



# Nuptial Agreements

**The definitive guide  
for couples**

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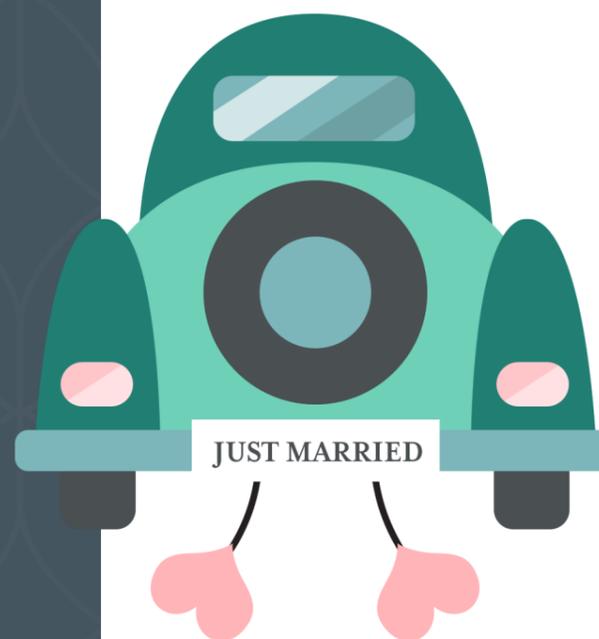
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They are absolutely at the top of their game while really going the extra mile. Chambers HNW Guide

<https://www.forsters.co.uk/nuptial-agreements>

## CONTENTS

WELCOME	2
AN INTRODUCTION TO NUPTIAL AGREEMENTS	3
TOP FIVE MYTHS ABOUT NUPTIAL AGREEMENTS	4
THE BENEFITS OF SIGNING A NUPTIAL AGREEMENT	5
TIPS ON HOW TO BRING UP THE TOPIC OF A NUPTIAL AGREEMENT WITH YOUR PARTNER	11
THE PRACTICAL PROCESS OF OBTAINING A NUPTIAL AGREEMENT	13
DO NUPTIAL AGREEMENTS HAVE A PLACE IN MODERN FAMILIES?	17
INTERNATIONAL ASPECTS TO A NUPTIAL AGREEMENT	19
NUPTIAL AGREEMENTS AND WEALTH PROTECTION	21
THE FORSTERS FAMILY TEAM	23



The Forsters Family team want to open up the conversation about nuptial agreements, to dispel some myths and to inform people about the benefits of having one and the practical process.

Over the following pages, we will be providing insight into and guidance on pre-nups and post-nups in the hope of bringing clarity, reassurance and understanding. Whether it be how to raise the idea of a pre-nup with your other half, how to incorporate one into your wedding plans or what the process was like for someone who is now happily married, we hope to tackle the most commonly asked questions.

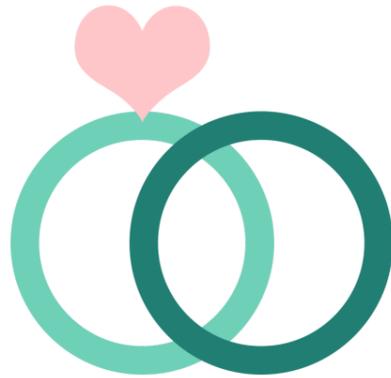
The aim is for people to feel comfortable about discussing nuptial agreements, so that an informed decision can be made about whether signing one is right for them.

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We are giving our insight and guidance on pre-nups and post-nups in the hope of bringing greater clarity to what can be seen as a ‘taboo’ topic.”

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## AN INTRODUCTION TO NUPTIAL AGREEMENTS

Engagements and wedding planning are joyful and heart-warming experiences and too often any talk of a pre-nup is viewed as being at odds with this special time. But mind-sets are changing, with more and more couples signing nuptial agreements, valuing the certainty and financial transparency that such an agreement brings and rejecting the notion that nuptial agreements are unromantic. Nevertheless, many feel apprehensive about raising the subject of nuptial agreements, partly due to the lack of impartial information and often influenced by popular misheld beliefs.

