ROYTHORNES solicitors

Roythornes Family Law Review

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Welcome to the latest issue of the Roythornes Family team's review

Non-matrimonial property - the Court's approach

The Court has, since the landmark case of White v White [2001] 1 AC 596, applied the principle of sharing to assets owned or acquired by the parties during their marriage/association. However, this has led to the issue of how to treat assets acquired by the parties by way of a gift or inheritance; so called "non-matrimonial assets". The topic has long been a cause for debate amongst judges and legal practitioners, and it is often a contentious issue between parties; within divorce/financial proceedings.

The general approach which the Court has adopted in relation to non-matrimonial assets is that, while they cannot be ring-fenced, they should in general only be invaded where it is necessary to meet needs.

In the recent case of Hart v Hart [2017] EWCA Civ 1306, the wife appealed a Final Order which provided for her to receive assets of approximately £3.5 million from a total pot of £9.4 million. The husband's pre-marital wealth had developed from several different, but overlapping business interests. The trial judge, at first instance, had determined that this was the amount required to meet the wife's needs. The trial judge reached the conclusion that, at the beginning of the parties' relationship, the husband had been a wealthy man (whereas the wife had no significant capital assets) and that this was a matter which 'must be reflected in the outcome'. It was, however, acknowledged by the trial judge that the husband's pre-marital wealth was difficult to quantify, given that his approach to disclosure was said to be 'very poor indeed'. It was this litigation conduct which the wife used as the basis of her appeal.

Lord Justice Moylan delivered the leading judgement in the Court of Appeal. The Court was concerned, in particular with:

(a) how such property should be assessed;

(b) the extent of the assessment that may be appropriate; and

(c) whether the approach should be formulaic or a matter for the Judge's wider discretion.

The Court of Appeal dismissed the wife's appeal. In his leading judgment, Moylan LJ noted that classifying property as matrimonial or non-matrimonial was relevant to any Court seeking to apply the sharing principle, because the sharing principle applies with force to matrimonial property, but does not apply (or applies only with significantly less force) to non-matrimonial property.

Moylan LJ considered that it was not a requirement for a judge to adopt a "formulaic" approach in order to achieve a fair outcome. The Court of Appeal thus determined that the Court at first instance had properly assessed the wife's award by looking at the case on the basis of the wife's needs. The Judge had then undertaken an overview of the case to check that his proposal was fair in the circumstances. Moylan LJ confirmed that this was the correct approach, and the Order could not be successfully challenged in those circumstances.

The case illustrates the difficulties that the Court has in dealing with arguments in relation to matrimonial and non-matrimonial property, as often an accurate financial history is difficult to obtain. The case thus highlights the importance of establishing a detailed chronology as to the nature and source of the assets, so that proper advice as to these arguments can be obtained.

What is the purpose of family mediation?

Mediation is a form of Non-Court Dispute Resolution. Individuals can use the process to address a wide range of family-related issues. The purpose of family mediation is to help people address issues, including arrangements relating to children, finances and property, arising out of the breakdown of their marriage or relationship in an informal and non-confrontational manner. It is important that those taking part in the process understand and adhere to the principles of mediation.

There are many benefits to mediation. The process is intended to give people an opportunity to control the outcome of the dispute themselves, rather than having the matter determined/imposed by the Court. Court proceedings can cause unnecessary rancour and bitterness between the parties. The legal costs associated with protracted litigation can also be substantial.

The process should also help to preserve good relations between the participants going forward. This is particularly important when there are children involved. During the course of mediation, a family mediator will encourage those taking part in the process to focus on the needs and interests of their children. This should help the clients to co-parent and work together as separated parents. In summary, the mediation process and all of its principles are designed to help maintain relations between people and to help them stay in control of the decisions which affect their lives and their children's lives.

We offer a family mediation service at Roythornes; Victoria Hope is a qualified mediator with Resolution, who is working towards accreditation, and offers a family mediation service on behalf of Roythornes. She specialises in all areas of family law, including divorce, financial proceedings and issues affecting children (such as, child support and contact issues). If you are interested in taking part in mediation and believe that it would be an appropriate forum for you and your partner, or, if you have any queries regarding the process itself, then please do not hesitate to contact us.

THREE PRINCIPLES OF MEDIATION

1. It is a voluntary process. The mediator and everyone taking part in the process have to agree that mediation is suitable.

