

Preuptial Agreements

This article looks at the benefits and enforceability of prenuptial agreements.

Celebrity marriage announcements, and probably more so, celebrity divorces, usually go hand in hand with commentary in the press as to whether the couple entered in to a prenuptial arrangement.

Although perhaps not the most romantic of proposals at a time when everything in a relationship is rosy, is the fact that some marriages fail. If you have substantial assets or have children from a previous marriage, it makes sense that you take reasonable steps to protect your wealth in a manner that is fair and reasonable.

So what is a prenuptial agreement? It is a formal contract entered into by a couple prior to marriage which sets out how their assets will be divided in the event of separation or divorce.

And are they enforceable? Prenuptial agreements are not automatically legally binding in England and Wales but recent case law has shown that judges are prepared to give them substantial weight and uphold them as long as certain precautionary steps were taken when the agreement was drawn up and signed. This means that prenuptial agreements can be a useful tool to protect pre-marriage wealth, family assets and future inheritances, or simply to provide certainty about what would happen in the event of relationship break down.

Case law has established factors that can now be looked at when considering the weight to be placed upon pre-nuptial agreements. Such factors include the following:

1. **The agreement must be freely entered into.** It is important that each party gets independent legal advice as it will help to prove that an individual was fully aware of the terms of the agreement and therefore freely entered into it. A person's emotional state, age and maturity together with the timing of signing the agreement are also relevant as to whether they entered into it of their own free will, without undue influence or pressure.
2. **The parties must have a full appreciation of the implications of the agreement.** There has to be a full and frank exchange of financial disclosure. If one party is seeking to ring-fence pre-marriage wealth they will have the best chance of doing

so if their partner is fully aware of the value of the assets before they sign the prenup.

3. **It must not be unfair to hold the parties to their agreement.** The court has broad discretion and will seek to ensure that both parties' needs (particularly the financially weaker party) and the needs of any children of the family are met. It is therefore important that the agreement meets this requirement to stand any chance of being upheld, it must be fair and realistic. It is also important therefore to ensure your prenup remains up to date, generally the longer the marriage, the lower the chance of it being upheld, as circumstances are likely to have changed i.e. one spouse chooses to stay at home for a number of years to raise children, thereby limiting their future earning potential. If this is the case then the agreement can be updated if both parties agree.

A cautionary tale....

What happens if the court finds a prenuptial agreement to be unfair? Case law suggests the court will aim to balance any unfairness. Therefore anyone seeking to make minimum provision or no provision in a prenup runs the risk that the court will ignore it and look to meet the needs of the parties.

Is reform on the cards?

In February 2014 the Law Commission published its report on Matrimonial Property Needs and Agreements recommending that prenuptial agreements should be given full legal force in England and Wales subject to certain procedural safeguards but the Government are still no closer to implementing any reforms.

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