



Pre-nuptial agreement

Advantages, disadvantages and the law relating to agreements

Pre-nuptial agreements are not legally binding in England and Wales. This means that by entering into a pre-nuptial agreement you cannot override the court's ability to decide how your finances should be dealt with, upon divorce however when considering an application, a pre-nuptial agreement is a relevant circumstance and the court should give appropriate weight to an agreement.

Advantages of a pre-nuptial agreement

The advantages to you of entering into a pre-nuptial agreement include:

- **Clarity.** You can make it clear to one another that certain property belongs to you alone and will not be shared during the marriage or on any future divorce. Such property is often referred to by family lawyers as “non-matrimonial property”. The definition of non-matrimonial property is unclear in case law, but can be clearly defined in the pre-nuptial agreement so that you are both aware of the extent of each other's non-matrimonial property and the value of any property you are giving up the rights to share.
- **Certainty.** You can agree at the outset of your marriage how your finances will be divided if you later separate or divorce. This should save you both the uncertainty, time and stress of litigating about your finances if you do later separate or divorce.
- **Transparency.** You should both provide financial disclosure of your assets and income in the pre-nuptial agreement, so you will both know at the outset of the marriage the value of each other's assets, which will assist you in your negotiations.

- May save money. While you will both incur legal fees for preparing and advising on the terms of the pre-nuptial agreement, it is usually much less expensive to negotiate and draft a pre-nuptial agreement than to litigate about the division of your finances should you later separate or divorce.
- Protection of assets. You can protect assets you may wish to “ringfence” from one another, such as inherited assets, family heirlooms, an interest in a family business, gifts received from a third party, or property acquired before the marriage. If the pre-nuptial agreement ringfences such property, the court is less likely to award a share of that property to the other party on any future divorce.
- Debt protection. If either of you has significant debts, either now or in the future, the pre-nuptial agreement can be used to protect your assets from being used to satisfy those debts. (This will also be the case with any debts you may have now or in the future.)
- Compensation for loss of career. You can agree that if, during the marriage, either of you gives up a potentially lucrative career to care for the family, that person should be entitled to a greater share of the assets on the breakdown of the marriage to reflect their loss of earning power going forward. It is often difficult to convince the court to award an element of “compensation” for loss of career, but provision for compensation in the pre-nuptial agreement is likely to be upheld by the court.
- Protection of family members. Where either of you has children from a previous relationship, a pre-nuptial agreement can protect the financial interests of those children by ensuring certain assets are ringfenced for them in the pre-nuptial agreement.
- Minimises acrimony on divorce. Setting out how assets are to be divided on divorce in the pre-nuptial agreement should lead to fewer arguments about finances should you later divorce and result in a more amicable relationship between you.
- Improves communication. Discussing financial issues can be one of the most difficult aspects of marriage. Dealing with this at the outset of the marriage can strengthen a relationship and support good communication in the marriage.
- Protection of business partners. Where either of you has an interest in a family or other private business the pre-nuptial agreement can protect that interest and prevent disruption to the business if the marriage breaks down in the future. This could prevent a

situation whereby one of you is awarded an interest in the business and has to participate in its running with family members or other business partners.

- Provision on death. The pre-nuptial agreement can set out what you wish to happen to your assets on your death. This can support the provision contained in your will and clarify what should happen to certain assets. For example, the inheritance prospects of children and grandchildren can be protected in the agreement.
- Freedom to agree your own terms. You may have a creative plan for dividing your assets if you divorce. A pre-nuptial agreement provides you with the freedom to agree your own terms without the court imposing a solution on you.
- Marrying for money concerns. Some people have concerns that their partner wishes to marry due to the other person's wealth. If they show commitment to negotiating a pre-nuptial agreement that leaves you both with fair and reasonable financial provision, this may ease this concern.

