

## ADVICE NOTE

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### PRE-NUPTIAL AGREEMENTS: ON THE RISE?

Big-money divorce cases hitting the headlines in recent years have resulted in a rise in the number of couples considering entering into a pre-nuptial agreement (or pre-registration agreements, for those contemplating a civil partnership). Indeed, pre-nuptial agreements themselves have become a topic for discussion in the papers as a result of a recent case, which many commentators believe has strengthened the position of 'the pre-nup'. So where do they now stand?

#### It's all a matter of discretion

- The family court deals with financial claims arising on divorce by exercising powers available under the Matrimonial Causes Act 1973. There is nothing in this Act which makes any pre-marital agreement a couple have entered into binding on the court. The basic legal principle, therefore, is that no Judge will be compelled to hold either party to any pre-marriage agreement they have entered into. The position with post-nuptial agreements is a little different, but that is outside the scope of this advice note.
- The Act does require the Judge to consider various factors which he can employ when contemplating whether or not a pre-nuptial agreement should be upheld or influence the case. The Judge is under a duty: *to have regard to all the circumstances of the case*. He is allowed a wide discretion as part of this exercise.
- Therefore, whilst the Judge does not **have to** enforce the agreement he **may** enforce the agreement and may do so to whatever extent he deems appropriate to ultimately achieve a fair and appropriate outcome for the case.

#### 'Ripe for review'

- Given the uncertainty, in 2008 the Law Commission described the law in this area as 'ripe for review', and is presently involved in a consultation exercise with a view to publishing a draft Bill for reform of the law in 2012.
- In the meantime, there is no question that in the twenty-first century these agreements have been given increased weight.
- A recent Court of Appeal case which has had a significant bearing was between a German national, Mrs Radmacher, an extremely wealthy heiress worth around £100 million, and her French ex-husband, Mr Granatino. Before their marriage they entered into a pre-nuptial agreement in Germany which in essence provided that Mr Granatino would have no claim on Mrs Radmacher's millions. The question of whether it was fair to hold Mr Granatino to this agreement, bearing in mind by the time of the divorce he was a man of very modest means in his own right, was key.

The High concluded that holding Mr Granatino to the agreement was 'manifestly unfair'. On appeal the Court of Appeal took a different view. After much consideration of the law and how it applied to this case, it found that the agreement would have been binding in either of the couple's own countries and that, as there was nothing untoward in the steps taken to arrive at the agreement, then it should be given very heavy weight in the exercise of discretion.

Mr Granatino was given a financial award, but primarily designed to enable him to provide their two children with a similar lifestyle during the years when he would be sharing their care. Some of the award will have to go back to Mrs Radmacher when the children are grown up.

### **So where does this leave happy couples?**

- It is clear that the existence of a pre-nuptial agreement heavily influenced the financial award made by the court in the *Radmacher v Granatino* case, and it is likely that this judgment will now go on to influence decisions in other cases that come before the court between now and the point when the law will finally change, if that point is reached.
- Whatever the trends, a couple should not underestimate the vital importance of the preparation and content of any such agreement. There are pitfalls to be avoided that could lead to the agreement falling at 'the first hurdle'. The content must be expressed very carefully and many aspects have to be taken into account if it is to stand any chance of being a persuasive aspect of any later financial dispute.
- Any couple sufficiently encouraged by recent trends to consider embarking on a pre-nuptial agreement should proceed to navigate this thorny road only with the benefit of an expert guide!
- Remember, a pre-nuptial agreement is designed to come into effect in the event of a divorce that (it is hoped) may never happen, and to cater for future financial circumstances at some unknown point in time which can be very difficult to do.

At Downs we can offer specialist and skilled advice delivered in a sensitive and honest manner.

### **Think you might need our advice?**

We offer an introductory fixed-fee interview for half an hour at a rate of £60, including VAT. This comes with no-strings, so if any of the above applies to you why not invest this money to ensure you are fully informed about your position.

The Downs team of family lawyers will provide you with the necessary specialist and sensitive legal advice, depending on whether you are parting, already living together or about to move in:

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