



## Pre-nups – are they really worth it?

## BRIEFING

Evidence of the cost and acrimony caused by divorce can be found on an almost daily basis in the UK media, laying bare the separation details of “celebrities”. Pre-nuptial agreements (or ‘pre-nups’ as they are more commonly known) are often discussed in such stories, leading many to believe pre-nups are confined to only the rich and famous.

However, following the widely publicised Supreme Court case of *Radmacher v Granatino* in 2010, pre-nups have gained strength in their ability to protect the assets of those entering into marriages or civil partnerships. If entered into in a spirit of collaboration, they can reduce the acrimony and difficulty often experienced upon divorce and the subsequent division of assets.

### What is a pre-nup?

A pre-nup is a contract entered into before a marriage. The written agreement sets out what the couple agree should happen in relation to finances and other matters, should the marriage breaks down in the future. An agreement may provide for the division of capital and property, and whether and how much maintenance will be paid by a former spouse to the other or for any children.

### Are pre-nups binding?

No, is the short answer. They are not legally binding in England and Wales (unlike in other countries) and as such, they cannot prevent one party from applying to the court for financial provision in different terms to the pre-nup.

However, the *Radmacher* decision suggests that, despite the court retaining its discretion as to the division of financial assets on divorce, there is a presumption in favour of upholding the validity of a pre-nup, unless there are good reasons not to do so; this is discussed in further detail below.

### Who can benefit from a pre-nup?

Increasingly people are marrying later in life, having worked and built up capital assets. They may own a house, have savings, pensions etc, whilst their partner may have much less. They may have been given assets by wealthy parents who are concerned that the gift remains in the family. The increase in second and third marriages has also led to parties wishing to “ring fence” or protect assets for children of previous relationships.

On divorce, all assets are placed into a notional “matrimonial pot” for division. This means that the



assets of each party are potentially vulnerable to an order that the court may make over them.

Provided they are entered into correctly, pre-nups can be an effective way in which to manage and protect assets on divorce. As such, we would commonly advise that a pre-nup be entered into in the following situations:

- Where the wealth of the parties is not equal.
- Where one of the parties has significant inheritance prospects, or who may benefit from gifts from their family.
- Parties with assets acquired during previous marriages that they would prefer to ring fence, in particular for children of the previous union.
- When both parties are bringing assets into the marriage they may both agree that anything acquired prior to the marriage remains the property of that individual.
- Parties with future wealth prospects, such as those with trust funds or careers that could be stellar.
- International clients who want a pre-nup to mirror one that they have had drawn up in a foreign jurisdiction where such agreements are commonplace.

### **What are the benefits of a pre-nup?**

Entering into a pre-nuptial agreement is a means of demonstrating what the couple consider to be fair should the marriage breakdown. It can show, for example, that a wealthier party would like to see assets passing to children from previous relationships or seek to protect pre-acquired or future wealth. Pre-nups can save a lot of acrimony and expense if the terms are fair. As such, it may be possible to avoid the need to involve the court.

### **How much weight is a court likely to attach to pre-nups?**

A court should give effect to a pre-nup that is freely entered into by both parties. The court has a duty to consider numerous factors when asked to make a decision on the division of assets. The list is not exhaustive but includes factors such as the age of the parties, length of the marriage, whether there are children, the working capacity and if there is a pre-nup.

### **How can I ensure my pre-nup has the maximum chance of being upheld?**

In 1998, the Government published a Green Paper proposing a number of procedural safeguards, which if followed, should result in the terms of the pre-nups being binding. These safeguards included:



- Both parties receive independent legal advice.
- Full disclosure of the assets and financial means of both parties is exchanged.
- The agreement is signed at least 21 days before the marriage. The recommendation in the Green Paper is meant to guard against last minute pressure being brought to bear on one party such as “sign this or I’ll cancel the wedding”.

However, we advise that ideally a pre-nup should be dealt with six months or even longer before the wedding.

The Green Paper was never made law but, as a matter of good practice, the legal profession has moved to adopt it. However, in *Radmacher* the pre-nup was upheld despite the husband not receiving independent legal advice before the agreement was entered, nor did he receive disclosure on the wife’s financial means. The court held that whilst sound legal advice was desirable, on the basis that the husband was fully aware of the implications of the pre-nup and indifferent to the details of the wife’s financial assets, they should not reduce the weight of the agreement.

As such, provided it can be shown that each party had all the information that is material to his or her decision and that they intended the pre-nup to govern the financial consequences in the event of a divorce, the procedural elements should be

satisfied. However, we continue to advise that the Green Paper requirements should still be followed.

On the basis of the above, the courts should not seek to disregard the terms of the agreement unless:

- 1) It results in one of the parties having to rely on state benefits.
- 2) It prejudices or does not provide for the children or child of the family.
- 3) The parties’ circumstances have changed so that it would be unfair to uphold the agreement.

### **How long does a pre-nup last?**

In other jurisdictions a pre-nuptial agreement can last the length of a marriage, however long. In England and Wales, the passage of time makes it more likely that changes in circumstances will have occurred so that enforcing the agreement may result in an inadequate provision for one party. However, the cases that have addressed the enforceability of pre-nuptial agreements have been cases where the marriage has broken down in a relatively short time.

Changes in circumstances can include having children, the standard of the living of the parties being significantly different to what it was at the



time of the marriage, unexpected windfalls or unexpected loss, the loss of a job or inability to work, the health of the parties changing materially, the change in value of money. The change in circumstances could be personal or due to forces wholly outside the parties' control – we only have to look at the current economic climate to see how people's finances can be affected through no fault of their own.

### **What can be done after the marriage?**

It is possible to review the terms of a pre-nup at any stage following the marriage. Pre-nups can also include review dates triggered by passage of time or an event such as the birth of a child. Should any revisions be necessary, the new agreement would be incorporated into what is known as a post-nuptial agreement (or "post-nup").

A court will approach a post-nup in the same way as a pre-nup. As such, all the procedural aspects discussed above, will need to be considered again when entering into one. However, by updating the pre/post-nup as and when there are material changes to the marriage, it should increase the life of the agreement.

### **Will the law change?**

As matters stand, if a separating couple cannot agree on a fair division of their assets, and their legal advisors have exhausted negotiations then it is for the Court to decide what, if anything, a party should receive on divorce. To change this position so that a pre-nup is automatically binding on the parties would require Parliament to pass new legislation.

The Law Commission will be reporting to Parliament in 2012 with proposals for reforming the law. Until there is a change in the law (which is as yet untabled) or a further Supreme Court decision on the matter, the *Radmacher* decision will provide the basis for the Courts' approach to pre-nups in future.

### **Conclusion**

It is important to remember that within the jurisdiction of England & Wales, pre-nups remain unenforceable in their own right. However, without doubt they are regarded as a valuable tool to safeguard assets in the event of divorce.

We continue to advise clients that they should enter into a pre-nup and post-nups where relevant. However, it is essential that the pre-nup is tailor made for each couple. The concept that 'one size fits all' does not apply. Each situation will be unique and if the agreement fails to take into



consideration all the relevant circumstances it could be deemed as unfair and therefore fail to have the desired effect.

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