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Debunking Family Law Myths – Part I

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The decision to live with, marry or have a child with someone is not usually taken lightly. These decisions, however, are often made with an incorrect understanding of their legal and financial consequences. Where a couple does not know what the law can and, probably more importantly, cannot do for them they run the risk of disappointment or, in some cases, financial disaster in the event of separation.

There are a number of harmful family law myths out there which I hope to debunk over the course of three articles. In this first article I focus on pre-nuptial agreements, the impact of a spouses' conduct on finances and so called common law marriage.

The point of a pre-nuptial agreement in England

I have lost count of the number of times that I have been told by friends, family and clients that pre-nuptial agreements (a "**pre-nup**") are not worth the paper they are written on. This would be true, if we were living in 2009 but in 2010 the power of the pre-nup radically changed thanks to the Supreme Court case of *Radmacher v Granatino.[1]* In this case the parties entered into a pre-nup in Germany which provided that neither party would make a financial claim against the other in the event of divorce. When the spouses separated in 2006 the husband applied to the English courts for a financial settlement. A final hearing and several appeals later, the Supreme Court found that 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".* In this instance, the pre-nup was worth many millions of times the value of the paper it was written on!

Since this case family lawyers have had to advise that if the Supreme Court test is met then you should expect to be bound by your pre-nup. There are various steps that should be taken to enhance the efficacy of your agreement such as: (i) providing full financial disclosure; (ii) each obtaining independent legal advice; (iii) negotiating and reaching an agreement in good time before the marriage; (iv) ensuring both parties understand the terms of the agreement; and (v) providing for each party's needs. This list is not exhaustive and it is not even the case that if the complete list is complied with then the pre-nup can be enforced like a commercial contract because parties cannot oust the Judge's discretion to decide the appropriate division of assets. However, a procedurally and substantially fair pre-nup becomes a relevant, and often decisive, circumstance of the case that a judge takes into account when exercising that discretion.

As tends to be the case in common law systems, case law on pre-nups is complex and constantly evolving. Where a party's needs are not met by the agreement the court has always felt able to deviate

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from the agreement to the extent necessary to meet such needs and recent cases[2] appear to show a trend towards empowering the court to depart from pre-nups to consider sharing claims. However, for the time being at least, on a cost / benefit analysis, pre-nups can be extremely valuable and why take the risk?

A party's behaviour during the marriage rarely has a bearing on finances

The most difficult part of a first meeting with a client is often when you have to explain that their spouse's behaviour during the marriage is unlikely to have an impact on the financial award. An adulterous party doesn't pay more for their affair nor is a neglectful parent awarded less for poor parenting. This can feel extremely unfair unless you understand the reasons behind it.

When deciding what award to make, judges are required by statute[3] to have regard to all the circumstances of the case. To guide them in exercising their discretion, the act[4] also sets out matters that judges are to have particular regard to, which includes the conduct of the party, "*if that conduct is such that it would…be inequitable to disregard it*". This sets a very high bar. Case law tells us that for behaviour to be taken into account it has to be so bad that you gasp when you hear it, not merely gulp [5]. Examples include a wife who incited someone to murder her husband[6] and a husband who had been imprisoned for assaulting and raping his wife.[7] These were, however, exceptional cases and there is no set rule on what judges will or will not consider relevant when reaching their decision.

So why is the court so reluctant to reflect the conduct of parties in their awards? The answer is threefold:

1 Whilst the emotional cost of the behaviour may be high, it is often difficult to establish the financial impact. Where there is no obvious effect on the parties' finances how and why should it be reflected in the financial award the parties receive? Any deduction for bad behaviour which did not have a financial impact would be arbitrary, 10% for one off adultery but 20% for a long time affair? In cases where you can easily quantify how one party's deliberate and wanton behaviour has reduced the matrimonial pot then the court *may* add that notional sum back in to the pot on the badly behaved parties' side. Cases where financial misconduct have resulted in a successful "add back" claim are, however, rare and pursuing one often leads to protracted and therefore costly litigation.

