

Pre-nuptial agreements - A look at the current position prior to the Law Commission consultation

The good, the bad and how to stop it getting ugly: advice for the newly betrothed

So you've set the date, booked the venue and the band, tasted the cake, and are now busy concentrating on all of the other details to make your big day absolutely perfect. Chances are you probably still have a lengthy list of things to do but does it tick all the boxes? One thing that you may not have thought about as part of the preparation for your wedding is a pre-nuptial agreement.

Why have a pre-nuptial agreement?

As unromantic as it may first seem, a pre-nuptial agreement is something you should certainly give some thought to. It could ultimately prove to be the most important part of planning your wedding or rather your marriage. The purpose of such an agreement is to set out what should happen in the event that your marriage breaks down. It can seem distasteful to many couples to have to think about the financial arrangements in the event that their marriage does not last, particularly at a time when all the focus is on love and romance. No one enters into such a serious and long term commitment thinking that it might not be for ever and a lot of couples feel uncomfortable even talking about what should happen if their relationship should break down, as though this in itself is a bad omen. For this reason a lot of couples avoid the difficult conversations about what they both expect from the marriage, financial and otherwise. Given that the wedding harmony inevitably encourages the ignoring of difficult conversations, it is unsurprising that many couples dismiss out of hand the need for a pre-nuptial agreement. Equally, it may be that the idea has arisen to one betrothed, but he or she is unsure or scared about raising it because they feel it may reflect their lack of commitment or faith in the forthcoming marriage.

However it can be helpful to think of a pre-nuptial agreement as similar to a taking out travel insurance for your honeymoon or wedding insurance for the big day. Everyone hopes that nothing will go wrong on the day or the lead up to it and all will run seamlessly. However it is better to be safe than sorry and have some protection in place, just in case. Likewise everyone expects that their honeymoon will be their dream trip but no one would consider booking it without also taking out travel insurance. If something does go wrong then the insurance provides important protection and takes a lot of the hassle out of having to deal with whatever the issue is. The same can be said of a pre-nuptial agreement. Whilst every couple hopes that they never need it, having it in place can ease a lot of the strain if the worst does happen.

The significance of pre-nuptial agreements has come to the wider public attention following the recent landmark case of *Radmacher v Granatino*. The case was heard by the Supreme

Court, the highest court in England and Wales. The judgment has given new status to pre-nuptial agreements, potentially changing the way in which the assets of a couple will be divided following separation, where they have previously entered into a pre-nuptial agreement.

For those couples who do have the difficult conversations and opt to take out the 'pre-nup' insurance, the position now stands that having freely entered into it, in contemplation of or during the course of their marriage, and with a full understanding of the implications of that agreement, they can expect that what they intended to happen, should happen if, unhappily, a breakdown occurs. This will mean that they can hopefully avoid court altogether, thereby saving huge amounts of time, costs and maybe even a friendship.

It remains the case that if there is a dispute, the court has the final say in what should happen. This is true even if the couple themselves have reached a financial agreement, whether this has been arrived at by way of a pre-nuptial agreement, an agreement entered into after marriage (commonly known as a postnuptial agreement) or an agreement reached upon separation. It is not possible to reach an agreement which prevents the court from being able to make any or all of the following financial awards:

- The sale of a property or a transfer of property into the other spouse's name;
- A lump sum payment;
- Maintenance for the financially weaker spouse and/or any children of the marriage;
- A pension sharing order, which effectively gives one spouse a portion of the other spouse's pension to invest in a pension fund of their own.

The court will make the award that it considers to be fair, taking into account the key principles of need, compensation and sharing. So why have a pre-nuptial agreement at all? The effect of the recent Supreme Court ruling has been to confirm that in the right circumstances, the court should give decisive weight to any pre-nuptial agreement, when deciding how a couples' finances should be divided upon their separation and divorce. In short, the pre-nuptial agreement stands and because of this many couples with pre-nuptial agreements will be able to resolve the issues arising from their separation without involving the court at all. It's right to say that pre-nuptial agreements are not binding yet – but they are as binding as they can be and a couple is likely to be held to their terms providing that the effect of the agreement remains fair.

