

Prenups - what happens with one and what happens without one?

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Prenups are increasingly used by couples to give certainty about the financial aspects of their relationship and so it pays to know what you're getting into. This is what you need to know:

Are they legally binding?

Although nuptial agreements are not yet legally binding in England, they can be influential and upheld if certain conditions are met. The golden rule is that the court will 'give effect to a nuptial agreement that is entered into freely 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.'

Fairness is therefore key. An unfair agreement is unlikely to be upheld so it is really important to consider not just what you want out of the agreement but also how the agreement would leave each of you if you were to divorce. Would everybody be able to house themselves and meet their day to day needs if the agreement is implemented? That's one of the key questions, but how much each of you and any children will need really depends on the circumstances of the case. Pre-nuptial agreements have to be carefully tailored to each couple. There is no one size fits all solution – each case is decided on its own facts.

What are the benefits of having a prenup or postnup ?

A well-drafted prenup or postnup (which is the same as a prenup, but for when you are already married) can help protect wealth built up prior to marriage or wealth received during the marriage or civil partnership (for example by inheritance) from being shared on divorce. It can also be used to try to limit spousal maintenance obligations if there are divorce proceedings in the future.

Postnups in particular can also be used to limit issues couples may have during their marriage; by enabling them to agree financial arrangements in the event of divorce and then work on any marital issues without money worries getting in the way.

On the flip side, the agreement has to be fair to the financially weaker party to ensure they are not left in a predicament of need.

What happens if you don't have one?

Without one in place, if you cannot agree between you what the financial arrangements should be on a relationship breakdown, the court will decide, taking into account all of your circumstances, and in particular:

- your income, earning capacity, property and other financial resources which each of you have or are likely to have in the foreseeable future;
- the financial needs, obligations and responsibilities which each of you have or are likely to have in the foreseeable future;
- the standard of living you have enjoyed as a family;
- the contributions each of you has made or is likely to make in the foreseeable future to the welfare of your family, including any contribution by looking after the home or caring for children; and

- any loss of benefits (such as pension rights) you each may have.

Above all, the court has to give top priority to the welfare of any children of the family who are under 18.

The starting point is that what is built up during the marriage is divided equally on divorce. Marriage truly is a partnership of equals and there is no discrimination between the contributions made by the 'breadwinner' and the 'homemaker'. However, there are important other factors at play. In particular, the Court has regard to what people need, which may mean there should be a departure from an equal division and over the years the court has found other reasons for departing from an equal share in appropriate circumstances. English family law is extremely discretionary, giving Judges the power to be creative in finding solutions that work for the family.

Prenups and postnups are not for every couple (and not every divorce lawyer has one!) but, for example, if you are looking to protect wealth you have or might inherit, or wealth built up prior to marriage, then they are a useful tool. Although not automatically binding, if drafted correctly and if they are fair, they can help to achieve certainty in what is a highly discretionary system.

To find out more about prenuptial agreements, [click here](#). To read more on [#ModernRelationships click here](#) or listen directly to our [podcast series here](#).

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