

# Pre-nuptial agreements

A pre-nuptial (also referred to as a pre-marital agreement) is an agreement entered into by a couple before marriage and sets out their intentions as to the division of the assets in the event that the marriage breaks down.

Although pre-nuptial agreements are not specifically enforceable in English law they may have evidential weight when the court is exercising its discretion. In deciding how to distribute assets between a divorcing couple the court have to apply Section 25 of the Matrimonial Causes Act 1973. This requires the court to have regard to “all the circumstances of the case”. The existence of a pre-nuptial agreement may therefore be considered a relevant circumstance.

Recent case law suggests that the courts are moving towards an acceptance of pre-nuptial agreements and that the existence of an agreement is tending to guide the court to a more modest award that would have otherwise have been the case in the absence of the agreement. In the case of *K and K (Ancillary Relief: Pre-Nuptial Agreement)* [2003] the Judge considered the parties’ pre-nuptial agreement both as part of all the circumstances of the case and as conduct which it would be inequitable to disregard. He held the Wife to the capital provision of the pre-nuptial agreement, holding it meant certain requirements such as:-

- i) The Wife had understood the agreement
- ii) The Wife had been properly advised
- iii) The Wife had been under no pressure to sign the agreement
- iv) There had been no unforeseen change of circumstance that would make it unfair to hold her to the agreement

The Government (through a Home Office consultative document – Supporting Families in 1998) mooted the possibility of pre-nuptial agreements becoming enforceable. The Home Office draft person suggested that pre-nuptial agreements should fulfil certain safe guards and that if one or more of the following circumstances were found to apply the written agreement would not be legally binding:-

- Where there is a child of the family, whether or not that child was alive or a child of the family at the time the agreement was made.
- Whether under the general law of contract the agreement is unenforceable, including if the contract attempted to lay an obligation on a third party who had not agreed in advance.
- Where one or both of the couple did not receive independent legal advice before entering into the agreement.
- Where the court considers that the enforcement of the agreement would cause significant injustice (to one or both of the couple or a child of the marriage).
- Where one or both of the couple have failed to give full disclosure of assets or property before the agreement was made.
- Where the agreement is made fewer than 21 days prior to the marriage (this would prevent a nuptial agreement being forced on people shortly before their wedding day when they may not feel able to resist).

Although pre-nuptial agreements are not binding on the courts their existence may well be taken into consideration and affect the division of the assets. For those people who therefore have substantial assets and are marrying someone of more modest means or for those people getting married for a second time would be advised to consider entering into a pre-nuptial agreement.

For advice on pre-nuptial agreements or any other family matters contact **Gorvins Solicitors Family Team** at:

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