

Pre and Post Nuptial agreements



Pre-Nuptial Agreements

A pre-nuptial (or ante-nuptial) agreement allows a couple to plan financially should their marriage breakdown. No one wants to believe that their marriage will end in divorce and such agreements are often seen as unromantic and dooming a marriage to failure. In reality however marriages do breakdown and having a pre-nuptial agreement in place can avoid the time, expense and animosity experienced in many divorce cases.

Are they legally binding?

As the law currently stands in England and Wales pre-nuptial agreements are not legally binding. No agreement, however well drafted can oust the jurisdiction of the court. However, following the Supreme Court decision in the case of *Radmacher- v- Granatino* in 2010 there is now a rebuttable presumption that the court should give effect to a pre-nuptial agreement if it is freely entered into by each party with a full appreciation of its implications and, unless circumstances prevailing, it would not be fair to hold the parties to the agreement.

What is fair?

What is fair will depend on the facts of a particular case. The Supreme Court did however give some generic guidance on what it meant by fairness and what circumstances could lead the court to depart from the agreement:

- › A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family
- › A failure to meet a party's needs or to compensate a party could render it unfair to hold the parties to the terms of the agreement
- › Where the agreement addresses existing circumstances and not merely contingencies of an uncertain future the court should be slow to interfere with the agreement simply on the basis that that the court knows best. Where a pre-nuptial agreement attempts to address all of the future unknowns in married life there is increased scope for what actually happens during the parties' married life to render the agreement unfair
- › Where a couple enter into the agreement assuming they will each run their own independent professional lives and keep their finances separate but then find this impossible when they have children
- › Where an older couple enter in to agreement to keep their finances separate but then one becomes the carer or is rendered homeless if grown up children take priority
- › Where a couple enter into an agreement thinking one will always be the breadwinner and the other the homemaker but then the homemaker's career takes off and the roles are reversed.

If the court decides that the agreement is not fair is the entire agreement scrapped?

No. If it transpires that needs are not met, or that a party is not adequately compensated or reasonable requirements of the children are not met then the agreement is not scrapped but instead it is tweaked to bring it within the boundaries of what the court considers fair.



“A pre-nuptial (or pre-marital) agreement allows a couple to plan financially should their marriage breakdown”.

What steps should be taken to give your pre-nuptial agreement the best chance of being upheld?

The circumstances surrounding the making of the agreement will affect the weight to be given to it upon a divorce. The court has suggested the following considerations:

- › Whether there is evidence of duress, fraud or misrepresentation
- › Whether there has been undue pressure or exploitation of a dominant position
- › Whether the parties to the agreement have taken legal advice and exchanged full disclosure of their assets and income before signing the agreement. However, even in the absence of this the court have held that if parties are aware of the implications of the agreement and indifferent to the detail of disclosure the weight attached to the agreement need not necessarily be reduced. Best practice would however suggest the exchange of at least a schedule of assets and income prior to entering into an agreement

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- › Each party should intend for the agreement to be binding. Such intention will be assumed. Whether the agreement is foreign or not is not a relevant consideration
- › The parties' ages, maturity, previous experience of relationships and marriage will be relevant, as will the question of whether the marriage would have gone ahead without it
- › The agreement should be entered into no fewer than 21 days prior to marriage.

Post-Nuptial Agreements

These are agreements which are entered into after marriage, while a couple are still living together, which deal with financial arrangements in the event of a divorce.

Whereas a pre-nuptial agreement is legally not binding, a post nuptial agreement can come within the definition of a "maintenance agreement" - a written agreement containing financial arrangements made during the marriage.

These agreements are binding unless there is a reason for them to be void or unenforceable under normal contract rules such as reasons of misrepresentation or undue influence. However, with family law the courts retain discretion because "maintenance agreements" are subject to the courts powers of variation.

The House of Lords decided in the Privy Council case of *MacLeod v MacLeod* (2008) that a post-nuptial agreement should be upheld if the parties have independent legal advice, if they provide financial disclosure, if there is no duress and as long as there is reasonable financial provision for any children. Post-nuptial agreements can therefore provide certainty without the need for litigation in financial proceedings on divorce.



Contact us

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