Articles

Pre-nuptial agreements and time limits: should the court automatically disregard agreements that fail to adhere to the '28-Day Rule'?

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A valid nuptial agreement requires both parties to have a full appreciation of the terms and implications of entering it. One of the key features that may go towards demonstrating this is the passage of time between signing the agreement and the wedding itself.

In 2014, the Law Commission recommended that 'qualifying nuptial agreements' should be introduced by legislation. One of the recommendations was that such agreements should be invalid if entered into less than 28 days before the date of marriage or civil partnership. Although the Nuptial Agreements Bill has remained in draft form, it has nonetheless evolved as general best practice to ensure that a pre-nuptial agreement is executed by the parties no less than 28 days before the 'Big Day'.

This article aims to explore the parameters of the colloquially known '28-Day Rule', alongside relevant case law and to consider the effects of not abiding by this 'rule'.

The Supreme Court

Since 2010, the Supreme Court's decision in *Radmacher (Formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900 has governed the treatment of nuptial agreements. The Supreme Court held that nuptial agreements, whether pre-nuptial or post-nuptial, should no longer be regarded as contrary to public policy. The court is required to examine the circumstances leading to the creation of the nuptial agreement and, providing there are no vitiating factors and appropriate safeguards are met, the court will generally hold the parties to their agreement, subject to it being fair to do so, which invariably means ensuring the needs of the parties are met.[1]

In reaching its decision, the Supreme Court placed great emphasis on respecting individual autonomy, where the parties had freely entered an agreement with a full appreciation of its implications.[2] The court highlighted the elements that would be necessary for a valid nuptial agreement to exist.[3] These may be summarised as follows: (i) the parties must exercise their own free will in entering the agreement and they must be informed of and understand the implications of the agreement; (ii) there should be no 'material' lack of disclosure, information or advice: legal advice is

1 Note that whilst a court is likely to make a needs-based award, it is not precluded from making an award in excess of needs (albeit it would be unusual to do so): *Brack v Brack* [2018] EWCA 2862
2 *Radmacher* at [75]
3 *Radmacher* at [67 – 74]

desirable, but if a party chooses not to obtain legal advice this will not negate the agreement; and, full disclosure of assets may be necessary to ensure the party fully understands the implications of an agreement, but the onus is upon the other party to seek disclosure (a clear indifference to disclosure will not diminish the weight attributed to an agreement); (iii) each party should intend the agreement should govern their financial arrangements in the event of divorce or dissolution; (iv) there must be no: duress, fraud or misrepresentation; unconscionable conduct, such as undue pressure; or, unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage.

Once a valid nuptial agreement has been found to exist, the parties' autonomy to enter into an agreement should generally be respected, providing it is fair to hold them to their agreement. The Supreme Court further set out[4] some particular features that should be considered when determining fairness, which include: the circumstances of the parties existing at the time of entering the agreement; the fairness (or otherwise) of holding the parties to their agreement in the circumstances existing at the time of reliance upon it (this will be fact-specific); whether the agreement terms prejudice the reasonable requirements of any children of the family; and, whether both parties' needs are met. If both parties can meet their own needs, it is likely to be fair to hold the parties to their agreement.

The Supreme Court made it clear that there is nothing inherently unfair in agreeing to ringfence non-matrimonial property. The court should respect individual autonomy by attributing weight to a nuptial agreement. A nuptial agreement is one factor for consideration in the court's discretionary s 25 exercise, to which the court will attribute appropriate weight when considering 'all the circumstances of the case'. The nuptial agreement may be the most 'compelling' factor in the circumstances of the case and therefore given decisive weight.

The weight attributed to an agreement will be reduced if the circumstances pertaining to the making of the agreement or its terms make it unfair, but the crucial consideration for the court will be 'whether the agreement operates unfairly having regard to the circumstances prevailing at the time of the breakdown of the marriage [or civil partnership]'[5]. A change in circumstances would likely warrant the creation of a fresh agreement (hence the usual inclusion of a review clause).

Qualifying nuptial agreements

Before the decision in *Radmacher*, the Law Commission had started a project examining the enforceability and status of marital property agreements, which encompassed pre-nuptial agreements, post-nuptial agreements and separation agreements. The Law Commission's *Matrimonial Property, Needs and Agreements Report*[6] ('the 2014 Report') was published on 27 February 2014, having been extended in scope and in timeframe by significant events, namely the Supreme Court's decision in *Radmacher* and the Family Justice Review Final Report in 2011.

The 2014 Report is often most renowned for its recommendation to introduce 'qualifying nuptial agreements'. The Report included a Draft Nuptial Agreements Bill, which is yet to be debated in Parliament. The government's interim response came by way of two letters to the Law Commission, in April and September 2014. The Government considered there was insufficient time to debate the Bill before the dissolution of Parliament in March 2015 and, to date, the debate has not yet taken place. The government's final response is awaited.