2. It is a confidential process, except where there are concerns of risk of harm to a child or vulnerable adult, or if a statement is made which discloses a criminal offence or a breach of money laundering legislation. Confidentiality is an essential component of mediation as it allows the participants to share openly their ideas and proposals without fear that they can be subsequently used against them, for example, in Court.

3. The mediator is impartial and has no authority to determine any issues which are raised during the course of the process. A mediator can provide information to the clients during the process. However, they are not able to provide any advice. The role of a mediator is to facilitate discussions between the participants in the hope that they can agree proposed arrangements on any points which are in dispute between them. If an arrangement is reached via mediation then those taking part in the process will have the opportunity to take legal advice from their solicitors before the proposed arrangement becomes legally binding.

Nuptial agreements

A pre-nuptial agreement is an agreement in writing entered into by two parties prior to their marriage, or entry into a civil partnership, which records how they wish their resources to be treated and distributed in the event that they should divorce or have their civil partnership dissolved.

Historically, it was contrary to public policy for married couples, or couples about to get married, to make an arrangement which provided for the contingency that they might separate. However, attitudes have changed over the years, and in October 2010 the Supreme Court, in the reported case of **Radmacher v Granatino**, held that in the case of both pre-nuptial and post-nuptial agreements:

60% of people are happy to sign a pre-nup (McCrindle 2016)

"The Court should give effect to a nuptial agreement that is freely entered into by each party with full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement".

Notwithstanding the Supreme Court's ruling, pre-nuptial agreements are not binding in the sense of being enforceable contracts; nor are they permitted to prevent the Court exercising its jurisdiction to make financial orders on a divorce or dissolution of a civil partnership. However, a party to a pre-nuptial agreement is now able to ask the Court to make orders that reflect the terms of the pre-nuptial agreement and this is now likely to be the outcome, provided the agreement is valid and produces a fair result. Pre-nuptial agreements can therefore now provide a degree of financial security and certainty, particularly as the Supreme Court has expressly held that there is nothing inherently unfair about such an agreement seeking to ring-fence non-matrimonial assets – i.e. assets acquired pre-association/marriage, or acquired during the marriage or civil partnership by gift or inheritance.

A valid pre-nuptial agreement has to meet certain basic requirements. In particular

- the agreement must be contractually valid (and be able to withstand challenge, for example, on the basis of undue influence, duress or misrepresentation);
- both parties to the agreement must have received, at the time of the making of the agreement, disclosure of material information about the other party's financial situation. In other words, there is a requirement for there to be a full and frank disclosure of the parties' respective personal and financial circumstances;
- both parties must have received independent legal advice at the time the agreement was executed;
- the agreement must not have been made within the 28 days immediately prior to the wedding, or the celebration of the civil partnership; and,
- the agreement must have been made by deed and contain a statement signed by both parties that they understand that the agreement is a pre-nuptial agreement and that it will be considered and taken into account by the Court.

There is now no doubt that the decision of the Supreme Court in Radmacher represented, and now demands, a significant shift in the approach and weight to be given to negotiated, drafted and freely signed nuptial agreements when there are no vitiating factors. Valid pre-nuptial agreements will now therefore always be considered and given weight, and often decisive weight, as part of the overall circumstances of a case involving the determination of financial claims on divorce, or dissolution of a civil partnership. The terms of a valid pre-nuptial agreement may thus affect not only whether an award is made at all, but also the size and structure of any award.

The following propositions of law can now be drawn from the Supreme Court decision in Radmacher:

1. it is the Court, and not the parties, that decide the ultimate question of what financial provision is to be made on divorce or dissolution of a civil partnership;
2. the overarching criterion remains the search for fairness in accordance with the matters set out in Section 25 of the Matrimonial Causes Act 1973 (and having regard to principles of need, sharing and compensation), but a valid agreement is a material consideration capable of altering what is fair, including in relation to "need";
3. an agreement (assuming it is not impugned for procedural unfairness, such as duress or misrepresentation) should be given weight in that process, although that weight may be anything from slight to decisive in an appropriate case;
4. the weight to be given to an agreement may be enhanced or reduced by a variety of factors;
5. effect should be given to an agreement that is entered into freely with full appreciation of the implications, unless in the circumstances prevailing it would not be fair to hold the parties to the agreement (i.e. there is at least a burden on the party seeking to resile from the agreement to demonstrate that the agreement should not prevail);
6. whether it will "not be fair to hold the parties to the agreement" will necessarily depend on the specific facts of the case, but the following guidance is now likely to apply:

