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Pre and Post Nuptial Agreements

A Guide



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WHAT IS A PRE NUPTIAL AGREEMENT?

A Pre Nuptial Agreement is a contract entered into by a couple prior to a marriage or civil partnership setting out the consequences in the event of a breakdown of the relationship.

Pre Nuptial Agreements are becoming more and more popular with many couples, especially those with substantial pre-marriage assets and those embarking on second marriages.

WHAT IS A POST NUPTIAL AGREEMENT?

A Post Nuptial Agreement is a contract entered into after a couple marry or enter a civil partnership and contains many of the same provisions as a Pre Nuptial Agreement.

Post Nuptial Agreements provide more certainty than Pre Nuptial Agreements, and it is advisable to have any “Pre Nup” converted into a “Post Nup” after marriage.

Although the courts’ jurisdiction is not ousted by the existence of a “Post Nup”, they provide those who wish to regulate their finances on or after a relationship breakdown with a better chance of doing so.

WHAT DO PRE AND POST NUPTIAL AGREEMENTS INCLUDE?

The contents of each Pre or Post Nuptial Agreement will vary, but usually they contain provisions for the division of property and assets along with provisions relating to maintenance.

Marrying couples can agree to include whatever they want in a Pre Nuptial Agreement, but there is no guarantee that the Agreement will be upheld if challenged at court. However, such agreements are good guidance for a court dealing with the consequences of the relationship breakdown, if certain criteria in their preparation have been met.

Pre Nuptial Agreements are becoming more common as a means of safeguarding wealth where one party to a marriage/civil partnership has assets they want to protect in the event the relationship breaks down.

Whether used to try to protect inherited assets or assets acquired before a marriage, Pre Nuptial Agreements are becoming increasingly important.

Post Nuptial agreements tend to include the same provisions as Pre Nups, and it is common for there to be a provision in a Pre Nuptial agreement that it will be transposed into a Post Nuptial Agreement post wedding or civil partnership.

The benefit of such agreements is that they limit exposure to risk and seek to achieve a better degree of certainty without the need for litigation and the associated costs on a divorce or dissolution.

WHAT ARE THE LEGAL IMPLICATIONS?

Pre Nuptial

Historically, Pre Nuptial Agreements have not been considered legally binding in England and Wales. Whilst the Supreme Court judgment in *Radmacher v Granatino* [2010] UK SC42 has been written about a lot, this decision has not changed the legal position.

Despite the case, the legal position remains that a court will look at each case individually and consider the following:

- whether there has been full and frank financial disclosure;
- whether the agreement was entered into in good time, ideally at least 6 weeks and certainly no less than 21 days before the wedding/civil partnership ceremony;
- whether there has been any undue influence on either party; and
- whether independent legal advice has been taken by each party.

As was the case before the *Radmacher* judgment, the court may uphold the terms of a Pre Nuptial Agreement even if these criteria are not met.

Post Nuptial

A Post Nuptial Agreement is different from Pre Nuptial Agreement in that it falls within the definition of a “maintenance agreement” – any agreement in writing made between the parties to a marriage, containing financial arrangements, whether made during the continuance or after the dissolution or annulment of the marriage in accordance with Section 34 (2) of the Matrimonial Causes Act 1973.

Post Nuptial Agreements are binding unless there is a good reason for them to be void or unenforceable because, for example, the agreement restricts a persons right to apply to the court because there has been misrepresentation or undue influence.

Therefore all Post Nuptial Agreements will be binding on the parties subject to voidable or unenforceable provisions.

The English Supreme Court has recently said 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.”

Such Agreements need to be:

- freely entered into by both parties;
- both parties need to be properly advised;
- understood in terms of their effect by both parties;
- fair; and
- subject to full financial disclosure by both parties.

FREQUENTLY ASKED QUESTIONS:

Are Pre and Post Nuptial Agreements legally binding?

Pre Nuptial Agreements are not legally binding, the courts have the final say. They are however important evidence for what both parties intend to happen.

Post Nuptial Agreements are binding, unless there is a good reason for them to be void.

Who can enter into Pre Nup and Post Nup?

Any couple that intends to enter into marriage or a civil partnership can enter into a Pre Nuptial Agreement. Post Nuptials apply to any couple that has already entered into marriage or a civil partnership.

Can a Pre Nup or a Post Nup be changed after it is entered into?

Any agreement can be changed if the parties to the agreement agree on what changes to make.

If a spouse dies can a Pre or Post Nup be varied?

Under the Inheritance (Provision for Family and Dependents) Act 1975, a Court can vary the terms of a Pre Nuptial, or Post Nuptial agreement if one of the parties dies without making reasonable provision for the other or for any children involved.

What about a DIY Pre or Post Nuptial?

DIY Pre Nuptial or Post Nuptial agreements may seem a good way of saving money and time, but you should always seek proper legal advice as there are many factors which must be considered to ensure that any Agreement will be enforced by the Courts. DIY agreements will generally need to be re-drafted and this will save neither time nor money. Getting the Agreement right can save you millions, conversely getting it wrong could cost you a small fortune. In some recent cases individuals have lost up to 60% of their personal wealth as a result of a clumsily self-written Agreement.

Do I have to use a solicitor to draw up a Pre or Post Nuptial Agreement?

Technically anyone can draw up a "Pre Nup" or "Post Nup," but we recommend that you seek legal advice from our Family Law specialists. English courts can be notoriously arbitrary in divorce cases and are unlikely to pass favourable judgment in the event of a "make-shift" Agreement. The cost of consulting a solicitor is minimal compared with the financial protection you get from a properly drawn up Agreement after consultation with one of our solicitors.



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