The 2014 Report recommended: qualifying nuptial agreements should be introduced by

4 *Radmacher* at [75 – 83]
5 *Radmacher* at [73]
6 The Law Commission's Matrimonial Property, Needs and Agreements Report 2014 can be found on the Law Commission website – https://www.lawcom.gov.uk/project/matrimonial-property-needs-and-agreements/

legislation; parties to an agreement would not be able to contract out of provision for financial needs; any dispute regarding a qualifying nuptial agreement should be heard by a family judge; and, in an application for reasonable financial provision for a surviving spouse (under the Inheritance (Provision for Family and Dependants) Act 1975), the court should have regard to the provision in a related qualifying nuptial agreement.

The Law Commission set out the requirements for a marital property agreement to be viewed as a qualifying nuptial agreement. The marital property agreement must be a valid contract, made by deed and the agreement should contain a clause, whereby the parties confirm they each understand the agreement is a qualifying nuptial agreement and that they are removing the court's discretion to make orders for financial provision, save insofar as the agreement fails to account for needs.

Qualifying nuptial agreements would be invalid if made less than 28 days in advance of the marriage or civil partnership.[7] Further, both parties must have received independent legal advice at the time the agreement is formed, supported by statements of legal advice. Parties must disclose material information about their financial situation, and they would not be able to waive their rights to disclosure.

A qualifying nuptial agreement could only be revoked by written agreement, signed by or on behalf of both parties. The presumption of undue influence (which usually applies in contracts where there is a relationship of trust and confidence) would expressly not apply to qualifying nuptial agreements.

Impact of the Draft Bill

Whilst the Law Commission recommendations are not (yet) enshrined in law, they have undoubtedly had an impact in terms of 'best practice'. The position recommended by the Law Commission is not wholly dissimilar to that of *Radmacher*, albeit the difference is clearly the position in common law rather than statute. Where there is a divergence in approach between *Radmacher* and the Draft Nuptial Agreements Bill, the requirements of a qualifying nuptial agreement would be more robust; for example, legal advice would be mandatory, parties would not be able to opt out of receiving disclosure and a failure to adhere to the 28-Day Rule would invalidate any qualifying nuptial agreement.

Time limits and case law

Whilst the Law Commission's recommendations are no doubt influential, and should continue to be adhered to when drafting a pre-nuptial agreement wherever possible, case law does not presently support the contention that execution less than 28 days in advance of a marriage or civil partnership will automatically invalidate the agreement.

In fact, the contrary is true. Many agreements signed less than 28 days beforehand have been upheld by the court. Whether or not a failure to adhere to the time limit will be fatal to the validity of a pre-nuptial agreement will depend entirely on the circumstances pertaining to the late signing. The lateness would not, of itself, amount to a finding of undue pressure; there may well be time pressures but 'undue pressure', as set out in *Radmacher*, requires there to have been unconscionable conduct which falls short of duress.

The key factor for the court to consider is not when the agreement was signed but whether or not the party seeking to depart from the agreement had a full appreciation of the terms and implications of it.

The case of *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120 was decided before *Radmacher*, but the principles applied accord with the Supreme Court's decision. This was a short marriage

7 The 2014 Report at [6.67]; the Law Commission makes no recommendation on timing in respect of post-nuptial agreements: [6.66]

of just 14 months to the date of separation. The parties had married after being surprised by an unplanned pregnancy; the wife wanted to marry, but the husband did not think they were ready. When the wife threatened a termination of the pregnancy if they did not marry, the husband agreed to marry. The parties prepared and signed a pre-nuptial agreement. The husband was the wealthier party, although the wife was unaware of the true extent of his wealth.

The wife had signed the agreement three days before the marriage and she was held to its terms, having fully understood the agreement and having been properly advised as to its terms at the time. Notably, it was found that she had not been under undue pressure; she exercised her own free will and the husband had not exploited a dominant position. Further, although there was no full disclosure, this was not deemed to be a factor that would undermine the agreement because the wife did not ask for it. Importantly, there were no unforeseen circumstances and the court found it would be unfair to the husband if the parties were not held to their agreement, given the circumstances leading up to them entering it.

In *Versteegh v Versteegh* [2018] EWCA Civ 1050, [2018] 2 FLR 1417, the pre-nuptial agreement was signed just one day before the wedding. There were three non-minor children of the 21-year marriage. The husband was an affluent businessman and the wife a homemaker. There were assets of some £273m. Both parties were Swedish nationals who had married in Sweden and the pre-nuptial agreement was a contractual arrangement which stated that the parties would each retain their own assets, acquired before and during marriage.

Although the pre-nuptial agreement was signed only one day before the wedding, the Court of Appeal held it was valid. It was a very simple document and commonplace in Sweden. It is also of note that the court accepted the husband's evidence that they had discussed the binding agreement and its terms in detail several months in advance (the wife had said she had only read the agreement upon separation and was shocked at its terms, but the court did not accept her evidence).

