

# Courts can enforce pre-nuptial deals

Supreme Court  
Published October 22, 2010

## Radmacher (formerly Granatino) v Granatino

Before Lord Phillips of Worth Matravers, Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood, Lord Mance, Lord Collins of Magesbury and Lord Kerr of Tonaghmore  
Judgment October 20, 2010

Courts could give effect to an ante-nuptial or post-nuptial agreement that was freely entered into by each party with a full appreciation of its implications unless it would not be fair to hold the parties to it.

The Supreme Court so held by a majority in dismissing an appeal by the husband, Nicolas Joseph Jean Granatino, against a decision of the Court of Appeal (Lord Justice Thorpe, Lord Justice Rix and Lord Justice Wilson) (*The Times* July 13, 2009) allowing an appeal by the wife, Katrin Radmacher (formerly Granatino), against a financial settlement in favour of the husband ordered by Mrs Justice Baron ([2009] 1 FCR 35).

Mr Nicholas Mostyn, QC and Mr Deepak Nagpal for the husband; Mr Richard Todd, QC, Mr Geoffrey Kingscote and Mr Jonathan Harris for the wife.

LORDS PHILLIPS, HOPE, RODGER, WALKER, BROWN, COLLINS and KERR, in a combined judgment, said that there could be no question of the court altering the principle that it was the court, and not any prior agreement between the parties, that would determine the appropriate ancillary relief when a marriage came to an end, for that was embodied in the Matrimonial Causes Act 1973.

What the court could do was to attempt to give some assistance in relation to the approach that a court considering ancillary relief should adopt towards an ante-nuptial agreement between the parties.

Their Lordships wholeheartedly endorsed the conclusion of the Privy Council in *MacLeod v MacLeod* (*The Times* December 29, 2008; [2010] 1 AC 298, paras 38 and 39) that the old rule that agreements providing for future separation were contrary to public policy was obsolete and should be swept away.

But that should not be restricted to post-nuptial agreements. If parties who had made such an agreement, whether ante-nuptial or post-nuptial, then decided to live apart, there was no reason why they should not be entitled to enforce their agreement.

There was no material distinction between ante-nuptial and post-nuptial agreements. The ancillary relief court should apply the same principles when considering ante-nuptial agreements as it applied to post-nuptial agreements.

If an ante-nuptial agreement, or indeed a post-nuptial agreement, was to carry full weight, both the husband and wife had to enter into it of their own free will, without undue influence or pressure, and informed of its implications. What was important was that each party should have all the information that was material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage ending.

*White v White* (*The Times* October 31, 2000; [2001] 1 AC 596) and *Miller v Miller* (*The Times* May 25, 2006; [2006] 2 AC 618) had established that the overriding criterion to be applied in ancillary relief proceedings was that of fairness and identified the three strands of need, compensation and sharing that were relevant to the question of what was fair.

A problem arose where the agreement made provisions that conflicted with what the court would otherwise have considered to be the requirements of fairness. The fact of the agree-

ment was capable of altering what was fair. It was an important factor to be weighed in the balance.

Their Lordships would advance the following proposition, to be applied in the case of both ante- and post-nuptial agreements: "The court should give effect to a nuptial agreement that was 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."

That left outstanding the difficult question of the circumstances in which it would not be fair to hold the parties to their agreement. That would necessarily depend upon the facts of the particular case, and it would not be desirable to lay down rules that would fetter the flexibility that the court required.

There was, however, some guidance that it was safe to give. Section 25 of the 1973 Act provided that first consideration had to be given to the welfare, while a minor, of any child of the family who was under 18. An agreement could not be allowed to prejudice the reasonable requirements of any children of the family.

There should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knew best. That was particularly true where the parties' agreement addressed existing circumstances and not merely the contingencies of an uncertain future.

Often parties to a marriage would be motivated in concluding a nuptial agreement by a wish to make provision for existing property owned by one or other, or property that one or other anticipated receiving from a third party. There was nothing inherently unfair in such an agreement and there might be good objective justification for it.

Where the ante-nuptial agreement attempted to address the contingencies, unknown and often unforeseen, of the couple's future relationship there was more scope for what happened to them over the years to make it unfair to hold them to their agreement.

Of the three strands identified in *White* and *Miller*, it was the first two, needs and compensation, which could most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties were unlikely to have intended that their agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoyed a sufficiency or more, and such a result was likely to render it unfair to hold the parties to their agreement.

Equally, if the devotion of one partner to looking after the family and the home had left the other free to accumulate wealth, it was likely to be unfair to hold the parties to an agreement that entitled the latter to retain all that he or she had earned.

Where, however, those considerations did not apply and each party was in a position to meet his or her needs, fairness might well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that had come to pass.

Thus it was in relation to the third strand, sharing, that the court would be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made.

Lord Mance delivered a concurring judgment. Lady Hale delivered a dissenting judgment.

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