

• HOPE FOR THE BEST BUT PREPARE FOR THE WORST – HOW TO PRESERVE FAMILY WEALTH

Preservation of wealth – current and future – is not usually high on the agenda (or on it at all) in the romantic froth of wedding preparations.

However divorce is one of the most common causes of loss of family wealth - but there are a number of ways of reducing the risk and level of wealth loss.

Upon a divorce the wealth of the family is split. This will in all likelihood include not only the wealth created during the marriage, including the value of pension funds, which can be significant but which may not be realisable, but also pre-owned assets and inherited wealth.

Account will also be taken of prospective assets such as share options and future inheritance. The costs of litigating about the division of wealth can itself use a significant part of the combined wealth, as well as causing hostility between the parties.

There are, therefore, a number of reasons for agreeing in advance – either before or shortly after the marriage - what will happen to wealth on divorce.

For many years the courts did not enforce or uphold such agreements on the basis that they ousted the jurisdiction of the courts. Then gradually their provisions were taken into account of as part of the circumstances of the case, while leaving the court free to apply or ignore them as it saw fit. More recently, as cases such as Radmacher –v- Granatino have illustrated, pre-nuptial agreements (“pre-nups”) are likely to be held to be binding as long as they meet the Court’s overriding duty to ensure fairness.

A pre-nup will be fair if it shows that all appropriate issues have been considered

in balanced negotiations. The crucial factors are (i) full and frank disclosure so that both parties know enough about the other’s wealth to make informed choices; (ii) provision for variation in the light of reasonably foreseeable circumstances such as the birth of children; and (iii) periodic reviews to adapt to changing circumstances. Such agreements must provide fairly for the party with the weaker ‘financial muscle’ and must take account of lower earning potential through loss of career, homemaking/child rearing roles, health and other foreseeable events. Finally both parties must have sufficient opportunity to obtain independent legal advice before signing.

The exercise of achieving a pre-nup with a good chance of being upheld is significant and must therefore be commenced well before the planned wedding day and completed with time to spare. Ideally a pre-nup should also be confirmed by both parties after the marriage has taken place to have the best chance of being upheld.

But it is not just the parties to a marriage that need to consider planning for possible divorce.

Parents who have accumulated wealth which will be inherited by their children should consider putting it into a trust or foundation for the benefit of their children and future generations - but not their spouses!

In recent years there has been a great deal of case law in England on how divorce courts should treat assets held in trust and the benefits received from them. Every case will depend on its own facts, but the principle which can be derived is that while what the child can reasonably expect to receive in terms of income and capital will be treated as

a resource, it is unlikely that the wealth itself will be treated as the child’s asset on divorce.

However foreign divorce court orders cannot be directly enforced against Jersey trusts. There have therefore been a number of cases in Jersey in which the Royal Court has considered whether and to what extent it should enforce a foreign divorce court order.

The Royal Court has pointed out that whilst the foreign divorce court is only considering the parties to the marriage and any minor children, it has to consider all of the beneficiaries of a trust, including unborn generations, and will only make its own orders to give effect to a foreign divorce court order to the extent that it is considered fair. At the same time it will not wish to rehear the whole issue of what the division of wealth should be in order to decide what is fair.

In most cases to date the Royal Court has made orders in the same or very similar terms as the foreign divorce court orders, but it is not bound to do so and if a case comes before it in which the foreign order is manifestly unfair then it is likely that it will not give full effect to the foreign order.

Likewise trustees or foundation councils of existing wealth planning structures should recommend a marrying beneficiary to enter into a pre-nup containing provisions which limit the ability to have the assets taken into account and waiving any right drag them and the assets they hold into divorce proceedings.

Wealth planning should be just as much part of wedding preparations as the bridal gown and flowers, and Collas Crill’s experienced family and wealth planning lawyers will be pleased to advise you.

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