### WHAT IS A NUPTIAL AGREEMENT?

The term **“nuptial agreement”** refers to both pre-nuptial and post-nuptial agreements, i.e. those entered into before marriage (“pre-nup”) or made after marriage (“post-nup”). The aim of the agreement is to set out what the financial settlement would look like if a couple ever got divorced and to “ringfence” any assets that one or both of them is bringing to the marriage, or that they

may inherit. An agreement helps to provide certainty and security if a marriage breaks down and is also a good way of entering marriage with full knowledge of the financial picture. It gives couples more control to make their own arrangements for the future, rather than leaving everything up to chance (and potentially costly court proceedings in the event of divorce).

## 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.

# 1

### 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

# 2

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:

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

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Although the expectation is that the lawyers will “go into battle”, most couples find the reality different.

## 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).

# 3

## 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.

# 4

## 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.



# 5

## 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.

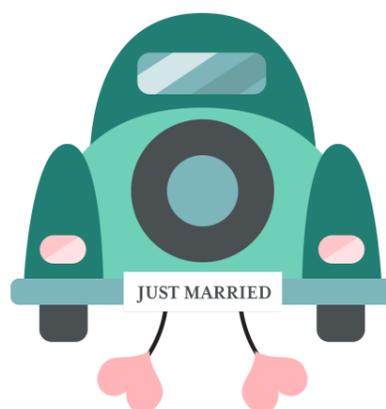
It is right to say that it is often more difficult to persuade one spouse to sign a post-nup than it is a pre-nup. With a pre-nup there is the focus of the wedding and it is usually clear why one person would want a pre-nup. In post-nup discussions there is often no particular “hook” to persuade the 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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**Generally we advise clients to start discussing a nuptial agreement 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.**

The benefits



## THE BENEFITS OF SIGNING A NUPTIAL AGREEMENT

However many years you have been together, financial conversations can be difficult. Raising the subject of a nuptial agreement with your partner requires you to be sensitive, rational and honest. The good news is it can help you to build trust as a couple and can underpin your relationship. You can begin your future together by being open and honest about difficult subjects.

The benefits of signing a nuptial agreement are plentiful, enabling you to:

### Start the discussion early about financial planning

If the financial discussion is broached as more of a general and broader conversation about your financial planning as a couple, this can help to pave the way for future constructive discussions. Taking this first step might feel awkward initially, but once this is out of the way it can be a positive step for you to take as a couple.

### Benefit from an open dialogue from the outset

Starting such discussions can help you to confront important and often difficult money conversations early and therefore reducing the potential for fall-out later. The real benefit of a nuptial agreement is the up-

front, honest communication couples can have about their intentions during marriage and beyond, focusing together on their financial arrangements and practical commitments.

### Lay the foundations for a happy relationship

Creating a forum for an honest and open dialogue can enable couples to plan together from the outset when they are most in love and in tune with each other. Conversely, financial issues are often at the route of difficulties between couples, so a healthy discussion, before these complexities arise, can only be constructive. Such agreements can underpin a solid partnership; good communication is known to be a pillar of successful, happy relationships.

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### Provide a degree of certainty about your future

If you did separate in years to come, a nuptial agreement would aim to make the divorce process easier and the outcome more certain, without costly negotiations about finances. The very act of discussing and trying to come to an agreement will help to reveal what you have in common and where you are apart.

### Promote autonomy and create a tailor-made document to suit your specific situation

A nuptial agreement can help to give couples the freedom to decide their future financial destiny rather than leaving that power to a judge in the family courts. It is a way for a couple to draw their own rules rather than relying on a default legal system which may or may not accommodate individual circumstances.



## Tips on how to bring up the topic of a nuptial agreement with your partner

**T**he prospect of discussing a nuptial agreement with your partner may seem daunting but if approached in the right way it can form part of an open and honest conversation about your future together. From our experience, when the subject is brought up sensitively, your other half will most likely welcome the opportunity to discuss finances and to provide greater certainty for the future.

