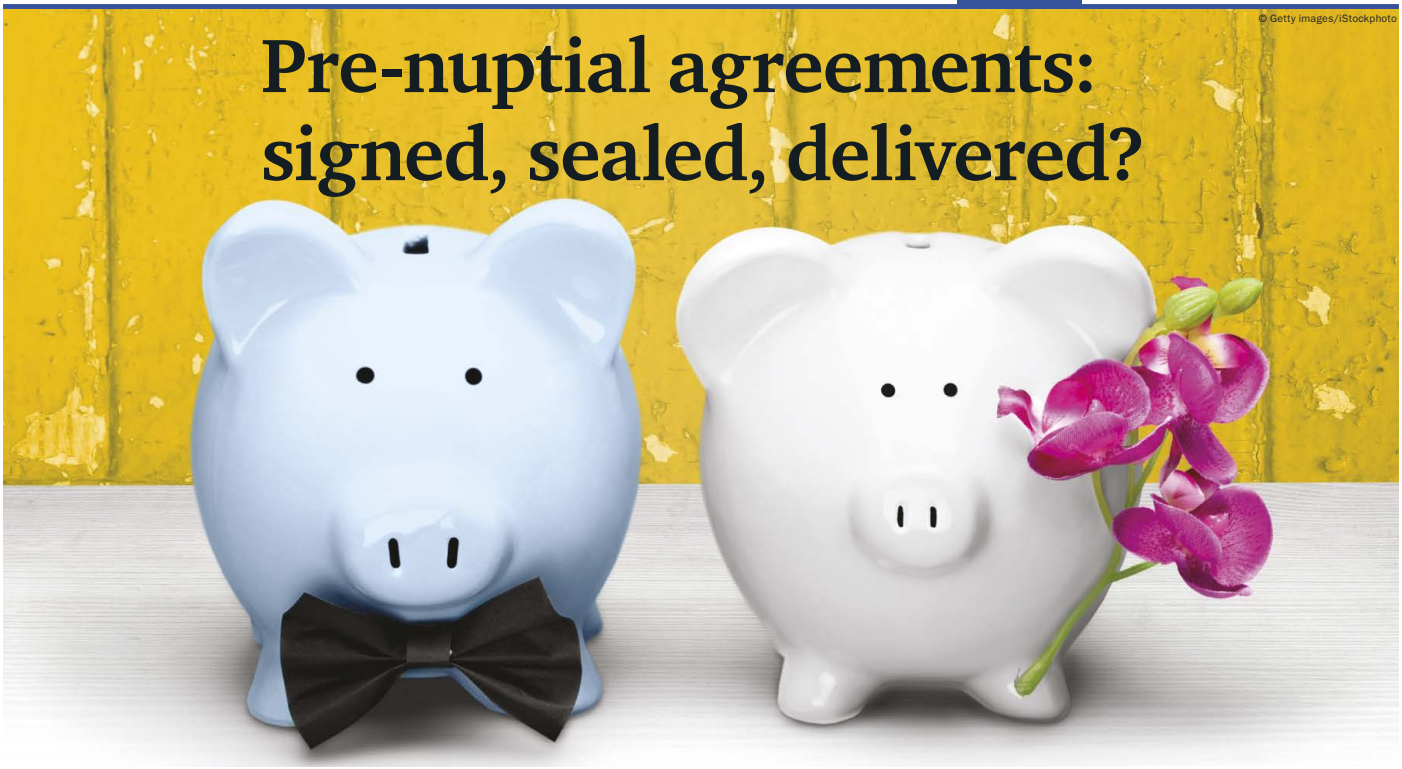
Pre-nuptial agreements: signed, sealed, delivered?



Sarah Jane Lenihan & Laura Couves examine a recent High Court ruling which has reinforced the legal landscape of pre-nuptial agreements in England & Wales

IN BRIEF

- Parties should continue to seek independent legal advice when negotiating pre-nuptial agreements to ensure they are freely entered into with full appreciation of their implications.
- An agreement is likely to be upheld, provided there is nothing which means it should be varied or amended on the premise of fairness.

