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Can appropriate reviews make pre-nups stick?

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Family analysis: What weight will the courts give to a pre-marital agreement when deciding applications for financial remedies? Katie Rainscourt, managing partner at Rainscourt Family Law Solicitors, says lawyers need to consider how best to incorporate reviews, to ensure both parties' needs continue to be met by the pre-marital document.

Original news

Luckwell v Limata [2014] EWHC 502 (Fam)

In a financial remedies case the court gave consideration to the weight to be given to a pre-marital agreement, and supplemental agreements entered into by the parties, and also whether the hearing should take place in public.

What is the significance of this decision?

The Supreme Court decision in *Radmacher (formerly Granatino) v Granatino (pre-nuptial contract)* [2010] UKSC 42, [2011] 1 All ER 373 established that divorcing couples can rely on a pre-marital agreement if it is freely entered into by each party with a full appreciation of its implications, unless to do so would be unfair. The significance of *Luckwell* is that it provides us with a further indication about what can make a pre-nuptial agreement fair, and therefore, more likely to be binding.

What does this case tell us about the weight the court will attach to pre-marital agreements?

The pre-marital agreements were prepared by experienced advisors, with full and frank disclosure and an understanding of the terms by both parties, but the terms of pre-marital agreements were varied by the court. The reason for this was that:

'the weakness, or even unfairness, of the agreements from the start was that they provided nothing at all for Frankie [the defendant] in any circumstances, no matter how long the marriage may have lasted nor how great his need upon breakdown. They made no attempt, for instance by a formula or by some reference to house price indices, to pre-assess any provision for his own accommodation or needs in the event of breakdown, perhaps after many years or dependence by him upon Victoria for his accommodation.'

The Supreme Court in *Granatino* decided that if the terms were unfair from the start, it would reduce its weight. The key questions though are whether the agreement is fair at the point of use and whether the outcome which the agreement produces is a fair one, looking at all the facts when the marriage breaks down.

How did the court approach the supplemental agreements entered in to?

Two supplemental agreements were entered into during the marriage by the parties. The court considered that it was 'highly significant' that the husband repeatedly signed marital agreements. He entered three of them over a period of two-and-a-half years. The court considered that 'very great weight' should be given to the agreements as he intended to be bound by them.

How did the existence of the agreements affect the court's decision on the size of the housing fund?

The court found that on the facts of the case, there was only 'one consideration which is capable of outweighing the above considerations and capable of having the effect that the agreements should not be applied rigorously and to the letter. That consideration is current and likely future need'.

The husband had a 'predicament of real need' for a home where the three children of the family could regularly stay with him. The court ordered that he needed his extensive debts paid and a housing fund of £900,000 loaned to him to purchase a home until the youngest child reached the age of 22, and then 45% of that sum was to be returned to his wife. The balance was to be returned to the wife on the husband's death. The judge decided:

'But for the agreements, I would have awarded that sum (and more) outright as a housing sum. But in order to give as much weight as possible to the agreements Frankie can only have the use and not the ownership of the property.'

What lessons can be taken from this complex case?

This case outlines the importance of ensuring that pre-marital agreements are fair at the point they are signed, and remain fair throughout a marriage. It is important to estimate the needs of both future spouses and then provide for the needs of both spouses to be met on divorce by the terms of the pre-marital agreement. The agreement in *Luckwell v Limata* provided for a 'review' to be carried out five years after the agreement was made, and every three years thereafter--but there were no details in the agreement about how this review should be carried out. Holman J also indicated that at the five year point in the marriage, 'there were many stresses in the marriage and it is fanciful to suppose that around that time [the wife] would have countenanced any relaxing of the terms'. Consequently lawyers need to consider how best to incorporate review, to ensure both parties' needs continue to be met by the document.

The recent Law Commission report decided that qualifying nuptial agreements should become enforceable as contracts, but they have recommended 'that spouses and engaged couples should not be able to make contractually enforceable agreements that deal irrevocably with their future needs for housing, childcare, an income, or any other aspects of "financial needs"'. Consequently, estimation of future need of both parties to a marriage will remain key when preparing a pre-marital agreement, even if the proposed draft bill becomes law.

See also: [add link to NA Family lawyers respond to Law Commission's report on Matrimonial Property, Needs and Agreements].

Interviewed by Nicola Laver.

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