In some cases, you will need to give your partner some time to consider the idea, so do be patient. More often than not, initial reservations are alleviated once the common misconceptions are better understood. The key is to keep the discussion positive by outlining the benefits for both sides and provide reassurance that a nuptial agreement is a document to create jointly.

Here are our tips on how to bring up the topic of nuptial agreements with your partner:

### Avoid beginning the conversation with, 'I want a nuptial agreement'

The subject needs to be handled delicately as part of broader discussion about financial planning. If you begin sensitively, you are more likely to achieve the outcome you want.

### Outline the positives

Think carefully about the benefits for you and your partner. For example, the freedom for you to agree on financial outcomes and provide certainty for your future.

### Agree the main headlines together

If you and your partner can agree the central elements of the agreement before your lawyers draw up the document, this will help to minimise potential areas of disagreement and can pave the way for a constructive negotiation.

### Reassure your partner

Let them know that your intention is to protect their financial independence as well as your own. The objective is to keep the two of you, as a couple, in control of your finances.

### Be transparent

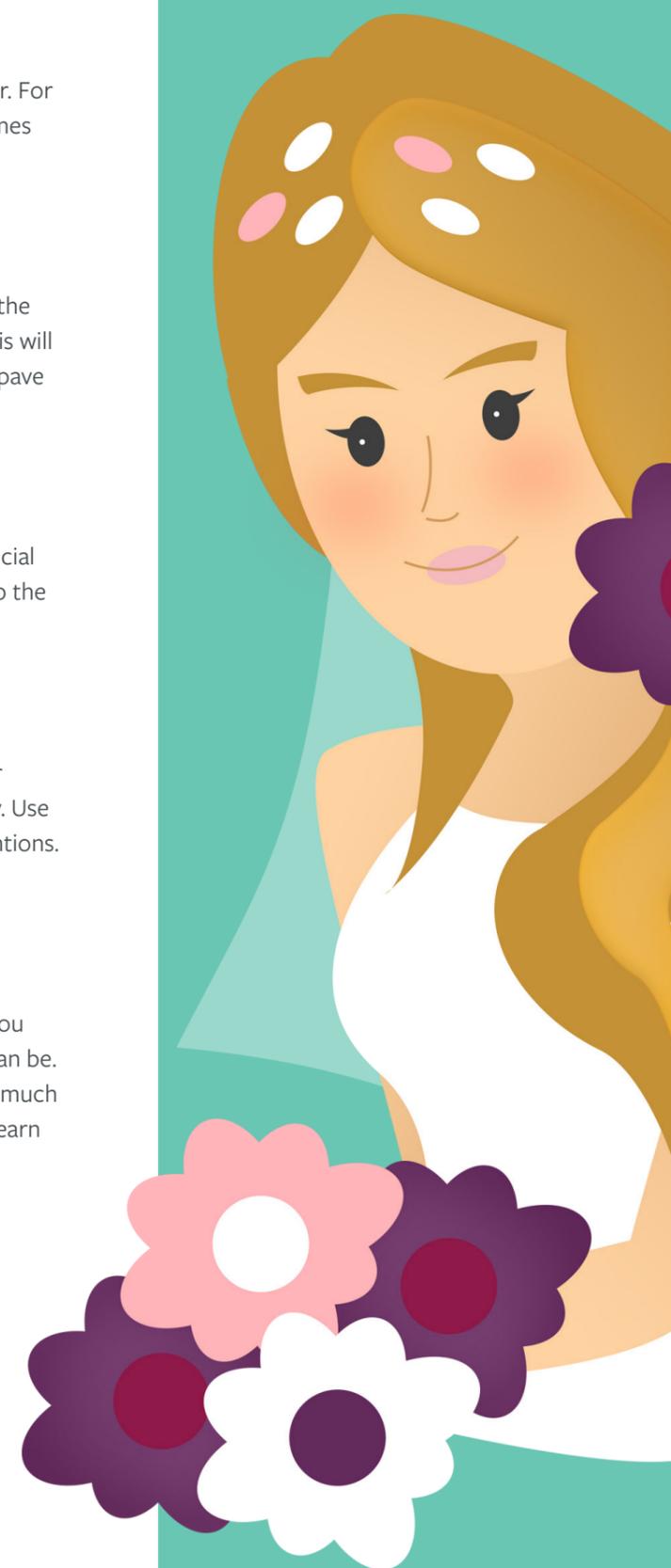
This is the time to be completely honest with your partner about your finances and what is important to you and why. Use this as an opportunity to talk about expectations and intentions.