A lot of people consider pre-nuptial agreements to be the preserve of the rich and famous and do not think that such considerations apply to them. It is certainly true that anyone with significant wealth entering into a marriage – including celebrities – would be well advised to consider entering into a pre-nuptial agreement. Paul McCartney might have saved himself a lot of time, money and tabloid cover had he and Heather Mills done so. Robbie Williams, in advance of his marriage, signed a pre-nuptial agreement so as to preserve his wealth in the unfortunate event of his marriage breaking down and there is much speculation already about whether we will see the first royal pre-nuptial agreement, with William and Kate set to wed this year.

You should not let the media attention that such high profile couples are bound to attract put you off considering whether a pre-nuptial agreement might be right for you. Pre-nuptial agreements are being used increasingly by those of us with a more modest financial outlook who would like some financial predictability were their relationship to breakdown.

Examples of situations where a pre-nuptial agreement may be useful:

- Where you or your partner own a property or other asset of financial value prior to the marriage, which you want to protect;
- Where you or your partner have received an inheritance before the marriage, or expect to receive one in the future;
- If you or your partner have set up or are in the process of setting up a business;
- If you or your partner are entering into second or later in life marriage, and have a greater amount of personal wealth, which you are keen to protect, or have children from a previous relationship or divorce whose inheritance prospects you wish to protect;
- If you or your partner have already gone through a divorce, and are alive to the emotional and financial cost of legal proceedings after separation and wish to take steps to minimise this ('once bitten, twice shy');
- If you or your partner have assets abroad or connections with another country, and want to achieve some consistency as to what will happen in the event of a breakdown of your marriage.

In any of these situations a dispute in court can lead to an uncertain outcome and the costs, both financial and emotional, may be substantial. A pre-nuptial agreement may help avoid this. While a separation is always going to be a painful experience for anyone, it can be made much worse if, for example, it becomes necessary to sell a property which was owned by one person long before the marriage or share a family inheritance.

A couple who have entered into a pre-nuptial agreement may be much better placed to deal with the issues arising from the breakdown of their relationship quickly, and cost effectively and this can reduce the stress that both people may experience at what will inevitably be a very difficult time. If you have had children together then you will have to work together as parents for at least the next 18 years. If you are able to sort out financial matters in the event of your separation without becoming involved in a bitter dispute this may help preserve a better parental relationship.

Top tips if you are looking to persuade your partner to sign a pre-nuptial agreement:

- Raise it early – you may find the conversation awkward and difficult and your instinct may be to keep putting it off, but the sooner you discuss your wish to have a pre-nuptial agreement with your betrothed, the better. Give your partner plenty of time to come to terms with the idea before marching them into their local solicitor and also allow time for the agreement to be drawn up. The last few weeks in the run up to your wedding will be hectic enough without having to deal with this too.
- Don't be shy – if you can't talk about this, what does it say for your future marriage? Rarely in our experience does a dispute about the terms of a pre-nuptial agreement lead to the wedding being called off entirely, but if this were the case then you have to wonder if it was the right thing to be getting married in the first place.
- Keep it simple – the future is uncertain and the most effective pre-nuptial agreements do not try to provide for every eventuality. It can be best to focus on existing assets, or assets which you are reasonably assured of receiving in the future, such as an

inheritance rather than trying to second guess how your financial future may pan out and what should happen in those circumstances. Making provision for future wealth is fine but keep the principles fair and straightforward so everyone involved can understand and accept them.

How do I get a pre-nuptial agreement?