Disadvantages of a pre-nuptial agreement

The disadvantages to you of entering into a pre-nuptial agreement include:

- Not legally binding. A pre-nuptial agreement will not necessarily be binding, as currently the court remains able to make financial orders on the breakdown of a marriage. The court will uphold a pre-nuptial agreement that is freely entered into by each party with a full appreciation of its implications, unless in the circumstances it would not be fair to uphold the agreement. Therefore, you could spend considerable time, money and effort negotiating the terms of the pre-nuptial agreement, but find it is not upheld by the court in any future divorce proceedings, though this will only happen if the court finds the agreement "unfair".
- Difficulties making financial provision for children. A court considering financial claims on divorce will primarily be concerned with ensuring any child of the family is financially secure. The court is likely to be sceptical that arrangements drawn up years previously will be in the best interests of the child(ren). If you wish to make provision for children in the pre-nuptial agreement, you can do so, but you must be aware that circumstances

change and, for example, a child may have to retake a year at school. Making provision for future children is fraught with difficulties as the pre-nuptial agreement cannot predict future circumstances. Any clauses dealing with child maintenance will be subject to review if the other parent questions the adequacy of the arrangements, because the jurisdiction of the Child Maintenance Service (CMS) cannot be ousted by agreement between the parents and a parent can apply to the CMS for a maintenance calculation at any time.

- Changes in circumstances. A pre-nuptial agreement cannot predict what will happen during the marriage and significant changes in circumstances may occur. For example, you may have a child, lose your job, experience significant financial change or become incapacitated. Should circumstances change, a pre-nuptial agreement that does not cover the changes will lose its relevance and is unlikely/less likely to be upheld by the court.
- Review. To increase the likelihood of a court upholding the terms of the pre-nuptial agreement on the breakdown of the marriage, there should be a review clause that triggers a review of the terms on a significant change in circumstances. A review of the pre-nuptial agreement will result in further time, legal fees and perhaps difficulties agreeing any changes that should be made to the agreement. As a review is likely to be made when there has been a significant change in circumstances, the timing of renegotiating the terms of the agreement may be awkward.
- Unromantic. You may find the concept of a pre-nuptial agreement setting out what will happen to your finances should your relationship fail rather unromantic at a time when you are in love and planning your wedding.
- Bad timing. Preparing for a marriage is stressful, and the added pressure of considering financial issues and negotiating the terms of a pre-nuptial agreement can put strain on a relationship.
- Vulnerability of economically weaker party. It is common for there to be one party who is the economically weaker party. Sometimes the economically weaker party wants to agree to clauses limiting his or her rights simply to get the pre-nuptial agreement finished so he or she can concentrate on the wedding. To ensure the pre-nuptial agreement is fair to both parties and has the best possible chance of being upheld by the court, you

must both be aware of the implications of each clause and whether it is of benefit to you. I will advise you accordingly and both of you should receive legal advice, but only each of you respectively can decide how you wish to proceed having had the benefit of that legal advice.

- Can cause family upset. A request for a pre-nuptial agreement may upset wider family members, such as parents, who may feel affronted and perceive the agreement as a reflection of a lesser social status or an implication that their son or daughter is seeking material advantage from the marriage. This can put strain on family relationships.
- Parental influence. Sometimes the parents of the economically stronger party drive the pre-nuptial agreement. A pre-nuptial agreement can end up reflecting the parents' wishes rather than those of the couple. This must not happen. You are my client and the pre-nuptial agreement must reflect the wishes of you both and not third parties.
- Inheritance issues. If a party waives inheritance rights in the pre-nuptial agreement and his or her spouse dies while they are still married (and did not provide properly for the other in a will) he or she may be in a precarious financial position. I advise that neither of you should waive your inheritance rights as this would likely result in the court considering the agreement unfair.
- Legal fees. A pre-nuptial agreement can save a significant amount of money if there are later divorce and financial proceedings, but if the marriage survives, the legal fees spent in drafting and negotiating the terms of the pre-nuptial agreement will effectively have been wasted.

Legal status of pre-nuptial agreements

- The law relating to pre-nuptial agreements has developed following the Supreme Court decision in *Radmacher v Granatino* in October 2010. The court will uphold an agreement that is freely entered into by both parties with a full appreciation of its implications, unless in the circumstances it would be unfair to hold the parties to the agreement. The key points of the current law are as follows:
- When considering the role of a pre-nuptial agreement in a financial claim on divorce, the starting point is the relevant legislation, which is the Matrimonial Causes Act 1973.

Section 25 of that Act obliges a judge to consider all the relevant circumstances of the case when deciding how to divide the parties' finances on a divorce.

