nuptial agreements filling column inches, as the law currently stands in England and Wales, pre-nuptial agreements are not legally binding.

Having said that, at the end of September 2009 the decision of the Court of Appeal in the case of *Radmacher v Granatino* made it much more likely that such agreements will be treated as binding. Richard Todd QC convinced the Court of Appeal to uphold a pre-nuptial agreement on behalf of Katrin Radmacher ensuring that she retained her £100m personal wealth at the end of an eight-year marriage. The Court of Appeal said that adults should be free to choose how to regulate their financial affairs in marriage, as long as those choices are informed, free and fair and do not impinge on any children of the family.

Leave has been given for a further appeal to the new Supreme Court and therefore the position could change again.

Until Parliament legislates on this issue, (and the Law Commission is due to examine the status and enforceability of agreements between spouses or civil partners with a report and draft bill expected in late 2012) pre-nuptial agreements

will still retain an uncertain status and the court will retain the power to ignore or vary them.

So why should couples consider entering into a pre-nuptial agreement? Such agreements are not the preserve of the 'super rich' but are of value to for example mature couples, perhaps each contemplating a second marriage, who wish to regulate the future enjoyment of their assets and perhaps protect the interests of the children of the earlier marriage.

When drawing up a pre-nuptial agreement it is important that certain safeguards are in place to make it more likely that the agreement will be upheld should it ever become necessary. The agreement should be procedurally fair. That is, there can be no undue pressure by one party on the other. There should have been full financial disclosure and there should be access to legal advice. The agreement should be substantively fair in that it provides for the basic needs of a divorcing spouse.

In conclusion, the Court will have regard to the pre-nuptial agreement as part of all the circumstances of the case. In many cases the impact of it may be decisive, at least on spousal maintenance, especially with a second marriage. The presence of a child is likely to cause a revaluation of the agreement, if only to ensure that the children are properly provided for. The Court will pay close attention to the circumstances in which the agreement was reached, so as to ensure that no unfair advantage was taken of the weaker party.

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