Hot Topic – Family Law

Edition: July 2009

Court of Appeal strengthens Pre-Nups in English law

The recent decision of the Privy Council in *McLeod v McLeod* appeared to have halted the advance of the Pre-Marital Agreement or "Pre-Nup" in English law. The Privy Council held that changing the law so that such agreements are binding was not for the Courts, it was a matter for Parliament. However, the Court of Appeal has now given the Pre-Nups momentum again. For years, solicitors advised their clients that Pre-Nups were not worth the paper on which they were written because the Courts considered them invalid for reasons of public policy. However, during the past few years, Pre-Nups have increasingly found favour with the Courts. *McLeod* appeared to have brought this to a halt, but the Court of Appeal's decision in *Radmacher v Granatino* has now made it clear that the presence of a Pre-Nup is one of the factors that the Court can take into account when it decides financial matters in divorce proceedings.

The Court of Appeal held that in future cases the judge should give due weight to the marital property regime into which the husband and wife had freely entered. Upholding a Pre-Nup was a legitimate exercise of the judge's wide discretion to achieve fairness. The Appeal Court deplored the current situation as being the "*worst of both worlds*"; Pre-Nups were considered void for reasons of public policy, but at the same time a pre-Nup was a matter which the judge could take into account. The Court accepted the Privy Council's view that the validity and effect of Pre-Nups were matter for Parliament rather than judges, but nevertheless, the presence of a Pre-Nup could be taken into account as the Court always had to take into account all the circumstances of the case. In some cases, it would be the most compelling factor.

Right-wing think tank proposals turn the clock back

In 1996, Parliament passed the Conservative government's controversial Family Law Act introducing "no fault divorce" in England and Wales. Divorcing husbands and wives would be required to attend Information Meetings before they could begin their divorces and there would be a lengthy cooling off period. Although most family solicitors were keen to see the arrival of "no fault divorce" as a means of reducing antipathy in divorces, many lawyers criticised the new law as being impractical and unworkable.

Shortly after Labour came to power in 1997, the then Lord Chancellor, Lord Irvine announced that implementation of the new law would be delayed indefinitely; in other words, it was quietly scrapped. Solicitors waited patiently for Lord Irvine's promised alternative reforms. None were forthcoming.

The Centre for Policy Justice, an independent right wing think tank led by former Conservative Party leader Ian Duncan Smith, has now revived the ideas. In its Report "Every Family Matters", the CPJ again proposes that husband and wives should attend information meetings before they can begin a divorce and that there should be 3 month cooling-off period. The CPJ says that its aim is to "save saveable marriages".

The CPJ endorses Pre-Nuptial Agreements and argues that they should be binding in English law, a suggestion that may be welcomed by many practitioners. The CPJ proposes that the courts shall only have a narrow discretion to be able to override a Pre-Nup; unless it causes significant injustice, a Pre-Nup should be upheld.

Couples who are about to marry would be encouraged to attend a Pre-Marriage Information Course.

The CPJ also opposes attempts to reform the laws that apply to cohabiting couples after they split up, arguing that to do so would weaken the status of marriage. This will be criticised by many family solicitors who will have experience of the difficulties caused in such cases by an underdeveloped and inflexible law which often leads to serious unfairness.

It remains to be seen if these proposals are adopted as official Conservative policy.

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