### Listen carefully

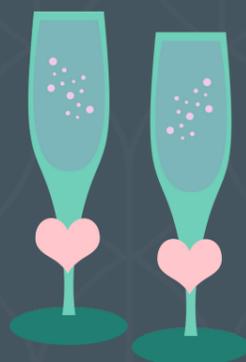
This is the best way to avoid misunderstandings. Ask your partner their opinion and explore their hopes. The more you work on this together, the more positive the discussions can be. It is more than likely than not that neither of you will have much practical experience with nuptial agreements, so you can learn together.

### Have faith and be prepared to persevere

It is important that you can, as a couple, have difficult conversations when necessary and honestly express your feelings. Such conversations are part and parcel of long-term relationships. If you do not get the answer you want, allow your partner time to cool off and re-evaluate your points. You will get there.



The process



## THE PRACTICAL PROCESS OF OBTAINING A NUPTIAL AGREEMENT

The process of entering into a nuptial agreement may not be as difficult as you think. We have pulled together a five step guide.

### 1 Discuss the possibility of a nuptial agreement with your partner

Some people choose to see a solicitor to find out a bit more information about nuptial agreements and the process of obtaining one before they raise the subject with their partner. Others prefer to float the idea with their other half first, to gauge their reaction. For some, this can be a daunting thing to do. We have found that our clients find it helpful to reference some of the benefits of a nuptial agreement, including:

- They offer a degree of certainty so both parties can feel secure and know where they stand
- They reduce the likelihood of acrimonious litigation in the event of divorce (this can be particularly important to people who have gone through a divorce before)
- It is important to them or their family that family wealth is ring-fenced for future generations.

Once the idea of a nuptial agreement has been floated, it is a good idea to discuss a broad outline as to what sort of things it will cover in order to ensure that you are both on the same page and there are no surprises down the line.



### 2

#### Each party engages a solicitor and agrees the headline terms

It is important that both parties have independent legal advice. Therefore each party should engage their own solicitor. At an initial meeting, both parties' solicitors will explain the law on nuptial agreements, the process of the negotiations and how the agreement can be structured so that it contains the terms that best suit your needs.

Typically, the agreement is drafted so that certain assets are excluded from the division that happens on divorce, commonly defined as "separate property". For example, one of you may want to exclude pre-existing wealth that you bring into the marriage. You may also want to exclude the sharing of broader categories of wealth that arise during the marriage, such as gifts and inheritance.

Marital assets, i.e. those owned or acquired jointly, will be treated differently and be open to sharing. These kinds of arrangements will usually be flexible. For example, if one person has defined needs on divorce that can only be met if some of the separate property is also required to meet needs, then those needs can be defined and this can occur (but only insofar as it is necessary).

Another method sometimes used is the 'tariff approach' which is to make specific financial provision using a system where one person receives, on divorce, a lump sum and/or maintenance linked to the length of the marriage. Such provision would probably be capped if the marriage exceeded a certain duration.

Whatever the approach, an agreement would also normally contain provisions as to how the property you own jointly is to be dealt with on divorce and how any marital finances are to operate. It is vital that you take specialist legal advice to ensure that a bespoke document is drawn up, which meets your objectives. In the event of divorce, it must satisfy the court that its terms are objectively fair.

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It is important that both parties have independent legal advice.”

## 3

**Disclose assets and liabilities**

It is important that both parties set out an accurate snapshot of their financial positions so that both go into the process of negotiating the agreement with their eyes open. Both will need to disclose accurately in writing their individual assets and liabilities. Some may feel apprehensive about this at first, particularly if there is family money involved, but it is a good opportunity to have a frank discussion about each other's finances. If either party fails fully to disclose their financial position, it could seriously undermine the agreement.

