



Prenuptial Agreements

A Guide for Clients

Preuptial Agreements on the Cusp of Change

The effectiveness of Qualifying Nuptial Agreements (QNA's) will be seen in two main factions. Firstly, it will afford legal certainty to couples of high net worth wanting to make reliable arrangements for future divorce or dissolution. Secondly, it will create a more consistent method of protecting assets for children from previous relationships; an increasingly common request. These instances are two of many ways in which the change in law could benefit the clarity of agreements.

In fact the diversity of options available to parties is not limited to the socially recognised methods of prenuptial agreements. Other forms of agreements can, in some cases, be more fitting and cost effective than the more familiar approach. A continuing rise in the use of these agreements since 2010 gives a clear indication that their usefulness in modern Family Law cannot be understated.

While the timing of the legislation to be enacted is uncertain, excellent skill, fair due diligence and the correct application of legal experience will unravel the nuances of any practical issue encountered and ensure the authority of a future-proof agreement that is fully compliant.

Qualifying Nuptial Agreements

With any nuptial agreement, or indeed with any agreement made in law, there are a number of criteria that must be met in order for it to be enforceable. Many of these are easily met if properly handled at the correct time during the creation of the agreement. It is important however that specific elements are included if the agreement is to be relied upon at a later date. These criteria can vary depending on the nature of the agreement desired, but the composition of these will play a large factor and will be a measure of an agreement's validity should they ever be needed. This has become increasingly apparent since the landmark case of *Radmacher v Granation* [2010].

- **Prenuptial Agreements:**

The validity of prenuptial agreements rests on a number of separate elements. It must adhere to all standard forms of contractual criteria i.e. be free of any fraud or misrepresentation. As with any agreement in law this can have serious ramifications during the enforcement process and will often render the agreement void. There are both time restrictions in terms of proximity to the

wedding date and conferral must be made by deed. A further protection is created by the necessity of independent legal advice in which parties will sign statements showing they understand the agreement they are entering into. This must be fairly entered into and not unfair at the point of divorce. While the courts are becoming more sympathetic to the removal of their discretion through agreements, protection of the economically weaker party is still a consideration.

- **Postnuptial Agreements:**

While slightly less well known than their counterpart, postnuptial agreements have also seen a sharp rise in their application. These are more akin to the standard forms of contract that can be entered into. They are also considered to be a faster method of dividing assets properly. This is because these agreements are often entered into with the purpose of being executed shortly after. It is for these reasons that the enforceability of these agreements are often more legitimate, mostly due to the consent of both parties at the time of the agreement.

Statistics on this area are however incomplete as many of these agreements are executed without the need for litigation at all.

- **Cohabitation Agreements:**

It has been a common issue within Family Law that the protections offered to married or civil partnership couples are not extended to cohabitants. It can in some cases mean that the law has little remedy for those at the end of cohabitation. While there are methods of making claims within Property Law these are strict and hold no guarantees. It is unsurprising that these agreements have seen a continuing rise which mirrors the increase within society of cohabitating couples. The drafting of a cohabitation agreement in many ways will not be complex, however, the clarity afforded to both parties should not be underestimated.

While it is clearly not pleasant to consider the conclusion of a relationship at its birth, it is likely that your partner will feel the same way and the transparency that a binding

agreement affords will go some way to mitigating potential disagreement, cost and discord to both parties at the end of a relationship.

It is therefore all the more important to not only seek advice from a legal representative who is able to guide you through the complexities of Family Law, but also to have the understanding ear that is required to establish the peace of mind you deserve.

Marital and Non-Marital Property:

The Court will in many cases have a large discretion with regard to the orders that it can make. Most of these powers are given to them through the Matrimonial Causes Act 1973. The reallocation or dissolution of assets will be the main mode of dividing property. The exercise of these powers has been shaped by jurisprudence over the past two decades. While in English and Welsh law the concept of community property does not exist as it may do in other jurisdictions, it is important to note that the method of inclusion of assets in the final division will in some way

rest on the status of these assets. In cases which have a surplus of assets available to easily meet the needs of both parties subsequent to the divorce, it is unlikely that any property held separately would be included.

