Top five myths about nuptial agreements

Nuptial agreements, namely pre-nups and post-nups, are commonly associated with the rich and famous and can often be sensationalised by popular news stories. This has led to widespread belief that nuptial agreements are unfair, worthless and unromantic, when in fact they can be a sensible, fair and transparent way to discuss the financial picture on marriage and agree the outcome if ever it broke down.

In this article The Forsters Family team dispel the five most common myths about nuptial agreements.

Myth 1

Nuptial agreements are not recognised in this country

This is one of the most common misconceptions about nuptial agreements. Whilst nuptial agreements do not have a statutory footing in England and Wales (laws are different in England & Wales and Scotland), nuptial agreements are likely to be upheld by the English courts if they are drawn up properly and meet the required safeguards. This is due to the landmark case in 2010 of Radmacher v Granatino, which saw the Supreme Court make clear for the first time

that a nuptial agreement will be upheld unless one person can show why it should not be. The Supreme Court said 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 the agreement".

Since this decision, the Law Commission (an independent body which keeps the law under review) published a report in 2014 with recommendations. It recommended the introduction of "qualifying nuptial agreements", which would enable couples to make binding arrangements for the financial consequences of divorce. To be a "qualifying nuptial agreement", it would have to meet certain procedural safeguards: it cannot be used to contract out of fairness/meeting the "financial needs" of each other and of any children.

Although the Law Commission's recommendations have not been enacted yet, couples should expect to be held to the terms of their nuptial agreement if they meet four key requirements:

1. Its terms must be fair (viewed against the circumstances at the time of divorce)
2. It must have been entered into without duress - signed at least 28 days before marriage (see myth four)
3. Both parties must have fully understood the terms, with both having obtained independent legal advice (or had the opportunity to)
4. Full financial disclosure must have been provided.

Where a couple move to England having signed a nuptial agreement in another country, they ought to take advice about whether that agreement would be recognised in England and, if not, enter into a fresh agreement here which respects these principles.

Myth 2

They're only for the very wealthy

Although nuptial agreements have traditionally been thought of as the preserve of the very wealthy, there are many different reasons for getting one. Examples include:

A young professional couple without children wish to keep their assets ringfenced as they accumulate savings from earnings

- An older couple, where one/both of them has been married before, want to pool their resources to a limited degree (e.g. buying a house together) but otherwise keep their assets separate, so that they may leave them to children from a previous marriage
- Where one of the spouses-to-be is a widow/widower and she/he want to carve out and protect assets left to them by their deceased spouse, perhaps for children or charitable purposes
- If there are expectations of future inheritances on one/both sides, a couple may wish to make clear what would not stand to be shared on divorce
- If the "bank of mum and dad"/another family member is gifting the couple money e.g. to put towards a property purchase, it is sensible to have a nuptial agreement saying that in the event of divorce that money would stay with the spouse whose family gifted the money
- A family may wish to protect wealth that has been built up over many generations. There may also be assets that have been passed down the generations and have great significance beyond monetary value, such as a family heirloom or landed estate that a couple are going to live on once married.

It must be remembered that needs trump all. If the effect of ring-fencing assets is that the other spouse is left without money for a house on divorce (especially where there are children), a court may seek to raid some of the assets referred to above. Again by having a nuptial agreement one can be creative (for example by

saying that any money provided for housing will be "loaned" from one spouse to the other on divorce and return to them/their estate on the death of the spouse who has been loaned the money or once the children are grown up)

Myth 3

It's about one person protecting all of their assets and will create disagreement when we should be happily planning for our wedding; how unromantic

Not at all. It is not about leaving all of the money on one side on divorce, as (rightly) the court would override a document which did that. It is about avoiding the huge acrimony and cost which can be associated with litigation on divorce, by having a sensible discussion before/after marriage about what the financial landscape would look like on divorce. Having an open conversation at the beginning of the marriage about how you wish to treat your assets if you were to divorce is sensible. Many couples find the discussions around a nuptial agreement helpful; when done ahead of a wedding, as a couple going into marriage, it means they start married life with open eyes about each other's finances and having had discussions about questions like will we have children, where will we live, will we both work, etc.

Although the expectation is that the lawyers will "go into battle", most couples find the reality different. Although you both have to instruct a lawyer so you get independent legal advice, you control the process. Most lawyers will suggest face to face discussions, involving the clients as appropriate, to iron out any differences about the terms, sometimes in the collaborative process. It is also possible to see a mediator together to agree the headline terms, before instructing solicitors to work from those agreed principles.

Myth 4

A pre-nup can be signed just as you're about to walk down the aisle

Often, a couple will make contact with solicitors about a nuptial agreement in the days leading up to their wedding. Generally, to stand the greatest chance of being upheld on divorce, a pre-nuptial agreement should be signed at least 28 days before the wedding date. It is less likely, if that is the case, for one person to say on divorce that they were under pressure to sign; it also gives proper time for financial disclosure to be prepared and legal advice to be obtained.

Generally we advise clients to start discussing a nuptial agreement/instruct solicitors at least 3-4 months before their wedding date, to give time for proper discussion in a period when they will be preoccupied with wedding planning too.

If a pre-nup is not signed at least 28 days before the wedding, all is not lost. Sometimes the negotiations have started many months beforehand and it just happens that the signing is delayed; in those cases we can include wording in the document explaining that the document had been under discussion for many months and there was no duress. Where the idea of a pre-nup is raised too close to the wedding, we usually advise that rather than signing a document which will be rushed, ill-thought through and prone to later accusations of duress, the couple should sign an agreement then to enter into a post-nuptial agreement within a couple of months of their wedding.

Myth 5

You can only sign one before you get married

Most people have only heard of a "pre-nup". However, it is possible to have a "post-nup" at any time after you marry. The circumstances in which a post-nup may be entered into include:

- If there has not been time to have a pre-nup (or a detailed/well thought through pre-nup) before the wedding
- Where there has been a considerable change in circumstances since a pre-nup was entered into which may make its terms unfair (e.g. where one spouse falls seriously ill or the financial picture changes in an unexpected way, although pre-nups can try to anticipate

those eventualities)

- There has not been a pre-nup but then one party comes into unexpected wealth, which they wish to protect if there is a divorce/ preserve to leave for children
- There are difficulties in the marriage and although no conclusion has been reached about divorce, the couple wish to have an early discussion about what the financial terms of divorce may look like
- A conclusion has been reached that there will be a divorce, but for tax or other reasons the couple wish to remain married and leave their asset structure unchanged for a while. A post-nup can set out the detail of how the finances will operate on separation before divorce, and on ultimate divorce (as well as giving thought to what would happen if one party dies after separation but before divorce)
- Where there has been a pre-nup entered into in another country, the couple subsequently move to/acquire another connection with England and are advised that their pre-nup would not be respected here. Sometimes that discussion will lead to more generous provision being made in the document here than was the case overseas, so that its terms are regarded as fair in the eyes of the English court.

It is right to say that it is often more difficult to persuade one spouse to sign a post-nup than it is a pre-nup. With a pre-nup there is the focus of the wedding and it is usually clear why one person would want a pre-nup. In post-nup discussions there is often no particular "hook" to persuade the other spouse to engage in the discussion/sign the document. People can see it as a suggestion that the marriage is in difficulty, whereas the suggestion is usually made for one of the reasons set out above. Often an incentive to sign a post-nup can be to suggest terms now which are more favourable than if there were a divorce now without a nuptial agreement, but which over time become less so.

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