

A Guide to Premarital Agreements

What is a Premarital Agreement?

A couple planning to enter a marriage or civil partnership may decide to enter into an agreement that shows what they intend to happen to their money and property if the marriage or civil partnership were to end. In this guide we use the term the Premarital Agreement to include: pre-nups (before wedding), post-nup (after wedding) and pre and post-civil partnership agreements.

The written agreement sets out what the couple want to happen to their finances, and other matters, should the relationship break down in the future.

The agreement can set out how much, if any, maintenance is paid to one former spouse by the other, and what the division of assets should be.

Who should enter a Premarital Agreement?

We recommend a premarital agreement is entered into when:

- ✓ The wealth of the parties is unequal
- ✓ There are significant inheritance prospects or one person may benefit from gifts from their family
- ✓ There is the potential for future wealth such as trust funds
- ✓ There are assets that one party wants to ring fence which were acquired prior to marriage
- ✓ Second (or more) marriages where a party has assets and/or children derived from the first marriage
- ✓ There are family businesses
- ✓ There are existing debts
- ✓ The parties have had agreements drawn up in other jurisdictions, and need an identical agreement in England and Wales

The starting point on looking at financial provision in divorce is that all the assets are considered to be in the marital pot, and available for distribution by the Court.

If a premarital agreement is entered correctly, it can be an effective way of protecting assets acquired before the marriage, or expected in the future from one party's family or endeavours.

Would your partner be bound to the terms of the Premarital Agreement?

A premarital agreement is not legally binding in England and Wales however, if properly drafted, can be fully taken into account by the court if the relationship were to fail.

The Court has the power, and authority, to determine what is a fair allocation of the assets of the marriage in the event of financial proceedings. Recent case law has upheld Premarital Agreements completely if they have met certain requirements.

The Law

The leading case is the Supreme Court case *Radmacher v Granatino*. In the decision of *Radmacher* guidance

was provided to the Courts when dealing with premarital agreements, and a 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 the agreement.

A Court can consider any marital agreement, pre or post, when determining what distribution of assets is appropriate. All of the terms of the agreement could be followed and enforced, or the Court could make a completely different decision compared to the terms

of an agreement. It is more likely that the Court will lend considerable weight to a premarital agreement if certain requirements are met.

The longer a marriage lasts the less likely a Court is to follow the terms of any agreement, because of possible changes in circumstances. In light of this, we recommend that any agreement should be regularly reviewed to consider whether it remains fair.

Change in Circumstances

A premarital agreement can last for the length of the marriage, however if there is a change in circumstances, it is less likely that a Court will enforce the agreement. A change in circumstances can include:

- ✓ The arrival of children
- ✓ Unexpected windfall or loss
- ✓ Loss of employment
- ✓ Health problems

A premarital agreement should demonstrate what you, and your partner, consider to be a fair division of the assets should the relationship break down.

An agreement can reduce the cost, both in terms of financial and emotional cost, of a divorce.

A Court will still need to approve the terms of any agreement after divorce but if the agreement is fair and meets the basic needs of a party, then the terms of the premarital agreement will be upheld.

What can be done to make the agreement more likely to be followed?

There are proposals by the Law Commission to introduce 'qualifying nuptial agreements' which they propose to be enforceable without the use of the Court.

Whilst these are not yet law, they are a helpful guide to what needs to be done to ensure the Premarital Agreement has the best chance of being upheld. The Law Commissions suggested requirements are:

- ✓ The Agreement must be contractually valid and enforceable
- ✓ It must be made by deed and must contain a statement signed by both parties that they

understand that the agreement will partially remove the court's discretion to make financial orders

- ✓ It must not be made within 28 days of 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 the agreement was formed

Premarital agreements are a developing area of law and we recommend you take full legal advice to ensure that your agreement is as robust as possible.

For more information please contact us on

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