



The Law Society **Gazette**

Pre-nups should be legally binding, says Law Commission

Family lawyers have welcomed as a 'big step forward' the Law Commission's proposal to enshrine pre-nuptial agreements in law, increasing certainty for splitting couples and reducing the number of long expensive court battles.

The commission's long-awaited report, which follows three years of consultation, includes a draft bill, which if enacted, would for the first time allow couples to make legally binding agreements about the disposal of their assets in the event of their relationship breaking down.

It proposes new legislation to make 'qualifying' pre-nuptial agreements binding.

In order to qualify an agreement made either pre- or post-nuptially must:

- meet the usual contractual criteria, so involve no fraud, undue influence or misrepresentation.
- be signed no less than 28 days before the wedding and contain a statement that the couple understand that the agreement is a qualifying nuptial agreement that will partially remove the court's discretion to make financial orders.

In addition, both parties must have had legal advice and made full disclosure.

Provided a qualifying pre-nup provides for the needs of the parties and any children, it will be binding and the court will have no discretion to make an order differing from its terms.

The absence of any of the obligatory criteria would not necessarily render the agreement void, but it would mean it is no longer a qualifying nuptial agreement and therefore it would not be binding.

In a landmark case, *Radmacher v Granatino*, the Supreme Court ruled in 2010 that judges could take pre-nups into account providing certain conditions were met. But earlier this week, the High Court ruled that the parties should not be bound by a pre-nup signed the day before the couple's wedding as its terms created unfairness.

Nigel Shepherd, family partner at the Manchester office of Mills & Reeve, said: 'Legally binding pre-nups would be a big step forward in divorce law reform. For the first time, individuals would be able to agree in advance what is to happen in respect of at least some of their assets in a way that will help them avoid bitter and costly disputes if sadly their marriage breaks down.'

Alison Hawes, family partner at Irwin Mitchell, said the 'long-overdue' decision provides 'clarity' after years of uncertainty and will turn case law into law. 'Qualifying pre-nuptial agreements will give couples greater autonomy to determine the financial outcome in the event of a future separation,' she said, making the outcome of a future separation more predictable and less expensive.

Co-chair of the Law Society's family law committee James Carroll stressed that the proposal does not mean that pre nuptial agreements are binding as of right and to all extent. 'Parties can

choose to opt out of sharing non-matrimonial property, but they will not be able to contract out of providing for each other's needs,' he said.

Lawyers predicted an inevitable increase in demand for pre-nups, but disagreed over the breadth of people who might use them. Shepherd suggested they would be applicable only for the relatively wealthy, those who marry late in life or who are on their second marriage, and international couples.

However Carroll argued that while pre-nups are more common for the wealthy, they are not just for the rich, suggesting it may be 'more important' for those of more modest means to agree in advance what happens to assets.

Vice-chair of family lawyers' group Resolution Jo Edwards warned there is a risk of creating a two-tier arrangement, where one type of agreement is legally binding, and others are open to challenge if they do not deal adequately with the parties financial needs.

Edwards said: 'We would prefer to see change which would open up binding pre-nups to a wider group of people, with appropriate safeguards.'

Jane Keir, senior partner and international families lawyer at London firm Kingsley Napley, said: 'We have long been squeamish about giving nuptial agreements contractual force. We may now, at last, be on the threshold of welcome change. Never before has English law gone quite so far.

'We urge parliament not to miss this opportunity to allow couples greater certainty and pre-agreed financial control should their relationship disintegrate.'

James Carroll is a partner in the family team at Russell-Cooke

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