









The Importance of Marital Agreements

What are Marital Agreements?

A Marital Agreement (sometimes also called a Nuptial Agreement) is an agreement entered into between two parties during their relationship (which can either be before or after their marriage), which sets out their intentions as to what should happen to their assets in the event they separate. A Pre-Marital Agreement is signed in advance of a parties' marriage; a Post-Marital Agreement is entered into following a parties' marriage (for example if there was a change to the parties' assets during the marriage and they want to address this change). Whilst they were once thought of as only for the wealthy, Marital Agreements are increasingly seen as a smart tool for many couples, regardless of their financial standing. By having this in place, couples can seek to ensure clarity and fairness should they unexpectedly separate.

Both a Pre-Marital and a Post-Marital Agreement (PMAs) are formal documents designed to define the financial rights and responsibilities of both parties in the event of separation or divorce. They should be drafted by lawyers and should include a summary of each parties' assets and property at the time the agreement is entered into. In addition, a PMA should:-

1.  Be agreed after full and frank disclosure of all assets. These should be appended to the agreement in a schedule;
2.  Include confirmation that both parties have taken independent legal advice or had the opportunity to do so;
3.  Have been entered into freely by the parties without duress or placed under influence;
4.  Contain confirmation that each party fully understands the terms of the Agreement;
5.  Ideally be signed at least 21 days before the wedding (in the event of a Pre-Marital Agreement); and
6.  Contain terms that are fair and make provision for both parties' needs.



What sort of clauses can a Pre-Marital or Post-Marital Agreement contain?

A PMA can be wide-ranging and amended to tailor towards a specific couples' needs. Some examples of what a Marital Agreement might contain include:

- A jurisdiction clause, setting out the country that any subsequent court proceedings regarding the relationship (such as divorce) should take place in;
- Protection of inheritance;
- What happens to the parties' separate property upon divorce – to include property, savings, inheritance, stocks & shares, income, pensions and business interests;
- What happens to the parties' joint property upon divorce – to include property, savings, inheritance, stocks & shares, income, pensions and business interests;
- What will happen to any debts upon divorce including any protection measures against the debts of the other spouse;
- Whether there will be any spousal maintenance paid and, if so, for how long;
- Descriptions of the responsibilities of each party;



- A review clause, stipulating that the Agreement will be reviewed at regular intervals (such as every five years and in the event they have children) to ensure that it still meets the parties' needs; and
- A sunset clause, providing a date when the agreement will expire.

What sort of clauses cannot be included in a Pre-Marital or Post-Marital Agreement?

- Provision about arrangements for children, to include who the children will live with, what school they will go to and whether they will have a religious upbringing (as these arrangements should be determined based on the children's best interests at the time);
- Waivers of child maintenance;
- Illegal or immoral clauses (Courts will not enforce agreements that encourage unlawful actions); and
- Details about the lifestyle or personal life of each spouse post-marriage – e.g. requirements that one/each spouse must 'live' in a certain way.

What are the effects of a Pre-Marital or Post-Marital Agreement?

A Pre-Marital or Post-Marital Agreement is not automatically legally binding in England. However, the weight that is attached to them when looking at the division of assets has grown significantly in recent years, most notably since the case of *Radmacher v Granatino* in 2010. The growing trend is that, in circumstances where the Agreement is entered into: (a) freely; (b) after full and frank



disclosure; (c) after independent legal advice has been taken or the opportunity to do so has been given; and (d) with each party understanding its terms and that these are fair and reasonable, it is likely to carry significant weight. In those circumstances, the party who does not seek for the agreement to be upheld will need to demonstrate good reason as to why the agreement should be departed from.

In *Radmacher* the Court started that it “should give effect to a marital 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 their agreement”^[1].

Recently, case law has very much pushed towards the enforceability of Pre-Marital Agreements, increasing the importance of these documents and the importance of them being prepared correctly. When properly drafted and complying with the requirements, a Pre-Marital or Post-Marital Agreement can be an incredibly effective way of safeguarding pre-acquired assets and ensuring certainty in the unlikely event that separation occurs.

What are the consequences of not having a PMA?