- a nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children;
- respect for autonomy, including a decision as to the manner in which their financial affairs should be regulated, may be particularly relevant where the agreement addresses the existing circumstances and not merely the contingencies of an uncertain future;
- there is nothing inherently unfair in an agreement making provision dealing with existing non-marital property, including anticipated future receipts, and there may be good objective justifications for it, such as obligations towards family members;
- the longer the marriage has lasted, the more likely it is that events have rendered what might have seemed fair at the time of the making of the agreement unfair now, particularly if the position is not as envisaged;
- it is unlikely to be fair that one party is left in the predicament of real need while the other has financial security; and,
- where each party is able to meet his or her needs (i.e. is financially independent), fairness may well not require departure from the agreement.

It is always sensible to review a pre-nuptial agreement every few years to ensure that it still reflects the parties' intentions, meets their needs and remains fair. For example, if children have been born, or circumstances change dramatically, the parties should sensibly review the agreement (and possibly convert it into a post-nuptial agreement) to take account of the new situation in which they find themselves.

If you think a pre-nuptial agreement may be suitable for you and your partner, you should discuss the general concept of it with them first. Remember – it needs both parties to be in agreement before it can be executed.

Our family services

- Pre and post-nuptial agreements
- Matrimonial finance
- Cohabitation agreements and disputes
- Asset protection and tax mitigation
- Parental responsibility, paternity disputes and surrogacy
- Negligence claims against family lawyers
- Separation and divorce
- Pension and property advice
- Children Act proceedings and wardship
- Injunctions

For a full list of our family services please see www.roythornes.co.uk

My child, my say

www.roythornes.co.uk

It is a matter of law that, save in exceptional circumstances, the parents of a child should have the final say with respect to their child's upbringing and care. However, in many cases this matter is not that straightforward, particularly when parents separate, or the wider family is involved.

The authority to make decisions in respect of a child derives from those who have Parental Responsibility. Parental Responsibility is defined in the Children Act 1989 (as amended) as "all of the rights, duties, powers and responsibilities and authority that, by law a parent has in relation to the child and their property". Parental Responsibility thus gives parents the authority to make important decisions with regard to a child's upbringing to include where they should live, by what name they should be known and to make decisions regarding their health and education.

However, not all parents in fact have Parental Responsibility and thus do not automatically have the power to make decisions regarding their child.

Who has Parental Responsibility?

A biological mother will automatically have Parental Responsibility on the birth of her child. However, a father will not automatically acquire Parental Responsibility. An unmarried father will acquire Parental Responsibility if he is registered on the birth certificate following a birth which took place on or after 1st December 2003. Alternatively, if a father is married to the biological mother at the time of the child's birth, or subsequently marries the mother, then he will acquire Parental Responsibility. There are also a number of other ways in which a biological father can acquire Parental Responsibility, such as by way of a Parental Responsibility Agreement or through an Order of the Court.

Step-parents also do not automatically acquire Parental Responsibility. They will need to acquire this by way of a Parental Responsibility Agreement or by an Order of the Court. Wider family members, such as grandparents, also do not automatically have Parental Responsibility. However, this can be acquired by Court Order.

How should Parental Responsibility be exercised?

There is a general presumption that both parents should be involved in a child's upbringing and care. However, many parents exercise Parental Responsibility unilaterally (i.e. without consulting all those who also have it). Parental Responsibility can be exercised unilaterally; however in some instances, it must be exercised jointly. For example, if a parent wishes to remove a child, under the age of 16, from the jurisdiction, they must obtain the consent of all those with Parental Responsibility or a Court Order permitting the removal. Unless they take such steps that parent would be committing a criminal offence under the Child Abduction Act 1984.

What happens at times of conflict?

Often, conflict arises when parents, or those with Parental Responsibility, cannot agree on the best way to raise a child or deal with specific issues in relation to their upbringing, for example who a child is to live or spend time with. In such cases, the Court can be asked to determine the matter by making one of three Orders provided for in Section 8 of the Children Act 1989, namely a Child Arrangements Order, a Prohibited Steps Order, or a Specific Issue Order. The Court's paramount consideration is the child's welfare and this, along with the welfare checklist contained in Section 1 of the Children Act 1989, will form the basis of the Court's decision making process. If the Court is asked to intervene then the decision-making power is ultimately taken out of the parents' hands, although their views will be taken into account.