- **Understanding the agreement**
Both you and your partner should each make an appointment to see a solicitor, preferably one who specialises in family law. You can find details of family solicitors in your area through Resolution, an organisation for specialist family lawyers at www.resolution.org.uk. You will each have to see a different solicitor to ensure that you both receive independent advice upon the terms of the agreement before entering into it.
- **Entering into the agreement freely**
Your solicitor will want to be sure that you are entering into the agreement of your own free will and that you are not being put under pressure by your partner or any other person to sign the agreement. This is important as the agreement may not otherwise be upheld by the court.
- **The finances**
Both you and your partner will be asked to provide one another with information about your finances. Your solicitor will help you draw up a schedule setting out the necessary financial information. Once this information is available your solicitor can advise you about the effect of the agreement and whether it appears fair, in the circumstances. An agreement which is not fair may not be followed by the Court.
- **Timing**
A pre-nuptial agreement should be signed at least 3 weeks before your wedding but to allow sufficient time for the terms of it to be agreed, it is a good idea to book an appointment to see a solicitor at least 6 – 8 weeks before the wedding. An agreement signed on the eve of a wedding, where the financially weaker person is likely to feel under a considerable amount of pressure to go ahead with their partner's wishes for fear that the wedding may be called off, is likely to be much weaker than an agreement signed in plenty time before the wedding. The key therefore is to get advice early on and don't leave it to the last minute. It will be an added pressure which you really won't need as the wedding approaches and you have many other demands upon your time. There is no reason why you can't get the pre-nuptial agreement out of the way a few months before the wedding.
- **Cost**
The starting cost for a pre-nuptial agreement is likely to be in the region of £2,000 plus VAT although if the financial or other arrangements are complex the costs could be substantially more. Your solicitor should give you an estimate of the cost which will depend upon your individual circumstances, before carrying out any work. If it is your partner who is pushing for a pre-nuptial agreement it may be appropriate to ask them to meet the costs of it and this is something your solicitor will advise you on.
- **Many people cannot contemplate spending such money at what is possibly the most expensive time of their life anyway. However the financial consequences of not having a pre-nuptial agreement could far outweigh these costs, with the cost of contested financial proceedings often exceeding £25,000 in cases involving even relatively modest assets. The existence of a pre-nuptial agreement can significantly**

alter the outcome of the financial settlement and the benefit of this could, again, outweigh the initial cost.

What if I am asked to sign a pre-nuptial agreement?

It may be the case that you had not considered a pre-nuptial agreement, but your partner has raised the subject. It can be very daunting if you are the financially weaker party and are asked to enter into a pre-nuptial agreement. You may be worrying about what financial security you will have in the future in the event that you separate. Where you will live? What will happen if you have children?

Following the steps outlined above will ensure that you have all of the information and advice that you need in order to make an informed decision about whether entering into a pre-nuptial agreement is the right decision. It is important that you take advice from an independent solicitor (not the same solicitor who has drawn up the agreement on your partner's behalf) who will be able to advise you of the effect of the agreement and whether it is fair in the circumstances.

If you are concerned about whether to enter into a pre-nuptial agreement as you are worried about the financial position that it may leave either you, or your partner in in the future there is some comfort to be had in the fact that a pre-nuptial agreement is unlikely to be binding where the court considers that the agreement would cause significant injustice to one or both of the couple or a child of the marriage.

It is not possible to predict what will happen in the future and if children are born within a marriage, and/or the longer a marriage continues, the more likely your circumstances will have changed and thus the less likely it is that a court will be held to the terms of a pre-nuptial agreement. For this reason it is generally recommended that pre-nuptial agreements are reviewed at regular intervals, say every five years, and also upon the birth of a child.

Top tips if you have been asked to sign a pre-nuptial agreement:

- If your partner suggests a pre-nuptial agreement don't think that this means they don't love you or aren't committed to making your marriage work. Having the security of a pre-nuptial agreement can actually give a couple a stable framework to help work through any difficult times in the marriage. You have each been open and honest about your financial position and have the certainty of knowing what will happen financially if the marriage breaks down. Because of this neither of you are likely to feel pressured into bringing the marriage to an end just in order to secure a financial advantage, i.e. before an inheritance is received.
- Seek independent legal advice so that you properly understand the consequences of the pre-nuptial agreement and are sure that you can live with this. If your marriage does break down there is a very real possibility that you may find yourself bound by the terms of the pre-nuptial agreement in the future and so you should not enter into it lightly, or without the proper advice.
- If you have any doubts, don't sign it! At the end of the day, no one can force you to sign a pre-nuptial agreement and you should only do so if you think that it is the right thing for you.

Although a pre-nuptial agreement may appear very low down on your list of things to do before the wedding, if at all, it can be an important part of planning your financial future. Everybody hopes for the fairytale but just in case, it is a good idea to take legal advice early on in your wedding planning to see whether a pre-nuptial agreement might be right for you and get another thing ticked off your list!

The Law Commission is due to publish a consultation paper on pre-nuptial agreements on 11 January 2011. A consultation period will then begin until 11 April 2011, during which time the Law Commission will invite submissions from interested parties as to the treatment and status of pre-nuptial agreements, which could in turn lead to a change in the law. We will publish a link to the Law Commission consultation document when it becomes available.

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