

## **Can I protect my Assets?**

### **What is a pre-nuptial agreement?**

A couple planning to enter a marriage OR civil partnership may decide to enter into an agreement that shows what they intend to happen to their money and property if the marriage OR civil partnership were to end. The legal rules about these agreements come from the usual laws that apply to divorce/dissolution, and also a decision of the Supreme Court in 2010 (Radmacher v Granatino) where the 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'.

### **Why enter into a pre-nuptial agreement?**

Everyone has their own reasons for entering into a pre-nuptial agreement. It may be that you and your proposed spouse OR civil partner simply like to be as organised as possible with your finances. Entering into a pre-nuptial agreement does not mean you are more likely to separate. A pre-nuptial agreement might be particularly beneficial where:

- one of you has substantially greater capital or income than the other
- one or both of you wishes to protect assets you owned prior to the [marriage OR civil partnership], including inheritances or family trusts
- it would be beneficial to define what is considered to be 'matrimonial property' or 'non-matrimonial property', for example in relation to business assets owned by one of you prior to the marriage OR civil partnership
- one or both of you has children from a previous relationship and wishes to protect assets for the purposes of inheritance planning
- one or both of you has a connection with, or property in, another jurisdiction

### **Are pre-nuptial agreements binding?**

In England and Wales pre-nuptial agreements are not strictly binding in the event of a later divorce/dissolution, but the terms of a pre-nuptial agreement may be decisive in the event of a dispute that is dealt with by the court unless the effect of the agreement would be unfair. It is not possible in England and Wales to have a fully binding agreement before marriage or civil partnership about what will happen on divorce or dissolution. In other countries, pre-nuptial agreements may be binding provided certain requirements are met, and where there is an international element advice will need to be sought from a specialist lawyer in that jurisdiction.

To reduce the likelihood of the court refusing to uphold the agreement on the ground that it is unfair, both of you will need to set out your financial circumstances in full (called financial disclosure) and take independent legal advice on the agreement and its effects. You can negotiate an agreement using mediation or collaborative law, or by using solicitors to negotiate and draft the terms of the agreement on your instructions. Your family lawyer will help you find the process most suitable for you.

It is good practice to finalise the agreement in good time before the wedding or civil partnership ceremony (ideally a minimum of 28 days prior to the ceremony), so that neither of you feels undue pressure to agree to anything. It can take time to deal with financial disclosure, negotiations and legal

advice, so it is important to plan in advance. If your finances, or those of your proposed spouse or civil partner, are complex (for example involving trusts, or international assets) then further time will be needed and specialist advice may be required from, for example, an accountant or a foreign lawyer.

Agreements are generally less likely to be considered to be unfair if they are recent, or if circumstances have not changed since the agreement was entered into, and if both people knew what they were agreeing when the agreement was made, both legally and financially, without any undue pressure being applied. It is common to build in provision for the agreement to be reviewed, either after a period of time has elapsed (say three or five years), or when a specified 'trigger' event occurs, for example the birth of a child, or if either you or your spouse were to have health issues that impact on your earning capacity.

It is possible that the court might uphold part of an agreement while considering a different part to have an unfair effect.

Even though pre-nuptial agreements are not always binding, you should not enter into a pre-nuptial agreement unless you intend to be bound by the terms of that agreement.

### **What can a pre-nuptial agreement include?**

A pre-nuptial agreement is a bespoke document drawn up for your particular circumstances, but your solicitor will advise you as to what types of provision are likely to be upheld and what matters are appropriate to address within the agreement. The focus of the agreement will be on finances. There are certain things that couples usually think about when deciding how they would like to arrange their finances in the event of a [divorce OR dissolution], including:

- what will happen to property that either of you brought into the [marriage OR civil partnership]
- what will happen to the family home
- what will happen to any property given to you or inherited during the [marriage OR civil partnership] or any income or assets derived from trusts
- what will happen to money held in joint accounts and any property purchased jointly
- what will happen to any personal belongings or possessions owned before your [marriage OR civil partnership], or acquired during the [marriage OR civil partnership]
- what will happen to any saved money earned during the [marriage OR civil partnership]
- what will happen to your pensions
- how will you deal with any debts
- will either of you pay or receive any maintenance and, if so, for how long
- what kinds of events may require the agreement to be reviewed
- whether you wish the agreement to be confidential, ie that neither of you may disclose all or part of the agreement (save for the purpose of taking legal advice) to a third party or to the press
- what financial arrangements you wish to make for any children you have, or are likely to have

- what arrangements you wish to make if either of you should die during the [marriage OR civil partnership], and whether you intend to enter into a Will to make provision for each other in the event of death
- who will pay the costs regarding preparation of the agreement

A pre-nuptial agreement *cannot* prevent the court from dealing with financial issues in relation to the [marriage OR civil partnership], as that would be contrary to public policy. Neither party can, therefore, agree that they will not make an application for financial provision from the court. In particular, it is not possible to make an agreement restricting any financial provision for children.

The agreement will include a declaration that you have each provided financial disclosure and attach a schedule summarising that disclosure. It will include a statement that you have each taken legal advice on the terms of the agreement (or if you have chosen not to, that you had the opportunity to do so). It will also state that you intend the agreement to be legally binding.

A pre-nuptial agreement is made in anticipation of marriage OR civil partnership and will become effective on you and your intended spouse OR civil partner entering into a valid marriage OR civil partnership together.

#### **What happens if we have children?**

A pre-nuptial agreement cannot prejudice the interests of any children in your family. It is common to build in provision for a review of the agreement if and when you have children, so that the children's needs can be considered and assessed at that time, with possible changes made to any expectations of the adults.

In the event of a [divorce OR dissolution], if the court is asked to intervene in financial arrangements its first consideration is always any minor children involved. If the court considers that an agreement made by the adults may adversely affect their children, for example by restricting any expectations of a lifestyle they would otherwise have had, it is likely to consider that it is not fair to uphold the agreement in the circumstances. It is not possible to 'contract out' of giving financial support to or for a child.

#### **What will happen if one party no longer wishes to be bound by the terms of a pre-nuptial agreement?**

If, in the event of a divorce OR dissolution, one of you no longer wishes to be bound by the pre-nuptial agreement, but the other person does, that person may make an application to the court for the other party to explain why an order should not be made in the terms of the agreement. Whether the court will uphold the agreement will depend on the factors detailed above, but you should not enter into a pre-nuptial agreement unless you intend to be bound by the terms of that agreement.

**To arrange an appointment to discuss a Pre-nuptial Agreement with one of our expert solicitors please contact Mackenzie & Co.**