

Family Law UPDATE

FIRM'S LOGO

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pre-nups – not quite there yet



The recent case in which the Court of Appeal ruled that a German heiress was able to rely on a

pre-nuptial agreement made with her husband was widely reported as meaning that the traditional view of the courts, that 'pre-nups' are little more than persuasive, was shattered.

However, the circumstances of that case were somewhat unusual and the comments of LJ Thorpe, the judge who issued the leading opinion, make interesting reading.

Firstly, he was at pains to make it clear that the law regarding pre-nups needs to be brought into line with that of most other countries, where they are enforceable as contracts and 'autonomous adults' have the right to 'govern their future financial relationship by agreement'. He also commented

that the presence of a pre-nup would assist in avoiding the stress, anxieties and expense which often accompany the negotiation of financial settlements on divorce.

Looking at the circumstances, however, the main issue was that both of the parties to the pre-nup were financially astute people (the husband had been a successful banker) and although the husband did not take professional advice before entering into the agreement, he had every opportunity to do so. He fully understood its effect. He had not asked his ex-wife for details of her finances. Crucially, it was the husband's choice to accept the pre-nup he was offered rather than negotiate.

We may expect legislation in due course to make indisputable the validity of pre-nups that are properly entered into, but there is no indication when such legislation is likely to occur. This ruling is a big step towards legitimising pre-nups, but we are not quite there yet. Until that time, it is essential that a pre-nup is entered into with full disclosure and with the benefit of professional advice on both sides.

We can advise you on any family law or wealth protection matter.

avoiding payment by bankruptcy plan fails

A husband who had himself declared bankrupt in order to avoid making a financial settlement to his ex-wife recently found his plan stymied by the court.

The man had many business interests and had purchased a substantial house through an Isle of Man company. When his wife issued a petition for divorce proceedings in 2006, she obtained freezing orders to prevent him from dissipating his assets. He then petitioned to be made bankrupt, claiming debts of £191,000. A few days before the bankruptcy petition was lodged with the court, he transferred the only issued share in the company to a third party, in breach of the freezing order. He was subsequently made bankrupt, but the order was not 'sealed'.

The bankruptcy order was opposed by his ex-wife on two grounds. Firstly, that the judge could change his mind about granting the bankruptcy petition before it was sealed and secondly that a bankruptcy order can be annulled on the petition of a debtor.

The house was sold, yielding a surplus of £1 million which was paid into court. The company which had owned the property was then put into liquidation, with an alleged debt due to another company exceeding £1 million. The ex-wife claimed that the debt due to the second company was a sham and that her ex-husband had organised his affairs to ensure there was no money with which to make a financial settlement.

The ability of the ex-wife to obtain a settlement depended on getting her ex-husband's bankruptcy order annulled. In order to do that, it had to be shown that he was capable of paying his debts at the time the order was made.

The application to annul the order was successful. Inevitably, the matter ended up in the Court of Appeal, which, after lengthy consideration, concluded that the husband was able to pay his debts when he was made bankrupt. By this decision, the Court has sent out a warning to those who seek to avoid their liabilities through financial manipulations.

financial provision – same address not necessary



When a person dies without making reasonable financial provision for someone who is dependent on them, the court may make an award to the dependent person. For a claim by the partner of the deceased to be successful, the claimant has to have lived with the deceased 'as the husband or wife' for at least two years prior to the death.

Normally, such cases are straightforward – the dependant lives in the same property and has been maintained by the deceased. However, this is not always the case. Recently, a woman was allowed to bring a claim for financial provision despite the fact that her postal address had never been changed from her previous residence (which she retained) and that this was also shown as her address on the electoral roll.

After her partner died in 2007, she successfully argued that they had cohabited since 2002 and she had 'gradually moved in with him'. The man's family contested

her claim. The case led to a great deal of detailed factual evidence being presented, but the decision seems to have been swayed in no small part by evidence of the couple's domestic arrangements, for which there were several witnesses whose testimony supported the claimant. The man's family were unable to produce evidence to rebut the assertion that the couple were living together as man and wife.

This case was unusual as normally such cases are about the extent to which one partner has provided for the other.

divorce – future pension not taken into account

In a recent 'big money' divorce case, the court rejected an application from a man's ex-wife to have an uplift in her maintenance because her ex-husband is due to receive a 'lucrative' pension in 2023.

Both parties tried to keep secrets from the other. The husband failed to disclose that he would be

the beneficiary of the pension plan and the wife failed to disclose that she had become pregnant by another man, with whom she had a relationship that could be described as cohabiting.

The judge concluded that since the pension could not be touched before 2023, it would not be fair to require the husband to share its value, in whatever proportion, with his ex-wife.

non-disclosure does affect settlement

The Court of Appeal has taken the unusual step of considering an appeal in a matrimonial case which was settled by agreement before the appeal was heard.

In the High Court, the ex-wife of a wealthy man had failed to obtain an 'uplift' to her original settlement. She based her argument on the fact that at the time the settlement was being negotiated, her husband had not disclosed that he was in negotiation for a new position that would make him materially better off. Had he done so, she would not have agreed to the

financial settlement. The District Judge had ruled that disclosure of the husband's true expected future income would not have affected the settlement awarded.

The Court of Appeal decided to examine the facts of the case because it considered that the original judgment raised difficulties for practitioners. It concluded that had there been full and frank disclosure of the imminence of the new contract of employment, it was inconceivable that the wife would not have raised her sights. In the Court's view, it was also inconceivable that, had it been disclosed, the District Judge

would have rejected the information as irrelevant.

Accordingly, the District Judge was wrong to conclude that a full and frank disclosure would have made no difference to the settlement.

It is a relief that the Court of Appeal has reversed the earlier decision as the principle that both sides must make a full and frank disclosure of their financial positions when making a settlement on divorce must be right in principle and had the decision of the District Judge been left to stand, it would have encouraged a culture of non-disclosure.

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