- No agreement between the parties can override the legislation or prevent the judge from deciding on the appropriate division of assets on a divorce. This means a pre-nuptial agreement cannot stop a spouse applying to the court for financial provision from the other spouse. Any "waiver" of the right to apply to the court for financial provision in an agreement will not be effective.
- The significance of a pre-nuptial agreement is as a relevant circumstance of the case, to be weighed by the judge. A pre-nuptial agreement will have a substantial impact on the judge's decision in many cases. The Supreme Court said in *Radmacher v Granatino* 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.**

The agreement must be freely entered into

This means both of you must enter into the agreement of your own free will, without any pressure from each other or anyone else. The agreement is unlikely to be upheld if the court finds evidence of mistake, duress, undue influence, misrepresentation or unconscionable conduct, such as exploiting a dominant position to secure an unfair advantage or coercive and controlling behaviour.

You both should feel you are on an equal footing and freely able to negotiate the terms of the pre-nuptial agreement with one another.

You both should negotiate the terms of the pre-nuptial agreement as far in advance of the wedding date as possible. You will both need sufficient time to consider the terms and receive legal advice about the effect of those terms, so that there is no last minute pressure on either of you as the wedding day approaches.

The court may also consider whether the marriage would have gone ahead in the absence of a pre-nuptial agreement. If a party would have refused to proceed with the wedding, that may reinforce its weight.

Parties must have a full appreciation of the implications of the agreement

You both should be in possession of all the information material to your decision to sign the pre-nuptial agreement before signing it, so that you fully understand the implications of the agreement.

To assist you in fully understanding the agreement's implications, you should both receive specialist family law advice.

You should each provide financial disclosure to be included in the pre-nuptial agreement, setting out your assets, income and potential assets such as inheritances and any interests under discretionary trusts. Once you have a full picture of each other's financial situation, you have a context in which to negotiate the terms of the pre-nuptial agreement.

You should both intend the pre-nuptial agreement to determine the financial consequences of any future breakdown of the marriage. While pre-nuptial agreements are not currently legally binding, you should presume that the agreement will pass the three-stage test set out by the Supreme Court and expect to be held to its terms.

it must be fair to hold the parties to the agreement in the circumstances prevailing

The Supreme Court has provided the following guidance for assessing fairness:

- It is not fair for a pre-nuptial agreement to prejudice the reasonable requirements of any children of the family. If, therefore, you have any children in the future, it would be advisable to reconsider the terms of the pre-nuptial agreement to ensure the children receive adequate financial provision under the terms of the agreement. I recommend a review clause providing for the agreement to be reviewed in these circumstances.
- There is nothing inherently unfair about a pre-nuptial agreement that seeks to ringfence what is often referred to as "non-matrimonial property". Non-matrimonial property comprises property owned by one party before the marriage, or assets a party receives from a third party during the marriage, through lifetime gift or inheritance. The Supreme Court judgment sanctions the use of a pre-nuptial agreement to shield family wealth and assets acquired before the marriage.
- The longer a marriage lasts following a pre-nuptial agreement being signed, the greater the chance it may not be fair to hold the parties to its terms because of unforeseen changes in circumstances. This is more relevant to young parties starting married life

with few assets and less relevant where significant assets have already been accrued before the marriage. However, significant changes in circumstances may occur shortly after signing the pre-nuptial agreement, for example, the birth of a child or bankruptcy. To help to mitigate these issues, I recommend a review clause in the pre-nuptial agreement that will lead to a review of its terms on certain events happening, or on the passing of a passage of time, for instance, five years, whichever is sooner.

If the effect of the pre-nuptial agreement would be to leave one party with less than his or her needs, while the other party is comfortably provided for, this is likely to be unfair. Needs are based on the amount a party needs to spend to maintain a standard of living not too dissimilar from that enjoyed during the marriage.

- If one party has a valid argument for an element of compensation (for loss of earning power following a joint decision that one spouse should give up a career to care for the family) then a pre-nuptial agreement which ignores this compensation is likely to be unfair.
- If needs and compensation are adequately covered in the provision offered in the pre-nuptial agreement, then further sharing of the assets may be prohibited. This limits a spouse's ability to claim an interest in non-matrimonial property, such as inheritances, gifts and property owned by the other spouse before the marriage.

Effect of the supreme court test

You will appreciate from the above explanation that, as the law currently stands, pre-nuptial agreements are almost as good as binding, provided they are fundamentally fair.

However, as emphasised above, even if a pre-nuptial agreement is given decisive weight, the court still has the power to make financial awards on divorce. A pre-nuptial agreement will be only one of the factors considered when the court is exercising its discretion to deal with the parties' finances. You should, however, expect to be held to its terms as you should assume the pre-nuptial agreement will pass the three-stage test explained above.