

Mackrell

Family Law

Pre & Postnuptial Agreements



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What is a Prenuptial Agreement?

A Prenuptial 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. Prenuptial 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 Postnuptial Agreement?

A Postnuptial Agreement is a contract entered into after a couple marry or enter a civil partnership and contains many of the same provisions as a Prenuptial Agreement. Postnuptial Agreements provide more certainty than Prenuptial Agreements, and it is advisable to have any 'prenup' converted into a 'postnup' after marriage.

Although the Courts' jurisdiction is not ousted by the existence of a 'postnup', 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 Postnuptial Agreements include?

The contents of each Pre or Postnuptial 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 Prenuptial 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.

Prenuptial 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, Prenuptial Agreements are becoming increasingly important. Postnups tend to include the same provisions as prenups, and it is common for there to be a provision in a Prenuptial agreement that it will be transposed into a Postnuptial 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?

Prenuptial Agreements

Historically, these 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 six 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 Prenuptial Agreement even if these criteria are not met.

Postnuptial Agreements

This is different from Prenuptial Agreement in that it falls into 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.

Postnuptial 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 Postnuptial 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;
- Fair and understood in terms of their effect by both parties; and
- Subject to full financial disclosure by both parties.

Frequently Asked Questions

Are Pre and Postnuptial Agreements legally binding?

Prenuptial Agreements are not legally binding, the Courts have the final say. They are however important evidence for what both parties intend to happen. Postnuptial Agreements are binding, unless there is a good reason for them to be void.

Who can enter into Prenup and Postnup?

A couple that intends to enter into marriage or a civil partnership can enter into a Prenuptial Agreement. Postnuptials apply to any couple that has already entered into marriage or a civil partnership.

Can a Prenup or a Postnup 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 Postnup be varied?

Under the Inheritance (Provision for Family and Dependants) Act 1975, a Court can vary the terms of a Prenuptial, or Postnuptial 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 Postnuptial?

DIY Prenuptial or Postnuptial 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 per cent 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 Postnuptial Agreement?

Anyone can draw up a 'prenup' or 'postnup', 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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