

Pre and Post Nuptial Agreements

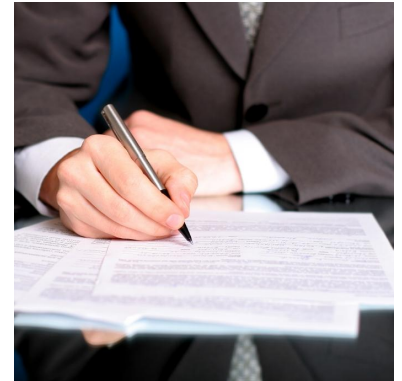
Overview

A pre-nuptial agreement ('pre-nup') is entered into before marriage and allows a couple to plan financially should their marriage breakdown. Pre-civil partnership agreements are similar and are available to couples about to enter into a civil partnership.

A post-nuptial agreement ('post-nup') is entered into after marriage, while a couple are still living together and allows a couple to plan financially should their marriage breakdown. Civil partners can enter into a post-partnership agreement.

No one wants to believe that their marriage or civil partnership will end in divorce and such agreements are often seen as unromantic and dooming a marriage to failure. In reality however marriages and civil partnerships do breakdown and having a nuptial agreement in place can avoid the time, expense and animosity experienced in many divorce cases.

Any further reference to pre or post nuptial agreements in this fact sheet will also be applicable to pre and post-partnership agreements.



Current Status of the Law

Although enforceable in many countries outside the UK, as the law currently stands in England and Wales nuptial agreements are not legally binding and cannot be used to limit or oust the jurisdiction of the divorce court. However, following the case of *Radmacher –v- Granatino* in 2010 and the publishing of the Law Commission's Report on 27 February 2014 courts are likely to give considerable weight to nuptial agreements if certain safeguards have been put in place.

In *Radmacher –v- Granatino* the Supreme Court set out the following principles:

1. It is important that each party should have all the information that is material to his or her own decision and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end.
2. The court should give effect to a nuptial agreement that is freely entered into by the parties with a full appreciation of its implications unless in the circumstances prevailing, it would not be fair to hold the parties to their agreement.
3. An agreement cannot be allowed to prejudice the reasonable requirements of any children of the family.
4. There must be respect for autonomy; the court should not override an agreement simply because the court knows best.
5. A term in the agreement that seeks to ring-fence non-matrimonial property (ie pre-acquired assets or future gifts and inheritance) is more likely to be fair.
5. The further the agreement tries to go towards addressing unknown future contingencies, the more likely it is that developments over time will render it unfair.
7. An agreement is unlikely to be able to displace claims based on need or compensation. It is much more likely to be able to displace the "sharing principle".

Matters that may seriously undermine the significance and weight attaching to a nuptial agreement such that it may have no or limited effect are also set out by the Supreme

Court. They relate to the facts and matters at the time the agreement is entered into and include:

- Material lack of disclosure, information or advice.
- Duress, fraud or misrepresentation.
- Unconscionable conduct such as undue pressure (falling short of duress).
- Unworthy conduct such as exploitation of a dominant position to secure an unfair advantage.
- A party's emotional state and the pressures applied on them
- The circumstances of the parties at the time of the agreement including their age and maturity and experience of previous relationships/marriage.
- Whether the marriage would have gone ahead without the agreement.
- Whether the agreement was unfair from the start.

The Law Commission's recommendations

The Law Commission has recommended the introduction of "qualifying nuptial agreements" and annexed to their report a draft Nuptial Agreements Bill. They recommend for an agreement to be given binding effect by the court as a qualifying nuptial agreement it must meet certain procedural safeguards and cannot be used to enable one or both parties to contract out of their responsibility to meet each other's financial needs.

In the event that any arrangements made in the agreement for either party's living arrangements (whether income, housing or otherwise) prove to be inadequate the door to the court would remain open; but only to enable orders to be made to ensure financial needs are met. The other elements of the agreement would however remain binding, including any agreement not to share property beyond that required to meet needs.

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The Law Commission recommend the following requirements in order for an agreement to be a qualifying nuptial agreement:-

1. The agreement must be a valid contract (for example, able to withstand challenge on the basis of undue influence or misrepresentation).
2. The law relating to undue influence be reformed, for qualifying nuptial agreements only, through an express provision to the effect that a presumption of undue influence will not apply to qualifying nuptial agreements.
3. The agreement must be made by deed.
4. The agreement must contain a statement signed by both parties (in addition to their execution of the document as a deed) stating that he or she understands that the agreement is a qualifying nuptial agreement and that it will remove the court's discretion to make financial provision orders, save insofar as the agreement leaves either party without provision for their financial needs.
5. The agreement will be invalid if made less than twenty eight days in advance of the marriage or civil partnership.
5. Both parties must receive, at the time of making of the agreement, disclosure of material information about the other party's financial situation.
7. Both parties must have received legal advice at the time that the agreement was formed. The legal advice should include advice that the agreement is a qualifying nuptial agreement that will prevent the court from making financial orders inconsistent with the agreement, save so far as financial needs are concerned and the effect of the agreement on the rights of the party being advised.
3. A statement signed by both lawyer and client to the effect that the client has been advised on the matters as referred to at paragraph vii above will raise an evidential presumption that the advice has been given.
9. The requirement for legal advice cannot be met by having the same lawyer advise the two parties.
2. Any variation must comply with all the pre-requisites for the formation of a qualifying nuptial agreement.
1. A qualifying nuptial agreement may only be revoked by an agreement, made in writing and signed by, or on behalf of both parties.
2. An agreement should not be able to waive the parties' rights to disclosure.

Financial Disclosure

In *Radmacher* the Supreme Court said that in order to have a full appreciation of the implications of a nuptial agreement, at the time of signing the agreement each party should be in possession of all of the information material to his decision to sign the agreement. To therefore show an appreciation of the implications of an agreement both parties should receive financial disclosure from each other. The test is about having enough information to make an informed decision. To be in possession of sufficient information the parties must be able to roughly quantify the claims that may be being given up and how the terms of the agreement will affect the overall division of assets.



Review

Nuptial agreements will be considered by the court on the basis of the law at the time of the relationship breakdown and not at the time that the agreement is entered into. Whether the Law Commission's Bill will be enacted and if so to what extent remains to be seen.

Cases since *Radmacher* show that the court are intent on giving significant weight to nuptial agreements that seek to 'ring-fence' pre-marital and future gifted/inherited assets.

The courts to date have however been reluctant to give significant weight to agreements that do not fully meet the needs of the financially weaker party. Accordingly, when drafting a marital agreement, care should be taken so that it adequately meets the needs of the financially weaker party.

Most cases in respect of marital agreements also concern relatively short marriages. The protection afforded by a marital agreement may grow weaker over time.

It would be advisable to regularly review an agreement and update it in the event of a change in circumstances. It is also advisable to review your agreement and ensure it can be recognised as a "qualifying" agreement should Parliament enact the Law Commission's recommendations. This would ensure you have a binding agreement rather than one (as is currently the case) that can only be given weight in any divorce.

Please feel free to discuss your own position and concerns. Contact your nearest office on:

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