When does Parental Responsibility end?

Parental Responsibility diminishes over time as a child grows older and develops sufficient understanding and has the intelligence to make up their own mind. Whether a child is capable of making decisions with regard to their care and upbringing will be assessed by the Court in light of their age and understanding. However, upon a child attaining the age of 18, Parental Responsibility will end. Prior to this, Parental Responsibility can also be brought to an end by Court Order.

It is important for parents, wider family members and anyone who makes, or wishes to make, decisions with regard to a child to seek expert advice so that they know where they stand as to their rights, responsibilities and obligations.

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Key cases of note

Sharp v Sharp [2017] EWCA Civ 408 –

Reinforced the need to consider all of the circumstances of a case when determining the financial claims arising from the breakdown of a marriage. The Court of Appeal allowed the appeal of the wife after the husband was awarded 50% of the total matrimonial assets in the first instance. The Court of Appeal reduced the husband's award and held that, depending on the circumstances of a case, a departure from the principle of sharing may be justified in the interests of fairness. The judgement challenges the longstanding starting point of dividing the matrimonial pot in equal shares.

Walker v Innospec Ltd and Others [2017] UKSC 47 –

This was a landmark ruling from the Supreme Court in which it was held that the Equality Act 2010 was discriminatory to same-sex couples. An exemption in the Act enabled employers to exclude same-sex partners from receiving survivor benefits or pension benefits, paid prior to December 2005, upon their spouse's death. The exemption was found to be unlawful and was disapplied. The case challenges the very law which serves to prevent inequality and discrimination. The judgement has helped to bridge the gap to equality for same-sex partners.

AAZ v BBZ [2016] EWHC 3234 –

Thought to be one of the largest divorce awards in the UK, the total assets of the marriage amounted to £1,092,334,626, of which the wife claimed a share of 41.5% of the assets, totalling £453,576,152. The Court found that, despite the husband's claims, he had not made stellar or special contributions so as to justify a significant departure from the equality principle.

Owens v Owens [2017] EWCA Civ 182 –

The case continues! Following on from the last update, Mrs Tini Owens has now been granted permission to appeal to the Supreme Court to challenge the Court of Appeal's decision to uphold the dismissal of her divorce petition. Mrs Owens had petitioned for divorce based on her husband's behavior and sought to rely on 27 allegations. However, these were held to be "minor altercations of a kind to be expected in a marriage" and her petition was dismissed. Mrs Owens' case will now be heard by the Supreme Court. Watch this space!

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Your Family team

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A partner in the team, Nick has vast experience in relation to high value financial claims arising out of the breakdown of a marriage with particular reference to farming cases – those involving the division of agricultural assets.

His client base is wide and varied, ranging from significant farmers/landowners, and successful business men/women.

Despite being predominantly based in Spalding, Nick has clients from Leicestershire down to East Sussex. The majority of his clients are reputation-based referrals.

John Boon

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John joined the firm as a paralegal in 2005, after completing his law degree and post-graduate training in Nottingham. He qualified into the Family department in July 2008, and was promoted to associate in July 2015.

In addition to his own varied caseload advising on divorce proceedings/financial proceedings, children issues, cohabitee disputes, pre-nuptial agreements and injunction proceedings, John also assists Nick Ingrey with more complex and high-value cases.

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Victoria is an associate of the firm and has over ten years' experience in family law. She specialises in matrimonial matters, including divorce/ financial remedy proceedings and pre- and post-nuptial agreements. She also advises clients in cohabitation disputes and Children Act matters. Victoria is also experienced in dealing with complex cases, including those involving businesses, farms, pensions and family trusts, and has represented trustees in financial remedy proceedings.

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Joel joined Roythornes in August 2011 as a paralegal after graduating from the University of Warwick reading Law with European Legal Studies. Once qualified, he quickly found his niche within the Family team.

His specialisms include divorce and dissolution proceedings, financial proceedings and child disputes. He has been involved in a wide range of work, managing his own caseload and assisting other members of the team on more complex matters. Most of the time, Joel is based at our Spalding office but also advises clients from all areas of the country.

When you are affected by the breakdown of a family relationship through divorce or separation, a member of our Family team can be retained to act as your trusted advisor.