

Prenuptial Agreements: Are they worth doing?

What is a pre-nup?

A “pre-nup” is an agreement entered into before marriage or a civil partnership, between the couple who are about to contract with each other. It lists what assets should not fall into the matrimonial “asset pot”. This is often of particular importance for those marrying following the dissolution of a previous marriage. A pre-nup can also cover other matters such as inheritance claims, child residence and child contact arrangements.

Why have a pre-nup?

If a marriage or a civil partnership is about to be dissolved, the Courts have certain powers to order that one party should pay maintenance, money, or transfer property - or even pension rights - to the other. These are wide ranging powers, and for some, these powers represent a risk to assets which they might wish to keep - possibly a family farm, heirlooms or similar. This can be particularly important to someone entering into a marriage after a divorce, when they want to pre-serve certain assets for their children of the first marriage.

A pre-nup offers a possible way to help preserve such assets. It can operate to keep the asset out of the matrimonial “kitty” of assets which may be divided later if the marriage (or civil partnership) fails. It can “ring-fence” certain assets so that they are not divided by the Court, if it ever comes to that. The same considerations apply to civil partnerships, which get a similar range of financial remedies if dissolved.

In our view, the greatest value in a pre-nup is in sitting down together and thinking about what each of you is expecting to happen in the relationship, who may need what, and so on. It is that aspect of “shared planning” that helps to avoid the “expectation gap” that can pull a relationship apart if it catches you unawares. It is a lot like an insurance policy or an umbrella - one hopes you never need it, but it’s good to know it’s there if you do.

Can a pre-nup be changed?

Yes. A well drafted agreement includes a review clause, that requires the agreement to be reviewed after a set period of time, or if children are born. Often, a written addition to the agreement is all that is needed. A total re-write is not usually necessary. Changes must be in writing, signed by the parties and witnessed, and kept with the original agreement.



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Is a Pre-Nup binding?

The answer is “mostly”. We have effectively reached the point of saying “Pre-Nups are binding unless there is a good reason not to apply them”. Here’s why:

Historically, the Courts have always been free to divide matrimonial assets in whatever way seemed just. English Courts have always decided that individuals cannot oust the powers of the Court to make decisions. That is, in effect, what a pre-nup does.

Some agreements have been approved by the courts in the past. In one case (*Edgar v Edgar*) the Court’s decision included a helpful check-list of factors to look for:

- a. Did the parties give full disclosure of their assets and finances generally?
- b. Did they have independent legal advice?
- c. Did they sign under duress - (such as “sign this or the wedding’s off”)?
- d. Did they consider the need for review, e.g. if any children are born?

If a case satisfied this so-called “Edgar test” it was likely to be approved, but it was by no means certain. Some were upheld, some were denied.

The turning-point came in a high-profile case reported in 2010 known as *Radmacher v Granatino*. The Supreme Court considered the “Edgar” tests, but it went further. It said that one must also consider the culture in which the parties were brought up. In their case, pre-nups were the norm.

The Supreme Court effectively suggested that, “**an agreement should be upheld, unless we can see good reason not to**”. That is where we are now.

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