



A Mediator's Guide to Pre- and Post-nuptial agreements

Radmacher v Granatino – 2010 UKSC 42

We would like to express our grateful thanks to Neil Robinson for allowing us to include his article as follows:

1. The Supreme Court in *Radmacher v Granatino* has apparently clarified (at least until the Law Commission and Parliament have their say!) the position about pre-nuptial agreements (“pre-nups”) in English law without the need for primary legislation.
2. What does it say?
 - 2.1 The essential test is: “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”
 - 2.2 Nevertheless:
 - 2.2.1 the English ancillary relief court is not *obliged* to give effect to nuptial agreements
 - 2.2.2 the parties cannot by agreement oust the jurisdiction of the Court
 - 2.2.3 the court must however give appropriate weight to such agreements
 - 2.3 the *likelihood*¹ of upholding the agreement would be rebutted if:
 - 2.3.1 the parties did not enter the agreement freely or fully appreciate its implications, or
 - 2.3.2 the agreement was entered voluntarily and understood but it would not be fair to hold the parties to it in the circumstances
 - 2.4 The sorts of *unfairness* that might result in the agreement not being upheld would include:
 - 2.4.1 a failure to meet the reasonable requirements of any dependent children
 - 2.4.2 where an attempt had been made to address future contingencies, there might be greater scope for unfairness the longer the marriage subsisted and the more the change in circumstances
 - 2.5 the agreement does not need to not have contractual force to be influential
 - 2.6 there is no usefulness in distinguishing between pre- and post-nups
3. Some interesting things about the case:
 - 3.1 In this case, the richer party was the German wife, who succeeded in upholding the agreement to the detriment of her French husband
 - 3.2 The Supreme Court decided on a majority of 8:1, but the dissenting voice was Lady Hale.
 - 3.3 Lady Hale said that to create a presumption in favour of upholding pre-nups was an impermissible gloss on statute and could only be achieved by primary legislation
 - 3.4 She also felt that there was a “gender dimension” to upholding pre-nups in the more familiar case of a weaker female spouse (see below)

¹ The legal term “presumption” is not quite accurate. We have plumped for the more common language of “likelihood”

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4. Some thoughts:
 - 4.1 fairness, s 25 considerations, children, needs and resources still rule – there is nothing here inconsistent with the current statute or the exploration of options within parameters in the mediation room
 - 4.2 the position might now be said to be similar to that of separation agreements properly entered into, where the advice that no-one can oust the jurisdiction is equally true, but with the added complications that there may be a more significant change of circumstances between entering the agreement and the Court application
5. How should mediators approach pre- and post-nuptial agreements raised in mediation?
 - 5.1 With caution, but there is no reason why the same forensic information gathering could not take place as when, for example, considering the history of contributions in a cohabitation case
 - 5.2 With a clear understanding of the law – at least as much as set out above
6. How should mediators approach other sorts of less formalised agreements?
 - 6.1 Mediators have traditionally been able to explore with clients the ethical and emotional implications of non-binding agreements reached at the point of marriage or even on separation. This further move towards private ordering would seem to give a little more weight to this exercise
 - 6.2 The principles of “fairness” in relation to agreements, formal or otherwise, may be a very useful starting point in any such discussions
7. How should mediators deal with the negotiation of pre- and post nups in mediation?
 - 7.1 With a clear understanding of the law – at least as much as set out above
 - 7.2 In the expectation that clear legal advice will be required at an early stage
 - 7.3 With the clients’ clear understanding that, if legal advice is not obtained alongside the process, the mediation summary will be of no worth unless properly effected by two lawyers
 - 7.4 Just as with the best property and finance summaries, an attempt should be made to express, clearly in lay language but allowing for no ambiguity to lawyers, the terms of the pre-nup. This will require a knowledge of the Resolution precedents relating to pre-nups.
 - 7.5 Using the FMA or Resolution precedents as far as possible; for example, there is no reason why Client Information Forms, Agreement to Mediate, Financial Disclosure Booklets, Open Financial Summary and Memorandum of Understanding should not be used as in the “standard” case; indeed it is likely to help guarantee due process.
8. What opportunities does this present for mediators?
 - 8.1 Many opportunities for pre-nups will relate to the rich, but not necessarily so (eg second/ subsequent marriages, contributions brought in, pre-existing property, ring-fencing of items). Also, the *exceptions* to the expectation of upholding pre-nups will be common in the cases we deal with – (children, needs outstripping resources). Nonetheless.....
 - 8.2 Pre-and post nuptial agreements provide a real opportunity for the private ordering for which mediation and ADR are designed. They also present a tremendous marketing opportunity.
 - 8.3 It may be argued that the cases which attract pre-nups are those that some mediators struggle to deal with – that is, high and complex finance. The absence of overt conflict does not of itself make mediation an appropriate process. There are however plenty of models for supporting such cases by

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a co-mediation process, with the direct involvement of lawyers (who could then draw up the pre-nup), the integration of IFSA or other experts or through a hybrid collaborative law process that could be equally appropriate for pre-nups.

- 8.4 Given that pre-nups are so often about protecting the assets of the person with the greater economic power, there is a risk, as suggested by Lady Hale, of a “gender dimension.” This will be even more true in mediation if parties are not properly supported.
 - 8.5 The crux of the matter is a proper exploration of process options. Just as any other complex cases which come to mediation assessment, it will be the relative cost-effectiveness and expertise that will decide; collaborative law would seem an ideal place to create a pre-nup, since it employs both consensual working but also expert legal advice; nevertheless mediation may well be a perfectly appropriate alternative where funds for costs are limited and the expertise of the mediator is known
 - 8.6 Despite the absence of overt conflict between the participants, there is considerable risk of a blurring of boundaries if professional conflicts are not guarded against scrupulously. The answer to the question “can’t you draw up the agreement for us?” is always “no.” The value of mediation is to provide a safe space where these often difficult and sensitive issues can be explored and resolved before others give legal effect to mutually acceptable proposals.
9. Broadening the service offered – prevention not cure
- 9.1 If mediating mutually acceptable proposals about the terms of the pre- or post-nup has some value, then why not wider estate and family planning? In all cases where there are potentially competing interests, such as the step-children in a new relationship, is mediation not the ideal place to resolve these? Could ADR become the natural place for negotiating the terms of estate planning, mutual wills, trusts, cohabitations, where there are conflicting issues and persons who are often still overlooked by the non-contentious lawyer employed to try to reconcile these interests?
 - 9.2 How many inheritance litigations (or, more commonly, fractured inter-generational relations) might be avoided if mediators were able to help families (and especially newly constituted ones) to deal appropriately and transparently with these competing interests prior to family breakdown or death?
 - 9.3 Whereas it might be felt that pre-nup mediation in its narrow sense, with little conflict, might be accomplished in one session, where there are wider family interests there may be great value in encouraging the participants to go away and consult with family members/ prospective beneficiaries before concluding proposals, much as, for example, in direct consultation with children.
 - 9.4 These are not of course simply financial issues, as Inheritance Act mediations so often demonstrate. It will be important to assist participants to acknowledge the *symbolic* value of family items.
 - 9.5 Another area opened up by the prospect of more involvement pre- or during- relationships is that of relationship support in general, and agreements which cover broader relationship issues than the merely financial. Mediators could assist participants to address potentially difficult relationship areas, particularly in second or subsequent marriages, and to include them in the confidential summary. In addition, participants could be encouraged to look in advance at potential step-children conflicts. A co-mediator or family consultant would be appropriate in these situations.
 - 9.6 The more these issues are addressed, the more potentially complex the options and outcomes. Complexity is not a reason for avoidance or not trying!

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10. Some other broader questions

- 10.1 Does the case herald a greater emphasis on *private ordering* in general? What does this mean for mediation? It could certainly be argued that this is another boost for all approaches to consensual settlements in families.
- 10.2 Is there a risk that this may provide an attack on privilege? There is already a sophisticated argument going about how far “agreements” even if reached “without prejudice” can be opened up. This is one reason why in mediation we try to talk about “mutually acceptable proposals” rather than agreements. There is a possibility that *Radmacher* moves us a little closer to the time when mediation outcomes, unperfected in open correspondence or by Court order, could be opened up.
- 10.3 What of “agreements” in co-habitation cases? Shall we also start to look at these differently?

11. And finally...

- 11.1 Many of these issues will already have been addressed by the more far-sighted of you; the ideal place for exploring them further will be in case discussions, workshops, and advanced training. A good starting point might be to share the group’s individual experience of being a (slighted) beneficiary or step child
- 11.2 What are the opportunities for marketing and promotion, nationally and on behalf of our own services?
- 11.3 Watch this space!

© Neil Robinson December 2010, with thanks to Chris Barton, (who has been telling him for years that a pre-relationship role is the next great opportunity for mediators!) Ruth Smallacombe, and Sally Bolton and the FMA mediators on the Isle of Man.

For further information on mediation or any other corporate or private law issues, please contact us on (01624) 676868

This publication is intended only to provide a brief guide. It does not purport to be comprehensive or to provide legal advice.

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