

Nuptial Agreements

"Nuptial agreements" refers to both pre-nuptial agreements (before marriage) and post-nuptial agreements (after the marriage) and their civil partnership equivalents, pre-registration or pre-civil partnership agreements.

A nuptial agreement usually sets out how a couple wishes their assets to be divided between them if they later separate or divorce. Some nuptial agreements also detail how a couple currently arrange their finances and how they will arrange their finances during the marriage.

There is no difference in the legal status of nuptial agreements entered into before or after the marriage or civil partnership. Our best family law solicitors in London can assist you with all aspects of establishing a nuptial agreement.

Contents of nuptial agreements

Commonly, a nuptial agreement sets out which party owns or will own certain assets on a future breakdown of the marriage or civil partnership. The agreement usually defines "*matrimonial property*" and "*non-matrimonial property*" or "*joint property*" and "*separate property*".

Matrimonial property or joint property usually includes assets acquired during the marriage and assets held in joint names, such as the matrimonial home and joint bank accounts.

Non-matrimonial property or separate property usually includes assets owned before the marriage, inherited assets and/or gifts received by one party during the marriage.

Nuptial agreements may also deal with income, such as treatment of earnings and future earnings and interests under trusts.

They sometimes deal with financial provision for existing children, but do not usually attempt to deal with financial provision for any future children. Significant changes in circumstances during the marriage, including the birth of children, are usually dealt with by review of the terms of the agreement; often a review clause is inserted into the nuptial agreement setting out when a review of the agreement should take place. They do not usually include non-financial arrangements relating to children.

Objectives of nuptial agreements

- To clarify how the parties will conduct their financial affairs during the marriage or civil partnership, to enable the couple (especially the financially weaker party) to have transparency at the start of the marriage. This may also assist the financially weaker party to feel financially secure within the marriage.
- To provide certainty for couples who wish to formally agree how their assets should be divided if they later separate or divorce.
- To protect assets (such as inherited wealth or pre-marital property) from a later financial claim.
- To limit the scope for uncertain, emotionally draining and financially costly court proceedings in the event of the future breakdown of the marriage.

Are nuptial agreements binding?

Nuptial agreements are not binding because the parties to the agreement cannot override the Court's broad discretion to decide how to redistribute their assets and income on an application for financial remedy. When considering an application for financial remedy, the court must, however, give appropriate weight to a nuptial agreement as a relevant circumstance of the case when considering the factors set out in section 25 of the Matrimonial Causes Act 1973 (MCA 1973). It may be that a nuptial agreement should be given decisive weight. This will depend on the circumstances of the case.

In the Supreme Court case of *Radmacher v Granatino* [2010] UKSC 42, the Court considered the weight that should be given to a nuptial agreement by a court when exercising its discretion. The Supreme Court held:

"The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to the agreement."

The Supreme Court emphasised that the very existence of a nuptial agreement is capable of altering what is fair.

Three-stage test for fairness

Fairness can be assessed by applying the following three-stage test:

1. The agreement must be freely entered into.

Both parties should enter into the agreement of their own free will, without undue influence or pressure. The agreement is unlikely to be upheld if there is any evidence of duress, fraud, misrepresentation or unconscionable conduct, such as the exploitation of a dominant position to secure an unfair advantage.

A party's emotional state at the time of making the agreement is a relevant consideration, together with factors such as age and maturity and previous experience of long-term relationships. These factors may inform what pressures a party felt to sign the agreement. In the case of a pre-nuptial agreement, the court may also consider whether the marriage would have gone ahead in the absence of an agreement in the terms signed.

2. The parties must have a full appreciation of the implications of the agreement.

At the time of signing the agreement, each party should be in possession of all the information material to his decision to sign the agreement. This means that while full and frank financial disclosure is desirable, it is not necessary for a party to have full particulars of the other party's assets and income if the party is fully aware of the implications of the nuptial agreement. Independent legal advice is strong evidence of a party's understanding of the implications of the nuptial agreement, though not conclusive. The parties should both intend the agreement to determine the financial consequences of the marriage coming to an end.

3. It must be fair to hold the parties to their agreement in the circumstances prevailing.

Consider the Supreme Court guidance when assessing what is fair:

- It is not fair to allow a nuptial agreement to prejudice the reasonable requirements of any child of the family.
- The autonomy of adults should be respected. It is "paternalistic and patronising" to override the terms of an agreement simply on the basis that the court knows best".
- There is nothing inherently unfair about an agreement that seeks to ring-fence non-matrimonial property, including assets owned before the marriage and assets a party anticipates receiving from a third party during the marriage, through lifetime gift or inheritance.
- In general terms, the longer a marriage lasts following a nuptial agreement being signed, the greater the chance it may not be fair to hold the parties to its terms because of unforeseen changes in circumstances. This is more likely to

be an issue where the parties to an agreement are a young couple starting married life with few assets than where, for example, a couple who have both been married previously each bring significant assets to a second marriage.

- The concepts of need, compensation and sharing are relevant considerations that may inform fairness and may apply as follows:

- a) it is likely to be unfair if the effect of the agreement would be to leave one party in a state of real need while the other party is comfortably provided for;
- b) if one party has a valid argument for an element of compensation (for example, for loss of earning power following a joint decision that one spouse should give up a potentially lucrative career to look after children), then an agreement that ignores compensation is likely to be unfair); and
- c) if needs and compensation are adequately covered, a nuptial agreement may effectively prohibit further sharing of the assets.

International considerations

International issues often arise in cases involving nuptial agreements. This is largely because of the type of people who have traditionally entered into nuptial agreements: those with significant assets who may have an international lifestyle, own property abroad and those who are nationals of countries where agreements relating to ownership of marital property are prevalent.

In *Radmacher*, the Supreme Court explained that the English court will normally apply English law when exercising its jurisdiction to make an order for financial remedy under the *MCA 1973*, irrespective of the domicile of the parties or any foreign connection.

In *Radmacher*, the fact that the parties were nationals of France and Germany, executed a German prenuptial agreement and included a clause in the agreement stating that German law should govern their matrimonial property in the future, did not prevent the English court from dealing with the parties' finances on the breakdown of their marriage. These facts were, however, relevant in demonstrating that the couple intended the agreement should, if possible, be binding on them.

The future of nuptial agreements

Moving forward, the Law Commission recommends the introduction of "qualifying nuptial agreements" that will limit the court's powers to make financial orders on divorce or dissolution. The court would be prevented from making orders inconsistent with the terms of a qualifying nuptial agreement except to meet either party's needs and/or in the interests of a child of the family.

This means a qualifying nuptial agreement cannot be used to contract out of providing for a party's needs. An agreement attempting to do so will fail as a qualifying nuptial agreement and will be remitted to the court. Agreements that are not qualifying nuptial agreements will continue to be treated as a "relevant factor" under section 25 of MCA 1973 and be subject to the fairness test set out in *Radmacher*.

To be a qualifying nuptial agreement, it is proposed that an agreement must comply with the following criteria:

- It must be contractually valid (the validity requirement).
- It must be validly executed as a deed and contain a "relevant statement" (the formation requirement).
- It must not have been made within the 28 days immediately before the wedding or civil partnership ceremony (the timing requirement).
- Both parties to the agreement must have received disclosure of material information about the other party's situation when they entered into the agreement (the disclosure requirement).
- Both parties must have received legal advice at the time they entered into the agreement (the advice requirement).

Should you require any further information in relation to Nuptial Agreements or wish to discuss your matter further, please do not hesitate to contact one of our family lawyers in London on 02074366767 [or info@kmjsolicitors.com](mailto:info@kmjsolicitors.com).