



## MACLELLAN & ASSOCIATES

Barristers & Attorneys, Notary Public

### **PRE-NUPTIAL AGREEMENTS**

A pre-nuptial agreement (“pre-nuptial”) is a contract made before marriage to protect the assets of each person in the event of a divorce. Because the terms are agreed when there is no bitterness between the parties as a result of a relationship breakdown the costs of negotiating a pre-nuptial are usually far less than the costs of negotiating a divorce settlement.

Pre-nuptials have historically not been considered legally enforceable in England. As a result of the recent Court of Appeal decision in *Radmacher v Granatino* [2010] such agreements are now carrying decisive weight in the eyes of the Court. When drafting a pre-nuptial there are four key principles to consider as a result of the *Radmacher* judgment:

#### **The court’s jurisdiction**

Pre-nuptial agreements cannot oust the jurisdiction of the court. A marrying couple cannot agree whatever they wish in a pre-nuptial and be guaranteed it will happen as pre-nuptial agreements do not have contractual status. Having said that the court should give effect to a pre-nuptial 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.”

#### **Fairness**

The contents of a pre-nuptial must be fair. What is considered fair can pose a difficult question however the court is keen to emphasize that it will depend on the facts of the particular case. In considering what is fair one has to consider the reasonable requirements of any children of the family and the needs of the parties. If the court feels that there is an unfair change in circumstances upon divorce then, as in *Radmacher*, the court will tweak the agreement and bring it within the boundaries of fairness.

#### **The circumstances surrounding the pre-nuptial agreement**

The circumstances surrounding the making of a pre-nuptial are important because the court will consider these when deciding what weight is to be given to the agreement upon divorce. Circumstances to consider are whether or not there is evidence of duress, fraud or misrepresentation. Was full and frank financial disclosure made? Was independent legal advice received?

When drafting a pre-nuptial, notwithstanding the outcome in *Radmacher*, it is advised to execute the agreement in sufficient time before the marriage so that



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disclosure and independent legal advice can be exchanged without any urgency so as to enable the parties to freely take their time in considering all the issues. A short time period can be construed as evidence of duress which can invalidate the agreement.

### **Pre-nuptial agreements and Collaborative Law process**

As pre-nuptials are entered into at a happy time in a couples life it may also be beneficial for them to be considered and drafted up using the collaborative process whereby all the parties attend 4-way meetings with their lawyers (see <http://www.cla.bm>).