

# Prenuptial Agreements

## What is a prenuptial agreement?

A prenuptial agreement (or 'prenup') is a legal document (contract) drawn up between a couple and signed before their marriage. It details all pre-marital assets, belongings and debts and then what will happen to this post-marriage. This is necessary in the event that your marriage sadly breaks down.

The key purpose of a prenuptial agreement is to provide clarity for couples around how their assets will be divided in the event of a relationship breakdown, and the exact details vary depending on your case

Prenuptial agreements are not a 'one size fits all'. They are very much drawn to your own needs. The parties must agree the terms of the agreement, and both must seek independent legal advice upon the document prior to signing it. Please review our other fact sheets for more information.

Assets including property, debts and income are usually covered in a typical prenuptial agreement to help couples avoid any financial surprises if the relationship were to break down in the future.

Typical prenuptial agreement terms cover:

- Protecting children's inheritance or specific assets;
- Protecting inherited money, assets or savings;
- Giving you both a say in how assets will be split if you decide to divorce;
- Allowing one partner to retain full control of business ownership; and
- Protecting you from your partner's debt.

Prenuptial agreements are more likely to be put in place when one partner already has, or is likely to acquire, more assets than the other. For example, those with a large inheritance, landowners, business owners or couples who are marrying in later life or who may be entering into a second marriage. However, they can be used by anyone who is intending to marry and/or remarry.

## Why should I have a prenuptial agreement?

Whilst any such agreement is not a prerequisite to marriage, it is certainly worth considering. There are a number of reasons for considering why you should have one; for instance, if you have significant assets (e.g. property, investments) then you may wish to ensure that your wealth is protected. Similarly, if one or the other of you has significant debts, you may want to ensure that an agreement is put in place regarding these. Prenups offer some certainty in

circumstances where you would prefer to agree in advance the distribution of your assets if you end up divorcing, rather than leaving it to the discretion of the courts.

You should consider entering into a prenuptial agreement before you get married if you want to determine how your property and finances will be dealt with during your marriage, and what will happen to them if you get divorced. Timings are very specific so please ensure that you take advice from us way in advance of your proposed marriage.

If you are entering into a civil partnership, you can have a pre-registration agreement drawn up in the same way.

## How long does a prenuptial agreement last and can it be changed?

A prenuptial agreement is a contract between you and your partner and will last for the full duration of your marriage. It can be reviewed also, and it is appropriate to have a clause regarding this entered into the pre-nuptial. A prenuptial agreement cannot be modified once it has been agreed or once you are married.

If you can't agree the terms for whatever reason, or you want to make amendments, it is possible to enter into a postnuptial agreement. These are a great alternative if you want to change the terms and is treated in the same way legally as prenuptial agreements but is created after marriage.

## Can a prenuptial agreement be voided after death?

The agreement can still be enforced, both positively and negatively, following death because your agreement will put your wishes into place in the event that either you or your partner pass away.

If you have a Will in place, and the terms of your agreement are different, providing you can show that you both entered into the document freely and both sought advice upon the document, then the Court will be more likely to uphold the agreement.

## How do I make a prenuptial agreement?

To give your prenuptial agreement the best chance of being considered by the court you must:

- have the prenuptial agreement drawn up by a qualified family law expert;
- both seek independent legal advice;
- fully understand the agreement so as to enter the contract willingly and not be coerced into it; and
- disclose all your personal assets and property fully, in advance of the signing of the agreement.

If you'd like to find out more about creating a prenuptial agreement, please contact us. Our highly experienced family lawyers have a wealth of experience and are able to tailor these to meet your individual needs/requirements.

## What will a prenuptial agreement cost in the UK?

The cost of prenuptial agreements varies on a case-by-case basis, depending upon the complexity of your needs. As a guide, you should consider a simple document will cost approximately £650 - £1000 + VAT. This may sound unnerving but if, unfortunately, your relationship breaks down and you don't have such an agreement in place, it will undoubtedly cost you substantially more to effect a fair financial settlement.

We offer a fixed fee interview that will allow our Lawyers to advise you more fully in the first instance.

## Are prenuptial agreements legally binding in the UK?

Prenuptial agreements are commonly underestimated by the general public. They are most definitely not just reserved for the rich and famous; anyone who wants to protect any property and assets they bring into a marriage will find them invaluable. This particularly comes to the fore if you are, for instance, entering a marriage later in life and you are bringing substantial assets into the marriage.

In February 2014, the Law Commission published its report 'Matrimonial Property, Needs and Agreements' which recommends that for prenuptial agreements to be enforceable, certain requirements must be met. It is summarised as follows:

1. The agreement must be contractually valid (and able to withstand challenge on the basis of undue influence or misrepresentation, for example). It must be entered into freely and willingly by both parties.
2. The agreement must be made by deed and contain a statement signed by both parties that they understand it is enforceable and will partially remove the court's discretion to make financial orders.
3. The agreement must not have been made within 28 days immediately before the marriage or civil partnership.
4. Both parties must have received, at the time of the making of the agreement, disclosure of material information about the other party's financial situation.
5. Both parties must have received legal advice at the time that the agreement was formed.
6. The terms of the agreement must not prejudice the reasonable requirements of children.
7. Providing your prenuptial agreement was drawn up by a solicitor who has provided you with clear advice and the document meets the necessary principles, the Court should uphold it if you were to get divorced.