## 4

**Draft and negotiate the agreement**

Normally the person who initiates the idea of a nuptial agreement will ask their solicitors to prepare the first draft. Once that person is happy with it, it would then be sent to their fiancé/ée or spouse to discuss with their solicitor before proposing any amendments they feel may be necessary. It is important that this process starts, ideally, at least three to four months before the wedding, in order that there is plenty of time for negotiations to take place without either party feeling under pressure.

We try and make sure our agreements are as flexible as possible, to take account of any significant life changes. In some cases couples will include clauses which require the nuptial agreement to be reviewed if a certain life event takes place. This could be after having children, moving abroad or simply after a specified period of time. Other parties may choose to review the document in the event that their financial circumstances change markedly from the point at which they first signed the agreement.

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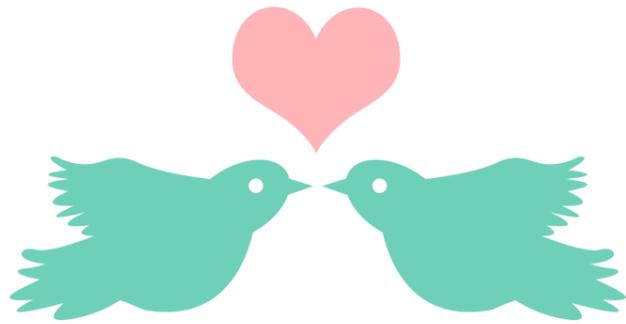
## 5

**Sign the agreement and put it somewhere safe**

Once the terms of the nuptial agreement have been agreed, the document must be signed. The parties can sign the agreement remotely, or they may choose to come in to one of the solicitors' offices in order to sign it together. The only requirement is that the signing of the agreement is witnessed.

It is then common for one of the parties' solicitors to hold on to the original on their file and to provide certified copies to the other parties. Unless you have made provisions to review the nuptial agreement or your circumstances have changed significantly, there should be no requirement to revisit the document again. All you need to do is keep the document somewhere safe and feel reassured that you have greater clarity over your financial future in the (hopefully unlikely) event of divorce.





## DO NUPTIAL AGREEMENTS HAVE A ROLE IN MODERN FAMILIES?

Modern families take many forms. So-called nuclear families (with a husband, wife and two children to whom they are both biologically related) have become gradually less common, with a corresponding increase in the number of people entering into same-sex marriages or civil partnerships, marrying for the second or third time or choosing to remain unmarried.

Regardless of the legal status of your relationship, formal agreements can play a vital role in clarifying and protecting you and your partner’s respective interests.

### Same-sex marriage

Same-sex couples are able to marry in England, Scotland, Wales and since 2020, Northern Ireland. The law dealing with financial provision on divorce is the same regardless of whether the parties are in a same- or opposite-sex relationship. As such, the benefits of entering into a nuptial agreement (for example, to protect of pre-marital or inherited wealth, or to avoid the uncertainty and cost of litigation) are equally applicable to same-sex married couples.

According to the Office for National Statistics, same-sex couples marry at an older age than their opposite-sex counterparts. As a result, there tends to be more time for those in same-sex relationships to establish their

respective careers and build up assets in their own right before marrying. A nuptial agreement could be used to ring-fence these assets, protecting them from being raided on any future divorce.

### Civil partnerships

Civil partnerships were introduced in the UK in 2005, providing legal recognition of same-sex relationships outside of marriage. Civil partnerships and married couples have the same rights and responsibilities in many areas, with only minor differences in how their relationships are legally formed and dissolved. In 2018, the government announced its intention to legislate to allow opposite-sex couples to enter into civil partnerships.

The same principles apply when dealing with financial provision following the dissolution of civil partnerships



### Subsequent marriages

A growing phenomenon is the “silver splicer,” people aged over 60 who may be marrying for a second or third time. It is common for clients in this situation to seek to preserve their assets for any children they have from their previous relationship, without fear of them being raided on divorce. A nuptial agreement can perform this role.

