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answered

PRENUPTIAL AGREEMENTS: ADVANTAGES AND DISADVANTAGES

This Stowe guide is designed to help people understand the advantages and disadvantages of entering into a prenuptial agreement prior to getting married.

A prenuptial agreement is a formal, written agreement between two partners prior to their marriage.

It can set out ownership of all belongings (including money, assets and property) and explains how it will be divided in the event of the breakdown of their marriage.

Below we have detailed some of the advantages and disadvantages of entering into a prenuptial agreement.

Advantages

Clarity

You and your fiancé/fiancée can make it clear to one another that certain property/assets belongings will not be shared during the marriage or on any future divorce. Such property is often referred to as “non-matrimonial property”. The definition of non-matrimonial property is unclear in case law, but can be agreed in a prenuptial agreement.

Certainty

You and your fiancé/fiancée can agree at the outset of your marriage how your finances will be divided if you separate or divorce. This should save you both the uncertainty, time and stress of litigating about your finances if you do separate or divorce.

Transparency

You and your fiancé/fiancée should provide full financial disclosure in the prenuptial agreement, so you will both know at the outset of the marriage the value of each other’s assets and their income.

Save on any potential divorce costs

You will incur legal fees for preparing and advising on the terms of the prenuptial agreement. However, it is usually much less expensive to negotiate and draft an agreement than to litigate about the division of your finances should you separate or divorce.

Protection of assets

You can protect assets you may wish to “ring fence” from one another, such as inheritances; heirlooms; an interest in a

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family business; gifts received from a third party; or property acquired before the marriage. If the prenuptial agreement ring fences such property, the Court is less likely to award a share of that property to the other party on any divorce.

Protection from debt

If one of you has significant debts, either now or in the future, the prenuptial agreement can be used to protect your assets from being used to satisfy those debts.

Compensation for loss of a career

You can agree that if, during the marriage, either one of you gives up your career to care for the other or any children, that person should be entitled to a greater share of the assets on the breakdown of the marriage to reflect their loss of earning power going forward.

It is often difficult to convince the Court to award an element of "compensation" for loss of a career, but provision for such payment in the prenuptial agreement is likely to be upheld by the Court.

Protection of family members

If one or both of you have children from a previous relationship, a prenuptial agreement can protect the financial interests of those children by ensuring certain assets are ring fenced for their benefit.

Can minimise acrimony in divorce

Setting out how assets are to be divided on divorce in the prenuptial agreement should lead to fewer arguments about finances should you divorce and so result in a more amicable relationship.

Improves communication

Discussing financial issues can be one of the most difficult aspects of marriage. Dealing with this at the outset can strengthen a relationship and support good communication in the marriage.

Provision on death

The prenuptial agreement can set out what should happen to your assets on your death. This can support the provision contained in your Will and clarify what should happen to certain assets. For example, the inheritance prospects of children and grandchildren can be protected.

Freedom to agree your own terms

You and your fiance/fiancee may have a creative plan for dividing your assets if you divorce. A prenuptial agreement provides you with the freedom to agree your own terms without the Court imposing a solution on you.

Disadvantages

Not legally binding

A prenuptial agreement will not necessarily be binding, as currently the Court remains able to make financial orders on the breakdown of a marriage.

However, the Court will uphold a prenuptial agreement that is freely entered into by each party with a full appreciation of its implications, unless it would not be fair to uphold the agreement.

You could spend considerable time, money and effort negotiating the terms of the prenuptial agreement, but find it is not upheld by the Court in any future divorce proceedings, though this will only happen if the Court finds the agreement "unfair".

Difficulties making financial provision for children

A Court considering financial claims on divorce will primarily be concerned with ensuring any child of the family is financially secure.

The Court is likely to be sceptical that arrangements drawn up years previously will be in the best interests of the children now. If you or your fiance/fiancee wish to make provision for existing children in the prenuptial agreement, you can do so, but you must be aware that circumstances change.

Making provision for future children is fraught with difficulties as the prenuptial agreement cannot predict future circumstances. Any clauses dealing with child maintenance will be subject to review if the other parent questions the adequacy of the arrangements. The jurisdiction of the

Child Maintenance Service (CMS) cannot be ousted by an agreement between the parents and a parent can apply to the CMS for a maintenance assessment at any time after separation.

Changes in circumstances

A prenuptial agreement cannot predict what will happen during the marriage and significant changes in circumstances may occur. For example, you may have a further child, lose your job or become incapacitated.

Should circumstances change, a prenuptial agreement that does not anticipate these events will lose its relevance and is unlikely to be upheld by the Court.

The need to review

To increase the likelihood of a Court upholding the terms of the prenuptial agreement on the breakdown of the marriage, there should be a review clause that triggers a re-examination of the terms on a significant change in circumstances, such as the birth of a child.

A review of the prenuptial agreement will result in further time, legal fees and perhaps difficulties agreeing any changes that should be made to the agreement.

Unromantic

You may find the concept of a prenuptial agreement rather unromantic at a time when you are in love and planning your wedding.

Timing

Preparing for a marriage is stressful, and the added pressure of considering financial issues and negotiating the terms of a prenuptial agreement can put a strain on a relationship.

Vulnerability of the economically weaker party

Sometimes the economically weaker party wants to agree to clauses limiting his or her rights simply to get the prenuptial agreement concluded so he or she can concentrate on the wedding.

Inheritance issues

If a party waives inheritance rights in the prenuptial agreement and his or her spouse dies while they are still married (and did not provide properly for the other in a will) he or she may be in a precarious financial position.

Need more information?

Call our Client Care Team on **0330 838 7456** to speak with one of our specialist family lawyers or visit www.stowefamilylaw.co.uk



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