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Pre-nuptial agreements – wedding bells or alarm bells?

Service area / [Dispute Resolution and Litigation](#)

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“Individuals who intend to marry tend not to see divorce as a possibility”¹

Entering into a marriage or civil partnership is one of life’s greatest events but is also big business; tens of thousands of pounds are spent by couples on celebrating their “big day”. And yet, in spite of being prepared to spend a small fortune on the ceremony, most enter into a life-long commitment with little or no regard for the financial consequences of their relationship breaking down.

Sadly, for every ten marriages that take place in England, there are five divorces. In Jersey, in 2011, one in five adults resident in Jersey had undergone a divorce or formal separation; in Guernsey over recent years, there have been half as many decrees of divorce issued as there have been marriage ceremonies.

Public policy deemed that it was wrong to agree financial provision to cover an eventual marriage breakdown at the outset of the marriage: paternalistic Victorians felt that this would discourage spouses from working at their marriage. Pre-nuptial agreements were rarely encountered in England unless they had been entered into overseas.

The long awaited English Law Commission report on Matrimonial Property, Needs and Agreements, which was published in February 2014, recommends that English law now be changed to enable parties to a marriage or civil partnership, like individuals entering into a business or commercial partnership, to have some control over their fate if the relationship comes to an end.

As Jersey and Guernsey have, broadly, long followed England and Wales when legislating for, and determining, disputes between married couples and civil partners (although Guernsey has yet to introduce laws permitting same sex couples to enter into civil partnerships), we are closely watching for signs that the British government may adopt the Commission’s recommendations. If Jersey legislators adopt the recommendations of the Jersey Law Commission Report of October 2015 on Divorce Reform Jersey may well follow, especially as there has been speculation that some wealthy individuals currently avoid taking up residence in jurisdictions whose courts disregard pre-nuptial agreements. The English Courts’ previous failure to enforce pre-nuptial agreements has earned London the dubious title of “divorce capital of the world”.

¹ Law Commission Report, citing “The limits of cognition and the limits of contract” MA Eisenberg, found that: “Individuals who intend to marry tend not to see divorce as a possibility”; they will “overemphasize the concrete evidence of their currently thriving relationship...divorce is a risk that, like other risks, people systematically underestimate”.

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After a number of years of consultation, and riding on the eddies of the media tsunami stirred up by the Supreme Court's decision in *Radmacher v Granatino* [2010] UKSC 42, the Commission has concluded that England should change the law, enabling couples to decide in advance how their assets will be shared if their relationship comes to an end, by preparing a "qualifying nuptial agreement" ("QNA"). A properly drafted QNA will preclude a court interfering in arrangements made by spouses and civil partners unless:

- those arrangements do not meet a party's financial needs; or
- the interests of a child of the family have not been taken into account.

Essential to the enforceability of the QNA, will be the requirements that the parties to the marriage/civil partnership:

- provide to each other material disclosure of their respective financial positions at the time of entering into the QNA; and
- both receive independent legal advice on the terms of the QNA and that their legal advisers are able to certify on the face of the QNA that this advice has been given; and
- enter into the QNA at least 28 days before the marriage/civil partnership.

Normal contractual principles apply. The QNA may be void in England if there is evidence of e.g. duress or mistake; we draft pre-nuptial agreements in Jersey and Guernsey taking similar considerations into account. Interestingly, the Commission has recommended that the law in relation to undue influence be reformed so as to prevent a presumption of undue influence arising in relation to a QNA.

There is no decided case law on the validity or otherwise of pre-nuptial agreements but we believe that Jersey and Guernsey courts would treat the existence of such an agreement as one of the circumstances they are bound to take into account when determining how a couple's assets and income should be divided when their relationship breaks down.

What next?

The Law Commission in Jersey has recommended the introduction of binding nuptial agreements. Even though legislation has yet to be introduced, Carey Olsen takes the view that the Jersey and Guernsey Courts would, generally, enforce the terms of such an agreement, provided it complied with criteria similar to those that the English Law Commission has recommended for a valid QNA.

A US study found that, when questioned just before marriage, respondents to the study accurately estimated that 50% of marriages would end in divorce. However, 100% of respondents to the study put their own chances of divorce at 0%.

Entering into a pre-nuptial agreement requires partners committing for life to prepare for an event that they, naturally, hope to avoid. A pre-nuptial agreement may not be romantic but it is a sensible precaution that will, increasingly prove to be money well spent. The potential benefits of knowing that the financial and emotional costs of a contested financial dispute on divorce or dissolution can be limited or avoided altogether should come hand in hand with the wedding preparations; akin to ensuring that you are insured to drive a car before taking it out of the garage.

However, the expected law providing for binding QNAs will also cover agreements entered during the course of the marriage, so, for example, should the parties to a happy and successful marriage or civil partnership determine that they should make provision for separation or dissolution – however unlikely that may seem – they are not prevented from doing so by the fact that they have been married or in a civil partnership, for some time. "Post-nuptial" agreements are increasingly common and we are also seeing an increase in the number of couples reviewing and, if necessary, varying their pre-nuptial/post nuptial agreements as their financial circumstances change during the course of the marriage.

The pre-nuptial agreement is of particular use in second marriages where parties wish to ring fence assets to secure them for their children from previous relationships but as the law surrounding the QNA is introduced and develops, the pre-nuptial agreement will – and should become more widely used by those who, while celebrating the future, want to protect what they bring with them from their respective pasts.

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