

Pre-nuptial Agreements

What is a pre-nuptial agreement?

A pre-nuptial agreement is a 'written contract' made prior to marriage seeking to regulate the prospective spouses' financial liabilities and responsibilities towards each other in the event of their subsequent divorce or separation. It must be in writing and signed by both parties.

Are they legal in the UK?

Pre-nuptial agreements are unenforceable in English law since they are perceived as contrary to public policy for undermining the concept of marriage as a life-long union. However, whilst unenforceable, pre-nuptial agreements may have evidential weight when the terms of the agreement are relevant to an issue before the court in subsequent proceedings for divorce. Thus, in any application for ancillary relief, the existence of a pre-nuptial agreement is a factor in the exercise by the court of its discretion to grant ancillary relief to which weight may or may not be given, depending on the facts of the case. Indeed in a recent Court of Appeal case, *Crossley v Crossley* (2008) it was confirmed that a judge had a discretionary power in ancillary relief proceedings to require a party to show good cause why a prenuptial agreement should not govern the division of assets on the dissolution of the marriage.

When determining the division of assets upon divorce the Court must have regard to all the circumstances of the case. The intentions of the parties as to how their finances should be divided may therefore be a factor to be taken into account by the Courts. The increasing use of pre-nuptial agreements may reduce the need to have recourse to the Courts where the intentions of the parties regarding the division of assets are made clear and the issues under dispute are narrowed. It will merely be necessary for a Consent Order to be endorsed by the Court.

Factors to consider prior to entering into a pre-nuptial agreement

There are various factors which must be considered before embarking on a pre-nuptial agreement. If these are followed the agreement is more likely to be taken into account in proceedings relating to the division of assets and other finances.

They are:

1. Full financial disclosure from both parties so that each party is aware of the financial settlement which they may have been entitled to if they had not entered into a pre-nuptial agreement. If full disclosure is not provided by one party, the agreement may be void if, for instance, an asset of significant value is discovered by the other party later in the marriage.
2. Both parties should obtain separate legal advice so that they understand the agreement, and are aware of its implications and enforceability (or lack of it) in the Courts.
3. The agreement must not contain terms that would mean the pre-nuptial agreement is void or voidable as a contract at common law. This means that it is vital that the meaning of the agreement must be clear enough to be enforceable as a contract.
4. It is important that both parties willingly sign the pre-nuptial agreement. There must not be any pressure put on either party by the other, or by any other person such as a parent. This includes the possibility that the more financially well-off party pressurises the other into signing the agreement with the threat that the marriage will not go ahead if they do not sign.
5. It is recommended that the pre-nuptial agreement be negotiated and concluded at least 6 weeks prior to the proposed date of marriage. This time period provides an opportunity for reflection and avoids any suggestion of undue influence which may arise from the time constraints. This also allows everyone to concentrate on the most important subject, the wedding itself.

It must be borne in mind that any unforeseen circumstances that arise during the marriage may mean it is unjust for the parties to be held to the agreement.

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