

● WHEN COUPLES ENTER INTO AGREEMENTS: PRE-NUP OR POST-NUP?

Most people will be familiar with pre-nuptial settlements, or 'pre-nups', from news stories about celebrity divorce cases. However, few will be familiar with the term 'post-nuptial settlements'.

Couples enter into pre-nups before they get married. The agreement determines how their assets will be shared if they end up divorcing. Pre-nups are increasingly used, not just in first marriages, but second and third too. They were regarded both as against the public policy of supporting marriage and as ousting the Court's jurisdiction, and have not therefore been enforced by the English Courts.

However, this year, the Supreme Court upheld a pre-nup (in *Radmacher (formerly Granatino) v Granatino*). The Court held that a pre-nup is one of the factors to be taken into account in deciding what is fair. In view of the facts of this particular case it was upheld.

In Jersey, as in the UK, such agreements will not necessarily be upheld, but will be a very relevant consideration for the court when deciding how to distribute the assets of a divorcing couple. Well negotiated pre-nups, providing for the couple's changing circumstances, made with the benefit of timely legal advice and following full financial disclosure, are increasingly likely to be upheld.

A post-nuptial settlement (post-nup) is one made after the marriage has taken place. A UK court case (*MacLeod v MacLeod*) recognised that post-nups are made between people who already have the protection of being married and, therefore, there is no reason why they cannot enter into binding contractual agreements governing what should happen to their assets if the marriage ends in divorce.

The case provides clear advice to those who wish to enter into agreements to cover the eventuality of a marriage ending in divorce. They may do so in the knowledge that a well prepared and executed post-nup will, in all likelihood, serve the purpose for which it was intended.

To be upheld the post-nup must comply with Jersey Contractual law, e.g. that it is not entered into by one party under undue influence, it must continue to be fair, despite changing circumstances, and must make proper arrangements for any children.

Under the Matrimonial Causes (Jersey) Law 1949, the Royal Court is expressly provided with the power to vary post-nuptial settlements so great care must be taken to 'get it right'.

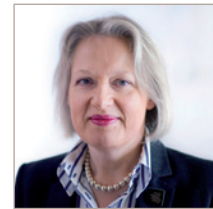
There are a number of valuable lessons in the *MacLeod* case to help get it right, including:

- the best way to ensure that a pre-nuptial agreement will be binding is to confirm its terms in a post-nuptial settlement after the marriage
- both parties must have independent legal advice
- there must be full and frank financial disclosure
- It must be fair
- It must provide for children
- It should make provision for changing circumstances

Our advice is that such agreements should be constantly reviewed, certainly at all significant points of the marriage as: birth of a child, inheritance, retirement, making wills and, perhaps, every fifth anniversary of the marriage.

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