2 It is not the role of the family court to make a moral judgment over how people conduct themselves in their marriages. Every marriage is different. Family judges should not be put in the position where they have to decide what constitutes good or bad behaviour, it is simply too subjective. How would the court deal with an open marriage for example? If the behaviour is 'bad' enough that it is criminal, a party can seek recourse in the criminal court, but family judges cannot hand out financial punishments instead of or in addition to criminal punishments.

3 It is likely that there is also a public policy reason behind the approach. If parties were able to get more money if they could show their spouse had behaved badly they would come to court with a list of their former partner's bad conduct. The necessary mudslinging that would take place in bringing such a claim would be extremely detrimental to the proceedings and to the parties. It would take up precious court time (and thereby the parties' and tax payers' money) to establish which party was telling the truth and if proven, whether the behaviour was "bad enough" to warrant a financial sanction. Parties would have to rake up upsetting and intimate details of their marriages which would likely be extremely inflammatory at a time when parties should be focusing on reaching an agreement and in many cases co-parenting children.

For these reasons, a financial settlement is not an opportunity to seek revenge, and nor should it be.

There is no such thing as a common law marriage in England and Wales

You live together in a committed, long term relationship but you don't want to get married. It's fine because after a while you acquire similar rights to married couples – right? Wrong.

Contrary to popular belief there is no such thing as a common law marriage in England and Wales. The myth of the common law marriage is becoming an increasing problem as more and more couples

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chose to live together without marrying. When married couples divorce, the court can make orders to divide the parties' assets (including the matrimonial home and pensions) regardless of whose name the assets are in. The court can also award spousal maintenance. When unmarried couples separate, neither party is legally required to take responsibility for the other and if the property in which they live is in the sole name of only one party, only they have the right to reside there. This is the case regardless of how long you have lived together, even if you have children.

If unmarried parents separate before their child is 18 the parent with care of the child can make an application to the Child Maintenance Service for child maintenance or to court for a claim under Schedule 1 of the Children Act 1989. Under this act the court has the power to: (i) top up child maintenance (if the non-resident parent earns more than £156,000 gross per year); (ii) order the payment of school fees, lump sums and what is known as a 'carer's allowance' (to cover child care); and/or (iii) award the purchase or transfer of a property to the parent with care, but only until the child no longer needs it which is usually when the child finishes education or reaches 18. So while there is some protection for co-habiting parents, the rights are only available in relation to the child and do not go nearly as far as those afforded to married couples.

There are various steps that co-habiting couples can take to give each other protection. For example, they can make each other beneficiaries under their respective wills so that they are properly provided for in the event of death. This is important because if one co-habiting partner dies without naming the other in their will, their estate passes to their next of kin, leaving their partner without a legal claim to the estate or shared home. Couples can also arrange to legally hold assets in joint names so that they have an equal right to the assets on separation. Arguably the most comprehensive option available to an unmarried couple is a cohabitation agreement. These agreements are bespoke to the couple and can set out exactly what financial responsibilities the parties intend to have towards each other, how existing and future assets are to be held and how they should be split in the event the parties separate. They require a little effort upfront but can be invaluable if the relationship breaks down and they are probably still less hassle than organising a wedding!

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[1] *Radmacher v Granatino [2010] UKSC 42, 3 W.L.R. 1367*

[2] *Brack v Brack [2019] 1 W.L.R 3438, MB v EB [2019] EWHC 1649* and *Ipekci v McConnell [2019] EWFC 19*

[3] Section 25(1) of the Matrimonial Causes Act 1973 (the "**Act**")

[4] Section 25(2) of the Act

[5] *S v S [2006] EWHC 2793 (Fam)*

[6] *Evans V Evans [1989] 1 FLR 351*

[7] *H v H (Financial Provision: Conduct) [1994] 2 FLR 801*