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## ***Thorne v Kennedy*: Why Australia's decision on prenups is important for English law**

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There are two main reasons why the courts in England, Wales and Northern Ireland have not yet had the opportunity to consider fully what would constitute undue influence in the context of a prenuptial agreement (prenup). First, prenups are not binding under legislation here, as the court can still decide to not give effect to an agreement if it would lead to unfairness. For instance, as Lord Phillips put it in *Radmacher (Formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900 (para 81), if the agreement would leave one of the parties in a position of real need whilst the other party enjoys a sufficiency or more. Secondly, the courts in England and Wales have avoided the issue of whether prenups have contractual status or not, and so whilst vitiating factors such as duress and undue influence are relevant to whether consent to a prenup was freely given, the court has said that pressure falling short of duress is also relevant (though in practice it has adopted a restrictive approach). But knowing when pressure will amount to undue influence in this jurisdiction is still important, not least because calls for contractually binding prenups have resurfaced in recent months (see, for example, Divorce (Financial Provision) Bill 2017-19). Even if prenups are not made legislatively binding in the near future, the courts since *Radmacher* have taken a fairly restrictive approach when deciding when an imbalance of power between the parties will affect the weight of a prenup on relationship breakdown. This is problematic when the autonomy of one party has been compromised by power inequalities in the relationship, and so a new approach is needed. For this reason, the ground-breaking approach of the High Court of Australia in *Thorne v Kennedy* [2017] HCA 49 will be of interest and importance for lawyers in England, Wales and Northern Ireland. As well as providing guidance on the operation of undue influence in the context of prenups, it crucially opens up the possibility for a broader range of circumstances to be taken into account when giving effect to such agreements.

### The Australian context

Unlike England, Wales and Northern Ireland, nuptial agreements are binding under legislation in Australia. Section 90F of the Family Law Act 1975 (as amended by the Family Law Amendment Act 2000) prevents one party from leaving the other unable to support himself or herself. Independent legal advice is a requirement in Australia under s 90G(1) and the parties must also sign a statement that the advantages and disadvantages of signing were explained to them. Agreements can be vitiated according to the normal principles of contract if one of the parties was subject to duress or undue influence. There is also scope for the Australian courts to set aside agreements according to the equitable doctrine of 'unconscionable conduct' if it can be shown that the innocent party was under a 'special disadvantage', preventing them from making an agreement in their own interests (*Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14). It is important to note the distinction between this doctrine in Australia and English law's *description* of behaviour as unconscionable in *Radmacher*, where the Supreme Court noted the relevance of unconscionable conduct such as undue pressure (falling short of duress) or 'other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage' (para 71).

### *Thorne v Kennedy*

In *Thorne v Kennedy*, the only issue for the court was whether a prenuptial and postnuptial

(postnup) agreement should be set aside for duress, undue influence or unconscionable conduct (para 22). On the face of it, the facts of this case do not suggest there had been duress or undue influence: both parties had obtained independent legal advice, it was both parties' second marriage and although the prenup was signed shortly before the wedding, the subsequent postnup was 'substantially identical' (para 1) and was entered into without any time pressure. Case law in England and Wales would suggest that all these factors go against a finding of duress, undue influence *or* a finding of improper pressure falling short of duress. For instance, *Kremen v Agrest (Financial Remedy: Non-Disclosure: Postnuptial Agreement)* [2012] EWHC 45 (Fam), [2012] 2 FLR 414 and *GS v L (Financial Remedies: Pre-Acquired Assets: Needs)* [2011] EWHC 1759 (Fam), [2013] 1 FLR 300 have suggested it will be more difficult for the claimant to have an agreement set aside if she had a material understanding of what she was signing, and the claimant in *Thorne* clearly comprehended the terms of each agreement. Furthermore, the Supreme Court in *Radmacher* noted that if the parties had been married previously, this 'may explain the terms of the agreement, and may also show what they foresaw when they entered into the agreement' (para 72). Taking all this into account, one might be surprised that the High Court of Australia (HCA) found that the wife in *Thorne* had been subject to undue influence and unconscionable conduct (with Nettle J and Gordon J dissenting and finding unconscionable conduct but no undue influence).

Nevertheless, the wider context of the parties' relationship in *Thorne* does indicate they were not on an even playing field. The wife (Ms Thorne) was 36-years-old, Eastern European, of limited financial means and living in the Middle East when she met the husband (Mr Kennedy). He was a 67-year-old Greek-Australian property developer worth between \$18m and \$24m. The husband made it clear to the wife from the beginning of their courtship that his money was for his children. 'You will have to sign paper', he said (para 5). Eleven days before the wedding, he told Ms Thorne that they were going to sign a prenup, and if she did not sign it the wedding would not go ahead. Ms Thorne was advised against signing the prenup by her lawyer, and understood that the agreement was the worst her lawyer had ever seen (para 12). The same lawyer later urged her not to sign the postnup that was virtually identical to the prenup (para 14). But she did not listen to her lawyer's advice, as she wouldn't consider the possibility of divorce and her only concern was that she would have protection if Mr Kennedy predeceased her (para 12). This highlights the limits of independent and competent legal advice – sometimes individuals will not take this advice because they do not think they will ever divorce (S Thompson, 'Levelling the Prenuptial Playing Field: Is Independent Legal Advice the Answer?' [2011] IFL 327). However, Ms Thorne's expectations were not borne out. Mr Kennedy did predecease her as she feared, but not before they had separated, less than four years into the marriage.

