

Marital agreements as a financial planning tool

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Head of family law at West End law firm RIAA Barker Gillette (UK) LLP, [Vandana Chitroda](#), explores the use of marital agreements as a financial planning and wealth management tool.

[Research commissioned by The Marriage Foundation](#) found that one in five UK marriages have utilised marital agreements. Marital agreements have recently become a focal point for couples who consider financial planning an essential marriage prerequisite. While many may think preparing for a marriage breakdown is unromantic, others view it as an essential part of financial planning and a vital security measure to safeguard their future.

What are marital agreements?

A marital agreement is a written agreement entered into by a couple seeking to regulate their financial position should their marriage break down. A couple can enter into a marital agreement before marriage (known as a pre-nuptial agreement or prenup) or during a marriage (known as a post-nuptial agreement or postnup).

Marital agreements set out the present ownership of assets and the intended future ownership of such assets in the event of a divorce. Such agreements define matrimonial, non-matrimonial, and joint and separate property. However, they can also deal with income, future earnings and interests under trusts and financial provisions for children.

Why enter into a marital agreement?

Couples enter into marital agreements to provide certainty, protect their assets, and clarify how they will conduct their financial affairs during and after marriage.

The law

No specific law relating to marital agreements currently exists. Therefore, they do not override a court's decision or automatically bind the courts upon divorce.

When considering the role of a marital agreement in divorce proceedings, the starting point is the Matrimonial Causes Act 1973. [Section 25 of that Act](#) obliges a judge to consider all the relevant circumstances of the case when deciding how to divide the parties' finances on divorce. The courts will consider whether a marital agreement meets specific procedural and substantive safeguards when determining whether to uphold it.

The law relating to the fairness of marital agreements lies in the Supreme Court judgment in [the case of Radmacher v Granatino](#). This decision provided the courts with guidance on the discretion to be applied when determining whether a marital agreement should be given 'decisive weight'. The courts will assess fairness by considering the following criteria:

1. The agreement must be freely entered into, which means that both parties must enter into the agreement of their own free will, without any pressure from each other or anyone else.
2. The parties must have a full appreciation of the implications of the agreement.
3. Holding the parties to their agreement, in the prevailing circumstances, must be fair.

Legislative reform

In 2014, the Law Commission published its [Matrimonial Property, Needs and Agreements report](#). The report recommended legislative reform to make marital agreements that are in a prescribed form and adhere to certain safeguards to be legally binding. If an agreement met the Commission's criteria, the courts would class it as a "qualifying nuptial agreement". A qualifying nuptial agreement would prevent the courts from making financial orders on divorce inconsistent with the terms set out in any marital agreement; unless an order is needed from the court to meet one of the parties' financial needs or to benefit a child of the family.

Nuptial agreements that do not adhere to the criteria would continue to be treated as a 'relevant factor' by a judge deciding what financial orders to make on divorce.

A qualifying nuptial agreement must meet the following criteria:

1. The agreement must be contractually valid.
2. The agreement must be validly executed as a deed and contain a "relevant statement" signed by both parties confirming that they understand the agreement is a qualifying nuptial agreement that will remove the court's discretion to make financial orders on divorce except to meet financial needs.
3. The parties cannot enter into an agreement within the 28 days preceding the wedding.
4. Both parties to the agreement must have received disclosure of material information about the other party's financial situation when entering into the agreement.
5. Both parties must have received legal advice when they entered into the agreement.
6. The agreement must not prejudice any children. For example, if the agreement makes insufficient financial provisions for children, it will be set aside by the court.
7. The agreement must meet both parties' needs regarding the standard of living during the marriage. Provision for needs is not limited to an income stream; it includes capital provision and the long-term provision of a home. The possibility of ongoing financial provision for a party caring for children is essential. The court would not uphold an agreement that results in a party receiving very little or nothing.

While the government has not yet issued its final response to the Law Commission's proposals, some of the proposed reforms may become law in due course. Accordingly, it is vital to remember the Commission's recommendations to ensure a marital agreement complies with the suggested requirements for a qualifying nuptial agreement. Complying with these requirements will mean that the marital agreement has the best chance of being legally binding in the future and will provide parties with as much clarity and certainty as possible regarding the division of assets in the event of a marriage breakdown. In addition, thinking ahead will save parties the stress, time and legal costs of contested financial proceedings.

Financial planning

No set criteria make some couples more eligible to enter into marital agreements. Certain factors may motivate some couples more than others to protect their wealth before they tie the knot.

Couples have often used marital agreements to ring-fence inheritance, family businesses and valuable family assets such as heirlooms from the 'matrimonial pot'. Recently, more and more couples have opted for marital agreements to protect and preserve assets for the benefit of their children from a previous marriage.

Often, the only purpose of having a marital agreement is simply because one party had acquired significantly more wealth than the other before the relationship began. Therefore, the wealthier party wishes to protect their wealth in case of a marital breakdown.

Protecting family assets and inheritance

In the event of a divorce, marital agreements can play a significant role in allowing a spouse to retain their shareholding in a generational family business established before the marriage.

It is common for owners of family assets to ensure that gifted and inherited assets do not become the property of the non-blood-related spouse in the event of a divorce. Therefore, that spouse cannot claim from the asset. In this scenario, couples often use a marital agreement to outline alternative housing provisions and identify other assets and resources to meet income needs.

Conclusion

With divorce rates significantly increasing year after year, it is wise for couples to consider discussing marital agreements, either before or during their marriage, as a financial planning tool and to seek independent legal advice to ensure its validity and fairness so that the court can give weight to it in any future divorce proceedings.

Call our head of family, Vandana Chitroda, today to find out how she can help you to plan for your future.

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Note: This article is not legal advice; it provides information of general interest about current legal issues.