### Informal relationships

According to the Office for National Statistics, cohabiting couples (i.e. those that have not married or entered into civil partnerships) are the UK’s fastest growing family type. Unfortunately, the law treats these couples very differently to their married counterparts, with no automatic financial claims against their partner if their relationship breaks down.

There are a number of practical steps that cohabiting couples can take to protect themselves. Although a nuptial or civil partnership agreement would not fit these circumstances, a cohabitation agreement may well be helpful. This would set out the couple’s respective property, confirming how it is held and what will happen to it in the event of relationship breakdown. Like nuptial agreements, they can help avoid the cost and uncertainty of litigation and allow for the preservation of assets.

as on divorce, with the only difference worth noting being that a (pre- or post-) nuptial agreement may instead be known as a (pre- or post-) civil partnership agreement.

The average ages of couples entering into civil partnerships is 49. Therefore, there tends to have been a significant period of time for wealth to have been accumulated before the civil partnership ceremony takes place. As with nuptial agreements, civil partnership agreements can be a useful tool for ring-fencing these assets.

The Civil Partnerships, Marriages and Deaths Bill recently gained Royal Assent on 26 March 2019 enabling the government to change the law so that opposite-sex couples can form a civil partnership. The Act came into force at the end of 2019, so therefore couples interested in forming such partnerships should reflect upon whether a civil partnership agreement would be beneficial for them.

“Regardless of the legal status of your relationship, formal agreements can play a vital role in clarifying and protecting you and your partner’s respective interests.”

# INTERNATIONAL ASPECTS TO A NUPTIAL AGREEMENT

When one or both parties to a marriage has a connection with another country in addition to England and Wales, there are international considerations and implications to take into account when considering a nuptial agreement. This could be because of where they live, their domicile or nationality, or where their assets are based.

## Where should my nuptial agreement be drawn up?

For international couples, many of whom divide their time between two or more countries, this question requires careful thought. It is commonplace for an agreement to be drawn up in one country and then reflected in another country by entering into a mirror agreement in the other country to ensure that the agreement would be upheld in accordance with that country's laws.

In practice, however, this can be fraught with difficulty because it can be difficult to translate legal principles from one country to the next.

The most logical country in which to "root" the nuptial agreement is the country in which the couple intend to spend the early years of their marriage, and to review this as necessary if the couple later relocate.

## The benefits of an English agreement

That said, there are enormous merits in drafting a nuptial agreement in accordance with English law. Although not completely binding, a nuptial agreement that is properly constituted carries the twin benefits of both it being extremely likely to be upheld, and providing certainty to both parties. This can mean certainty for the financially stronger spouse that their wealth will not be shared on divorce, and confidence for the financially weaker party that their needs on divorce will be met.

To be properly constituted, the agreement must be entered into freely and without duress; (in case of a pre-nup) signed at least 28 days before the wedding; with full financial disclosure of each party's assets, with each party having the opportunity to take legal advice; and be fair. That is not the same in all countries.

## Will my English nuptial agreement be upheld abroad?

It is important for couples to consider how their English nuptial agreement will fare in another country, if there is a possibility that another country may have power to hear any future divorce. The other country may have such power at the same time as England and Wales or have sole jurisdiction, because, at the time of divorce, the couple no longer meet the jurisdictional requirements to divorce in England.

Couples should take advice at an early stage from lawyers in the other country(ies) which may be relevant in the future to ascertain the view that the local foreign court would take of an English nuptial agreement.

The best advice to the party seeking to uphold the agreement is not to leave England or let England lose power to oversee a divorce, without reviewing the agreement in the light of the advice from the other country and, if necessary, entering a nuptial agreement in that other country.

## I am moving to England – will my foreign nuptial agreement be upheld by the English court?

It is often a surprise to couples divorcing in England that their nuptial agreement may not be binding on the English family court, particularly if their agreement would have been binding in another country. Whereas other countries can apply English law, in England, the court will only apply English law, which means that whether or not a foreign nuptial agreement will be upheld depends on the circumstances of the case and, importantly, whether the terms of the foreign agreement are fair from an English legal perspective.

