

Pre-Nuptial & Post-Nuptial Agreements

1. What are they?

Pre-nuptial agreements are formal agreements entered into by a couple prior to their marriage the main aim of which is to set out how their finances should be distributed should they divorce or separate.

Post-nuptial agreements are formal agreements entered into by a couple after marriage and before an actual separation is planned, and as is in a pre-nuptial agreement allows the couple to set out how their finances should be distributed should they divorce or separate.

Pre-civil partnership and post-civil partnership agreements are similar and are available to couples about to enter or who have already entered into a civil partnership.

2. Are they legally binding?

Although such agreements are enforceable in many countries outside the UK, as the law currently stands in England and Wales, while the court may take such agreements into account when deciding how to divide assets on a divorce, these agreements are not legally binding on the courts.

However, over recent years the court has tended to attach increasing weight to nuptial agreements. This principle was taken further following the recent Supreme Court landmark decision of *Radmacher -v- Granatino* in 2010 which held that courts should give effect to a nuptial agreement freely entered into by each party with a full appreciation of its implications unless it would not be fair to do so.

3. What weight will the court give to the agreement?

How much weight the court will give a pre-nuptial agreement will depend on various factors such as:

- whether there has been any duress, fraud, undue pressure, exploitation of a dominant position, or misrepresentation by a party;
- whether the parties had the benefit of financial disclosure;
- whether the parties had taken, or had the opportunity to take, independent legal advice;
- how long before the wedding the agreement was signed.
- It is advisable that any agreement is entered into at least 21 days prior to a marriage to avoid accusations of duress.

The court will also consider whether the agreement is broadly fair. What is deemed fair by the court will depend on the facts of a particular case. However, the Supreme Court has given guidance and at the very least any agreement should not prejudice the reasonable requirements of any children of the family and should meet the parties' reasonable financial needs. The Supreme Court made it clear that failure to provide for a child's or spouse's needs are likely to make it unfair to hold parties to their agreement.

Factsheet

A change in circumstances or the time that has elapsed since the making of an agreement may render an agreement unfair or reduce the weight to be attached to it. It is therefore a good idea to regularly review and update the agreement.

If the court decides that an agreement is not fair, whilst the court might adjust the financial settlement to make it fair it may not necessarily need to vary all aspects of the agreement and any award may be at the lower end of what the court considers fair to reflect the existence of the agreement.

4. Should I have one?

Such agreements are often viewed as unromantic and that by having one it is more likely to doom the marriage to failure. However, in some cases the existence of the agreement can lead to a more successful marriage with the parties knowing the marriage is for love and not money.

It cannot be ignored that nearly one out of two marriages end in divorce and therefore marriage can be a financial risk and so it is sensible to manage and minimise that risk as much as possible.

A Pre-Nuptial agreement can help protect your interests in the event of the breakdown of your relationship. They are particularly useful where the parties have pre-marital assets and future inheritances they wish to protect.

The courts have noted the distinction between matrimonial and non-matrimonial property and an agreement which expressly sets out to exclude non-matrimonial property, such as inherited wealth or pre-marital assets, from being shared if the marriage comes to an end, will often be respected as fair.

The existence of a nuptial agreement can provide some degree of certainty as to what will happen in the event a relationship breaks down and help save the time, costs and animosity so often experienced on a divorce.

If you wish to discuss making a Pre-nuptial agreement or reviewing your existing Pre-nuptial agreement please contact our Family Team.