

# TRUST & ESTATE PRACTITIONER™



ISSN: 1479-0275

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# Pre-nuptial agreements – they don't work do they?



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**P**re-nuptial agreements (PNAs) are standard fare to many of our European counterparts and indeed to our cousins over the Atlantic. But here in the UK they have something of a mythical status – considered a good idea by many but unavailable to all.

This perception is by no means unjustified. When the English judges assess the financial provision to make upon a divorce, they are instructed to consider a variety of factors and given discretion subsequently to reach a decision. Public policy dictates that this discretion should be fiercely protected, to the extent that no document or other agreement can override it. And this is therefore what prevents PNAs in this jurisdiction having the power to bind parties in the same way as, for example, an agreement executed under New York law.

In addition, there is the argument that any agreement that contemplates the end of marriage goes against the sanctity of that marriage. Marriage is, after all, the union of one man and one woman for life – the familiar ‘til death do us part’.

But times and societies change and there are plenty of depressing statistics documenting the percentage of marriages which now fail. Aware of this and wanting perhaps to protect some of their assets, avoid litigation and the stress and cost that entails or simply to clarify any uncertainty as to what would happen if things do not go to plan, many couples are now putting in place PNAs.

Why do they bother, though, if the English courts could still ignore such agreements? The answer is that, while the courts are not obliged to obey the terms of the agreements, they can

nevertheless take them into account as a relevant factor when deciding how to exercise their discretion. Being a persuasive document at least has to be more attractive than there not being a document at all, surely?

Case law over the years has established a variety of factors that further enhance the persuasiveness of a PNA, the most well known case being *K v K*. It was in *K v K* that Judge Rodger Hayward Smith set out a clear checklist of points for a PNA ideally to satisfy and of these it was apparent that some were considered especially vital.

In essence, the key is to demonstrate that each party to the agreement signs the document willingly and knowledgeably. Both the husband and wife to be should have separate legal representation, advising them of what they are doing and, by so

doing, what rights they might accordingly be sacrificing.

Best practice suggests that each lawyer should sign a certificate, included in the PNA, to confirm they have given such advice and that, in their view, their client did enter into the agreement with the requisite level of willingness and knowledge. While any lawyer could, in theory, give this advice, the bar is likely to be that much higher to jump for a judge wanting to stray from the provisions of a PNA where the advisers to it were specialists in such matters.

Of course the lawyers concerned can, in turn, only fully advise their clients as to the consequences of signing any PNA when they themselves are aware of both parties' circumstances. Accordingly, it is paramount that each party makes a full disclosure to the other of their assets and liabilities, often scheduling this information to the agreement and providing copy documentation, such as bank statements, well in advance. Trust interests should be included, even if such an interest is only that of a potential beneficiary, and notes to the schedules can then explain the reality of the benefit that the party receives from this. Likely inheritance prospects may also be mentioned, and particularly where one of the main motivators to entering into a PNA is to protect inherited family wealth.

Neither party should feel pressured into signing a PNA against their wishes, either explicitly or by force of timing. With respect to this latter point, it is generally recommended that the agreement should be completed at least 21 days prior to the wedding and this same minimum interval of time was proposed in the government consultation report ‘Supporting Families’ published in 1999, although interestingly in *K v K* the parties signed it on the eve of their wedding.

Assuming all of the above factors are satisfied, a judge is nevertheless still likely to have less regard to any PNA unless he or she is also convinced that the provisions it sets out are fair to both parties. The popular conception that PNAs are a means by which the rich (often) husband can ensure his relatively poor wife would leave their marriage with little or nothing is utterly fallacious.

That is not to say that a PNA could not circumscribe a divorcing spouse's entitlement to less than they might otherwise have expected to receive, but there is a limit to this. It is thus the job of the advisers to ascertain what financial order, in their opinion, a court would otherwise make in the absence of the PNA and to structure the PNA on this basis. Again, the higher the quality of legal advice obtained, the more able the adviser in question will be at making such a judgement call.

