

POST-NUPTIAL AGREEMENTS

Offering a certain level of protection, a couple who are already married or in a civil partnership may wish to set out ownership of money and property and what will happen to their respective finances in the unfortunate event that the relationship ends. This may be because they did not enter into a pre-nuptial agreement before getting married or where there has been a separation followed by a reconciliation.

WHAT IS A POST-NUPTIAL AGREEMENT?

A post-nuptial agreement is a bespoke contract that reflects the particular circumstances and agreement reached between spouses or civil partners regarding what should happen with their finances if their relationship breaks down.

A post-nuptial agreement can be entered at any time after a marriage or civil ceremony has occurred.

SHOULD I HAVE A POST-NUPTIAL AGREEMENT?

A post-nuptial agreement can give more certainty as to financial arrangements if you separate or divorce. In addition, it can be an effective way to provide more assurance about how assets will be divided. This can be beneficial if, for example, you have been married before and have children from a previous relationship.

ARE POST-NUPTIAL AGREEMENTS LEGALLY BINDING?

In England and Wales, post-nuptial agreements are not legally binding and cannot exclude the court's jurisdiction. However, the courts do take them into consideration and appear to be giving increasing weight to them.

In the event of a later divorce, a court is more likely to take a post-nuptial agreement into account if it is recent or if there has been no significant change of events that are not covered within the agreement, such as a birth of a child or serious illness. Critically, it must be "fair", and the court's first consideration is always to any children involved.

For an agreement to be considered fair, the court will take the following into account the following:

- Whether both parties have or have had the opportunity to obtain independent legal advice
- Whether both parties have provided full disclosure of their respective financial positions

- If there has been any pressure applied to either party to enter the agreement
- Whether the terms are substantially fair and meet both party's basic needs; and
- If legal, contractual requirements were followed

To add weight to the agreement, it is common to build in provision for the agreement to be reviewed, either after some time has elapsed (say three or five years) or when a specified 'trigger' event occurs, for example, the birth of a child.

The court might uphold part of an agreement while considering a different part to have an unfair effect.

Even though post-nuptial agreements are not always binding, the document will state that you intend the agreement to be legally binding. Therefore, you should not enter into a post-nuptial agreement unless you want to be bound by the terms of that agreement.

A post-nuptial agreement will usually include a 'jurisdiction clause', confirming your domicile and habitual residence, together with your intentions regarding the jurisdiction in which the divorce or dissolution will proceed and where you intend the agreement to be enforceable.

The approach to the enforcement and validity of post-nuptial agreements varies between countries. For example, in some countries outside England and Wales, a post-nuptial agreement will be fully binding with no regard to fairness.

WHAT IF ONE PARTY NO LONGER WISHES TO BE BOUND BY THE POST-NUPTIAL AGREEMENT?

An application may be made to the court by the other party asking the other to explain why an order should not be made in terms of the agreement. Whether the court will uphold the agreement will depend upon the various factors detailed above and whether the court considers the post-nuptial agreement to have been 'fair'.

This guide is intended to be general information and not to be relied upon as legal advice. This is a complex area, and each case is different. We would suggest you contact us to obtain complete and proper legal advice.