

Pre (and post) marital agreements – a guide

What is a pre-marital agreement?

A pre-marital agreement is an agreement entered into by a couple before their marriage designed to regulate what would happen on relationship breakdown.

The landmark judgment of the Supreme Court in October 2010 means that pre-marital agreements, “pre-nups”, are even more likely to be upheld. *Radmacher v Granatino* involved a pre-marital agreement that protected Ms Radmacher’s vast and largely inherited wealth on separation. The Court said the agreement was not unfair. Mr Granatino was broadly held to his promise not to seek financial provision for himself. Ms Radmacher is to support the children and Mr Granatino (as their father) until the children are grown up.

The Supreme Court said “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.” This means that a pre marital agreement freely entered into after 20 October 2010 will in effect be presumed to be intended to be binding, if the parties’ and their children’s needs are met. Not every pre-marital agreement will be upheld, nor are they automatically binding.

Pre-marital (or post-marital – see below) agreements should be considered:

- if you wish to protect business interests, trust interests, inherited wealth or assets owned before the marriage (it is usually the person with the stronger finances, or their parents, fellow business partner or the trustees of trusts who have this wish)
- if you would like reassurance about what will happen in the event of a divorce before compromising your career, or making other life-changing decisions, or if most of the family’s money is tied up in assets that are not liquid or trusts (usually the person with less wealth)
- if you would like to be clear about what the financial arrangements will be in the event of a divorce – this reassurance can help both partners when things get tricky in a married relationship as they do from time to time
- if you wish to reduce the likelihood of incurring significant legal fees in the event of a divorce

Judges have huge discretion when determining financial settlements following divorce, and wide powers to transfer property and cash sums. Inherited wealth and business assets will not be ring-fenced if needed for one party, or if the marriage has been a long one.

Pre-marital agreements are often perceived as unromantic, but the divorce statistics are not encouraging. No married person is immune from the possibility of divorce; especially given all the challenges that life throws at us all. Marital agreements are part of sensible financial planning, and can, at times, help consolidate relationships.

What is a post-marital agreement?

Post-marital agreements are, in effect, pre-marital agreements entered into during the marriage. They aim to regulate what would happen on relationship breakdown.

Post-marital agreements may be treated differently on a divorce from pre-marital agreements because although the Supreme Court did not distinguish between the status of such agreements, post-marital agreements are

“maintenance agreements” under section 34 Matrimonial Causes Act 1973. Whether that makes a difference remains to be seen.

A post-marital agreement is an essential means of wealth protection for couples who are already married.

The effect of marital agreements

The stronger financial party should bear in mind that such agreements are still not legally binding, although they are likely to be upheld if drafted appropriately and proper procedures are followed. They are unlikely to be legally binding until Parliament decides that they should be (and the Law Commission is looking at this now).

The weaker financial party should assume that such agreements will be binding. They will be held to the terms of the agreement unless the circumstances have changed, the agreement will not meet their needs (usually for housing and if appropriate income) or those of any children and it would not be fair to uphold the agreement.

Conclusion

Divorce is an unfortunate reality for a very significant minority of us. Marital agreements can assist with minimising the financial and emotional impact on the family in the event of divorce, but should not be entered into lightly without full consideration of the implications.

For more information please contact any member of the Mills & Reeve family law team.

Birmingham:	Marc Saunderson marc.saunderson@mills-reeve.com, Tel: 0121 456 8390
Cambridge:	Caitlin Jenkins caitlin.jenkins@mills-reeve.com, Tel: 01223 222520
Leeds:	Ed Heaton edward.heaton@mills-reeve.com, Tel: 0113 388 8453
Manchester:	Alison Bull alison.bull@mills-reeve.com Tel: 0161 235 5424
Norwich:	Nick Stone nick.stone@mills-reeve.com, Tel: 01603 693264