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Prenuptial agreements

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Prenuptial agreements are an increasingly common feature of modern day marriage. Commonly known as a 'prenup', it is a contract entered into by the parties before marriage specifying how they would wish their assets to be divided in the event that the marriage ends in divorce.

Whilst a prenuptial agreement cannot bind the Court, in recent years the divorce Courts both in Guernsey and the UK have shown that they will take into account the terms of a prenuptial agreement which has been properly and fairly negotiated. The guidance provided by the Courts includes:

A requirement that the agreement shall be entered into freely and without pressure, and ideally at least 28 days before the wedding. Duress or undue pressure could reduce the weight that is given to the agreement or negate it completely.

That each party is independently advised.

That there should be full disclosure of each party's assets prior to the agreement being signed.

The terms of the agreement must be fair and reasonable.

The Court will look at the parties' circumstances (age, maturity and emotional state) at the time the agreement was entered into, when considering whether the parties understood the implications of the agreement and whether they intended it to be effective.

Any children of the marriage remain the first consideration for the Court and the terms of the agreement must still result in a 'fair' outcome. The closer the effect of an agreement to an outcome that the Court would find fair, the more likely it is to be given decisive weight.

On divorce, the Court has a wide ranging jurisdiction to make sweeping orders in respect of real and personal property, as well as the income and pensions of each party. One of the significant advantages of having a well drafted prenuptial agreement in place is that the contract can allow parties to retain control over their finances.

There are of course other advantages:

Prenuptial agreements can encourage parties to discuss finances from the outset and help resolve financial issues before the marriage has started. This encourages openness and full disclosure, so that both parties know where they stand.

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They are a good way of protecting family assets or property that was acquired before the marriage.

They can help provide financial security if there are children from a previous relationship or marriage. As long as such provisions are fair, they will ordinarily be upheld by the Court.

Prenuptial Agreements can also save time and costs. Such a contract can avoid long running financial settlement proceedings, thus saving legal fees, tension and heart ache.

Whilst no one likes to be pessimistic when entering a long term relationship or marriage, prenuptial agreements provide a forum for parties to contemplate the potentially life changing nature of a divorce and enables them to prepare for such an event taking place. Whilst once a taboo subject, prenuptial agreements are now becoming increasingly more common place.

The Law relating to prenuptial agreements also applies to postnuptial agreements, the only difference being that a postnuptial agreement is entered into after marriage whilst a couple are still living together whereas a prenuptial agreement is arranged before the marriage. The Privy Council, in the case of MacLeod, swept away the long held principle that postnuptial agreements are contrary to public policy.

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