

In Practice

Collaborative nuptial agreements: plain sailing – well almost

Innovative POD Group

The legal services market has undergone a sea change during the last decade. Family law practitioners have had to adapt their practices rapidly to be able to navigate these changes and keep afloat during often turbulent times. Among the developments, the introduction of the new Family Procedure Rules 2010, the pre-action protocol for mediation information and assessment meetings, along with the introduction of family law arbitration has placed the use of alternative dispute resolution to resolve family law disputes firmly on the agenda.

Alongside these developments has come an increase in the number of cohabitating couples. Office for National Statistics figures show that since 2001, the number of cohabiting couple families has risen from 2.1m to 2.9m. Increasing numbers of couples are also entering into pre and post nuptial agreements, so much so, that the Law Commission published its consultation paper, 'Marital Property Agreements' in January 2011. Following the Supreme Court judgment in *Radmacher (Formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900, the enforceability of such agreements has become a particularly hot topic not simply among practitioners drafting such agreements on the ground, but also at policy level.

This has led the Law Commission to launch a supplementary consultation, 'Matrimonial Property, Needs and Agreements' on 11 September 2012 on the law relating to financial 'needs' on divorce and the status of non-matrimonial property, in the wider context of enforceability of marital property agreements. The Commission's final recommendations are expected to be published in Autumn 2013. In the meantime, practitioners have to balance client demand for increasingly creative and cost effective family law solutions to resolve ever complex, sometimes international, financial arrangements, while also keeping in mind the direction of proposed policy changes to be able to create enforceable agreements.

The members of Innovative POD group have responded to the changes at policy level and those being driven by clients by combining the increased demand for pre and post nuptial agreements with ADR in the form of collaborative law. This combination has yielded positive outcomes for clients and can also lend weight to the enforceability of marital property agreements.

Why collaborative nuptial agreements?

Open dialogue and transparency form the cornerstone of the collaborative model, thereby making it the ADR process option of choice for clients who are agreed about entering into nuptial agreements. Negotiating an agreement, be it ante or post nuptial, can be tricky at the best of times. However, negotiating against the backdrop of the clients and solicitor representatives all having committed themselves to resolve the negotiation in an open and non-adversarial manner, provides clients with an additional level of reassurance. They can begin, what are often difficult discussions with their partners, safe in the knowledge that all concerned are working to achieve an outcome by means which are tailor made to minimise stress and tension.

More often than not, pre and post nuptial agreements include a clause to the effect that couples will have recourse to ADR processes to resolve disputes upon separation. However, rather than simply considering ADR at the conclusion of their relationships, the members of Innovative POD group are urging their clients to utilise the collaborative law model at the beginning of their lives together, as it provides couples with the opportunity of road testing the collaborative model. Having first-hand experience of collaborative law in turn provides clients with an insight about whether this model would be suitable for future use, if necessary.

Clients, who seek advice in relation to nuptial agreements, do so for a variety of reasons. Some, who are marrying for the second time, may wish to protect assets for the children of a first marriage. Others may be urged to enter into a nuptial agreement to protect dynastic assets at the suggestion (or in some cases, the insistence) of parents or extended family members. Unlike conventional solicitor negotiations, many clients welcome the fact that the collaborative model allows couples to be accompanied and supported throughout four-way meetings by a family member or other neutral supporter. The inclusion of a third party supporter can often provide clients with the benefit of an objective view particularly when negotiations get sticky.

As any collaborative lawyer will know, even with the best of intentions, collaborative negotiations can sometimes stall or even fail. Depending upon the nature of the issues arising, the couple can seek support and assistance in resolving matters, with a family consultant. In traditional practice, lawyers may 'park' or shy away from tackling such matters, on the basis that they fall outside of the traditional 'solicitor/client' remit. The use of family consultants alongside the collaborative process can be beneficial in assisting couples to develop strong communication skills and healthy techniques for resolving differences between them, early on in their relationship.

Once couples are engaged in the four-way meetings, the collaborative process permits for wider discussion and reality testing of proposed clauses of the agreement, than may ordinarily be the case if an agreement has been negotiated at arms-length through solicitor correspondence. The collaborative model allows for terms to be critically and constructively assessed within a less confrontational and non-adversarial framework. Hence the collaborative process smoothes the passage of negotiations which may otherwise become fraught through traditional lawyer correspondence and in turn place unwelcome stress upon the couple's relationship in the run up to the wedding.

