

Your guide to pre and post-nuptial agreements

Overview

A pre-nuptial or pre-marital agreement (sometimes also referred to as a pre-nup) is a formal written agreement entered into prior to a marriage to record the financial provision a couple want to make for one another in the event of a divorce.

A post-nuptial agreement is the same as a pre-nuptial agreement, the only difference being it is entered into after marriage. These can be used if there has been a change of circumstance after marriage, for example receipt of an inheritance or other significant financial change. They can also be used if there hasn't been enough time before the marriage to complete a pre-nuptial agreement.

Are nuptial agreements legally binding?

A nuptial agreement cannot stop a financial claim being made to the court on marriage breakdown, however, if a claim is made the nuptial agreement will be a relevant circumstance. Provided the three-stage test in the case of *Radmacher v Granatino* have been complied with the agreement will be given decisive weight and parties should expect the court to hold them to the terms of the agreement.

In *Radmacher v Granatino* [2010 UKSC 42] the Supreme Court enforced a pre-nuptial agreement and confirmed that *'the court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement'*.

What is the three-stage test?

1. The agreement must be freely entered into

Parties must enter into the agreement without any pressure from each other or anyone else. An agreement is unlikely to be upheld if the court finds evidence of mistake, duress, misrepresentation, exploitation of a dominant position or undue pressure. Coercive and controlling behaviour is an example of undue pressure, exploitation of a dominant position or relevant conduct that can vitiate a nuptial agreement.

The terms of the pre-nuptial agreement should be negotiated as far in advance of the wedding date as possible to avoid any last-minute pressure.

The court will consider the parties individual circumstances such as their age and maturity, previous experience of relationships, as well as their emotional state at the time of making the agreement.

The court may also consider whether the marriage would have gone ahead in the absence of a pre-nuptial agreement. If a party wouldn't have gone ahead with the wedding without the agreement that may reinforce its weight.

2. The parties must have a full appreciation of the implications of the agreement

In *Radmacher* the Supreme Court said that 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 the information material to their decision to sign the agreement. The test is therefore materiality. Each party must have the information they need to make an informed decision on whether to agree the terms of the nuptial agreement.

What is material will differ from case to case. It will depend on how much a couple's finances are intertwined and how much they know about each other's financial circumstances. Whilst financial disclosure is not a pre-requisite of *Radmacher*, parties should each give disclosure of their assets, liabilities, income, trust interests, business assets, pensions and inheritance prospects to enable the other party to assess what future financial claims they may be giving up and to understand how the financial provision in the nuptial agreement will

affect the overall division of assets. A summary of the disclosure provided should be set out in a schedule to the agreement.

Both parties should also take independent legal advice so that they understand the implications of the agreement, the advantages and disadvantages of entering into the agreement and an understanding of how the court will deal with financial remedy claims.

3. It must be fair to hold the parties to the agreement in the circumstances prevailing

In *Radmacher* the Supreme Court provided the following guidance for assessing fairness:

- It is not fair for a pre-nuptial agreement to prejudice the reasonable requirements of any children of the family. Provision should therefore be included for the benefit of any children or a review clause to cater for a change in circumstances following the birth of a child.
- The autonomy of adults should be respected; it is 'paternalistic' and 'patronising' to override the terms of an agreement on the basis that the court 'knows best'.
- There is nothing inherently unfair about a pre-nuptial agreement that seeks to ringfence non-matrimonial property. Non-matrimonial property comprises property owned by one party before the marriage, or assets a party receives during the marriage, through lifetime gift or inheritance.
- The longer a marriage lasts following a pre-nuptial agreement being signed, the greater the chance it may not be fair to hold the parties to its terms due to an unforeseen change in circumstance.
- If the pre-nuptial agreement will leave one party in a predicament of need, while the other party is comfortably provided for, this is likely to be unfair.
- If one party has a valid argument for an element of compensation (to recognise the loss of a career following a joint decision to give up work to care for the family) then a pre-nuptial agreement which ignores this compensation is likely to be unfair.

International considerations

If you or your family have a close connection to more than one country, it is important that you consider which jurisdiction you want to govern your agreement and to ensure that your agreement stands the best chance of being upheld in all jurisdictions you have a connection with.

The legal position on nuptial agreements varies from country to country as does the law on divorce and dissolution in the event of your marriage breaking down. It is therefore important you understand the law in each country and can make an informed decision on which jurisdiction you want to govern your agreement and if necessary, enter into mirror agreements in all relevant jurisdictions.

The legal status of a nuptial agreement in England and Wales is the same whether the agreement is made in England or in a foreign jurisdiction. The English court will apply English law, irrespective of any foreign connection.

What are the advantages of having a nuptial agreement?

If there is no nuptial agreement in place, a principle of sharing will apply as the starting point to all assets, regardless of their source. As well as protecting assets, an agreement allows a couple freedom to plan financially and provide clarity and certainty. They can also ensure that the interests of the wider family are safeguarded, particularly if family businesses, trusts or inherited assets are involved. In the event of the worst happening they can also reduce the stress and costs of a contested divorce.

What are the disadvantages of a nuptial agreement?

Discussing a pre-nuptial agreement can be seen as unromantic or a lack of confidence in the relationship. There may also be pressure from wider family members to consider. The preparation of a nuptial agreement can however be used as an opportunity to lay the foundations for a strong and secure relationship. They provide an opportunity to discuss challenges you face now or foresee becoming challenges in the future and will help minimise the potential for conflict during the marriage.

Watson Morris 2Unify service

Our 2Unify service offers legal expertise alongside relationship coaching. Our qualified coaches will work with you in a safe, non-judgemental way, to explore your wishes and feelings on a range of issues. With the support of a neutral third party, you may find it easier to discuss subjects that could otherwise be uncomfortable, or that you may not have considered. For more information [Watson Morris Family Law - 2Unify](#)

You can also consider using mediation or collaborative law. Mediators are trained professionals who can meet with both you and your fiancée/spouse to work through the terms of an agreement. Alternatively, you can use hybrid mediation. This gives you confidentiality to explore options with the mediator without commitment whilst having the benefit of instant legal advice. Collaboratively trained lawyers can also meet with you to work through an agreement together.

This guide is for general guidance only and should not be treated as a definitive guide or be regarded as legal advice. If you need more information about the issues referred to in this guide, please seek formal advice.