Untying the knot

A recent ruling in a landmark pre-nuptial agreement case could have far-reaching implications for tax planning and passing assets to the next generation, says **Julie Butler**

Every tax planner must ask the question of how long the 100% inheritance tax (IHT) relief on business property relief (BPR) and agricultural property relief (APR) will last. It is appreciated that holdover relief for capital gains tax in respect of business property is still in existence, so why is property not being passed on to the next generation now? Is it because of concerns over the potential for divorce?

A landmark ruling in a recent 'pre-nuptial agreement' case, *Radmacher v Granatino* [2009] EWCA Civ 649, may give a boost to confidence in passing wealth to the next generation now, secure in the knowledge that these assets can be protected. The case related to the divorce settlement of Katrin Radmacher, a German heiress said to be worth £100m, and her former husband, Nicolas Granatino. On 2 July, Lord Justice Thorpe, in the Court of Appeal, ruled that a pre-nuptial contract should be decisive when the courts divide a couple's assets after a marriage fails. This emphatic endorsement of the pre-nuptial should give reassuring backing to those contemplating their use. Above all, it is considered that this ruling brings England into line with the rest of Europe. Lord Justice Thorpe was clearly influenced by the harsh contrast with European law. In Germany, the contract between Radmacher and Granatino would have been accepted and enforced, as it would be in Granatino's native France. Justice Thorpe said that, nowadays, "divorce is a statistical commonplace".

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EARLIER CASE LAW

Prior to this case, the case of *Crossley v Crossley* [2008] 1 FLR 1467, confirmed that the courts were becoming increasingly prepared to take pre-nuptial agreements into account. Mr and Mrs Crossley became engaged after a whirlwind romance. They were both wealthy and well into middle age, and both had grown-up children. Before their wedding, they entered into an agreement that, if the marriage collapsed, they would walk away taking only those assets they had personally introduced.

The collapse of the marriage happened after only 14 months. Mrs Crossley then, contrary to the agreement, issued a financial claim as well as the divorce petition, maintaining that Mr Crossley had failed to give full disclosure of his means at the time they entered the agreement, and that, as a result, Mrs Crossley should not be bound by it. The judge considered Mrs Crossley's claim should be struck out.

In making this order, the judge was not employing any specific rule relevant to family proceedings, but the general power the court has to manage its own proceedings. Mrs Crossley appealed on the basis that the judge had exceeded his powers. The Court of Appeal did not think the judge had. The judge's order was allowed to stand, and the Court of Appeal praised him for a decision that reflected the growing importance of pre-nuptial agreements.

IMPORTANCE FOR TAX PLANNING

A simple change by the Treasury to, say, 50% BPR and APR, from the current 100%, would bring millions of pounds into the IHT net, so does the ruling in *Radmacher v Granatino* present a driver for tax planning?

With entrepreneurs' relief (ER) seen as a poor replacement for business asset taper relief, there will be a focus on both rollover relief and holdover relief, so perhaps this will herald a consideration for passing down business assets before death. Whatever the decision of the taxpayer with regard to succession planning, there are complexities related to both rollover and holdover relief. Are assets passed down before a change to the 100% rate? If assets do flow down to the next generation, what happens if IHT reliefs remain the same and there is a divorce? Will the pre-nuptial agreement help?

Some may say the current environment is not conducive to encouraging tax advisers to be proactive in advising their clients on succession planning, not least because of potential litigation claims. However, advisers still have to present a full synopsis to their clients of what might and might not happen on passing down wealth to the next generation, either through lifetime or death transfers. They will need a strong understanding of what the client really needs, and their advice may well have to include some 'crystal ball-gazing', as well as careful explanations of potential downsides and safeguards. Good luck to all those brave enough to discuss the subject as part of proactive tax planning. However, the ruling of Lord Justice Thorpe made clear that pre-nuptial contracts were not just for the rich. ■

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