Another aspect of the case was that, during post-separation negotiations, the husband had made an offer of settlement to the wife, which left her with a greater share of the assets than she otherwise would have had if the terms of the pre-nuptial agreement were strictly applied. The Court of Appeal held that where there is a finding that a valid and effective pre-nuptial agreement exists, 'fairness' does not require a court to ignore the whole agreement just because one party chooses not to hold the other to its terms in its entirety.

SA v PA (Pre-Marital Agreement: Compensation) [2014] EWHC 392, [2014] 2 FLR 1028 concerned an English wife and a Dutch husband, with four children. The capital assets amounted to approximately £3.8m. The court held it was fair to implement the terms of the pre-nuptial agreement, as against the capital assets. The High Court found the pre-nuptial agreement to be valid even though it was signed on the eve of the wedding ceremony, in circumstances where the wife was pregnant and had only received impartial (and not independent) advice from the notary. Although this was executed at short notice, the court was satisfied that the wife had entered the agreement freely with a full appreciation of the agreement's terms and implications. The wife was found to have been privy to all the draft agreements and even though the agreement was written in Dutch, the wife had made extensive annotations on an early draft of the agreement, in English, and she had added some Dutch words to the declarations the parties were to sign. The court also found that the parties had intended the agreement would be binding upon them in all jurisdictions.

The other significant factor in the case was the wife's claim for compensation, as she had given up her legal career to focus on the family. The court was not satisfied that the wife had met the high threshold for establishing a compensation claim.

In the case of *WC v HC* [2022] EWFC 22, heard in March 2022, Peel J upheld a pre-nuptial agreement that had been signed just three weeks before the wedding. There had been a marriage of about 16 – 17 years between a Swiss husband, from a very wealthy family, and a wife, a UK national; the litigation centred around the validity of a pre-nuptial agreement and a post-nuptial agreement.

The key issue surrounding the pre-nuptial agreement was the wife's allegation that she had been placed under undue pressure to sign. The parties (at [31]) were held to have been under pressure, from the husband's father, to enter into the agreement, but this pressure applied to both parties and fell short of the level required to satisfy a finding of 'undue' pressure. Moreover, the agreement stated, on its face, that the parties entered the agreement 'of their own free will, without undue influence or duress' and their solicitors' certificates (appended to the agreement) concurred. The pre-nuptial agreement had been negotiated for many months and, further, the wedding was delayed (by 3 weeks) to enable the parties to have a cooling off period. These circumstances satisfied the court that it would be fair for the parties to be held to their agreement.

Conversely, in *AH v PH (Scandinavian Marriage Settlement)* [2013] EWHC 3873, [2014] 2 FLR 251, Mostyn J did not hold the parties to an agreement that was signed the day before the wedding, not solely because of the late signing but due to the circumstances existing at the time the parties entered the agreement. The case concerned a Scandinavian couple who were living in England. They had signed the pre-marital agreement, both having been advised by lawyers who practised in Scandinavia. The agreement identified the wife's housing need in Scandinavia and ringfenced the husband's inherited wealth. The agreement did not become registered and therefore, as the court held, it was not binding in Scandinavia.

The court found that the wife did not have a full appreciation of the implications of the agreement. The pre-nuptial agreement was predicated on the wife living in Scandinavia and she did not have any understanding of the implications if she were to remain living in England; she was never advised to obtain legal advice in England and Wales and she was therefore unaware of the discretionary approach to matrimonial finance on divorce. The husband admitted that he knew the English courts were 'generous' to wives, but he did not share that information with the wife or seek to include reference to it in the pre-nuptial agreement. Mostyn J held that this placed the parties on an unequal footing. The court further found that the husband had acted in a way that demonstrated he did not consider himself bound by the agreement, post separation (promising the wife that he would provide generously for her in the event of their divorce).

All of these cases clearly demonstrate that the key feature remains not the passage of time, but that:

> 'The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.'
> (*Radmacher*, at [75])

Best practice

The cited case law may well assist those (at separation) seeking to enforce an agreement that falls short of the requirements of a qualifying nuptial agreement, particularly where the '28-Day Rule' has not been abided by. However, signing an agreement at least 28 days beforehand is likely to go a considerable way to avoiding any arguments that a late execution meant that there was not enough time to reflect and properly consider its terms. Furthermore, doing so will avoid a pre-nuptial agreement being declared invalid should there be a future statutory implementation of the terms of the Draft Nuptial Agreements Bill.

Until there is a change in the law, if an agreement is signed very close to the 'Big

Day' but there have been ongoing negotiations for some time, any dispute as to lateness are likely to be significantly weakened. However, since the purpose of entering into an agreement is (in most cases) ultimately to limit or even eradicate post-separation litigation, it would clearly be more advantageous to settle a pre-nuptial agreement well in advance of the marriage or civil partnership. Sometimes this may mean parties would be best advised to delay their ceremony.