This, of course, further substantiates one of the purposes of a PNA, namely litigation avoidance. If each spouse feels that the agreement treats them fairly and a court would have been unlikely to grant them a significantly more generous entitlement, there is little incentive to litigate the point.

Having found expert advisers for each party, obtained disclosure of each of their finances and confident that each wishes to approach the agreement fairly and willingly, what should the agreement do?

What it should not try to do is to fetter the court's power to make provisions in respect of children. As explained earlier, the

court is protective of its discretionary power, but in no case more so than where children are concerned. Consequently, most agreements tend to focus purely on the assets of the marriage.

A common approach is to break down the assets that each party has (either individually or jointly) into three types: those owned before the marriage, those generated during the marriage and those acquired during the marriage (perhaps by way of gift or inheritance). It is normally the first and last of these that clients wish to protect above all else and in the case of inheritance the parents and grandparents often feel equally strongly, if not more so. PNAs will often therefore seek to ring-fence these two particular asset classes, all the time ensuring, though, that fair provision is nevertheless made for the other spouse.

As regards wealth that is generated during the course of the marriage, clients may adopt a variety of attitudes. Some take a very simple stance and agree that such assets should be split equally between them, reflecting the fact that each has contributed in one way or another to the marriage. Such an attitude reflects well the prevailing approach of the courts at present which, since the landmark case of *White v White* in 2000, adopt a 'yardstick of equality' and view all marital contributions, whether by way of home-making, child-rearing or salary-earning, as equally valuable.

Others, by contrast, seek to proscribe formulae by which the value of assets purchased, or the growth in value of other assets, can be split. These may, for example, make a division proportionate to capital contributions, or they may provide that capital contributions are first 'reimbursed' to the respective parties and the remainder split equally.

And others adopt a middle way, agreeing that assets acquired during the marriage will be held equally unless the parties agree otherwise. Such agreement might then have to be in writing, or within a prescribed period of time, or both, or neither.

Besides dealing with assets, a PNA may also set out circumstances in which the terms of the agreement should be reviewed – the so-called 'mid-nup'. These might include the birth of any children, the unemployment or disability of either party or, simply, after a certain duration of time.

As perhaps becomes apparent from this, PNAs are most

popular with, and most suited to, those couples where there is, or is likely to be, a sharp distinction of wealth, whether by assets brought to the marriage or by assets that are expected to be received during the marriage. By the same token, they are not therefore suitable for everyone – it is by no means the case that every good marital home should have one.

But, perhaps as a result of the divorce courts both increasingly favouring a 50/50 split of assets and increasingly being persuaded by PNAs, the popularity of PNAs appears to be growing exponentially. Where will matters go from here? Well, the government itself has not announced any intention to make PNAs enforceable under statute although Resolution (formerly the Solicitors Family Law Association) in its November 2004 publication 'A more certain future – recognition of pre-marital agreements in England and Wales' felt that there might be virtue in doing so. Such a change, if it comes, still remains, though, a rather distant prospect.

In the meantime, a new section of society will also have the chance to dip its toe in the pre-nuptial (or rather the pre-registration agreement) water. As from 6 December 2005, same sex couples have begun registering their civil partnerships and, for the same reasons as heterosexual couples, some have seen merit in regulating in advance their financial affairs were their relationship not to work.

If anything, pre-registration agreements may prove even more effective, and consequently popular, than PNAs as the public policy objections appear fewer. There cannot be a religious basis to a civil partnership and thus it would seem there is less sanctity to preserve. And the Civil Partnership Act 2004 does not say that a civil partnership is a union between two people of the same sex for life, but only until death, annulment or dissolution. By foreseeing from the outset the termination of a civil partnership, it would appear harder to argue that one should not also be able to regulate in advance the financial consequences were this to occur.

It is inconceivable that pre-registration agreements will be treated any differently to PNAs by the courts. The advent of this new kid on the block, however, could set the pace for a general change in attitude and approach towards such agreements by the government, courts and public alike.



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