A New Year's Quiz - Will my prenuptial or postnuptial agreement be recognised if I get divorced in the Cayman Islands?

Across many parts of the world, nuptial agreements have contractual force, meaning that when parties divorce, they must split the assets they own in accordance with the agreement that they have signed. The population of the Cayman Islands is diverse, with recent statistics published by the government showing that over 130 nationalities live and work here[1]. However, if you have a nuptial agreement, what happens if you get divorced in the Cayman Islands? This brief article will highlight how the courts in the Cayman Islands will approach such agreements and considers the recent case of **AA v BB**[2] heard in the Grand Court of the Cayman Islands which reviewed the recent authorities in both the Cayman Islands and England and Wales.

A starter for 10 – What is a nuptial agreement?

A nuptial agreement is an umbrella term encompassing both prenuptial agreements (those agreements signed before and in contemplation of marriage) and postnuptial agreements (those agreements signed after marriage). The agreements, which are legal documents, can set out how the parties intend their assets to be divided in the event that they should divorce and in the vast majority of cases set out which assets are not to be divided should the marriage come to an end. A nuptial agreement can vary as to length and content and over the years we have seen documents ranging from 2 pages in length to well over 100 pages!

The general knowledge round – How will the courts in the Cayman Islands approach a nuptial agreement?

For those getting divorced in the Cayman Islands it is important to understand that the court has ultimate control and oversight of how assets are divided between the parties, even if there is a nuptial agreement in place. This means that even if you have signed a nuptial agreement (be it a pre- or post- nuptial agreement) there is no guarantee that you will be held to the terms of it and you cannot contract out of meeting the "financial needs" of each other or any children of the marriage. The court will look at the financial circumstances and needs of each the parties, the assets that each has and apply sections 19 and 21 of the Matrimonial Causes Law when determining what level of financial provision should be made.

In his judgment in AA v BB, Mr Justice Walters, sitting in the Grand Court of the Cayman Islands, undertook a review of the law and applied it to the facts of that case. In AA v BB, the parties had executed a pre-nuptial agreement (termed an Antenuptial Agreement) in Florida on 20 October 2008, some 3-months before they married. The pre-nuptial agreement set out the property and other financial assets that each of the parties held in their sole names at the time of the agreement and provided that in the event that they separated, each party would keep those assets. The agreement notably did not make provision for what should happen should any children result from the marriage.

By the time the parties separated in early 2022, the parties had two children and the husband in the case sought to hold the wife to the terms of the prenuptial agreement.

Mr Justice Walters, at paragraphs 21 to 28 of his judgment, set out a precis of the law in both the Cayman Islands and England as presented to him by the advocates in the case. The judge considered the Cayman Islands cases of **DJ v BJ**[3] (a case heard in the Grand Court in which Priestleys appeared for the Respondent) and **AH v AW**[4] (heard in the Cayman Islands Court of Appeal), the latter of which approved the approach taken by the Supreme Court of England and Wales in the case of **Radmacher (formerly Granatino) v Granatino**[5] and more recently in **Brack v Brack**[6] (heard in the Court of Appeal).

The judge approved the approach adopted by the Supreme Court in the aforementioned Radmacher case, before making provision for the wife and the children beyond the terms of the executed agreement, on the basis that there was a financial need for the same, which had not been provided for in the agreement.

The connection round – What are the principles to be applied when it comes to pre- and post- nuptial agreements?

The judgment in Radmacher runs to 70 pages, however, helpfully, Mr. Justice Peel (the lead ancillary relief judge in England) summarised the following propositions in the case of **HD v WB**[7]:

i. There is no material distinction to be drawn between a prenuptial agreement and a postnuptial agreement. They are both nuptial agreements.

ii. If a nuptial agreement is to carry full weight, "what is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end."

iii. It is to be assumed that each party to a properly negotiated agreement is a grown up and able to look after himself or herself.

iv. "The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future."

v. The first question will be whether any of the standard vitiating factors, duress, fraud or misrepresentation are present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it.

vi. The court may take into account a party's emotional state and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures.

vii. "The court should give effect to a nuptial agreement 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." (Paragraph 75 of Radmacher)

viii. The financial needs of a party or compensation due are the most likely factors to render it unfair to hold the parties to the terms of an agreement. It is taken that "the parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or mote, and such a result is likely to render it unfair to hold the parties to their agreement." (Paragraph 81 of Radmacher)

ix. Where a party is in a position to meet his or her needs, fairness may well not require a departure from their agreement.

x. It is the court that determines the result after applying the Act.

xi. Sound legal advice is "desirable" (paragraph 69 of Radmacher) but not essential. The court should look at all the circumstances including whether the party had the opportunity to take legal advice and whether the party had a sufficient understanding of the meaning and consequences of the agreement.

xii. Ultimately, the court remains under an obligation to consider all of the factors in the case and see whether or not the agreement is fair.

xiii. What constitutes a "predicament of real need" is a judge specific assessment, taking into account the circumstances of each particular case.

