

# TO PRENUP OR NOT TO PRENUP

Lets face it; the subject of a prenuptial agreement is a touchy one. It may be something that you both want to discuss but can't quite figure out how to bring the conversation up. We take a look at the legalities and why it is in your best interest to get the conversation rolling.

## WHAT THEY ARE

A prenuptial agreement (often referred to as a "prenup") is an agreement entered into by a couple before they get married, setting out what should happen in relation to financial matters in the unhappy event of a divorce. No one gets married thinking that their marriage will break down but due to the high incidence of divorce in our society (sadly about one in three marriages now ends in divorce and the incidence of divorce is even higher with second marriages) most people today sensibly recognise that separation and divorce might happen to them. Similarly, agreements between same-sex couples prior to entering into civil partnerships work in exactly the same way.

Although prenups are not strictly legally enforceable in this jurisdiction in the sense that, unlike a commercial contract, you can't sue on one and there's always the possibility that the court will not uphold the terms of the agreement, recent court decisions have given increasing weight to such agreements if they are properly prepared and deemed fair by the court. The effect of the recent decision of the Supreme Court, is that there is now a legal presumption that prenups will be upheld unless good reason can be shown to the contrary. So the onus is now on a spouse who wants to argue that he or she should not be held to the prenup to convince the court why it would be unfair to do so.

## WHY HAVE A PRENUP?

In this country the divorce court has very wide discretionary powers to distribute the family assets on marital breakdown between the couple as they see fit - to achieve fairness between the couple. The court recognises the couple's respective roles in the marriage as economic provider and carer as of equal value. All the financial assets, whether in the sole name of the spouses or their joint names and whether acquired before, during or after the marriage (or sometimes years after the separation date) are up for grabs. Although there is no entitlement to any fixed percentage share of the assets (certainly in the case of a long marriage) it would be unusual not to divide all the assets equally, plus make an award of maintenance to a former wife, which could continue indefinitely unless she remarries or until one or other of the couple dies (known as a "joint lives" spousal maintenance order.)

## HOW PRENUPS WORK: GOOD PRACTICE

In order to have the best chance of your prenup standing up to scrutiny by a court, if your other half decides to challenge its terms, it is essential to observe accepted best practice in such matters. This will include both of you getting separate, independent legal advice and providing full information about your finances (known as "financial disclosure"). Like a will, in order to be valid, the prenup needs to be carefully drawn up. You will also need to get a will or update your existing one because marriage automatically revokes a will.

A properly drawn up prenup is not a cheap option and the additional expenditure, on top of all the wedding costs, may be very unwelcome. However, the legal costs involved (perhaps as much as £5000-£10,000 for the two of you) pale into insignificance when compared to the costs of a contested financial application in divorce proceedings, which could easily come to £50,000-£100,000 or even more for each party. And that's before you even think about what you might be ordered to give to your ex by way of asset division. The idea, a bit like taking out an insurance

policy, is to spend a not insignificant amount of money upfront before the wedding so as to avoid paying out a lot more if your marriage breaks down. Also, it is important not to leave sorting out your prenup too close to the wedding date because there needs to be adequate time to consider and reflect on the terms of the proposed prenup and to negotiate the terms to be included. Most lawyers recommend that you should be signing your prenup at least three to six weeks before the date of the marriage.

## WHO NEEDS A PRENUP?

Traditionally, it is a middle-aged wealthy man marrying a much younger woman with no financial assets. More recently there is evidence that increasingly successful young men in their 30s are insisting on them before getting married to their live-in partners. Also, middle-aged couples, one or both of whom may have been married before and wish to protect the position of their adult children by previous relationship as well as their financial assets are now seeking prenups before getting married.

## PROS & CONS

Many people argue that prenups are unromantic and that asking your fiancée to sign one means that you don't trust her. Forgive the gender stereotyping but in such situations it's still usually the man who is the economically stronger partner and wants his girlfriend to sign a prenup to protect his assets. It's true that she will almost certainly be worse financially getting divorced after signing a prenuptial agreement but she will be even worse if he refuses to marry her without one meaning they will live together without marriage. Even though people still refuse to believe this, there is no legal status in our jurisdiction of a common law wife conferred by merely living together (in contrast to most states in the US). Essentially people who sign prenups are choosing the certainty of knowing what will happen to their finances if they divorce, rather than incurring the financial and emotional costs involved in leaving it to the court to decide for them in that unhappy event.

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