The lower court (the Full Family Court of Australia) held that Ms Thorne could not have been subject to undue influence, as she knew from the beginning that Mr Kennedy intended his wealth for his children. Ms Thorne had obtained the best legal advice, and the court will not protect people from signing bad agreements when they know what they are doing. To do otherwise would arguably undermine freedom of contract and the autonomy of the parties. It is not a stretch to surmise that the Full Court's conclusion would be similar in the English courts. In *Hopkins v Hopkins* [2015] EWHC 812 (Fam), for instance, the judge attributed significant weight to the quality of the wife's legal advice, deciding that she must have understood the consequences of the postnup she was signing. She could not have had better legal advice, and her solicitor repeatedly told her not to sign the agreement. This was therefore considered to be a 'text-book example of how to assess whether a nuptial agreement was entered into freely' (see Gillian Douglas's *Family Law* case report on *Hopkins v Hopkins* [2015] Fam Law 1021), even though the husband had admitted to bullying behaviour.

### A 'Thorne' in the orthodox approach?

The majority in the HCA took a different approach, overturning the Full Court's decision and finding undue influence and unconscionable conduct. In doing so, the court zoomed out of the discrete circumstances in which the nuptial agreements were signed to understand *why* Ms Thorne decided to sign. The prenup was signed only days before the wedding, the wife's family had travelled to Australia for the wedding and the wife would not be able to get a visa to stay in the country unless she married. This wider context enabled them to conclude that the wife did not make a free choice. The court noted a range of contextual factors which may have prominence:

'(i) whether the agreement was offered on a basis that it was not subject to negotiation; (ii) the emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or end an engagement; (iii) whether there was any time for careful reflection; (iv) the nature of the parties' relationship; (v) the relative financial positions of the parties; and (vi) the independent advice that was received and whether there was time to reflect on that advice.'

These factors were pivotal in satisfying the HCA that there was undue influence and the decision of the Full Court should be overturned. For instance, this contextual view enabled the HCA to take the view that threats to end an engagement can be just as coercive as threats to end a marriage (as suggested by my previous work: S Thompson *Prenuptial Agreements and the Presumption of Free Choice* (Hart 2015), 115).

The HCA's reasoning in *Thorne* demonstrates a radical departure from the approach of other Australian and English courts. The HCA did not regard the decision to sign a nuptial agreement as a binary choice, and focused on the context of the parties' relationship instead of only on the contractual transaction at issue. Conversely, the Full Court was only concerned with whether the parties *consented*, reducing the question of free choice to an assessment of their competence to agree. This narrowly constrained idea of choice led to a view of Ms Thorne as a gender-neutral, atomised person, who could (but did not) insist on making the agreement better, or who could walk away from the engagement. And so it is unsurprising that the Full Court concluded her will was not overborne because she had received excellent legal advice and signed both agreements knowing their effect could be disastrous.

By contrast, the HCA asked whether *the wife* was under pressure within the constellation of relationships and circumstances *she* was experiencing. This led to the conclusion that Ms Thorne had no choice 'as she saw it' because 'every bargaining chip and every power' was in Mr Kennedy's hands (para 47). Whilst the Full Court took factors such as the solicitor's recommendation not to sign as evidence that Ms Thorne was not subject to undue influence because she understood it was a bad agreement, the HCA moved beyond this factual assessment and asked instead *why* she would knowingly sign such a bad agreement. The 'significant gap' (para 56) between Ms Thorne's actions and her lawyer's advice was considered by the court to be evidence of undue influence, as she would do anything to ensure the wedding would go ahead. This is an example of a shift away from the orthodox contractual approach adopted in the Full Court and in English case law, and follows the broader relational approach suggested in my work which was cited in the judgment. By taking a more expansive view of undue influence, the court can appreciate wider questions like why decisions are made in the context of nuptial agreements, or how power imbalances affect the parties involved.