The reverse round – How do I make sure that my nuptial agreement will be upheld?

As set out above, there can be no guarantees that the court will hold the parties to the terms of a nuptial agreement, however, if the agreement is properly drafted and contains appropriate safeguards for the parties, it is more likely that the agreement will be upheld by the courts in the Cayman Islands.

The most important thing is to ensure that both parties take independent, specialist legal advice at an early stage when considering whether a nuptial agreement is for them. In our experience it is important to take that specialist advice as early as possible as it provides both parties with sufficient time to come to an agreement, they are happy with and to have the time to consider the same. It is important that the parties are open and honest with the assets that each have, and the agreement should, wherever possible, cover as many bases as possible, for example if the parties do not have children, the agreement should countenance what should happen if they do.

Nuptial agreements are not just for the very wealthy. They can be important documents in a number of different situations, for example, where one party expects to or has inherited a significant amount and wishes to retain those sums should the marriage subsequently breakdown.

At Priestleys we have extensive experience of providing advice on a tailor-made solution that will protect you and your family in the event of a divorce. We can advise you as to possible changes in the law and ensure, as far as possible, that any nuptial agreement is future proofed. We will take the time to get to know you as an individual and what you want and act in a collaborative way to get an agreement that you are happy with.

A challenge to the quizmaster - What can I do if I want to challenge a nuptial agreement?

Should you find it necessary to challenge an agreement after the breakdown of your relationship or are concerned that an attack may be made on an agreement you wish to uphold, it is crucial to seek specialist legal advice at the earliest opportunity. This will enable you to understand how the agreement may be contested and potentially undermined and be able to prepare accordingly for the same.

The starting point will be to consider whether any of the vitiating factors as set out in Radmacher apply, which would negate the effect of the agreement outright.

If none of those vitiating factors are present, then it is important to consider whether there are any other factors that would undermine what weight the court would give to the agreement, such as the circumstances that arose at the time of signing the same.

Finally, we will consider whether the agreement has provided, fairly for yourself and any children of the family. Taking that advice early on, ensures that you know how the court is likely to approach your case and provides the opportunity to set out, at an early stage, your

case on the agreement. More often than not, an early settlement can be achieved with the other side by adopting this approach, thus saving you costs.

The joker card – Need more help?

If you require any assistance or advice in relation to any aspect of a nuptial agreement, do not hesitate to contact the family team at Priestleys on **info@priestleys.ky** and we will be happy to assist you.

The end of the quiz.....?

Or is it? - What happens next?

In 2024, the author of this article was appointed as a member of the Family Law Bar Association Working Group who worked with the Law Commission to consider changes to the divorce laws in England and Wales. Whilst such work may not directly impact immediately upon how nuptial agreements are approached in the Cayman Islands, there is a push for change in this area both within the legislative framework but also within those judges sitting in the High Court and Court of Appeal in England which is likely to shape the approach taken by the courts here in due course. As part of the scoping work undertaking by the Law Commission, the issue of nuptial agreements, and whether or not parties should be held to them was actively considered. The initial scoping report was released on 17 December 2024[8] and recommended, as the Law Commission had in 2014[9], the introduction of qualifying nuptial agreements which would be contractually enforceable between parties, subject to appropriate procedural safeguards being in place. With an increasing judicial tendency to enforce agreements where they cannot be vitiated, further case law may emerge, making it even more challenging to depart from such agreements. [10]

The author

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Gareth has been consistently ranked as a leading practitioner in family law by the Chambers and Partners and Legal 500 directories, which describe Gareth as “exceptional, approachable and extremely knowledgeable” and a “brilliant advocate.”

Gareth has been a Family Law Arbitrator since 2021 and was appointed by His Majesty the King to sit as a Deputy Judge of the Upper Tribunal in 2024.

References

1. https://www.gov.ky/ourislands
2. AA v BB (GC) (Fam) 118 of 2022
3. DJ v BJ (GC) (Fam) 66 of 2014
4. AH v AW (CICA) (Civil) Appeal No 12 of 2021
5. Radmacher (formerly Granatino) v Granatino [2010] UKSC 42.
6. Brack v Brack [2018] EWCA Civ 2862
7. HD v WB [2023] EWFC 2
8. https://lawcom.gov.uk/law-commission-publishes-scoping-report-on-financial-remedies-on-divorce/
9. https://lawcom.gov.uk/project/matrimonial-property-needs-and-agreements/
10. See for example BI v EN [2024] EWFC 2000 and NM v PM [2024] EWFC 199.