Comments from **Nicholas Bennett, Family Partner at Payne Hicks Beach** feature in the article concerning the Radmacher divorce originally published by The Times online on 15 October 2020 and reproduced with kind permission.
https://www.thetimes.co.uk/article/a-decade-on-the-ruling-that-rewrote-divorce-law-nf3st80ww

THE TIMES

Nicholas Bennett
Partner, Family

A decade on: the ruling that rewrote divorce law

Catherine Baksi looks back at a game-changing ruling — and asks whether more clarity is needed

Catherine Baksi
Thursday October 15 2020, 12.01am BST, The Times

It is not often a judgment comes along that flips family law on its head. But ten years ago the case of the German paper heiress and her French former husband did just that.

The Supreme Court's decision in Radmacher v Granatino transformed the way the English courts and the public regarded prenuptial agreements.

Although routine in many European jurisdictions, until this case, in England and Wales such agreements were considered to be contrary to public policy. The view was that they created unfairness to the financially weaker party — usually the wife — and even encouraged divorce.

The twist in this case was that it was the former wife, Katrin Radmacher, who was the wealthier party seeking to rely on the agreement and her husband, Nicolas Granatino, who asked the court to depart from it.

The couple signed a prenup before their marriage in 1998, in which they agreed that if they split, her husband would not make a claim on Radmacher's wealth. While some view prenups as unromantic, for Radmacher, it was proof that the pair were marrying for love, not money.

The couple divorced in 2007 and the following year the High Court awarded Granatino £5.85 million. Radmacher challenged the decision and the Court of Appeal agreed that her fortune, thought to be about £100 million, should be protected by the terms of the agreement. This reduced his lump sum payment to about £1 million plus a £2.5 million fund to buy a house, which was to be returned to Radmacher when their youngest daughter turned 22.

Granatino fought this decision but the Supreme Court rejected his appeal eight to one, stating that so long as the agreement was "fully entered into by each party with a full appreciation of its implications" it would be valid unless "in the circumstances prevailing it would not be fair to hold the parties to their agreement".

The dissenting judgment came from Baroness Hale, at the time the only woman to have sat on the Supreme Court. She said: "The object of a [prenuptial] agreement is to deny the economically weaker spouse the provision to which she — it is usually although by no means invariably she — would otherwise be entitled." Ayesha Vardag, Radmacher's solicitor, insists that the former state of the law,

backed by Lady Hale, was “paternalistic and patronising”. In addition, she says that before the ruling, anyone with money “was effectively writing one’s partner a blank cheque to half or even more of one’s assets”.

Radmacher caused a seismic shift in the law, which had largely ignored prenups, to a situation in which so long as they were entered into by both parties freely and with full appreciation of their consequences, they are regarded as valid, unless they would leave a party destitute.

Prenups, Vardag says, do not remove the requirement to meet the parties’ needs from the available assets and income if possible, but can reduce those needs from the generously interpreted level generally applied by the courts to basic needs, and dispense with the 50:50 split.

“So the way is clear for parties to agree in the best of times what will happen in the worst of times, and to marry on a basis they have both agreed is fair,” she says.

Nicholas Bennett, a partner at Payne Hicks Beach, says that in the past decade there has been a “major cultural shift” in the view of prenuptial agreements by wealthy families.

Before Radmacher, he says, “they were often seen as not quite cricket [but] they’re now seen as part of standard wealth planning, like a proper will and good tax advice”.

The consensus among family lawyers is that the greater independence and control that prenups give to couples is positive — and they are no longer the preserve of the superrich.

Ordinary families are increasingly using them, says Graeme Fraser, a member of of the family lawyers’ group Resolution, especially for couples marrying later in life, those on their second marriage or where grown-up children have relied on the bank of Mum and Dad or their grandparents to get on the property ladder.

But the Radmacher ruling had pitfalls for lawyers. It put divorce specialists under increased pressure; those drafting agreements now fear that they would be sued for professional negligence if the courts ruled the terms were unfair.

Lucinda Holliday, a partner at Blaser Mills Law, says that this may have concentrated minds and resulted in fairer agreements. She points out that clauses are usually built into the terms of prenups to cater for changing circumstances, and especially to make provision for children.

Four years after the ruling, the Law Commission, the independent body that advises the government on reform in England and Wales, suggested legislation to codify the principles set out in the judgment. The proposals remain in limbo. Jane Keir, a partner at Kingsley Napley, says that this is concerning because cases are coming through the courts with parties seeking to rely on the terms of a prenuptial agreement to cut short financial litigation on divorce, and so clarity is important.

Others agree that the room for judicial discretion still creates too much uncertainty and acrimony. Vardag would like legislation to enforce prenups as contracts, so it is clear they are the default standard for the distribution of the couple's assets. While she insists that a proper application of the law in Radmacher allows the courts to enforce agreements consistently, she says: "It would be good to carve this in stone, rather than let judges take pot shots whittling it away and bringing prenups back under the vast and woolly mantle of judicial discretion."

10 New Square, Lincoln's Inn, London WC2A 3QG
DX 40 London/Chancery Lane
Tel: 020 7465 4300 Fax: 020 7465 4400 www.phb.co.uk