



BRIEFING

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Pre-Nuptial and Post-Nuptial Agreements – a way of reducing resentment and uncertainty if your marriage breaks down

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. Marital property agreements, or nuptial agreements as they are more commonly known, are often discussed in such stories, leading many to believe nuptial agreements are confined to the rich and famous: they are not.

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. Entered into in a spirit of collaboration, they can reduce the acrimony and difficulties frequently experienced upon divorce and the subsequent division of assets.

What is a nuptial agreement?

A nuptial or civil partnership agreement is a type of nuptial agreement entered into before (pre-nuptial) or during (post-nuptial) a marriage/civil partnership. The written agreement sets out what the couple agree should happen in relation to finances and other matters, should the relationship break down in the future. An agreement 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.

Are nuptial agreements binding?

No, is the short answer. They are not legally binding in England and Wales (unlike in other countries). They cannot oust the jurisdiction of the Court. The Court retains its discretion at all times and, when determining what provision for the

parties is appropriate, it looks at the factors set out in the Matrimonial Causes Act 1973 with first consideration always being given to the welfare of any minor child of the family. It is under the umbrella of the Matrimonial Causes Act factors that a nuptial agreement would be taken into account, should there be an application for financial provision following divorce or the dissolution of the civil partnership.

That said, radically, the *Radmacher* decision indicates that, despite the Court retaining its discretion as to the division of financial assets on divorce, it 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 the agreement. Put simply, a Court may uphold the entire agreement or give considerable weight to a nuptial agreement if certain requirements are met.

Who can benefit from a nuptial agreement?

Increasingly people are marrying later in life, having worked and built up capital assets. They may own a house, have savings, pensions, etc. whilst their future spouse may have much less. They may have been given assets by wealthy parents who are concerned that the gift remains in the family. The increase in second and third marriages has also led to parties wishing to “ring fence” or protect assets for children of earlier relationships.

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 contribution) is potentially vulnerable to an order being made by the Court requiring it to be transferred to the other spouse.

Provided they are entered into correctly, a nuptial agreement can be an effective way of protecting assets on divorce or dissolution. We advise that a nuptial agreement be entered into in the following situations:

- 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 who may benefit from gifts from their family.
- 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, they may 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.

What are the benefits of a nuptial agreement?

Entering into a nuptial agreement is a means of demonstrating what the couple consider to be fair, should the marriage or civil partnership break down. It can show, for example, that a wealthier party would like to see assets passing to children from a previous relationship or seek to protect pre-acquired or future wealth. Nuptial agreements can save expense and reduce the acrimony between separating couples if the terms are fair. As such, it may be possible to avoid the need to involve the Court (other than following the breakdown of the marriage, requesting it to approve the terms of the nuptial agreement, which will be translated into an

order confirming the terms agreed between the parties).

How much weight is a Court likely to attach to a nuptial agreement?

The terms of the nuptial 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. The agreement will be unlikely to be upheld if there is evidence of duress, fraud, or undue pressure at the time it was executed. It could be ignored completely if it would be unfair to hold a party to it, through the need to provide for the reasonable needs of children or one of the spouses. The longer the marriage the less likely it will be that an agreement will be upheld as a result of changing circumstances, so we advise that nuptial agreements should be reviewed regularly to ensure that they remain fair and relevant.

How can I ensure my nuptial agreement has the maximum chance of being upheld?

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. This would mean that agreements (if they follow the statutory provisions) 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.

Unhelpfully, the Commission failed to provide any definition of “financial needs” but said that “it will remain open to spouses to make agreements about financial needs, but such terms will not be contractually enforceable and will be subject to the Courts’ scrutiny for fairness as they are at present. A qualifying nuptial agreement will not remove the parties’ ability to apply for, and the Courts’ jurisdiction to make, financial orders to meet their financial needs”.

The Law Commission recommended that for an agreement to be a qualifying nuptial agreement certain requirements must be met at the point that the agreement is entered into. These 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; and
- Both parties must have received independent legal advice at the time that the agreement was formed.
- It will not be possible to waive the right to disclosure and legal advice.

If the agreement meets the above requirements it will be considered to be a "qualifying nuptial agreement". For an agreement then to be *enforceable* it must have provided for the parties' financial needs.

The Commission identified that the main area for dispute is likely to arise over whether the agreement has properly catered for the parties' needs. It is intended that the meaning of 'financial needs' should be clarified in guidance to be published by the Family Justice Council. However, where currently an agreement can be argued not to apply if it is considered to be "unfair", this would no longer be possible under the Law Commission's proposals.

Please note that the recommendations set out above have not been enshrined in law and there is no guarantee that they will be. In the meantime it is worth noting that in *Radmacher*, the nuptial agreement was upheld despite the husband NOT receiving independent legal advice or any disclosure about his future wife's financial means. The court held that, whilst sound legal advice was desirable, on the basis that the husband was fully aware of the implications of the nuptial agreement and indifferent to the details of his wife's financial assets, their absence should not reduce the weight of the agreement. As such, provided it can be shown that each party had all the information that was material to his or her decision and they

intended the nuptial agreement to govern the financial consequences in the event of a divorce, the procedural elements should be satisfied. However, in light of the Commission's report, we advise that it is important to give careful consideration as to whether each party's needs will be met if the terms of the nuptial agreement subsequently need to be applied and that the fullest possible financial disclosure should be given and viewed together with independent legal advice.

How long does a nuptial agreement last?

In other jurisdictions a nuptial agreement can last the length of a marriage, however long. In England and Wales, the passage of time makes it more likely that changes in circumstances will have occurred so that enforcing the agreement may result in inadequate provision for one party (i.e. that their reasonable needs are no longer met under the terms of the agreement).

A change in circumstance can include: having children; the standard of living of the parties being significantly different to what it was at the time the agreement was entered into; unexpected windfalls or unexpected loss; the loss of a job or inability to work; the health of the parties changing materially; or the change in value of money. The change in circumstances could be personal or due to forces wholly outside the parties' control – we only have to look at the current economic climate to see how people's finances can be affected through no fault of their own.

What can be done after marriage?

Even if you did not enter into a nuptial agreement, it is still possible to draw up such an agreement after you have married or entered into a civil partnership (this is simply called a "post-nup"). For example, if your financial circumstances change and you wish to ring fence assets (or income). The procedure is exactly the same as the drawing up of a pre-nup.

It is also possible to review the terms of a nuptial agreement at any stage following the marriage. Nuptial agreements can include review dates triggered by the passage of time or an event such as the birth of a child or the sale of a home. Should any revisions be necessary, the new

agreement would be incorporated into a new nuptial agreement.

A Court will approach a post-nup in the same way as a pre-nup. As such, all the procedural aspects discussed above will need to be considered again when entering into one. However, updating the nuptial agreement as and when there are material changes to the marriage should increase the life of the agreement and enhance the likelihood of a Court upholding its terms.

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.

It is essential, however, that a nuptial agreement is tailor-made for each couple. The concept that 'one size fits all' does not apply. Each situation is unique and, 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.

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