

Pre-nups: can you have your wedding cake and eat it?

By Nicola Frost

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Since the landmark ruling in *Radmacher v Granantino* [2010] UKSC 42, prenuptial (and postnuptial) agreements are more likely to be upheld in the jurisdiction of England and Wales. Over a decade later, they are still not binding and are regarded as one of a number of factors considered by the court when carrying out its discretionary exercise.

The main aim of any prenuptial agreement is that it is upheld by the court. But how is that achieved when it is merely persuasive? There are some key ingredients, which will make it more likely an agreement will be deemed as effective at that uncertain future time.

The starting point of any nuptial agreement is that it must be fair. The three fundamental components which address fairness are 'needs', 'compensation' and 'sharing' (*Miller; White*). Of course, the primary consideration is that of 'needs'; an agreement that fails to meet needs risks not being upheld, in part or in whole.

Some consider prenuptial agreements to be unromantic, but, along with wedding cake and wills, they ought to be viewed as an essential part of wedding planning. Parties' intentions and expectations can be discussed frankly, set out and recorded. Whilst neither party enters a marriage or civil partnership aiming to rely on a prenuptial agreement, its existence (if well drafted and well considered) ought to make things a little easier in the unfortunate event of a relationship breakdown.

Thinking of key ingredients and weddings brings to mind the analogy of a cake.* Following the 'pre-nup cake' recipe will make it more likely a prenuptial agreement will be enforced.

'Pre-Nup Cake'

Preparation:

1. Disclose the assets.
2. Ensure you begin drafting with sufficient time for the agreement to cook, so that it is signed at least 28 days before the wedding.

Method:

1. Begin by creating a Deed.
2. Then, carefully mix in a generous amount of fairness, taking time to ensure that both parties have freely entered the agreement with a full appreciation of the implications.
3. Shake in and define the assets, taking care to ringfence only the non-matrimonial ones.
4. Fold in the parties' intentions, not forgetting to squeeze in their intention to create legal relations and record all relevant background circumstances.
5. Identify the parties' needs and then liberally sprinkle these in.
6. Flatten any attempt to preclude claims for periodical payments. Make sure that children are not prejudiced by any of the terms.
7. Do not apply undue pressure or the agreement may crumble.
8. Mix well.
9. Ensure both parties take independent legal advice.
10. Bake.
11. Decorate. Sometimes 'needs' taste better with a cherry on top.
12. Once cooled, make sure both parties sign the deed at least 28 days before the wedding.
13. Freeze the pre-nup cake and, for best results, it should be defrosted and reviewed about every five years, or whenever there is a significant life event or change in circumstances.

So, can you have your wedding cake and eat it...?

Well, yes, if you carefully add all the ingredients to the deed; but remember that needs are likely to change over the years and an adjustment may be necessary at the time the agreement is to be relied upon. Ensure your client is not left with the crumbs of a well-intended

agreement; it needs to be fair and an agreement that fails to account for needs is likely to be departed from and may be disregarded altogether.

If the method is followed closely, and needs are met, you *should* be able to have your wedding cake and eat it; but if not, the agreement will probably deflate at the time it is to be relied upon faster than an overcooked soufflé.

Further, the search for fairness may (albeit unusually) lead the court to make an award in excess of needs:

“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 [party] in excess of [the party’s] needs.” per King LJ in *Brack v Brack* [2018] EWCA Civ 2862

Therefore, to avoid getting burnt fingers, the parties may wish to sweeten the agreement by adding a cherry – or perhaps sprinkling some hundreds and thousands – on top of ‘needs’.

(All puns intended and it is hoped some real cake will be enjoyed with this article!)

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