If there is no Marital Agreement and the parties' separate, then the division of their assets will need to be agreed between the parties at that time and, in default of agreement, by way of a Court determination. For international couples and families this may raise additional considerations: which country should (or could) the divorce take place in; are there any default matrimonial property regimes and, if so, which apply; and will the Marital Agreement be recognised in the country where the divorce takes place? There may be a number of different countries where divorce proceedings could take place, and this could result in a number of different outcomes and financial consequences for the parties.






For example, if the proceedings were to take place in England, the Court would have a discretionary role. It cannot be said for certain what Orders the Judge may make as to the division of assets: broadly speaking, the Court are required to look at what is fair, in reference to the sharing, needs and compensation principles.

There are therefore a number of potential consequences if a Marital Agreement is not entered into. These include:

1. ● Uncertain division of assets: the assets will be divided by the Courts according to statutory principles and case law. The ability to influence the division will be more limited and the



division of assets might not align with preferences or expectations.

2.  Unfair financial responsibility: there is a risk that one party (or both) feel that the outcome decided by the Court is unfair to them, or certain assets are included in the asset division that a party seeks to exclude.
3.  Increased legal costs and time: divorce and financial remedy proceedings can be costly and last for a long time. Without a Marital Agreement, disputes over assets may arise and this can significantly increase the legal costs of the divorce and the length of time it takes to resolve these.
4.  No protection for business interests: if business interests are involved, a Marital Agreement can protect these from being divided. Without this, a business could be considered a marital asset and subject to division.
5.  Risk to family wealth and inheritance: without a Marital Agreement, assets that may have been inherited could be treated as marital property and subject to division. A Marital Agreement can protect these types of assets and ensure they remain within the family.
6.  Emotional stress and relationship strain: divorce and separation are difficult enough before discussions have been had about the financial arrangements. The absence of a Marital Agreement can lead to a more adversarial divorce process, and the lack of clear financial expectations can exacerbate disputes during the divorce, which can create heightened emotional stress and conflict.

Once an Agreement has been finalised is there anything else that needs to be done?

Once an Agreement is signed, it is important that the original copies are stored safely for future reference. Whilst the Agreement is designed to cover the financial aspects of the marriage, circumstances may change over time (such as after the parties have children, or if there are any significant changes in the parties' assets). Therefore, it is important that in the event of any major change in the parties' circumstances a review of the PMA is undertaken. This is to ensure that the Agreement remains relevant and has the highest chance of being upheld in the event of divorce.

Conclusion

Whilst Marital Agreements continue to not be automatically legally binding in England, a carefully



drafted Agreement, complying with the requirements can be a very useful tool for couples. It can provide certainty, protection of specific assets and clarity in the challenging landscape of separation – not to mention save both parties' money in the event of divorce.

If you would like any further information in relation to marital agreements please do not hesitate to contact us by email at enquires@iflg.uk.com or telephone on +44 (0)20 3178 5668.

Georgie Huse

georgina.huse@iflg.uk.com

The International Family Law Group LLP

www.iflg.uk.com

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About Us

Georgina Huse is a dual-qualified English and Australian solicitor. Georgie handles all aspects of financial and children law, many of which are cross-border cases. She advises on financial proceedings arising from a divorce or separation, pre- and post-marital agreements, cohabitation agreements, tracing and freezing assets, financial provisions for children and proceedings after a foreign divorce.

Georgie is regularly instructed in relocation cases both in this country and out of the jurisdiction. She also advises in parental disputes arising from contact and residence and in cases preventing one parent from taking steps without the other parent's agreement, or to request permission for a specific step to be taken in the best interests of a child.

The International Family Law Group LLP is a specialist law firm situated next to St Paul's, London. Our legal team includes specialist accredited English lawyers, mediators, collaborative lawyers, arbitrators, and Australian lawyers. We look after the interests of families and children, with a specific focus on international families. A key area of our work is recognition of foreign marriages and divorces and the financial consequences of relationship breakdown. We are committed to the use of digital innovations for the benefit of clients and resolution on international family law cases. We have outstanding links with law firms and specialist family lawyers within Europe and worldwide. Our website is full of helpful information including a 24-hour abduction and emergency line at www.iflg.uk.com.



“The International Family Law Group has a superb reputation for its work with international families and families living in England & Wales in the areas of relationship breakdown & children matters”

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[1] At paragraph 75 of *Radmacher v Granatino* [2010] UKSC 42