

A guide to Pre-Nuptial and Post-Nuptial Agreements



Winckworth
Sherwood



Winckworth Sherwood Family Guide

This guide is intended to provide an overview of nuptial agreements and includes:

- the key considerations you should be aware of when it comes to nuptial agreements
- the benefits of having a nuptial agreement
- practical steps to put an agreement in place
- the future of nuptial agreements - potential legislative changes recommended in a Law Commission report

If you would like to discuss anything raised in this guide, our experienced family law team is here to help. Their contact details can be found on the final page.

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Evidence of the cost and acrimony caused by divorce can be found on an almost daily basis in the UK media, laying bare the separation details of celebrities and the uber-wealthy. The existence or absence of nuptial agreements is regularly referenced in the gossip columns as being crucial to the division of the millions of such couples.

However, pre and post nups are not just for the rich and famous. They are a must for financial planning and for getting your ducks in a row. They need not be controversial when approached fairly and sensitively by your lawyer.

In short, a nuptial agreement, which can be entered into before (pre-nuptial) or during (post-nuptial) a marriage/civil partnership, is a written agreement which sets out what the couple agree should happen in relation to finances and other matters, should the relationship break down in the future. It may provide for the division of capital and property, and whether and how much maintenance will be paid by a former spouse to the other.

Following the landmark case of *Radmacher v Granatino* in 2010, nuptial agreements have gained strength in their ability to protect the assets of those entering into marriages or civil partnerships.

In the *Radmacher* decision the Court indicated that they may uphold the entire nuptial agreement, or give considerable weight to a nuptial agreement if certain requirements are met.

Nuptial agreements: key considerations

1 The first and most important factor to consider is that unlike in other jurisdictions, English courts have the discretion to decide on a case-by-case basis whether prenuptial agreements should be relied on.

2 The terms of the agreement are likely to be given considerable weight by the Court if entered into willingly by the parties, with full information available to them, and each intending that the agreement should be applied should the marriage come to an end. However, it could be ignored completely if it would be unfair to hold a party to it, for example because it does not meet the reasonable needs of the children or one of the spouses.

3 There is no 'one size fits all' agreement; each situation is unique. If the agreement fails to take into consideration all the relevant circumstances, it could be deemed as unfair and therefore fail to have the desired effect.

4 Nuptial agreements should be reviewed regularly to ensure that they remain fair and relevant. Review dates can be included in the agreement. The following scenarios may impact the agreement for example:

- having children;
- unexpected windfalls or unexpected loss;
- the loss of a job or inability to work;
- the health of the parties; changing materially; or
- significant inflation or deflation.

5 Even if you did not enter into a nuptial agreement before you have married or entered into a civil partnership, it is still possible to draw up a post-nup. The procedure is exactly the same as the drawing up of a pre-nup, and the Court will approach it in the same way.

What are the benefits of a nuptial agreement?

- On divorce, all assets are placed into a notional "matrimonial pot" for division. This means that any asset (regardless of strict legal ownership and/or financial contributions) could be subject to a Court order requiring it to be transferred to the other spouse or divided between you as the court thinks is appropriate and/or fair. Provided that it is entered into correctly, a nuptial agreement can be an effective way of protecting assets on divorce or dissolution.
- Nuptial agreements can save expense and reduce the acrimony between separating couples if the terms are fair.
- As such, it may be possible to limit the Court's involvement to approving the agreed financial arrangements, as opposed to requiring it to decide on those arrangements itself.

Nuptial agreements are particularly advisable in the following scenarios:

- Where the wealth of the parties is not equal.
- Where there are family businesses involved.
- Where one of the parties has significant inheritance prospects, or may benefit from gifts from their family.
- Where there are parties with assets acquired during previous marriages and/or relationships that they would prefer to ring fence, in particular for children of a previous union.
- When both parties are bringing assets into the marriage, and they both agree that anything acquired prior to the marriage remains the property of that spouse.
- Parties with future wealth prospects, such as those with trust funds or careers that could be stellar.
- International clients who want a nuptial agreement to mirror one that they have had drawn up in a foreign jurisdiction where such agreements are commonplace.
- Where there are existing debts.

Practical steps to putting a nuptial agreement in place

Our family law team has noted a change of attitudes towards nuptial agreements in recent years, and is adept at putting such arrangements in place. Nevertheless, there is still concern in some quarters that a nuptial agreement is unromantic, difficult to discuss, or 'for other people'.

However, nuptial agreements are increasingly common and, if approached with sensible and sensitive assistance, their use can merely be part of routine and prudent financial planning.

For those considering a nuptial agreement, the following initial steps can be particularly useful:

- 1 Take stock of your personal financial situation. This need not be an overwhelming exercise. The most important questions are:
 - a. What do you have? As well as property and liquid capital, consider other valuable and personal items, such as art collections and jewellery.
 - b. What might you have in the future? People often forget to factor in inheritance or benefits from trust funds.

- 2 Consider what you know about your partner's finances, and how much your financial health is currently linked through joint assets or liabilities.

- 3 Reflect on your respective priorities and attitudes. It is not uncommon to be unsure at this stage and this can be explored as part of the process.

- 4 Call our family team for an informal initial conversation to establish whether a nuptial agreement might assist in your circumstances.

- 5 With our assistance and taking into account your personal circumstances, plan effective, amicable communication with your fiancé or spouse.

The future of nuptial agreements

- In its 2014 report, Matrimonial Property Needs and Agreements, the Law Commission introduced the concept of "qualifying nuptial agreements" and recommended that these should be introduced into our legislation.
- However, the recommendations have not yet been enshrined in law and there is no guarantee that they will be.
- The essence of the agreements (if they follow the statutory provisions) is that they could be enforceable without necessitating the involvement of the Court.
- However, that said, the report concluded that it should not be possible to contract out of providing for each party's financial needs.

The recommended requirements for the agreement to qualify are:

- The agreement must be contractually valid (and so for instance not be entered into under duress);
- It must be made by deed and contain a statement confirming that the parties understand its effect;
- It must not be made within 28 days of the marriage or civil partnership;
- There must be disclosure of material information about the other party's financial situation;
- Both parties must have received independent legal advice at the time that the agreement was formed; and
- It will not be possible to waive the right to disclosure and legal advice.

Conclusion

As matters stand, if a separating couple cannot agree on a fair division of their assets, and their legal advisors have exhausted negotiations, then ultimately it is for the Court to decide what assets a party should receive on divorce or dissolution. To change this position so that a nuptial agreement is automatically binding on the parties would require Parliament to pass new legislation. It has not yet done so.

It is important to remember that within the jurisdiction of England and Wales, nuptial agreements remain unenforceable in their own right. However, without doubt they are regarded as a valuable tool to safeguard assets in the event of relationship breakdown. The case law which has developed rapidly since *Radmacher* clearly indicates that nuptial agreements usually do reduce the level of an award. Therefore, we advise clients to execute a nuptial agreement where possible.

Crucially, however, a nuptial agreement must be created bespoke for each couple. This does not entail huge expense. Rather, it is an acknowledgement that each couple and each situation are unique and if the agreement fails to account for that, it may fail to meet its objective of being enforced by the Court.

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Alex advises on all aspects of family law, including nuptial agreements, financial remedies and issues involving children upon the breakdown of marriages and relationships.



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- Cyber security
- Data protection
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“An impressed source notes that the lawyers ‘were simply delightful and provided the best client care I have experienced from a law firm’.”

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