Prenuptial agreements are open to being contested by either party in a divorce setting. On the basis that you can show that the Agreement was drawn correctly, meeting all the principles currently required, then the contest will be overturned. This happened in the case detailed below – this is the leading case in this field.

Granatino-v-Radmacher [2010] was a case in which Baroness Hale of Richmond gave a dissenting judgment on the case stating “the object of a prenuptial agreement is to deny the economically weaker spouse to the provision which she – it is usually although by no means invariably she – would otherwise be entitled.”

As the Law Commission report recommends that prenuptial agreements should be made legally binding in English courts, we expect to see prenups used on an increasing basis as people feel more confident that their terms will be taken seriously.

## When will the court refuse to enforce a prenuptial agreement?

For a prenuptial agreement to be upheld in court, the agreement must be considered fair to both parties. This will mean you both need to fully outline your financial circumstances and seek independent legal advice on your agreement.

The Supreme Court sets out the following three factors that will increase the likelihood of a prenuptial agreement being upheld in court proceedings:

1. It must be freely entered into;
2. Both parties must understand the implications; and
3. It should not be unfair and hold parties to their agreement in the circumstances prevailing.

Other factors that need to be met include:

- Independent legal advice must have been received by both parties entering into the agreement;
- This will show that both parties understood what type of agreement they were entering into, without the coercion of the other and that both parties were of sound mind; and
- If there are children alive before the marriage and/or there are any children born to the marriage, then the agreement must provide for those children to be treated fairly within the terms of the agreement.

You will need to ensure that the agreement is signed as a Deed and within good time of the marriage. As a minimum, this is 21 days before the date of marriage, but the better position is to sign it earlier to provide a greater chance of it being upheld by the Court as legally binding. We would recommend, at the very least, this should be 28 days before the date of marriage.

Our family team of lawyers are equipped to provide you with the advice that you need. Please do contact us for further information.

## What should be included in a prenuptial agreement?

Prenuptial agreements are put in place to protect a range of assets and are completely tailored to your and your partner's needs. There is no 'one size fits all'. There are templates available on the Internet, but you will both need to ensure that you seek independent legal advice upon this.

You will need to provide financial disclosure and, usually, they will contain an inventory of each of your assets and debts, if applicable. The agreement will detail how you both wish for them to be looked after during your marriage and how they will be split should your relationship break down. If there are any assets you would prefer not to be divided or split between you and your partner if you decide to divorce in the future, these should be included in your prenuptial agreement.

Prenuptial agreement clauses usually include:

- Property held in your sole name or in joint names;
- Savings held in bank accounts;
- Premium bonds;
- Inheritance;
- Stocks and shares;
- Pension pots;
- Income; and
- Business interests.

A lot of people find it a very difficult subject to discuss and even more difficult to enter into disclosure and/or an agreement especially when you are also considering marriage. It may be one of the best conversations that you have and will undoubtedly seek to protect your individual positions, fairly, should your marriage ever breakdown. A good start is to discuss making a list of all the assets you own, both solely and jointly, and then decide on how you would like them to be dealt with in the event of a divorce.

When signing a prenuptial agreement, you will be able to decide whether one partner keeps the assets, whether you will split them and what portion each of you will receive. A prenuptial agreement may prevent your partner from automatically receiving a share of your assets in any divorce settlement.

## What cannot be included in a pre-nup?

Although prenuptial agreements can cover a wide range of assets, there are strict rules on what can and cannot be included. Not considering these when signing a prenuptial agreement could result in the agreement not being taken seriously in court.

Issues that cannot be included in a prenuptial agreement are:

- Child custody including visitation, religious upbringing and schooling;
- Child support;
- Personal matters;
- Illegal or unfair matters; and
- Lifestyle matters.

## What does a prenuptial agreement protect?

Typically, a prenuptial agreement is entered into to protect the asset base that you may have entered the marriage with. It can also protect you against the debts that may be accrued by the other party in the marriage.

A large consideration is also people's pensions. This is particularly relevant if you are marrying later in life or for a second time and do not want to risk losing part of your pension in a divorce settlement. This can protect this with a prenuptial agreement. It is also possible to protect your future earnings as well.

You should take note of the key factors that need to be met:

- Both parties must have received independent legal advice before entering into the agreement;
- You must have both entered the agreement, having understood fully what you were doing (i.e. with a sound mind) and not having been coerced by the other party; and
- If you have children together, they must be treated fairly under the terms of the agreement.

This list is not exhaustive.

For further advice, please contact one of our Experts who will be happy to provide further advice.