Reality testing suggestions and draft clauses which are discussed in four-way meetings can also add weight to the enforceability of a nuptial agreement. The Supreme Court in

Radmacher held that courts should give effect to nuptial agreements which are freely entered into with a full appreciation of its implications unless in the circumstances prevailing, it would not be fair to hold the parties to their agreement. Attendance notes which are circulated after each four-way meeting form an essential part of the collaborative process and can be used after the agreement has been concluded, to reference the range of scenarios which were considered, rejected and/or accepted during negotiation of the agreement. Whilst this ultimately may not be ideal for one or other party, it can save the couple substantial legal fees in contested proceedings, should the marriage breakdown and the agreement fail to be implemented. Clauses can also be included in the agreement about the discoverability of supporting documentation and attendance notes from each four-way meeting to ensure that no misunderstandings arise. Provided that all parties are in agreement, these documents can even be annexed to the nuptial agreement.

Many couples tend to sail through relationships making unspoken assumptions that they and their partner share the same belief systems and long term goals in life. Very few tend to sit down before their big day and explicitly discuss issues such as their hopes and aspirations for their lives together, how their children will be raised, or how they envisage leading their lives together. Throughout the course of any marriage these are some of the issues which can be the cause of much heartache when couples disagree. Negotiating a nuptial agreement raises these issues for discussion and resolution, prior to marriage. Where there is disagreement, the collaborative process provides a supportive forum within which couples can discuss such matters, if necessary, with the assistance of a family consultant or couple therapist. Having expert third party assistance can facilitate communication and assist couples in developing techniques to reach a mutually acceptable compromise.

Invariably, couples contemplating an ante nuptial agreement very often tend to leave discussion and execution of it, to the last minute. Notwithstanding technological advances, a nuptial agreement negotiated at a distance with a travelling draft can be time consuming to finalise. In contrast, negotiation via two or three collaborative four-way meetings is often sufficient to agree the terms of an agreement with clients on hand to provide their instructions immediately. Many clients who have used the collaborative model to conclude nuptial agreements have welcomed the swift and cost-effective resolution of the agreement in this way.

In the event that the couple are unable to reach agreement on the terms of the ante nuptial agreement prior to the marriage, the collaborative law process can be used to map out broad areas of consensus with a view to executing a post nuptial agreement. This might include identifying some areas that are agreed and those that are 'parked' for consideration after the marriage. There is of course a risk involved to at least one of the parties if they marry without the agreement being in place and this should be explained carefully to them if they agree to postpone execution of a pre nuptial agreement and instead sign a post nuptial agreement. If the parties decide to go down this route, it is advisable to agree a form of words that both clients sign, confirming that they will restart discussions after the wedding (perhaps with a long-stop deadline) with a view to concluding a post nuptial agreement. Whilst this is not binding, it can represent a statement of shared intentions if ever questioned later. This approach was taken in a case

where the wife simply couldn't deal emotionally with discussing the potential breakdown of the marriage whilst trying to make wedding arrangements. In that case the wife was as good as her word and a successful post nuptial agreement was negotiated after the wedding in considerably less stressful circumstances.

When collaborative law was first introduced in the UK, its training was primarily geared towards solicitor practitioners. Today, increasing numbers of counsel are collaboratively trained. Their expertise can also helpfully be used in negotiating nuptial agreements in the collaborative process, particularly when couples reach an impasse in relation to particular terms and clauses. As collaborative counsel would be jointly instructed, the couple are assured of counsel's neutrality, which often takes the heat out of negotiations. In this sense the role of counsel would be that of trouble-shooter, joining a four-way meeting to assist couples in resolving a discrete issue.

Conclusion

The negotiation of nuptial agreements is often stressful and on the odd occasion, the resulting turbulence can sadly lead to the breakdown of a relationship. Using the collaborative law model as a forum within which to conduct negotiations and discussion has much to commend it, both from the lawyers and clients perspectives. For clients the model represents a safe, less confrontational vessel in which to hold sensitive and deeply personal discussions. For the lawyers, four way meetings are a quick and efficient way of concluding an agreement. It remains to be seen what approach the Law Commission will adopt in relation to the concept of 'qualifying nuptial agreements'. One thing which is certain is that the family law landscape is set to shift, with the introduction of a single family court and plans to modernise the family justice system. Whilst collaborative nuptial agreements, may not be entirely plain sailing, as a process option for negotiating nuptial agreements, it certainly assists many couples to steer a less turbulent course to settled waters.

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