

iGuide: Prenuptial and Other Relationship Agreements

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Many people on entering a relationship, during a relationship or on its termination want to enter into an agreement about financial matters, to record what agreements have been reached, expectations for the future or to resolve and avoid any litigation.

This iGuide sets out in summary the position and what can be done.

Unlike many other countries, the starting point is that the English family law courts cannot be bound under any circumstances by any agreements, arrangements or other forms of settlement. The court has an absolute discretion to do what is fair and just in every case. This may mean in some circumstances and after consideration the courts fully accept agreements reached between the parties, ignore them entirely or partially accept them.

In the past decade there has been a much greater awareness of marital agreements, and English Courts have given increasing weight to agreements reached between couples.

In October 2010 the Supreme Court gave judgment in the case of *Radmacher*. This judgment significantly changed the status and weight given to marital agreements including pre-nuptial agreements. The court held that

“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 their agreement.”

The consequence now is that the English courts will give weight to an agreement and, in some circumstances, the terms of the agreement will be upheld.

There is greater encouragement to enter into marital agreements now because there is a greater likelihood that they will be upheld at court.

England will often require at least the following before it will give any material consideration to any agreement:

- Each party has had separate independent specialist legal advice or chosen not to obtain it
- Each party has given full and frank disclosure of their financial and other relevant circumstances
- There has been no duress, misrepresentation or mistake • the agreement is within the general parameters of what a court would otherwise consider was fair
- It provides for the needs of each and of any children
- Each party fully understood the implications of the agreement
- Each party has been given sufficient time to consider the agreement (it is commonly felt that pre-marital and pre-civil partnership agreements should be entered into at least 28 days prior to the wedding or civil partnership ceremony)

In these circumstances, the court is much more likely to follow the terms of an agreement even if it might otherwise have made a different order.

There are various types of agreements that may be considered by the family courts:

Pre-nuptial Agreements (or Pre-Marital Agreements)

These are not *binding* on any divorce or civil partnership dissolution in England (even if they would have been binding in a country where an agreement was entered into). However, the family court will take them into account if the above conditions have been complied with. In essence, their success may often depend on what developments, especially

unexpected developments, have occurred since the agreement was entered into.

Marital Agreements (or Post- Marital agreements)

These are often in similar terms to pre-nuptial agreements, although entered into during the period of the marriage.

Civil Partnership Agreements

These are agreements entered into either in advance of, or after, a Civil Partnership, and are treated in the same way as the marital equivalents.

Separation Agreements

Separation agreements are entered into between a couple, often after legal advice, on the breakdown of relationship, with the intention that the contents of the agreement will govern their financial affairs on separation as a full settlement and ultimately be made into a court order.

Mediation Agreements

Discussions in mediation take place on a '*without prejudice*' basis meaning that they cannot be openly referred to in court if the negotiations breakdown. Agreements made in mediation are also treated in this way, unless and until the parties have confirmed that they are both prepared to go ahead with the mediated agreement after legal advice.

Cohabitation Agreements

These are agreements to govern the financial arrangements between cohabiting couples. This is a purely contractual arrangement and provided the conditions above are generally complied with, there is every good reason to believe that the court will follow the agreement as if it were a contract.

International Pre-nuptial and Marital Agreement Issues

Where any agreement is likely to have any international element, it is wise to be entered into after consultation with lawyers in the other countries with which the family may have had or may have in the future some connection.

In these cases these are some of the issues that you must bear in mind:

Some pre-nuptial agreements contain jurisdiction clauses. These state that if there are subsequently any court proceedings regarding the relationship, then they should take place in a specific country. The English courts will give these clauses consideration when deciding which country should deal with a divorce or civil partnership dissolution or other family proceedings, but may not be bound by them (unlike some other countries). For this reason it is very important that advice is taken, possibly in more than one country, before any agreements are entered into.

Some agreements contain applicable law clauses. These clauses state that if there are subsequently any court proceedings regarding the relationship, then the couple want a particular country's laws to be applied, regardless of where the divorce or civil partnership dissolution takes place. This means that sometimes a court will apply the law of another country. England will only ever apply English law and therefore will construe any applicable law clause as a jurisdiction clause.

The English courts are cautious about foreign pre-nuptial and other marital agreements. This is because they have often been entered into without independent legal advice and disclosure, sometimes under time pressure and duress and they are often in terms which an English court may consider unfair. The English courts have sometimes ignored these agreements, which caused much disquiet abroad where such agreements are binding, irrespective of how unfair they may be. This has also changed since the UK Supreme Court decision in *Radmacher* and foreign marital agreements will be considered and given greater weight if the parties fully understood the implications of entering into them. We believe that despite being unable to state they will be upheld, for some couples in some situations prenuptial or other relationship agreements can be very valuable, including for thinking through in advance, expectations on financial matters and other situations which can arise during a relationship. Commonly they involve seeking to ringfence various assets of a particular party, often comprising inheritances or pre-acquired assets.

For more information about prenuptial and other agreements, or other questions you may have, please contact a member of our specialist family law team.

You can do so via our website, by email to enquiries@iflg.uk.com or telephone on +44 (0) 203 178 5668.

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