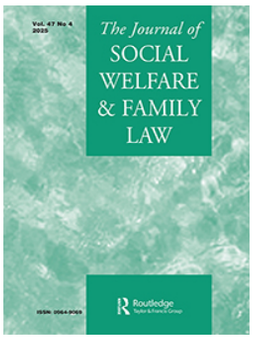

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Fraud, needs, and gender discrimination in pre-nuptial agreements

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KEYWORDS Pre-nuptial agreements; divorce; financial remedies; disclosure; fraud; needs; gender discrimination

More than 15 years after the Supreme Court decided that pre-nuptial agreements would be given effect unless unfair in *Radmacher v Granatino* [2010] UKSC 42, questions remain as to when it would be unfair to uphold an agreement's terms. The issue of disclosure, however, is relatively settled. As the Supreme Court clarified in *Radmacher*, the court must ask whether there was any 'material lack of disclosure' depriving a party of 'all the information that is material to his or her decision' to enter the agreement in question [69]. Put simply, does the lesser-moneyed spouse have a broad sense of the financial claim they are relinquishing in the event of divorce, by signing the nuptial agreement?

In *Helliwell v Entwistle* [2025] EWCA Civ 1055 the Court of Appeal decided that the husband did not. It was therefore unsurprising that the pre-nuptial agreement in question was set aside for fraudulent non-disclosure, especially since fraud generally affects the enforcement of *any* contract. Indeed, as King LJ asserted, it 'should not be thought' that *Helliwell* has brought about 'some sort of seismic or even modest shift in the court's approach to non-disclosure in cases where there is a pre-nuptial agreement' [122].

Still, this case is useful both in clarifying when disclosure is inadequate and in exposing other complexities affecting nuptial agreements, which in turn suggest the need for reform. These include the courts' diverging approaches when assessing needs, the approach of the court when the lesser-moneyed spouse is the husband, and why the lower court did *not* identify fraudulent non-disclosure as a vitiating factor.

Helliwell concerned a short marriage, lasting approximately three years. There was a significant wealth gap: the wife had assets in her sole name between £60 m and £70 m, and was the daughter of a very wealthy businessman, while the husband had previously worked as an accountant, had assets of approximately £850,000 (£500,000 of which was tied up in property) and was not working at that time. They signed a 'drop-hands' pre-nuptial agreement – meaning each party would retain their own separate property and split any jointly owned property 50:50 – on the day of the wedding. The parties received

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independent legal advice and undertook that they had provided substantially complete disclosure. However, the wife only disclosed assets of approximately £18 m, excluding almost three quarters of her actual worth, later claiming that she believed she did not have title in her father's assets.

In the Family Court ([2024] EWHC 740 (Fam)), the alleged defects in the wife's disclosure did not persuade Francis J to vitiate the agreement [12]:

> What difference, I ask rhetorically, does it make after a short childless marriage whether the economically stronger party is worth £50 million, £60 million or £70 million, when none of the capital forms any part of the marital acquest, but was gifted to that person by a parent?

Francis J, therefore, upheld the agreement, awarding the husband a tiny amount of the wife's wealth to meet his short-term needs (£400,000 for two years' rental and some income). He held that it would be wrong in the context of the agreement for the wife to be expected to buy the husband a house.

However, when *Helliwell* went to the Court of Appeal, King LJ highlighted two salient aspects that Francis J had failed to consider fully regarding disclosure. First, he did not address the husband's submission that the wife's *deliberate* concealment of assets constituted a material lack of disclosure [64], and that there is a distinction between failure to disclose and wilful non-disclosure [113]-[115]. Second, the undertaking that the wife had 'fully and frankly' disclosed her assets (when she had not) meant that Francis J should not have been satisfied that the husband was aware his wife was exceptionally wealthy. The undertaking concealed a gross underestimate of her true fortune:

> This is not a case where the 'number' was simply 'lower than the truth or lower than it should have been'; it was a case where 73% of the assets were deliberately not disclosed because the wife and her father were 'concerned about tax'. [65]

Disclosure, therefore, is not just a vague admission of substantial wealth. While it must be material rather than complete, a degree of accuracy or at the very least 'resemblance to the true wealth' [123] is required so that the lesser-moneyed party is aware of what they are contracting out of when signing the pre-nuptial agreement. Thus, the Court of Appeal held that the *Helliwell* agreement should not be given effect. In short, King LJ was influenced both by the dishonest and deliberate efforts to avoid disclosure and the sheer scale of the non-disclosure.

While the Court's finding of fraud determined the fate of the pre-nup here, the husband also appealed on other grounds [102]. He claimed an agreement signed on the day of the wedding should not have been upheld, that the wife had failed to mediate, that Francis J had failed to provide for his needs adequately, and that Francis J had been guilty of gender discrimination, because provision would have been different had he been a wife in this scenario. All but the final ground was mentioned briefly by King LJ, who concluded that the timing, pressure, and failure to mediate were 'clearly highly undesirable' but were not in themselves sufficient to vitiate this agreement [125].

