

# Pre Marriage Agreements

## What is a Pre Marriage Agreement?

A pre marriage (or pre nuptial) agreement is a contractual agreement between two people who intend to marry which sets out in clear terms what they would wish to happen in respect of their financial affairs should the relationship break down.

## Why should I consider a Pre Marriage Agreement?

You should consider such an agreement if you are getting married or and you own assets that you wish to protect as best you can.

A pre marriage agreement should be considered particularly where:

- one or both of you have significant personal assets
- you are getting married in later life
- you are getting married for a second or subsequent time
- you have divorced and have received a settlement to provide a home for yourself and the children of that marriage
- you have children and want to protect their inheritance

## Is a Pre marriage Agreement binding?

Not necessarily. Currently the law provides that the court has an absolute discretion to make orders in respect of settlement of financial matters when parties divorce. The court is therefore NOT bound to uphold a pre marriage agreement. However, increasingly the courts are prepared to recognise parties rights to try and determine their own affairs in order to provide certainty of outcome in any subsequent divorce proceedings. A pre marital agreement is good evidence to the court as to the intentions of a couple. Even if the court does not uphold an agreement in its entirety, it can still significantly influence the court's decision.

## Important considerations

The court is more likely to uphold a pre marriage agreement if certain conditions are met. In order to ensure that a pre marriage agreement is as effective as possible, it is recommended that:-

- the agreement should record that both parties have freely negotiated the terms and each has had the benefit of independent legal advice before entering into the agreement
- there should not be any duress. A pre marriage agreement should be negotiated and executed in plenty of time before the planned wedding. If an agreement is entered into hastily and shortly before the marriage, then the court are more likely to take the view that one party has put pressure on the other to enter into the agreement
- both parties should disclose full details of their financial circumstances to the other so that both enter the agreement with full knowledge of their respective positions
- if children are born or if the marriage lasts for a reasonable length of time, then on marriage breakdown, the court will need to consider the needs of a spouse and children and a fair outcome. It is less likely that the terms of a pre marriage agreement entered into many years before will be appropriate

- think about what provision should be made for a spouse and children and include this within the agreement. Those agreements which try and anticipate a fair outcome on divorce stand a better chance of being upheld. However drafting a pre marital agreement inevitably involves a degree of crystal ball gazing and the longer the marriage lasts, the less likely that speculation is to be accurate. A pre nuptial agreement might provide for staged provision and the financially weaker party may acquire a higher settlement the longer the marriage lasts
- regularly update and review the agreement, as time progresses and before any future transactions or acquisitions are undertaken which were not anticipated in the original agreement. It is possible to negotiate a mid marriage contract, particularly if circumstances change
- if one or both of you are a national of another country you may be able to divorce in a jurisdiction which does uphold pre marriage agreements and any agreement could state in which country any future divorce proceedings should take place in
- to maximise its effectiveness, an agreement should be well drafted and the product of careful planning, negotiation, advice and disclosure. It may require input from overseas experts if there is an “international” element, i.e. if you have assets in or are a national of another country. A well drafted and thought through agreement is more likely to have a significant effect in any divorce settlement than an improperly prepared document

### Civil Partnerships

From December 2005 it has been possible for same sex couples to enter into a civil partnership. A civil partnership has many features similar to marriage and importantly gives the court power to determine how settlement of financial matters should be dealt with on an application for dissolution of the relationship. The advice in this fact sheet applies equally to both spouses and civil partners and we recommend that the latter consider “pre-partnership” agreements. Civil partners may be older and more financially secure than married couples and may not have children. An agreement in such circumstances is therefore more likely to be upheld by a court.

### A final note

Parliament continues to ensure that there is a difference in treatment between parties who are married or who enter into a civil partnership and those who cohabit. Marriage or a civil partnership brings with it rights and obligations which cannot be abrogated by private agreement. A pre marriage or pre-partnership agreement cannot provide absolute certainty but it is better to have a sensibly drafted agreement than no agreement at all if there are assets to protect.

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