Mr Justice Moor in *M v A* [2023] EWHC 613 (Fam), [2023] All ER (D) 14 (Apr) has reinforced the legal status of pre-nuptial agreements in what was, arguably, the biggest challenge to the concept since 2010, where the Supreme Court set out the principles governing the agreements in the case of *Radmacher v Granatino* [2010] UKSC 42, [2010] All ER (D) 186 (Oct). *Radmacher* established that such agreements should be upheld save for when they are unfair, either by virtue of how they were created, or the effect that they would have, if enforced.

In *M v A*, the wife argued that the pre-nuptial agreement was unfair for both of those reasons: first, that it was created unfairly, because of the existence of undue pressure; and second, that it would be unfair to enforce it today for two reasons: the parties signed the agreement pre-*Radmacher*, and it did not meet her needs.

Undue pressure

Dealing first with undue pressure, Moor J had made participation directions for the wife to sit in a curtained-off area of the court. Moor J made it clear that they were quite unnecessary after hearing the case, on the basis that there was 'not a shred of evidence of coercive control' [35]. Indeed, the wife made this case herself when she did not make use of those permissions.

A word of warning was delivered by Moor J against relying on conduct as a 'circumstance of the case' [35] where the wife had previously stated that she did not intend to rely on the s 25 factor (under s 25 of the Matrimonial Causes Act 1973 (MCA 1973)). To rely on conduct in such a way should not be permitted following *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] All ER (D) 343 (May), and Moor J advised that, in the absence of evidence, it 'should never reappear in this type of litigation' [35]. For practitioners, if you intend to run a conduct argument, it must be pleaded properly; you cannot simply run the argument in the background in the hope that it will add colour to your client's case.

An interesting analysis of what may amount to undue pressure was explored in this judgment. The judge acknowledged that the wife *was* under some pressure, but that was not sufficient. It had to be 'undue' pressure. It was also accepted that the husband said that there would be no marriage without a pre-nuptial agreement. However, that was not, in and of itself, a vitiating factor. Indeed, for couples intending to employ a pre-nuptial agreement, it is commonplace for the signing of such to be a prerequisite to the marriage.

There was discussion of the 'mother of all arguments', the existence of which was not disputed by the parties, but their recollection of the event differed significantly. Moor J accepted that the fact that the parties rowed did not amount to undue pressure. There was a significant cooling-off period before the agreement was signed, and further drafting amendments were made by both parties after the argument occurred.

In *M v A*, the wedding was not scheduled to take place until September 2005. Notably, the 'save the dates' were not sent out to guests until a final agreement had been reached. The pre-nuptial agreement was executed on 3 June 2005. The husband had made it clear that no wedding invitations should be sent out until the pre-nuptial agreement had been settled, to avoid either party from feeling under pressure. The lapse of time between a pre-nuptial agreement being signed and the date of the wedding is likely to be a strong countervailing factor to an argument that there was significant pressure upon a party to sign. If your client is seeking advice in respect of a pre-nuptial agreement and the wedding is imminent, they would be well advised to explore the alternative option of a post-nuptial agreement, which, in any case, has the same legal status as pre-nuptial agreements in English and Welsh law.

To summarise, Moor J found that there was no undue pressure which should eliminate or reduce the weight to be attached to the agreement.

The wife maintained that, absent any finding of undue pressure, it was unfair to enforce the pre-nuptial agreement as it was signed pre-*Radmacher*. This reasoning did not stand up in court. Moor J commented that it cannot be right that the fact that an agreement predates *Radmacher* minimises its weight (*KA v MA* [2018] EWHC 499 (Fam),

[2018] All ER (D) 92 (Apr) at [55]), or Mr Granatino would not himself have been held to the pre-nuptial agreement that he signed.

What's reasonable?

Finally, the wife argued that the agreement did not meet her needs. The court is obliged to consider the factors in s 25(2), MCA 1973 (*Brack v Brack* [2018] EWCA Civ 2862, [2019] All ER (D) 18 (Jan) at [103]), otherwise known as the '*Brack* exercise', including the needs of each party. This obligation is not obviated by the existence of a pre-nuptial agreement. One cannot sign a pre-nuptial agreement which would leave their spouse in a situation of need and expect it to be upheld, simply because both parties freely signed up to its terms.

