



No 18 Chambers

Nuptial Agreements

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Introduction

- Nuptial agreements (rather than just separation agreements)
- Look at attempts to reform to provide a statutory basis
- Look at the current position with reference to relevant case law

Historic Position

- The State has a vested interest in the institution of marriage (*Hyman v Hyman* [1929] AC 601)
- Considered the pre-nuptial agreements undermined marriage and English law declined to approve them
- Ancillary Relief Advisory Group set up to advise Lord Chancellor in 1990s to look at reform
- Green Paper “Supporting Families” 1998

Reforms suggested

- Nuptial agreements could be binding in certain circumstances:
 - Including independent legal advice being obtained
 - Full disclosure
 - Making the agreement not less than 21 days before the marriage
 - The case Granatino v Radmacher 2010
 - Law Commission Consultation Paper 208 Matrimonial Property, Needs and Agreement Law A Supplementary Consultation Paper (2012)
 - Law Com No 3434 (2014)

Arguments For and Against Reform

- Supports marriage – encourages marriage in those who would be reluctant to risk sharing their assets rather than merely cohabit.
- Promotes the value of autonomy by respecting the rights of adults to make their own agreements
- Denial of recognition is paternalistic and patronising
- “The autonomy that is prayed in aid of binding marital property agreements is not simply the freedom to make an agreement, not simply the freedom to do as one wishes to. It is the freedom to force one’s partner to abide by an agreement when he or she no longer wishes to do so. It is freedom of contract, but it is therefore freedom to use a contract to restrict one’s partner’s choices (Law Com No 343 at para 5.31..
- Law is already fairly certain where assets don’t exceed needs – at least as to objectives
- Other states where nuptial agreements are the norm have safeguards – starting point and context is different

Qualifying Nuptial Agreement

- Law Com No 198 recommended statutory effect should be given to Radmacher
- Recommended it should not be possible to contract out of meeting a spouse's financial needs or deprive a child of financial support
- Not "real needs" as understood in Radmacher but needs interpreted widely

Recommended formal requirements

- Cooling off period of 28 days before wedding
- Agreement should be made by deed.
- Material disclosure required.
- Requirement for independent legal advice.
- All contained in a draft nuptial agreements bill
- But insufficient time before the dissolution of parliament in 2015 for the bill

Current State of Law

- Both parties must enter the agreement of their own free will, without undue influence or external pressure [R v G [68]].
- Sound independent legal advice will provide strong evidence of a party's understanding of the implications of the agreement, though it is not necessarily conclusive (WH v HW [2015] EWHC 1844 (Fam))

Intention and vitiating factors

- It's important that both parties intend the agreement to determine financial obligations (*Y v Y (Financial Remedy: Marriage Contract)* EWHC 2920 (Fam)).
- Agreement will not have effect if there is evidence of the standard vitiating factors. It is not necessary to identify such vitiating factors in a strict legalistic or contractual sense [R v G 17 & 173].

Pressure

- *AT v BT* [2023] EWHC 3531 Francis J held that W had been under pressure when signing because it was signed the day before the wedding, and she was 4 months pregnant and knew her earning capacity in her sector of expertise was damaged.

Emotional State

- A party's emotional state at the time of the making of the agreement and factors such as age, maturity and previous experience of long-term relationships are relevant considerations. Such factors may inform what pressures a party felt under to sign the agreement (R v G para 72)
- AB v BD [2020] EWHC 857. Cohen J refused to accord any weight to an agreement signed the day before the wedding ceremony where the parties had not discussed the contents, and W was in great turmoil having just learned her father was terminally ill..

Would the marriage have happened anyway?

- In the case of a pre-nuptial agreement a consider whether the marriage would have gone ahead in the absence of any agreement in the terms signed ([72] R v G)

Disclosure

- Before signing the agreement, each party should be in possession of all the information material to their decision to sign the agreement
- In determining whether an agreement has been freely entered into by each party with a full appreciation of its implication there is no absolute rule for full disclosure or independent legal advice
- The question is whether in the individual case there is a material lack of disclosure, information or advice (See Kremen v Agrest (No 11) Financial Remedy: Non-Disclosure Post-Nuptial Agreement) [2012] EWHC 45 (Fam) at [72(ii)] and AH v PH [2014] EWHC 3873 (Fam) at [50].

Any Questions?

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