



Nuptial Agreements: A Client Guide

Pre-Nuptial Agreements

A pre-nuptial agreement is a legal agreement made between two individuals before their marriage has taken place. The agreement usually sets out how the couple wish their assets to be divided between them if they later separate or divorce. Some pre-nuptial agreements also detail how the couple currently arrange their finances and how they will arrange their finances during the marriage.

Individuals who are planning to become civil partners can also enter into a legal agreement before the registration of their civil partnership. These agreements are often referred to as **pre-civil partnership agreements** or **pre-registration agreements**. For the purposes of this practice note, reference to pre-nuptial agreements includes reference to pre-civil partnership agreements.

Post-Nuptial agreements

A post-nuptial agreement is a legal agreement made between individuals who are already married. The agreement usually sets out how the couple wish their assets to be divided between them if they later separate or divorce. Some post-nuptial agreements also detail how the couple currently arrange their finances and how this will continue or change during the marriage.

Civil partners can also enter into a post-nuptial agreement, usually referred to as a **post-civil partnership agreement** or a **post-registration agreement**. For the purposes of this guide, reference to post-nuptial agreements includes reference to post-civil partnership or post-registration agreements.

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. 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.
- 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.

Nuptial agreements 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. Nuptial agreements do not usually include non-financial arrangements relating to children.

Objectives of Nuptial Agreements

Essentially the objectives of pre-nuptial agreements and post-nuptial agreements are the same:

- **Clarification.** To clarify how the parties will conduct their financial affairs during the marriage, 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.
- **Certainty.** To provide certainty for couples who wish to formally agree how their assets should be divided if they later separate or divorce.
- **Protection.** To protect assets (such as inherited wealth or pre-marital property) from a later financial claim.
- To limit scope for uncertain, emotionally draining and financially costly court proceedings in the event of the future breakdown of the marriage.

Differences between Pre-Nuptial agreements and Post-Nuptial Agreements

Before the Supreme Court decision in *Radmacher v Granatino* [2010] UKSC 42, it was thought that post-nuptial agreements were more likely to be upheld by the court. This distinction had been given significant weight in *MacLeod v MacLeod* [2008] UKPC 64, where the Privy Council of the High Court of Justice of the Isle of Man found that only post-nuptial agreements were contractually binding.

However, the Supreme Court has now clarified that there is no difference in the legal status of pre-nuptial agreements and post-nuptial agreements.

Are Nuptial Agreements Binding?

Nuptial agreements are not binding. The parties to a nuptial 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.

Radmacher v Granatino

In *Radmacher v Granatino* [2010] UKSC 42 the Supreme Court considered the weight that should be given to a nuptial agreement by a court when exercising its discretion under [section 25](#) of the MCA 1973. 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." (*At paragraph 75.*)

The key question is: **what is fair?**

The Supreme Court emphasised that the cases of *White v White [2000] UKHL 54* and *Miller v Miller; McFarlane v McFarlane [2006] UKHL 24* established that fairness is informed by the following three principles:

- **Need.** Fairness requires that provision is made for both parties' housing and financial needs. When assessing these needs, the court should take into account a wide range of factors, including the parties' ages, earning capacity and current standard of living.
- **Compensation.** Once needs are met, the court should consider whether one party's financial situation is stronger as a result of how the parties divided their responsibilities within the marriage. For example, one spouse may have given up a potentially lucrative career in the City to become primary carer for the children of the family, leaving the other spouse free to pursue a career which is now going from strength to strength. In such a case, fairness may require the court to award an element of compensation to the financially weaker party.
- **Sharing.** Marriage is a partnership and fairness requires that each partner should be entitled to an equal share of the assets of the partnership unless there is good reason to the contrary. One such reason might be the distinction between matrimonial property generated during the marriage and non-matrimonial property brought by one party into the marriage or inherited by one party during the marriage.

If a nuptial agreement deals with assets and income in a way that, in the absence of the agreement, a court may have adopted applying the principles in *White* and *Miller* it is highly likely the agreement will be upheld by the court.

The court will need to consider the guidance provided by the Supreme Court in *Radmacher* as to what may be fair (or not). 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, as set out in *Radmacher*:

- The agreement must be freely entered into.
- The parties must have a full appreciation of the implications of the agreement.
- It must be fair to hold the parties to their agreement in the circumstances prevailing.

(At paragraph 75.)

Each stage is discussed in more detail below.

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.

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.

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 (*paragraph 77*).
- 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" (*paragraph 78*).
- 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 (*paragraph 79*).
- 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 (*paragraph 80*).
- The strands of need, compensation and sharing identified in *White* and *Miller* are relevant considerations that may inform fairness and may apply as follows:
 - 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 (*paragraph 81*);
 - 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 (*paragraph 81*); and
 - if needs and compensation are adequately covered, a nuptial agreement may effectively prohibit further **sharing** of the assets (*paragraph 82*).

International Considerations: The Foreign Connection

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, as in *Radmacher*.

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 (*at paragraphs 103-108*).

In *Radmacher*, the fact that the parties were nationals of France and Germany, executed a German pre-nuptial 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

The Law Commission began a project in October 2009 to examine the status and enforceability of pre-nuptial agreements, post-nuptial agreements and separation agreements. The Commission uses the term **marital property agreements** to refer to all three types of agreement.

The Commission published its final report on its *Matrimonial Property, Needs and Agreements project* on 27 February 2014, together with a draft nuptial agreements bill (Nuptial Agreements Bill) (*Law Commission: Matrimonial Property, Needs and Agreements (Law Com No 343) (27 February 2014)*). The report 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.
- In the interests of a child of the family.

(*Paragraph 1(2), Schedule A1, Nuptial Agreements Bill.*)

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 the Matrimonial Causes Act 1973 and be subject to the fairness test set out in *Radmacher* (see *Radmacher v Granatino*).

Prerequisites for a Qualifying Nuptial Agreement

To be a qualifying nuptial agreement, 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), (*Paragraph 2(1), Schedule A1, Nuptial Agreements Bill*).

If you would like to understand how your personal circumstances apply to the law, practical issues, your options for managing family change and planning for the future; please contact us by telephone to arrange an appointment or by email FamilyTeam@srb.co.uk

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