

## Nuptial Agreements in the Cayman Islands

### PRE-NUPTIAL AGREEMENTS

A pre-nuptial agreement is a legal agreement made between two individuals before their marriage has taken place. The agreement usually sets out how the couple wish their assets to be divided between them if they later separate or divorce. Some pre-nuptial agreements also detail how the couple currently arrange their finances and how they will arrange their finances during the marriage.

### POST-NUPTIAL AGREEMENTS

A post-nuptial agreement is a legal agreement made between individuals who are already married. The agreement usually sets out how the couple wish their assets to be divided between them if they later separate or divorce. Some post-nuptial agreements also detail how the couple currently arrange their finances and how this will continue or change during the marriage.

Separation Agreements are a form of post-nuptial agreement but are founded on **'actual separation' as opposed to a hypothetical separation at an indeterminate point in the future. They are intended to deal with the parties' assets and financial resources at that specific point in time.**

### CONTENTS OF NUPTIAL AGREEMENTS

Commonly, a nuptial agreement sets out which party owns or will own certain assets on a future breakdown of the marriage. The agreement usually defines "matrimonial property" and "non-matrimonial property" or "joint property" and "separate property".

Matrimonial property (or joint property) usually includes assets acquired during the marriage and assets held in joint names, such as the matrimonial home and joint bank accounts.

Non-matrimonial property (or separate property) usually includes:

- Assets owned before the marriage.
- Inherited assets.
- Gifts received by one party during the marriage.

Nuptial agreements may also deal with income, such as treatment of earnings and future earnings and interests under trusts.

Nuptial agreements sometimes deal with financial provision for existing children, but do not usually attempt to deal with financial provision for any future children. Significant changes in circumstances during the marriage, including the birth of children, are usually dealt with by review of the terms of the agreement; often a review clause is inserted into the nuptial agreement setting out when a review of the agreement should take place.

### OBJECTIVES OF NUPTIAL AGREEMENTS

Essentially the objectives of pre-nuptial and post-nuptial agreements are the same:

- **Clarification.** To clarify how the parties will conduct their financial affairs during the marriage, to enable the couple (especially the financially weaker party) to have transparency at the start of the marriage. This may also assist the financially weaker party to feel financially secure within the marriage.
- **Certainty.** To provide certainty for couples who wish to formally agree how their assets should be divided if they later separate or divorce.
- **Protection.** To protect assets (such as inherited wealth or pre-marital property) from a later financial claim.
- **To limit scope for uncertain, emotionally draining and financially costly court proceedings in the event of the future breakdown of the marriage.**

### THE LEGAL STATUS OF NUPTIAL AGREEMENTS

The parties to a nuptial agreement cannot override the court's broad discretion to decide how to redistribute their assets and income on an application for financial remedy. However, when considering an application for financial remedy, the court must give appropriate consideration to a nuptial agreement which has been freely negotiated and entered into by parties who express their intention to be legally bound by such agreements.



## RADMACHER V. GRANATINO

The Judgment of the U.K.'s Supreme Court in *Radmacher v Granatino* in October 2010, although not strictly binding on the Cayman Islands' court, is a highly persuasive reference of the key points of the current law.

(a) When considering the role of a nuptial agreement in a financial claim on divorce, the starting point is the relevant legislation, which is the Matrimonial Causes Law (2005 Revision) (the "Law"). Sections 19 & 21 obliges a Judge to consider all the relevant circumstances of the case when deciding how to divide the parties' finances on a divorce.

(b) No agreement between the parties can override the legislation or prevent the Judge from deciding on the appropriate division of assets on a divorce. This means a nuptial agreement cannot stop a spouse applying to the court for financial provision from the other spouse. Any "waiver" of the right to apply to the court for financial provision in an agreement will not be effective.

(c) The significance of a nuptial agreement is as a relevant circumstance of the case, to be weighed by the Judge. A separation agreement will have a substantial impact on the Judge's decision in many cases. The Supreme Court said in *Radmacher v Granatino* that **the court should give effect to a nuptial [separation] agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances it would not be fair to hold the parties to their agreement [emphasis added]**.

## EFFECT OF SUPREME COURT TEST

Nuptial agreements are almost as good as binding, provided they are fundamentally fair. Nevertheless, to be given decisive weight, nuptial agreements must meet the following criteria:

(a) It must be contractually valid (the validity requirement). This means there must be no factors present that cast doubt on the free will of either party to the agreement or on the level of information a party had when entering the contract. Any evidence of mistake, misrepresentation, duress or undue influence may cause the agreement to fail.

(b) It must be validly executed as a deed and contain a "relevant statement" signed by both parties confirming that they understand the agreement is intended to be binding particularly in respect of the financial terms as agreed.

(c) Both parties to the agreement must have received disclosure of material information about the other party's financial situation when they entered into the agreement (the disclosure requirement).

(d) Both parties must have received legal advice at the time they entered into the agreement (the advice requirement).

(e) It must not prejudice any children. If the agreement makes insufficient financial provision for this, it will be set aside by the court.

(f) Both parties' needs must be met. As explained above, need is measured with reference to standard of living during the marriage. Provision for needs is not limited to an income stream; it includes capital provision and the long-term provision of a home. An agreement that results in a party receiving nothing or very little would not be upheld by the court.

# HSM



## CONCLUSION

Provided that the requirements set out in *Radmacher* are complied with, the parties will optimise the prospects of the terms of a nuptial agreement being applied by the court.

However, these agreements require drafting by an expert family law practitioner and will require both parties to have received their own independent legal advice on the terms and entitlements to which they may be acquiring or surrendering.

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