Showing that property was in fact non-marital can at time be complex especially after a lengthy marriage, it is therefore wise to consider options sooner rather than later.

Defining Needs and Sharing:

A common misconception in this area is that on divorce there is an equal division of assets i.e. 50/50. This however is rarely the case, and in many circumstances the courts will not consider this a viable option. It is important therefore to understand how a judge would decide to proceed in any given case.

While many judgments over the years have shaped the Court perspective on how to decide the proper method of division, none were more influential than the case of *White*

v White [2000]. Since this landmark case the method of dividing has moved away from the previous system of the reasonable requirements of each party and towards a more equitable style of asset management. This allows for cases in which the assets can easily meet the parties needs, then a more sharing-based system prevails. The assumption is then that should the weaker economically able parties needs be easily met, any non-marital property can be excluded from the division.

Equity and fairness are at the heart of these proceedings and while there is no assumption of an equal split, that is not to say that awards cannot be substantial. In fact the removal of the 'reasonable requirement' system after *White* has led to much higher awards in cases with larger assets. Knowing the law and where you stand is the surest way to avoid any unwanted surprises.

Foreign Agreements:

Family Law within England and Wales has developed in a slightly different manner than many other jurisdictions.

Improperly considering these conflicts could give rise to a number of unnecessary costs, stress and even unfair decisions. These conflicts however are easily addressed through a simple redrafting process. Foreign prenuptial agreements will often not be as binding as they were in their own jurisdiction however a redraft to fill the necessary criteria for a binding postnuptial agreement could save both time and money.

Furthermore marriage law in many parts of the world is so starkly different that English Courts may not recognise certain agreements at all. It is therefore imperative to ensure the basis of any foreign agreements and if necessary, create matching obligations in this jurisdiction.

Natalia & Nikolai

N and N were married outside of the UK, after moving in 2015 the relationship has become difficult. It is unlikely that they will continue the marriage but both are unsure of the status of their prenuptial agreement which was also signed outside of the UK. Before entering into a divorce in which the outcome cannot be predicted they wish to seek legal advice.

The prenuptial agreement itself will not be binding in this jurisdiction, even if it was in the country they signed it in. It would therefore be appropriate to draft a postnuptial agreement. This is intended to have an immediate effect and as such can be more enforceable than a prenuptial agreement. This process takes less time than dividing assets within court and therefore more cost effective. Furthermore the agreement is properly advised and constructed. Free from any duress and having properly sort legal advice the court will likely enforce this agreement as a formality saving both parties stress and money.

An order would then follow on a consensual basis to ensure the unimpeachable nature of the agreement.



Sophie & Daniel

Sophie was a TV personality when she married Daniel. In order to protect her wealth they entered into a prenuptial agreement. She has since supported Daniel including placing large amounts of assets into his now failing business. The couple are now discussing divorce and Sophie wishes to know if the prenuptial agreement will protect the remainder of her assets.

The complexity of cases such as this often hinge on a few minor details for example, the standard of living held by both parties during the marriage as this will have a direct effect on the award to cover Daniel's needs. If the couple have few assets left it is unlikely that Sophie will be able to enforce her prenuptial agreement to the extent of completely excluding Daniel's claim. If however there is a surplus of assets to meet the needs of Daniel and more it would be more likely that the fairness of the prenuptial agreement could be a good reason to depart from a more equal split of assets.

Sophie is in the unfortunate position of not having a guaranteed right of enforcement, it is therefore in her best interest to seek proper legal advice on her next step so as to not waste her own time and money.



Antony Clapp Solicitors

If you'd like to discuss the protection that such an agreement would provide for you, Antony Clapp Solicitors has a wealth of experience in dealing with these arrangements.

Contact us with your questions regarding a prenuptial, postnuptial or cohabitation agreement, or with your questions surrounding the validity of an existing foreign agreement under UK law.

Antony Clapp Solicitors is one of the leading Family Law firms serving both international clients and those residing in the South East of England and London.

We have particular experience with high net worth clients where the complexities of the case demand specialist guidance and advice.

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