Therefore, where an agreement provides that e.g. Spanish law will govern the couple's nuptial agreement, the English court will not be constrained by a nuptial agreement and will apply English law. Within English law, a nuptial agreement is most likely to be upheld if it is fair and meets the other criteria that the English court looks to when weighing up the relevance of a nuptial agreement to the outcome of a case (for example, that is entered into freely, and with full and frank disclosure of the other's financial position). If, in the eyes of an English family court judge, the agreement would lead to unfairness or leave one party in a predicament of real need, it is not likely to be upheld, or might

be upheld only in part. However, the very fact of its existence may carry evidential weight. For instance, if one party agrees not to share the other's assets on divorce in a nuptial agreement, the English judge may abide by that principle whilst varying the agreement to ensure that the financially weaker party's reasonable financial needs for housing and income are met. This could be by the provision of capital being paid on trust, to revert to the payer at some point in the future. This achieves the twin goals of meeting the financially weaker party's needs for a period of time, but also ensuring that the principles of an agreement which might have been intended to protect family wealth from claims on divorce are, ultimately, upheld.

## How are nuptial agreements treated in other countries?

Countries around the world take different approaches towards nuptial agreements. For details about specific jurisdictions, including the US, Australia, and various European countries, [please visit our website version of this article here](#). If you or your spouse have existing or anticipated connections with another country or countries, it is important to take specialist advice at an early stage when drawing up a nuptial agreement, or (if later) before moving to another country. It is also important for advice to be taken in any relevant countries. That way, couples can have confidence that their wishes as regards to wealth protection can be respected.

Forsters' Family team are experienced at negotiating cross-jurisdictional nuptial agreements for HNW individuals and co-ordinating the international aspects with our network of overseas advisors. We also prepare detailed advice for overseas law firms when considering in which country to root the agreement; this often involves comparing the financial regimes in various jurisdictions.



Wealth protection



## NUPTIAL AGREEMENTS AND WEALTH PROTECTION

A nuptial agreement can be a useful tool for wealthy individuals and families who seek to preserve wealth for future generations.

### The risks

Wealth protection strategies are devised to reduce the risk of wealth being dissipated or lost, and to mitigate any risks that can be identified. For example, the risk of currency fluctuation can be mitigated by hedging, the risk of losing key personnel can be mitigated by life insurance, and the risk of incurring unnecessary tax can be reduced by careful structuring.

Divorce can pose a significant risk to a family or individual's wealth. Recent publicity suggests that Amazon founder Jeff Bezos will pay his wife MacKenzie Bezos in the region of \$35

billion, following the breakdown of their 25-year marriage. Multi-million pound divorce settlements are far from uncommon in England: not for nothing is London referred to as the "divorce capital of the world".

For a family seeking to ensure that wealth is preserved for future generations, a divorce can be hugely expensive and disruptive. The emotional toll on all concerned is well-known. Legal fees can be significant. The cost of the settlement can significantly deplete the family finances. But there are other, hidden, costs: a protracted divorce can lead to business paralysis. Injunctions may be granted, severely curtailing business operations.

Trusts, family businesses and trusted advisers may be required to disclose documents or even joined as parties to the proceedings. The most hard-fought divorce cases may last for two or three years, causing significant disruption.

### The role of nuptial agreements

A nuptial agreement can reduce or mitigate these risks.

A common perception of nuptial agreements is that they are designed to limit the extent of one party's financial claims. Whilst they can be used in that way, their greater

utility in this context is their ability to reduce uncertainty, and therefore risk.

### Jurisdiction

Wealthy families are increasingly mobile, and many will have connections with several countries. A great deal of thought may have been given to where individual family members reside, where they are domiciled, and where assets and structures are located.

The rules regarding jurisdiction for divorce are complex, and vary from country to country. It is highly likely, however, that a party seeking a divorce will have a choice of jurisdictions, and that choice can hugely affect the size of the likely award, as well as the likelihood that payment of any sums due under the award can be enforced. The practice of "shopping" for the most favourable jurisdiction is well established, and can lead to protracted litigation in multiple jurisdictions.