In *M v A*, under the terms of the pre-nuptial agreement, both parties were to retain any property accumulated before they met. The wife would receive £500,000 for each complete year of the marriage (to a maximum of £12.5m on their 25th anniversary). Additionally, she would receive half of the value of their London property on the eighth anniversary of the marriage or when the parties had children, whichever was the earlier. Alternatively, she would receive 50% of the increase in value of the net assets during the marriage if the sum was greater which would be capped at 42% of the husband's net worth. The husband's assets were £32.5m at the time the pre-nuptial agreement was signed and £46.3m at the time the matter appeared before the court. The marital acquest was therefore £14m and so this clause did not take effect. In terms of maintenance, the husband was to pay £60,000 per annum, per child, plus school fees and medical expenses.

The wife wished to retain the London property on the basis that it had been the parties' children's home throughout their lives, the two children now being 14 and 15. The welfare of those minor children is the first consideration to which the court is to have regard, but Moor J was satisfied that children are able to adapt to change and their welfare was not conditional on the retention of the family home by the wife. It was noted that despite it being the first consideration, the children's needs are not paramount unlike under s 1, Children Act 1989.

In line with the terms of the pre-nuptial agreement, Moor J awarded the wife £7m, by way of a *Duxbury* fund, to reflect the 14-year marriage, and a housing fund of £4.75m, the property having been valued at £9.5m. In addition, the husband was ordered to discharge the wife's litigation loan with Level, resulting in a total award of £12,326,903. Child maintenance was ordered in accordance with the pre-nuptial agreement. Moor J made it clear that either the husband or the wife were at liberty to apply for costs.

Key takeaways

Although without the pre-nuptial agreement the award might have been more generous, the question is: is there anything in the agreement that means it should be varied or amended on the premise of fairness? There is a two-stage exercise to be undertaken. First, are there any circumstances surrounding the making of the agreement which means the weight to be attached to it should be eliminated or reduced? Second, an assessment must be carried out as to whether the agreement operates fairly today, having regard to all the s 25, MCA 1973 factors. Pre-nuptial agreements are intended to afford parties with respect for individual autonomy, which may encroach into the court's jurisdiction in deciding what would be a fair settlement. This is a concept we have seen before in *Radmacher*: 'The fact of the agreement is capable of altering what is fair' ([75]).

Family law is discretionary. You will often hear practitioners say that you could go to five different judges and, while you might not get five different answers, you will certainly get a few. If you have two parties who wish to secure some financial certainty if their marriage were to break down, as opposed to rolling the dice at court, that decision should be respected. How can we otherwise allow clients to incur the expense of entering into such agreements if one party is able to renege on their promise because they no longer like what they agreed?

The use of open offers in this case cannot be ignored. When the solicitor was instructed by the husband, his first letter to the wife was an open offer, offering the wife over and above what she was eventually awarded at court, by permitting her to remain in the property for ten years. This offer was refused and second, third and fourth open offers followed, none of which were accepted. Where Moor J enforced the pre-nuptial agreement in its entirety, save for the additional payment of the wife's litigation loan, it must be right that the use of reasonable open offers has a significant impact on any decision made as to the parties' costs.

There are two key messages to be taken from this judgment:

- For practitioners, *Radmacher* remains good law. If the parties freely entered into the agreement, with full appreciation of its implications (having received independent legal advice on the same), and it remains fair to hold the parties to their agreement, the court should give effect to the agreement. Consider sending an early open offer, in accordance with the terms of the pre-nuptial agreement.
- It is clear pre-nuptial agreements will not be ignored and a client must proceed on the basis that it will be upheld. For litigants, the message is simple: if you do not want to be bound by the terms of a pre-nuptial agreement, do not sign it! **NLJ**

Sarah Jane Lenihan, partner, & **Laura Couves**, trainee solicitor, at Dawson Cornwell LLP (*www.dawsoncornwell.com*). Dawson Cornwell LLP acted for the husband in *M v A*.