

PRENUPTIAL

WHY A PRE-NUPTIAL AGREEMENT

Getting married should be one of the happiest times of your life however there is no reason why being practical about your financial future should stand in the way of wedded bliss.

Reasonable couples, whose critical faculties are not temporarily impaired by the tunnel of love acknowledge the fact that almost one in two marriages in England and Wales will end in divorce (we in the UK have the highest divorce rate in Europe). Statistically that is a lot higher than your car being written off in an accident, your package holiday being cancelled or your property being broken into or burning to the ground but most people do not hesitate in insuring against these more remote risks.

Yet marriage which has the same odds as flipping a coin as ending in divorce could prove a bigger financial disaster than both your house burning to the ground and your car being written off on the same day without insurance.

Even if you believe that your marriage won't be one of those ending in divorce would you even think twice about taking out an insurance policy against the more remote chances of your car being written off or irreparable damage to your home?

Whilst it is a sad fact that we have the biggest divorce rate in Europe we have also one of the largest rates for second marriages. This in itself brings additional considerations for couples who have been previously married and may be bringing considerably more assets to the new relationship and often have other competing interests that are necessary to protect such as the financial security and planning for existing children.

- | **What is a Pre-Nuptial Agreement?**
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WHAT IS A PRE-NUPTIAL AGREEMENT?

A 'marital' or 'pre-marital' contract' (formerly known as a nuptial or pre-nuptial contract) is a contract entered into before a marriage. They are agreements made between the parties' pre marriage whilst these agreements may purport to oust or supersede the jurisdiction of the court, strictly speaking they are not automatically enforceable per se, but remain subject to the judicial discretion in accordance with exercise of the Matrimonial Causes Act 1973 Section 25.

Notwithstanding this there is now a strong trend that such agreements are carrying more favour and relevance with the courts when a relationship unfortunately breaks down. In 2003, the case of *K -v- K* (Ancillary Relief: Prenuptial Agreement) [2003] 1 F.L.R. 120 (Fam Div) altered the way the English courts view prenuptial agreements. A wealthy property developer married his pregnant girlfriend, with both signing a prenuptial agreement the day before the wedding. The marriage regrettably ended within the year. The wife then launched a multi-million pound claim on her husband's assets. However, their prenuptial agreement was upheld by the court which followed its financial provisions almost to the letter, saving the husband millions of pounds.

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This landmark case is also useful in setting out just some of the criteria that English courts now examine when reviewing Prenuptial Agreements: Did the parties to the agreement have independent legal advice, did the party with most to lose understand the agreement was there full financial disclosure and would an injustice be done if the agreement was upheld. More recently, the 2006 appeals of Miller and McFarlane and the 2007 appeal of Charman clarified the courts approach to the fair distribution of matrimonial assets, and in 2006 the Law Commission published 'The Financial Consequences of Relationship Breakdown'. Drawing on recent case law, a starting point would be the equal distribution of matrimonial assets (i.e. acquired during marriage). However a prenuptial agreement really comes into its own in protecting assets previously acquired, as well as expected future inheritances from a named source.

WHAT DIFFERENCE WILL IT REALLY MAKE?

The Government has already indicated its willingness to advance the legal status of prenuptial agreements, and the courts appear to be falling into line with public opinion and are increasingly making judgments in favour of prenuptial agreements. So long as a prenuptial agreement is fair and reasonable in all the circumstances then there is no reason why the wishes of the couple, as expressed in the agreement, should not be followed in the event of the relationship breaking down.

The Courts have been careful to impose a variety of different safeguards in the interests of fairness, and therefore prenuptial agreements must be carefully managed throughout the drafting process to ensure that every legal requirement and safeguard is met.

Of course any children of the marriage are not party to a prenuptial agreement, and under the 'paramountcy principle', their needs will always be addressed before the terms of a prenuptial agreement are considered by the court.

DIY RISKS

Just downloading a generic DIY contract from the internet without legal advice pinpointing every potential pitfall will put all your assets and future earnings at risk in the event of divorce. What may appear initially a cautious and wise precaution could without the proper tailored legal advice unique to your circumstances end up costing considerably more in the long run.

What is at stake if your marriage breaks down? It depends what you're worth, but as a rough guide you're looking at up to half of everything you own (property, savings, pensions, etc.) including everything you brought to the marriage plus theoretically a share of your future earnings pensions for the rest of your life (case McFarlane 2006).

Pre nuptial agreements are not necessarily only for the super rich, but for ordinary people in employment with their own property and probably some savings with expectations of future inheritance.

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