



Pre and Post-Nuptial Agreement Packages

by Philip Barnsley – Head of Family Department

Protecting
your wealth

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The family department at Higgs & Sons deals with all aspects of private family work. All of our team are members of Resolution, First for Family Law and our department head, Philip Barnsley, is Chair of the West Midlands regional committee.

We are committed to working within Resolution's code of practice and seek the constructive resolution of cases wherever possible. We work closely with financial advisers and professionals and deal with complex and contested cases at all levels.

Higgs & Sons has its headquarters at the Waterfront, Brierley Hill, the largest legal office in the Black Country and works with clients and professionals from across the Midlands and the UK.

Our 180-strong team provides advice across a diverse range of disciplines from private client and family law to corporate and commercial, employment and private crime.

We are committed to developing long-term relationships with our clients and our professional contacts and pride ourselves on providing trusted advice.



Pre and post-nuptial agreement packages

We offer pre and post-nuptial agreement packages to those wishing to protect their assets.

The package includes the drafting of a pre-nuptial agreement, including negotiation of terms where necessary. Following marriage, the pre-nuptial agreement will then be reviewed and varied into a post-nuptial agreement.

The cost of each package will be tailored and bespoke to each individual client and agreed prior to the commencement of any work. If a pre or post-nuptial agreement is already in place, we also offer a full review service of the existing agreement on an hourly rate basis, to include any amendment and re-signing.

Pre-nuptial agreements

Pre-nuptial agreements – what are they?

Pre-nuptial agreements are made between two parties who intend to marry, setting out what will happen to their assets upon permanent separation.

A pre-nuptial agreement should be used when:

- Assets were acquired prior to the relationship
- There is a disparity in income
- There are family or other trusts
- One or both parties have received, or will receive, a substantial inheritance
- There have been significant gifts made to one or both parties
- There is a family business

Are pre-nuptial agreements legally binding?

Pre-nuptial agreements can only become legally binding if legislation is passed to that effect. However, the Supreme Court has now ruled that it will be inferred that parties to a pre-nuptial agreement intend to be bound by their terms and this will give decisive weight to pre-nuptial agreements in divorce proceedings.

How can it be ensured that a pre-nuptial agreement will be taken into account?

It cannot be guaranteed that a pre-nuptial agreement will be decisive, however, the body of case law suggests that the following steps should be taken to maximise the weight given to any agreement:

- Both parties should have obtained independent legal and financial advice
- The agreement should be signed as far in advance of the date of marriage as possible
- There has been no duress on either party to enter into the agreement
- There has been an element of financial disclosure
- The contents of the agreement must be reasonable
- The agreement must make full provision for any children

Latest developments in pre-nuptial agreements

The Supreme Court handed down their judgment in the leading case in this area on 20 October 2010.

The case of Radmacher v Granatino concerned an estimated fortune of £103m. The parties entered into an agreement four months prior to their marriage, waiving each other's rights to make financial claims.

The Court of Appeal upheld Ms Radmacher's argument that the freedom to enter into a binding contract is at the heart of every modern commercial and legal system and awarded Mr Grantino provision in his role as a father, reducing his award of £5.5m received from the High Court.

Mr Granatino's appeal to the Supreme Court was dismissed by a majority of 8 to 1. The Supreme Court went further, stating that pre-nuptial agreements should be given decisive weight, provided that the parties had entered the agreement freely, even if there was limited financial disclosure and the parties were indifferent to that fact, provided they had a full appreciation of the implications of the agreement.

The court also stated that after their judgment, courts will naturally infer that parties entering into pre-nuptial agreements governed by English law, intend them to be binding.

However, the court also stated that they would not uphold any agreement if the prevailing circumstances made it unfair to do so.

Where does all this leave the position now?

Whilst pre-nuptial agreements are not formally legally binding, they have now been clarified to a large degree by the highest court in English law. They are a clear record of the parties' intentions and should be given decisive weight by the court on divorce, provided they have been entered into freely, the parties fully appreciate the implications and the terms of the agreement are reasonable.

It has prompted fresh calls for the UK to reform divorce laws along the lines of European systems where both pre and post-nuptial agreements are binding. The Law Commission is due to report in 2012 on whether a change in the law should be made to ensure pre-nuptial agreements are fully enforceable. A draft bill is expected to be introduced in parliament in late 2012 and the prospect of a new law in place by 2014.

Until then, the Supreme Court ruling provides clear guidelines to practitioners and clients alike. Those wishing to protect family or personal wealth before entering into marriage should benefit from the generosity of the English courts.

Post-nuptial agreements

Post-nuptial agreements – what are they?

Post-Nuptial Agreements are made between two parties dealing with provision for maintenance, children and division of property in the event of their marriage breaking down. The agreement can be entered into during the marriage or even after separation.

When should a post-nuptial agreement be used?

A post-nuptial agreement should be used when:

- Assets were acquired prior to the relationship
- There is a disparity in income
- There are family or other trusts
- One or both parties have received, or will receive, a substantial inheritance
- There have been significant gifts made to one or both parties
- There is a family business

Are post-nuptial agreements legally binding?

If properly executed, a post-nuptial agreement can be binding upon the parties as a maintenance agreement under section 34 of the Matrimonial Causes Act 1973. The following steps should be taken to increase the possibility of the agreement being binding upon the parties:

- Both parties should have obtained independent legal and financial advice
- There has been no duress on either party to enter into the agreement
- There has been an element of financial disclosure
- The contents of the agreement must be reasonable
- The agreement must make full provision for any children
- The agreement should clearly state that the parties intend it to be considered a maintenance agreement under section 34 of the Matrimonial Causes Act 1973.

Latest developments in post-nuptial agreements

The 2008 case of MacLeod involved an American couple living in the UK and is likely to herald a rise in popularity of post-nuptial agreements. The couple signed a pre-nuptial agreement on their wedding day. They varied the pre-nuptial agreement twice in the form of post-nuptial agreements. The marriage broke down and the husband argued that the latest post-nuptial agreement should be upheld, with the wife arguing that a more favourable settlement should be made in her favour.

The court ruled that the parties had entered into the post-nuptial agreement with the benefit of legal advice and knowing their respective financial positions. Although the court may have made a different order, they held that the agreement was binding as a maintenance agreement under section 34 of the Matrimonial Causes Act 1973.

The Supreme Court in Radmacher have clarified the situation further and stated that whilst the courts will infer that parties' entering post-nuptial agreements intend them to be binding, the court will still refuse to uphold such agreements, if the prevailing circumstances make it unfair to do so.

Where does this leave the position now?

Whether or not you have a pre-nuptial agreement in place, a post-nuptial agreement is strongly recommended. Those who have a pre-nuptial agreement should ensure that it is reviewed and re-signed as a post-nuptial agreement and kept up to date.

Those who already have a post-nuptial agreement should regularly review and update their agreement, so that it fairly reflect their circumstances and ensures that it remains current and binding.



To find out how Higgs & Sons and our family department can support you and your clients or for further information on our pre and post-nuptial agreement packages, contact:

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