

Agreements: prenups and postnups

If there is an agreement between 2 people about how their assets should be divided up when they get divorced, a court will usually take this into account when deciding how to divide the assets. The court takes the agreement into account as one of the “circumstances of the case” under section 25(1) of The Matrimonial Causes Act 1973.

Agreements can be either:

- “Ante-nuptial”, in other words before the marriage. Most people are more familiar with the term “pre-nuptial”;
- Nuptial, i.e. during the marriage; or,
- Post-nuptial, towards the end or after the marriage.

Was an agreement reached?

In some cases an important question will be whether an agreement was actually reached. This most often happens when 2 married people have fallen out and are trying to sort out their finances. Sometimes they will have agreed about nearly everything but still have to sort out a few small points. There is guidance about this from a case called *Xydhias v Xydhias* [1999] 1 FLR 683. In that case the parties had engaged solicitors and barristers. There had been long negotiation and an overall agreement had been reached. The parties were in the process of setting down in writing a “consent order” to be placed before the court. At that point the Husband sought to withdraw from the agreement which had been reached. The Court of Appeal found that an “accord” had been reached between the parties and that the Husband was bound by the deal.

For this reason it is very important that when negotiating parties think carefully about the terms of any offer which is made to them. Once you have accepted an offer it is very difficult to withdraw from the position if you later think it is not quite right. In the same way you should only make an offer if you think the terms of it are something you could live with if the other side accept it.

It is also important to get an agreement down in writing if possible, with both parties signing the draft agreement.

What makes an agreement final?

For an agreement to be binding and final it requires the approval of the court. In other words the court needs to be provided with a draft consent order and the information about the parties’ finances which is set out under the consent order procedure. If a judge thinks that a draft consent order contains a settlement which is fair then they will approve the order. It will be “sealed” by the court and once this has occurred the consent order is binding on the parties.

The procedure for settling a case by a consent order is set out in the Family Procedure Rules at rule 9.26.

Ultimately it is always for the court to decide whether the agreement which has been reached is “fair”. A fair number of draft consent orders are not approved each year. If the judge does not give approval, they will usually provide a reason. For example:

“This was a long marriage but the agreement suggests the Husband should keep all of his very large pension”; or,

“The fact that the Wife keeps the whole house with the Husband having no share at all is an unfair capital division”.

Status of agreements

For many years English law did not give full effect to agreements between parties about how to divide up their property. In particular the law did not give weight to “pre-nuptial agreements” in other words agreements entered into before people got married. The reason for this was that such agreements were believed to be a bad idea as they were against the idea of marriage which was for 2 people to be together for the rest of their lives.

Over time this changed. Most importantly in 2010 there was a decision of The Supreme Court: *Radmacher v Granatino* [2010] UKSC 42. In that case the Supreme Court found that the same rules should apply to agreements between married couples if they were reached before the marriage, during the marriage or after the marriage. All “nuptial agreements” were therefore to be treated the same. In the case of *Radmacher* the Supreme Court set down a rule which is meant to help courts decide how far an agreement is to be taken into account:

“The court should give effect to a nuptial 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.”

What does that mean? Well it means that courts will hold parties to their agreements unless the court decides that it would not be fair to do so. The following factors might make it unfair to hold parties to their agreement:

- Where one of the parties did not enter into the agreement “freely”;
- Duress
- Fraud
- Misrepresentation
- Other unconscionable conduct such as undue pressure falling short of duress;
- One of the parties did not have “a full appreciation of the implications of the agreement.” In other words they did not know what it meant. It would be relevant to consider whether they had any legal advice about the agreement. It would also be relevant whether the agreement had been properly explained to them by someone and whether they were intelligent enough to understand it.
- There has been a significant change of circumstances since the agreement, for example the parties have had children together.

It is quite likely that in a case where the agreement does not provide for the financially weaker party's reasonable needs, a court would ignore the agreement or place less weight on it when deciding how to divide up the assets. In Radmacher the court stated:

“The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement