

# pre-nuptial agreements in the spotlight

Ayesha Vardag and Emily Brand of Ayesha Vardag Solicitors, highlight some practical and procedural strategies in advising on pre-nuptial agreements

Pre-nuptial agreements are firmly in the spotlight in the context of economic uncertainty, anxiety about draconian awards in the English courts and a brace of these cases at appellate level. There is an increasing number of clients who want a contract drafted, or advice on whether an executed agreement, very often a foreign agreement, will be applied in the English courts.

## Enforceability

Pre-nuptial agreements are still unenforceable in this jurisdiction on public policy grounds, an approach established by case law in the 1920s designed to protect vulnerable wives from unscrupulous husbands. If a client is hoping to rely on a pre-nuptial agreement, a strategic approach is required. The agreement may be binding abroad but will not be so in England. Consider, therefore, whether a client has any jurisdictional basis to commence proceedings in a country where the contract will be upheld.

Under **Brussels II** (Council Regulation (EC) No 2201/2003), it is a first-past-the-post situation so divorce proceedings may need to be issued in another European Union country as a matter of urgency,

provided that it favours the client. If a foreign jurisdiction is an option, seek urgent specialist advice regarding jurisdiction and the applicability of the agreement in that country, liaising with foreign lawyers as appropriate.

If the client wants to avoid the terms of a pre-nuptial agreement, a legal adviser will probably want to rush to petition for divorce here. The situation in England is anomalous and this may have huge implications for individuals who are resident but not domiciled here. Believing their assets to be safely ring-fenced by a pre-nuptial agreement, a party may come to England to save tax, only to be subjected to a huge divorce payment which makes tax savings pale into insignificance.

This is all the more galling if there is a pre-nuptial agreement which would have worked if the client had stayed in the home country.

## Binding

However, even though pre-nuptial agreements are technically not binding in England, parties may be held to the agreement if properly drawn up. Depending on the facts, the judge may give such weight to the agreement that the resulting award is

more or less the same as if the agreement had been implemented.

*K v K (Ancillary Relief: Prenuptial Agreement) (2003 1FLR 120)*, as confirmed and clarified by subsequent cases, sets out the issues that need to be considered when drafting a pre-nuptial agreement and when considering its validity. A court is more likely to make orders that reflect the terms of a pre-nuptial agreement if both parties have independent legal advice so that the courts can verify that:

- both parties understand the agreement;
- both parties were properly advised;
- there was no untoward pressure on either party to sign the agreement;
- both parties were full and frank about their financial resources;
- child provision was taken into account; and
- there would be no manifest injustice in holding the parties to the terms of their agreement.

When drawing up a pre-nuptial agreement, it is advisable that letters from both parties confirming that they were independently advised are obtained or that this is drafted into the agreement. Copies of identification documents should also be attached to the deed; this is not technically required under English



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law, but is important in case another jurisdiction is subsequently involved.

## Recognition

It is possible that, within the next five years, there may be some form of legislation here that will recognise pre-nuptial agreements, not least to harmonise the apparent discord in Europe arising from the fact that it is virtually only in this jurisdiction that pre-nuptial agreements are not binding.

Referring to this disharmony, Thorpe LJ held in *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FCR 323 that the pre-nuptial agreement in that case was of “magnetic importance”. This case was a ‘paradigm’ case in that the marriage was short, childless and both parties had independent means. The Lord Justice stated in his judgment: “It does seem to me that the role of contractual dealing, the opportunity for the autonomy of the parties, is becoming increasingly important.”

At first instance, in the case of *NG v KR* [2008] EWHC 1532, [2008] Fam Law 108, Baron J reduced an award to a French husband, married to a German wife, on the grounds that he had entered into a German marriage contract whereby neither party would be entitled to a penny from the other on divorce. The judge reached this decision even though she held that



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“the husband’s agreement was tainted because he did not know what his future wife was worth and did not have independent legal advice about the ramifications of the deal”. The agreement operated, the judge said, to reduce the husband’s need to “the lower end of the bracket of any possible award”.

The significance of this case is that the pre-nuptial agreement, despite not conforming to the English best-practice criteria for pre-nuptial agreements, was applied in principle to reduce the husband’s award, on the basis that he was a man of commerce who knew what he was signing.

However, given that the pre-nuptial agreement was fully compliant and binding under German law where the parties, both foreign nationals, executed it, the judge’s award of several million pounds to the husband who would have been entitled to nothing under

the pre-nuptial agreement (except the claims in respect of children available to all parents, married or unmarried) has given rise to an appeal, to be heard this April.

The wife has been given leave to argue that the 1929 case of *Hyman v Hyman* (1929) AC601 which rendered pre-nuptial agreements not binding on policy grounds, is no longer good law, as well as considering the foreign element in this sort of case.

The outcome of this case may be of interest to resident-non-domiciled individuals who will certainly require clear guidance on the enforceability of their pre-nuptial agreements in this country.

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