A nuptial agreement can fix jurisdiction in one state. Alternatively, it can be drafted so as to be effective in each state that may have jurisdiction. A well-drafted nuptial agreement can significantly reduce the risk of jurisdiction shopping.

### Asset definition

A nuptial agreement will typically define which assets form part of each party's separate property, and which constitute joint property. The agreement will then establish rules for how the different classes of assets are to be divided in the event of divorce. The rules may be very broad, or very detailed.

A well-drafted nuptial agreement can provide certainty about the extent of the parties' assets, and how they are to be divided in the event of divorce.

### Wealth preservation

A nuptial agreement can ensure that fair provision is made for the economically weaker party on divorce, whilst nonetheless preserving family wealth for future generations. For instance, a home can be settled subject to a life interest, rather than by outright transfer, or a separate structure can be established from which maintenance is paid during the recipient's lifetime, with the structure later reverting to family ownership.

### Predictable outcome

A nuptial agreement should provide a couple, and their wider families, with certainty about the financial consequences of divorce.

A nuptial agreement is likely to be upheld by the English court, provided both parties had disclosure of the other's wealth, and had independent legal advice about the consequences of entering into the agreement. The agreement must also make fair provision for the economically weaker party, and neither party must feel unduly pressurised to sign the agreement.

Provided those criteria are met, the parties can be reasonably certain that the agreement will be upheld. This greatly reduces the likelihood of costly and time-consuming and expensive litigation, if the marriage does break down.

### Existing structures

A nuptial agreement should be drafted with existing asset structures in mind. For instance, the agreement should set out the mechanism whereby trustees are to be requested to assist in the event of divorce.

Equally important is that existing structures are "stress-tested" to ensure they are sufficiently robust if they are challenged in the event of divorce. As specialist family lawyers, we have extensive experience of the way in which the family courts approach complex structures, and will be able to advise what steps should be taken to reduce or mitigate risk.

### Nuptial agreements and family culture

Family dynamics can be complex. It is rarely easy for one family member to suggest to another that they should obtain a nuptial agreement. Trusted advisers have a key role in ensuring that nuptial agreements are discussed, and the advantages are understood.

Older generations can encourage future generations to enter into nuptial agreements by making it clear in letters of wishes that trustees are to look more favourably on those who have done so.

Similarly, family constitutions can be drafted so as to confirm an expectation that family members wishing to share in the family wealth are expected to enter into nuptial agreements.

Nuptial agreements are an essential tool for wealth planning. At Forsters, our family law specialists work hand in glove with our private client, tax and property law specialists, to ensure that all aspects of wealth protection are attended to seamlessly.

## CONTACT US

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Known for the highest quality service and achieving the best results for our clients, our focus is always on the needs of each individual. We take the time to understand each client's unique personal situation – and we work with them to develop the course of action which best suits them.

We cover the full range of family law matters including pre and post-nuptial agreements, separation arrangements, matters involving children, financial issues and divorce for clients both in England & Wales and overseas. Our team has a strong track record of delivering excellent results in complex financial cases involving multiple jurisdictions, complicated financial structures and valuations, pre-acquired and inherited assets and trust cases. In addition, we are experts in mediation and collaborative law.



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The partners are always willing to get their hands dirty with the nitty-gritty of a case, and are very well supported by a stellar team of senior associates and associates.

Chambers HNW Guide, 2021



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**Introducing Breaking Good, the new Forsters' podcast. Comedian Marcus Brigstocke teams up with leading family lawyer Jo Edwards and members of Forsters' Family team to demystify the divorce and separation process. An informative and entertaining guide to modern family law.**

In episode 4, 'Love nuptially - a definitive guide to pre-nups and post-nups', we are re-joined by family lawyer Rosie Schumm to talk all things nuptial agreement-related. From debunking some common myths, to sharing tips on how to broach the subject with your other half, and discussing why they aren't as unromantic or as new a concept as you might think – it's all here.

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