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Briefing

Pre- and post-nuptial agreements

Pre- and post-nuptial agreements are becoming more popular for couples and now form a key part of financial planning.

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At a glance

- Pre- and post-nups are becoming far more common – and enforceable
- A pre-nup is a written agreement between a couple made before their marriage that specifies what would happen if the relationship breaks down
- People in a wide range of circumstances would benefit from a pre-nup, such as those who have built up some wealth prior to their marriage, those who are likely to receive wealth from their family during their marriage, those with children from a previous marriage, or business owners
- Post-nups are almost the same as pre-nups – and are signed during the marriage

Pre- and post-nuptial agreements

For years, pre-nuptial agreements – or pre-nups – were considered by many to be the preserve of the rich and famous, and did not have any significant influence over the decisions in the family courts. However, their position in English law has changed radically over the last few years and they are now heavily influential on court decisions, even for couples with modest wealth, if done in the right way. As a result, they are becoming the norm for couples who are getting married and now form a key part of sensible financial planning.

What is a pre-nup?

In a divorce situation, judges in the family courts have very wide discretion to divide a family's finances according to what the judge thinks is fair. This includes wide powers to transfer or sell assets and share future income. In many cases, there is an assumption that the fair thing to do is to divide all assets equally between the divorcing couple, and there may also be a significant element of maintenance to pay.

A pre-nup is a written agreement between a couple before their marriage that is designed to regulate what would happen with their wealth should the marriage break down, so narrowing the extent of judicial discretion. Pre-nups are therefore commonly used to limit claims to far less than half of all assets, or to "ring-fence" specific assets, or to limit the amount and duration of any maintenance.

Pre-nups are also useful for proving what assets are brought into the marriage. These assets are called "non-matrimonial property" and are less likely to be divided equally on divorce, because they are not the product of the marriage.

How effective are pre-nups?

As a result of a large number of court cases over the last few years the family courts will now be very heavily influenced by a pre-nup, as long as:

- The pre-nup is freely entered into.
- Both parties fully appreciate the implications of entering into it.
- The pre-nup is not significantly unfair to one party. As the law currently stands, pre-nups are not completely binding on the family courts. However, a recent Law Commission report has recommended changes to the law to make pre-nups completely binding, as long as certain safeguards are met.

How do I ensure my pre-nup will be binding?

So, to make a heavily influential pre-nup, with the possibility that it may become completely binding, we recommend the following steps:

- Each party engages their own lawyer.
- Full, frank and clear financial disclosure is provided by each party.
- The lawyers negotiate the terms of the pre-nup.
- The terms of the pre-nup allow for any children of the family to be properly financially supported.
- The pre-nup should not be outrageously unfair to one party, for example, by not meeting their basic financial needs in the event of a divorce.
- The pre-nup should be finalised at least 28 days before the wedding.

Assets that do not need to be deployed to meet financial needs could therefore be fully protected, and the principle of equal sharing of assets can be avoided. Maintenance could also be eliminated, or at least capped.

What is a post-nup?

A post-nup is very similar to a pre-nup. It is signed during the marriage, for instance when there is about to be a significant change in the couple's financial circumstances such as receiving an inheritance, or selling a business or a property.

A post-nup can also be useful when the marriage is in difficulties. This may sound odd, but financial issues can in themselves put pressure on a marriage, so if a couple who are arguing about money can negotiate a post-nup, this could remove a major cause of friction.

Our recommendations for creating an effective post-nup are the same as with those for an effective pre-nup.

Who might benefit from a pre or post-nup?

Pre-nups and post-nups should be considered by:

- Those who have been married before who want to ensure that wealth generated during that relationship passes to any children from it.
- Anyone who is bringing assets to a marriage (particularly cherished properties or a family business) that they want to protect.
- Parents who want to ensure that any lifetime gifts or inheritances stay within their family.
- Business owners who want to ensure that the future of the business is not jeopardised by their fellow shareholder/director having to sell or transfer their shareholding as a result of a divorce.
- Trustees who are obliged to protect trust assets.

How much will it cost?

Probably not as much as you think, although fees depend very much on individual circumstances, including:

- How complex the agreement is, in terms of what needs to be covered.
- How much financial disclosure is required and whether it requires input from other experts, such as someone to value a business.
- Whether both individuals play a full role in the negotiations.
- Whether the agreement has to deal with international aspects, requiring advice and input from a foreign lawyer.
- How much correspondence is sent, and the number of meetings that are needed to finalise the agreement.

How do I introduce the idea?

Attitudes to pre-nups and post-nups are changing. In a recent poll, 42 per cent of those aged 45-54 said they would consider such an agreement because they have either gone through a divorce or know someone who has. Almost half of 18 to 24-year-olds also said they would consider entering into a pre-nup. In a few years' time, pre- and post-nups are likely to be the norm, as they are in the US and most of Europe. Having said all that, the idea is unromantic and can be awkward to bring up, so here are a few suggestions:

- Discuss it as part of more general financial planning when contemplating marriage, such as the need to make new wills.
- Most people provide for the possibility of bad things happening in other areas of their life, for example through insurance, so why not provide for the possibility of divorce?
- Everyone knows that divorce can be stressful, drawn out, expensive and unpredictable. A pre-nup or post-nup provides certainty and security for both parties, and should cut out a lot of the delay and expense.
- If there are children from a previous relationship, it seems fair to ensure that money built up during that relationship is passed to them.
- Parents could suggest a pre-nup or post-nup as a condition of passing their wealth down to the next generation, either during their lifetime or after their death.
- Partnerships or companies can have a business-wide policy that all of the existing and incoming business owners must have a pre-nup or post-nup.
- Entering into a pre-nup or post-nup should demonstrate that a couple are getting married for the right reasons.

Meet our experts

Our experienced team operates nationwide. For further advice, please get in touch with your local contact.

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