

## PRE-NUPTIAL AGREEMENTS

Offering a certain level of protection, you may wish to set out ownership of money and property and what will happen to your respective finances in the unfortunate event that the relationship ends.

### WHAT IS A PRE-NUPTIAL AGREEMENT?

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

A pre-nuptial agreement is made in anticipation of marriage. It will become effective on you and your intended spouse entering into a valid marriage together.

### SHOULD I HAVE A PRE-NUPTIAL AGREEMENT?

A pre-nuptial agreement can give more certainty as to financial arrangements if you divorce. In addition, it can be an effective way to protect assets that you may have had before the marriage; for example, you wish to protect assets for the purpose of inheritance for any children of a prior marriage or relationship.

### ARE PRE-NUPTIAL AGREEMENTS LEGALLY BINDING?

In England and Wales, pre-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 pre-nuptial agreement into account if it is recent or if there has been no significant change of events not covered within the agreement, such as a birth of a child or serious illness. Critically, the agreement 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

**NB** to ensure the pressure is not a considering factor by any court, the agreement must be entered into "comfortably in advance" of the proposed ceremony (ideally a minimum of 21 days).

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 pre-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 pre-nuptial agreement unless you want to be bound by the terms of that agreement.

A pre-nuptial agreement will usually include a 'jurisdiction clause' confirming your domicile and habitual residence. The approach to the enforcement and validity of pre-nuptial agreements varies between countries. For example, in some countries outside England and Wales, a pre-nuptial agreement will be fully binding with no regard to fairness.

### PLAN AHEAD FOR A PRE-NUPTIAL AGREEMENT

Do plan ahead as it can take time to deal with financial disclosure, negotiations and legal advice. For example, suppose your finances, or those of your proposed spouse or civil partner, are complex (involving trusts or international assets). In that case, additional time will be needed, and specialist advice may be required from, for example, an accountant or a foreign lawyer.

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

An application may be made to the court by the other party asking them 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 pre-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.*