

FAMILY LAW SERVICES

PRENUPTIAL AGREEMENTS

Burgess Mee

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We are an award winning family law firm. We are experts in our field and are based in Clapham Common and Liverpool Street with meeting rooms in Hammersmith.



At Burgess Mee our team provides expert advice on the drafting, negotiation and execution of prenuptial and postnuptial agreements. We also have considerable expertise in interpreting, implementing and challenging such agreements.

WHAT IS A PRENUPTIAL AGREEMENT?

A prenuptial agreement ('prenup') is a contract or deed that a couple enters into before they get married. Although England does not have a long history of such agreements, they are commonplace in many other countries including across Europe and the United States.





HOW DO THEY WORK AND ARE THEY BINDING?

An English prenup seeks to anticipate and provide for the financial claims that might be made if the marriage does not last. English agreements usually mirror the way our law has developed with consideration of each party's needs and how these can best be met. Usually, the parties reach a compromise position so that there are some clearly defined parameters for resolving the financial claims that would arise at the end of the marriage.

Although they are not automatically binding, the case of *Radmacher v Granatino* in 2010 means that if a prenup is “freely and voluntarily entered into”, the starting point will be that the parties are held to its terms, unless there are other factors present which reduce its impact and mean that it would be unfair to uphold it. These include the absence of financial disclosure, a lack of independent legal advice, inadequate financial provision for one of the parties, or the presence of duress or undue pressure on one party.

In addition to this, in 2014 the Law Commission report proposed the creation of a category of prenup called a ‘qualifying nuptial agreement’ or QNA. These were to be entered into at least 28 days prior to the date of the marriage. It is commonplace, therefore, for family lawyers to work to a deadline of 4 weeks prior to the date of the marriage to ensure that an agreement would become a qualifying nuptial agreement if the law were to change.

There is currently a further report which has been written by the Law Commission dealing with matrimonial claims and needs which has considered the question of reform in this area. One suggestion has been to make these agreements binding on both parties unless needs have not been met.

WHY MIGHT PARTIES WANT TO ENTER INTO A PRENUP?

Sometimes the parties wish to enter into a prenuptial agreement where they have already been married and divorced. They wish to avoid financial remedy litigation in the event of the ending of this subsequent marriage or where one of them expects to receive a significant inheritance they want to protect from any future divorce litigation.

A prenup can also be used to protect assets owned before the marriage, such as a business. This is particularly important as English matrimonial law may deem the increase in value during the marriage of a pre-existing asset such as a business or property as an asset to be shared between the parties on divorce. Likewise, the courts have the power to order that inherited assets that have come from one spouse's side, but which have been used (or "matrimonialised") during the marriage, should be shared between the parties. The prenup is an essential part of a wealth planner's toolbox.

WHAT IS THE DIFFERENCE BETWEEN A PRENUPTIAL AND A POSTNUPTIAL AGREEMENT?

A postnuptial agreement (or 'postnup') is an agreement entered into after the marriage, whereas a prenuptial agreement (or 'prenup') is entered into before the marriage. For a period of time prior to the Radmacher decision, it was thought, based on a Privy Council decision, that postnups were binding while prenups were not. The decision in Radmacher laid that idea to rest. Where the parties enter into a prenup less than 28 days prior to the marriage, it is not uncommon for them to agree to enter into a postnup in identical terms very shortly after the wedding.

WHY MIGHT PARTIES ENTER INTO A POSTNUP?

Sometimes the spouses agree to enter into a postnup when the marriage encounters difficulties, the idea being that financial claims that might arise were the marriage to break down can be dealt with in principle to give the couple peace of mind to work on their relationship.

Another important reason for entering into a postnup is when a couple moves to another country where the financial claims on divorce are very different to those in the country they are leaving. The differences between financial outcomes on divorce can be stark, particularly for couples moving to London where the English court is typically more generous to the financially weaker party than courts in other jurisdictions. The couple might wish to enter into a postnup to have more certainty and predictability about what might happen if they were to divorce.

WHAT SORTS OF PROVISION MIGHT A PRENUP MAKE?

The parties are free to agree whatever provision they think is fair but in general, prenups broadly fall into three categories:

1. A “ring fencing” agreement – each party retains their own assets and particular assets (which they anticipate owning in the future) are categorised as being kept as separate property.
2. A “needs provision” agreement – there can be a formulaic approach to ensuring that one party has their needs met. This might include housing provision being made for them outright or on the basis that the housing provision/capital returns to the paying party when any children turn 18 or 21 or leave home.
3. A “tariff” provision – for each year (or month) of marriage, provision is made on the basis of an increasing lump sum. Sometimes there is a cap on the overall level of provision so that one party’s wealth cannot be eroded by more than a particular percentage.





WHAT DOES THE PROCESS LOOK LIKE?

Often the process involves one party having an initial meeting with a solicitor. The solicitor will sketch out some basic terms and a prepare a draft agreement.

The solicitor would then advise the client in writing when they give the draft agreement to the client. Once the agreement has been agreed between the drafting solicitor and that client, it is sent to the other party. The other party will then need to take their own advice on the draft. It is possible for the drafting lawyer to recommend lawyers for the other party to consult.

The party drafting the agreement, usually the financially stronger party, can pay both parties' legal fees and this does not prejudice the independence of either party's legal advice. Financial disclosure schedules need to be attached to the agreement so that the parties are making an informed decision. This may be accompanied by documentary evidence in support of any values or there may be a round of further enquiries from both parties so that they can be satisfied they have the complete financial picture. Once the wording of the agreement is approved by both parties, they then execute the agreement.

WILL IT BE REVIEWED DURING THE MARRIAGE?

It is quite common for such agreements to have review clauses where the parties agree to review the agreement on the happening of, say, the fifth anniversary of the agreement or the marriage or on the birth of any children of the family. Careful advice should be taken about the pros and cons of a review clause.

INTERNATIONAL

As every country's legal system is different, an agreement drafted in one country will not necessarily apply in another country. Accordingly, where a party has a connection with another jurisdiction it may be necessary to take advice in that jurisdiction to ensure that the agreement works in more than one country. We have links with lawyers in other jurisdictions and have drafted agreements which work across borders, including with the United States, France, Italy, Scotland, Spain, South Africa, New Zealand and Australia. Peter Burgess is a Fellow of the International Academy of Family Lawyers, an international network of family lawyers in each jurisdiction.





CHALLENGING PRENUPTIAL AGREEMENTS

We have significant expertise in the challenge and implementation of prenuptial agreements. The firm appeared in *AH v BH* and also in *Cazalet v Abu-Zalaf*. Both cases involved challenges to and the implementation of a prenuptial agreement.

Sometimes a prenuptial agreement can be challenged on the basis that one party did not receive the correct financial disclosure or on the basis that the implementation of the provision would lead to manifest unfairness. Despite this, these agreements do carry significant weight. Many of the recent cases about prenuptial agreements (with the exception of *AH v BH*) involve judges saying that these agreements should be followed as far as possible.



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If you would like to speak to one of the partners about drafting a prenuptial or postnuptial agreement or challenging or implementing one, please do speak to us.



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