The majority decision of the HCA represents a radical interpretation of undue influence, which was not favoured by the dissenting judges in this case or by academics commenting on the case

to date (see K Barnett, ‘Thorn in the side of prenuptial agreements?’ (4 December 2017) accessed at <https://blogs.unimelb.edu.au/opinionsonhigh/2017/12/04/barnett-thorne/>). The dissent preferred to conclude that pursuant to the doctrine of unconscionable conduct, Ms Thorne was at a ‘special disadvantage’; she could not rationally decide to protect her own interests and it was unconscionable for Mr Kennedy to take advantage of this (para 81). Gordon J argued that the threshold for undue influence was not met in this case because ‘Ms Thorne’s capacity to make an independent judgment was not affected’ (para 80). It is regretful that yet again, this interpretation limits the question of undue influence to one of capacity, and a limited conception of choice. The majority were clear that one does not need to be an ‘automaton’ (para 40) for their will to be overborne. Undue influence does not have to mean that an individual objectively has no alternative, but it is possible, as the majority in the HCA has shown, to understand whether that individual subjectively felt *she* had no alternative. As a result, the HCA’s approach arguably bends orthodox understandings of ‘free will’ in contract to incorporate important context about the parties involved. If followed in England, Wales and Northern Ireland, *Thorne v Kennedy* could affect how intimate agreements are evaluated in future.

### The implications for English law

The potential for a more contextual approach to nuptial agreements in English law is already rooted in Oliver LJ’s rationale for giving effect to separation agreements, as stated in *Edgar v Edgar* [1980] 1 WLR 1410, (1981) 2 FLR 19:

‘Men and women ... must be assumed to know and appreciate what they are doing and their actual respective bargaining strengths will in fact depend in every case upon a subjective evaluation of their motives for doing it.’ (para 1420)

This statement underlies the current approach set out in *Radmacher* whereby nuptial agreements have decisive weight out of respect for individual autonomy (para 78). It is patronising to hold that someone’s decision is not good enough, and to deny them of the agency and responsibility of being held to a legally binding agreement. But the latter half of Oliver LJ’s statement is also significant; a *subjective* evaluation of one’s motives for signing a nuptial agreement allows a wide range of relevant aspects of the relationship to be taken into account so that the balance of power between the parties can be understood. However, to date, the potential of this approach has not been realised by English courts. In practice, individual autonomy is frequently prioritised and positioned in opposition to a subjective assessment of power imbalances in the relationship. This is the case even though the courts in England, Wales and Northern Ireland are not restricted to making findings of undue influence, and can consider pressure falling short of duress. And so case law in recent years has seen the primacy of autonomy in nuptial agreements develop until even flagrant power imbalances have not undermined the effect of the nuptial agreement (*V v V (Prenuptial Agreement)* [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315).

Had *Thorne v Kennedy* been decided in the English courts, the prenup and postnup may still have been set aside – not because of undue influence, but because these agreements arguably left Ms Thorne in a predicament of real need. Indeed, nuptial agreements following *Radmacher* tend to have been set aside or varied on this basis. Despite the wife’s claim that the husband had made assurances not to enforce their nuptial agreement, the agreement in *Z v Z (No 2) (Financial Remedy: Marriage Contract)* [2011] EWHC 2878 (Fam), [2012] 1 FLR 1100 was varied because of needs rather than through an assessment of how the parties’ autonomy had been affected. As a result, when seeking to have a prenup or postnup set aside, it appears that establishing unfairness in this way is more effective than arguing an agreement should not be

given effect because the autonomy of both parties was not freely exercised. Yet having an agreement set aside out of unfairness is problematic because it tells us nothing about *how* the parties reached their decision. Instead, assessing the claimant's nuptial agreement as unfair forces the court to prioritise its own sense of justice over respecting party autonomy. This reinforces the view that protecting vulnerable spouses means ignoring spouses' agency and overlooks the subjective element in *Edgar*. Furthermore, this route might have provided relief to Ms Thorne, but its focus on fairness circumvents a comprehensive judicial analysis of the parties' relationship and the pressures they were under and so relief may not be provided to other deserving claimants.

Significantly, *Thorne v Kennedy* demonstrates the potential to expand equitable doctrines like undue influence by moving beyond the binary question of whether there was free consent or not and by considering other subtler indications of power imbalance, such as *why* insistent warnings against signing nuptial agreements are ignored. It was clear Ms Thorne did not think the agreement would ever come into effect. Her two options – sign or leave Australia – did not make her decision to sign a free choice. Had the playing field been equal, Ms Thorne could have had a third option: she could have made a mutually beneficial agreement. Being able to see this third way recognises that both protection of economic vulnerability *and* the promotion of agency are possible. This approach could be hugely beneficial in English law given Diduck's assertion that '[a]utonomy has become more than one aspect of justice in the new, "modernised" family justice system, it is becoming almost its very essence' ('Autonomy and family justice' [2016] CFLQ 133, 134). If party autonomy is now the most important aspect of nuptial agreements, a richer understanding of how and why decisions are made and the effect of power imbalances on such decision making is critical. The HCA's broader and richer understanding can provide inspiration to courts elsewhere showing how agreements can be assessed contextually, without resorting to a paternalistic approach that undermines individuals' agency in practice.