

# Tricky transatlantic nuptial agreements

Considerations for HNW individuals and their advisors

London is well-known as the divorce capital of the world, due to the relatively generous approach to financial provision for the financially weaker party on divorce, and the courts of different US states take a variety of different approaches. Nuptial agreements are increasingly popular forms of wealth protection for HNW international couples on both sides of the Atlantic as they can provide a degree of certainty and allow parties to agree provision that they both consider to be fair.

For those who divide, or intend to divide, their time between the UK and the US, there are important issues for them and their advisors to consider as part of the process.



Those entering into a new nuptial agreement should take advice as to whether it should be rooted in English law, or in the law of the US state with which they have the greatest connection.

Those with existing nuptial agreements who plan to move between the US and the UK should consider whether any steps need to be taken to ensure that agreement is given maximum weight in the new jurisdiction in the event of divorce proceedings taking place there.

## 1. Where should you enter the prenuptial agreement?

Usually, it makes the most sense for the nuptial agreement to be rooted in, and drafted by specialist family lawyers from, the country in which the couple intend to make their main home during their marriage. If one or both of the parties have a significant connection to another jurisdiction, or they intend to move during the marriage, it is prudent to also take advice from specialists in each location, so as to try and ensure that the agreement would be upheld in that jurisdiction. It might be that local advice suggests entering into a ‘mirror agreement’ (an agreement with the same key terms) in the jurisdiction they intend to move to or for specific wording to be included within the main agreement.

The requirements for a nuptial agreement to be considered valid vary between jurisdictions. For example, in England and Wales, nuptial agreements are not automatically enforceable, but they ought to be upheld if, quoting the Supreme Court authority of *Radmacher*, they

are “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”. In practice this means agreements should be entered into freely and without duress; (in case of a pre-nup) ideally signed at least 28 days before the wedding; with material disclosure of each party’s assets being exchanged; with each party having the opportunity to take independent legal advice. Crucially it also means that its terms must not be considered unfair in the context of the prevailing circumstances at the point of divorce, rather than when the agreement is signed. Given that this latter requirement is relatively unique to England and it is often possible to take a less generous approach to providing for the financially weaker party in most US states, care must be taken when ‘pitching’ financial provision in transatlantic agreements.

## 2. Will my divorce be dealt with in the jurisdiction in which we enter the prenuptial agreement?

Where a nuptial agreement is entered into is not necessarily determinative of which jurisdiction should deal with the couple’s divorce and it is possible for more than one country’s court to have jurisdiction at once.

It is possible to agree, in a nuptial agreement, both the governing law that will apply to the agreement and the country/state that the parties agree shall have jurisdiction to entertain a divorce and deal with associated financial matters. Advice should be taken as to the local court’s likely approach to such elections.



### **3. If I move from England to the US a few years after marriage, will my English prenup be automatically enforceable in the US?**

If planning or considering moving to the US state in the early years of marriage, it is important for couples (and particularly the financially stronger party) to consider before any such move how their English nuptial agreement may be interpreted by a judge in the relevant US state on divorce and whether there are any procedural formalities that need to be addressed in order to ensure it is given maximum weight. It might be that the US has jurisdiction to hear the divorce at the same time as England and Wales, or the US state could have sole jurisdiction, because, at the time of divorce, the couple no longer meet the jurisdictional requirements (based on their habitual residence and domicile) to divorce in England.

### **4. If I move from the US to England a few years after marriage, will my US prenup be automatically enforceable in England?**

Couples who enter into a prenuptial agreement in the US, then later relocate to and divorce in England might be surprised to find that their nuptial agreement may not be binding on the English family court, even if their agreement would have been binding in the US state in which it was entered into.

Whereas judges in some other countries may apply English law in some cases (such as if the parties elect as such within the agreement), in England, the court will only apply English law. This means that whether or not a US agreement will be upheld depends on the circumstances both when the agreement was signed and on divorce including most importantly, whether the terms of the US agreement are fair from an English legal perspective. This is the case even where the US agreement says that it should be governed by US law.

As noted above, prenuptial agreements are not automatically binding in England and Wales at present and so the English court could decline to follow or effectively amend the terms of the prenuptial agreement in order to achieve its interpretation of fairness, or to avoid leaving one party in need. However, it is notable that if the couple enters a prenuptial agreement in a jurisdiction where prenuptial agreements are more readily upheld vis-à-vis England (for example, New York or California), this will indicate to the English court that the couple intended to be bound by this agreement, meaning the English Court should be more likely to give it weight.

### **5. Can I have a nuptial agreement that would be upheld by a US and EW court?**

Drafting a prenuptial agreement that satisfies the law and judicial preferences of two separate legal systems can be a challenging task. However, it is possible. Couples in this situation would each need to instruct solicitors in both jurisdictions who have experience of working on international agreements who can work together to carefully draft terms that would be upheld by both/multiple jurisdictions.



# Our key team



**Dickon Ceadel**  
Partner  
T +44 20 7863 8395  
E [dickon.ceadel@forsters.co.uk](mailto:dickon.ceadel@forsters.co.uk)



**Annalisa Gardiner**  
Associate  
T +44 20 7863 8391  
E [annalisa.gardiner@forsters.co.uk](mailto:annalisa.gardiner@forsters.co.uk)



Last updated: February 2025



[forsters.co.uk](https://forsters.co.uk)