

## Changes in marital/nuptial agreements

The Law Commission reported in February on:

- financial needs,
- non matrimonial property,
- marital property agreements and Law Commission policy recommendations.

This update will tell you about how the law is likely to be changing in relation to marital/nuptial agreements (i.e. pre-nuptial, post-nuptial and separation agreements). No change in black letter law is promised any time soon. However the Law Commission recommendations, if followed by practitioners and clients, should considerably increase the chances of any marital/nuptial agreement being upheld later by the courts.

In this this briefing we:

- briefly cover the court's approach as it is now
- consider the two main policy recommendations by the Law Commission and how this is likely to bring about a change in approach
- set out the six formal requirements proposed for nuptial agreements to be Qualifying Nuptial Agreements (Q'Nups)

### The court's approach now

Nuptial agreements gained considerable purchase and credibility with the Supreme Court case of [Radmacher v Granatino](#) (2010).

The courts regard agreements made between the parties as important now and quoting the Supreme Court:

*'The court should give effect to a Nuptial Agreement that is freely entered into by each party with the full appreciation of its implications unless, in the circumstances prevailing, it would not be fair to hold the parties to their agreement'.*

*Radmacher v Granatino* (2010) 1AC534 at para 75

### Two main policy recommendations by the Law Commission

1. Statutory confirmation of the abolition of a public policy rule that **contracts contemplating a future (not actual) divorce are void**.
2. The introduction of '**Q'Nups**'

These will enable couples to contract out of the sharing element of financial provision but **not**:

- out of making provision for their children; nor
- for each other's financial needs.

'Contracting out' means that the relevant contractual provisions in the Q'Nup will no longer be able to be scrutinised by the courts for potential unfairness provided:

- prerequisites for Q'Nups are satisfied;
- the parties' needs are met; and
- children provided for.

The recommendation is that the courts will not be able to make orders inconsistent with the provisions of the Q'Nup. *Note: the courts' powers to make orders for the benefit of children are unaffected.*

Currently nuptial agreements cannot be enforced as contracts. They cannot take away the parties' ability to ask the court to make financial orders nor the courts' powers to make such orders. Thus the only way to achieve legal finality is to seek a court order that reflects the terms of such agreement.

Clients entering nuptial agreements will know the agreement may not be enforced and currently financial orders made may or may not follow the terms of their agreement depending on the courts' views about fairness. Whilst advisors over recent years have become more used to drafting nuptial agreements that they can say may uphold, advisors cannot say for certain what the eventual outcome will be.

The Law Commission says Q'Nups should rectify this. They recommend such agreements should be enforceable as contracts without being subject to the courts' assessment of fairness. Hence this offers the client predictability and certainty.

### **Six formal requirements for Q'Nups**

1. Agreement must be contractually valid i.e. not subject to challenge from allegations of undue influence or misrepresentation;
2. The Agreement must be under Deed;
3. The Agreement must contain a Statement signed by both parties (in addition to their execution of the Deed) that he/she understand the agreement is a Qualifying Nuptial Agreement and that this will remove the courts' discretion to make financial orders, save for where either party is without provision for their financial needs;
4. The Agreement must not have been made within 28 days before the wedding or celebration of civil partnership (pre-nups only);
5. Both parties' prior to the Agreement and at the time of making the Agreement, must have made disclosure of material information about their respective financial circumstances. This should not be waived;
6. Both parties must have received legal advice at the time the Agreement was made, again not subject to waiver. Statement must be signed by a solicitor and the client as to advice given.

All nuptial agreements it seems if they satisfy the formal requirements will be Q'Nups – whenever made. All variations must satisfy the formal requirements.

Thus we should now be advising our clients of the above requirements which must be present if their Agreement is to be a Q'Nup. Whilst this is not yet law and only the recommendations of the Law Commission, this will no doubt give impetus to the increasing demand for nuptial agreements and their contents.

Q'Nups, once law, will be binding and regarded as an agreement not to share property beyond needs. The courts will only have power to interfere with an Agreement to:

- meet the needs of either party in the event the Agreement does not do so adequately; and
- meet the needs of any children of the marriage.

The introduction of Q'Nups would represent a fundamental change in English family law and would be a new feature of Statute.

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