King LJ did challenge the process Francis J used to assess the husband's needs, yet she did not explicitly criticise the limited award the husband received, even

though it is likely much less than an award in a case absent a nuptial agreement. As King LJ noted, this is not the first time the courts have taken a 'needs light approach' [127], with cases such as *HD v WB* [2023] EWFC 2 and *Xanthopoulos v Rakshina* [2024] EWCA Civ 84 suggesting that a pre-nuptial agreement would limit the level of needs otherwise awarded. Rather, the problem, for King LJ, was that Francis J did not just lower the award; he assessed the husband's needs without considering the other section 25 factors, such as the standard of living the parties had enjoyed during the marriage. Presumably – though King LJ did not say so overtly – such assessment would have compelled Francis J to increase the husband's award.

The approach to disclosure post-*Helliwell* is relatively straightforward: fraudulent non-disclosure is a vitiating factor, but non-disclosure will not necessarily impact a nuptial agreement. Yet there are other hints in *Helliwell* that the court's application of *Radmacher* is becoming increasingly relaxed, such as King LJ's assertion that 'disclosure is desirable but not essential and that is equally the case with legal advice' [122]. This apparent restatement of *Radmacher's* principles omits two words the Supreme Court deemed important to the exercise of autonomy: *material* disclosure and *independent* legal advice. While the husband in *Helliwell* received independent legal advice, and King LJ found a material lack of disclosure, this dictum could still inform an approach that helps to ensure that pre-nuptial agreements are increasingly difficult to overturn.

Another implication of the relaxation of *Radmacher* requirements can be seen in the approach to needs. King LJ rightly said that needs under a pre-nuptial agreement cannot be assessed independently of the other section 25 factors. In doing so, the courts would be ousting their own jurisdiction to make financial provision – and this is not possible without Parliament amending the Matrimonial Causes Act 1973 to make nuptial agreements binding. Yet this *was* Francis J's approach, which appears to have been more consistent with Mostyn J's assertion that needs are scaled back under a pre-nup, sufficient only to keep the lesser moneyed spouse from 'destitution' (*Kremen v Agrest (No 11)* [2021] EWHC 45 (Fam), [72]). This complexity and inconsistency as to how needs are quantified can present real problems for practitioners advising clients, as my empirical research has found (Thompson 2025, p. 8).

One might also ask why Francis J neglected to consider the wife's fraudulent behaviour in his assessment. This may have been because of the circumstances in which the case was heard: 'I have heard very lengthy submissions and it is already half past four in the afternoon' [3]. It is therefore possible that his stringent approach was because he did not have time to give full consideration to the parties' every submission. In my study of nuptial agreements in FDR hearings, I found that the practical consequences of limited court resources and time help to explain the difficulty of challenging a nuptial agreement (Thompson 2025, p. 11). In court, a judge might hear several cases in one day and often does not have time to read documents in detail, meaning complex aspects of the case can be overlooked.

King LJ did not consider the husband's claim of gender discrimination. Would he have been treated differently had he been the wife? King LJ likely sidestepped this point for good

reason; after all, she could not predict Francis J's decision in this counterfactual scenario with any degree of certainty. But this is a point that has repeatedly been raised anecdotally. Pre-nups are gendered, in that the lesser moneyed spouse is more likely to be responsible for caregiving and other domestic labour, and this is inextricably linked to an *additional* layer of gender discrimination: sacrifices made for the relationship might not be recognised as such when they do not fit within stereotypical gender norms. As Lady Hale observed in *Radmacher*, the majority saw Mr Granatino's career change as being for his own sake, and not the family's. So too for Mr Entwistle, who left his career as an accountant to work for Ms Helliwell's father. Yet while Lady Hale asserted that sacrifices usually are made 'because of the demands of child-rearing and the (often life-long) financial disadvantage which results' ([2010] UKSC 42, [187]), she also noted that in some cases, other choices are made for the family's happiness:

> The couple may move . . . to another country; they may adopt a completely different lifestyle; one of them may give up a well-paid job she hates for the sake of a less lucrative job that she loves . . . These sorts of things happen all the time in a relationship. The couple will support one another while they are together. And it may generate a continued need for support once they are apart. [188]

It is certainly possible that the gendered context in which career sacrifices tend to be made can foster an unconscious bias, that blinkers the court from considering the broader relational context in which choices are made in the marriage. Indeed, there is some limited empirical evidence to suggest that the husband in *Helliwell* is not alone in alleging gender discrimination. As I was told in my empirical study on unreported nuptial agreements: 'If the man is trying to get out of the nuptial agreement, I do find judges will be harder on them in terms of assessing their needs than if a woman were to argue it' (Thompson 2025, p. 8).

That the assessment of needs might be arbitrary in this way again underscores inconsistency in the court's approach to nuptial agreements. When combined with the fact that the Court of Appeal in *Helliwell* exposed the lower court as having missed fraud and having incorrectly assessed needs independently of section 25, the need for legislative reform is plain. Judges need statutory requirements to abide by, so they consider fully the impact of power imbalances upon nuptial agreements, as well as clear guidance regarding the scope of needs provision. And so, *Helliwell* serves as a timely reminder that, 15 years since *Radmacher*, the adjudication of nuptial agreements continues to be marked by significant complexity.

Disclosure statement

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