



Prenuptial Agreement

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This is an excerpt from Lawpack's *Prenuptial Agreement eKit*.
To find out more about making a Prenuptial Agreement, [click here](#).



► How to use this eKit

This Lawpack eKit can help you achieve a legal objective efficiently and economically. Nevertheless, it is important for you to use this Lawpack eKit properly if you are to avoid later difficulties.

- This eKit is for those couples drawing up a Prenuptial Agreement (or Pre-Partnership Agreement for civil partners) who are both domiciled or resident in England or Wales. This eKit is not suitable for use in Scotland.
- Read this Manual carefully. It contains the instructions and advice you need to bear in mind when considering the terms of your Prenuptial Agreement.
- Please note that a Prenuptial Agreement may not necessarily be binding under current English law. Although, following the recent Supreme Court case of *Radmacher v Granatino*, the existence of a Prenuptial Agreement may be an influential factor in any decision of the Court when it considers a financial application upon divorce. To increase the chances of a court approving your Prenuptial Agreement, you should follow the advice given in this Manual.
- Once you have completed your Prenuptial Agreement you should take it to a solicitor so that he or she can advise on its contents, in writing. This is to give you the best possible chance of persuading a judge to take it into account. By using this eKit and doing the negotiating and drafting yourself, you should save time and money in legal fees, as you will have done most of the work yourself. **Note that it is advisable for each party to take separate independent advice in order for the agreement to be treated as binding. This means you should both go and see a lawyer, and should not use the same lawyer.**
- Always use a pen or type on legal documents; never use pencil.
- Always keep legal documents in a safe place and in a location known to your spouse, family, executor or solicitor.
- This eKit is designed for couples who are planning to marry or enter into a civil partnership in the near future. All references to divorce in this eKit also cover dissolution for civil partnerships and references to marriage should also be construed as including civil partnerships.



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► Introduction

When you get married, are you planning to have a long and happy life together? Of course you are. However, if the unthinkable happens and you fall out do you want to be certain of the financial outcome, or leave it to chance and the skill of the lawyers acting for you? You want the former of course. How can you achieve this? Well, you can enter into a Prenuptial Agreement before your marriage if you are heterosexual, or a Pre-Partnership Agreement before your civil partnership if you are homosexual. Currently, Prenuptial Agreements are not legally binding in English and Welsh courts; but they are an influential factor following the decision of the Supreme Court in *Radmacher v Granatino* and they can therefore be treated as binding in some circumstances. Following the recent recommendations of the Law Commission in 2011 it may not be long before there is an Act of Parliament specifically drafted to deal with prenuptial agreements and their enforceability. In the meantime, they are long established as invaluable evidence of what a couple intend to happen on divorce, or death.

This eKit can help you agree the terms upon which you will separate should the unthinkable happen. It will also help you to draft a Prenuptial Agreement that you and your partner can both enter into and see as fair now, whilst the sun is shining. If the rain comes, it may just help you both to separate with dignity, not acrimony; sadly, not angrily; cheaply, not expensively.

► What is a Prenuptial Agreement?

Prenuptial Agreements are recognised in many countries.* However, in the UK they have a history of being seen as unromantic by couples about to embark on a life together. Yet they have also, with increasing frequency, been taken into consideration by the English courts when they have been looking at financial settlements on divorce.

In the recent case of *Radmacher v Granatino* the Supreme Court decided by a majority that an English court should give effect to a Prenuptial Agreement that is freely entered into by each party with a full appreciation of its implications unless, in the circumstances, it would not be fair to hold the parties to their agreement. During the course of 2011, and in the early months of 2012, there was a number of reported decisions made by the courts in which Prenuptial Agreements were upheld, following the decision in the *Radmacher* case. This trend looks set to continue.

By their nature, Prenuptial Agreements are designed to set out the terms upon which a couple will separate or divorce. Since couples enter into them before they marry, the terms are agreed when there is no bitterness between them. Therefore, the costs of negotiating a Prenuptial Agreement are likely to be far less than the costs of negotiating a divorce settlement, because all the hard work (i.e. the negotiation of the division of the 'family pot') has already been done. The Prenuptial Agreement can also deal with what parties intend to leave to each other on death (see below).

* Countries that recognise Prenuptial Agreements (subject in many cases to judicial approval) are not limited to but include:

Australia, Belgium, Canada, Czech Republic, Denmark, Estonia, France, Germany, Greece, Holland, Hong Kong, Hungary, Italy, Lithuania, Norway, Portugal, Spain, Sweden, Switzerland, United States of America (but each state has a different approach – check with a local lawyer, as some states will not recognise them or only in part).



▶ What can a Prenuptial Agreement cover?

In order to stand a good chance of being upheld by a court, it is wise to let a Prenuptial Agreement deal only with financial matters, and not with any other more personal issues regarding your relationship, otherwise the court may consider that some of the non-financial clauses render the whole of the agreement void.

You should not, for example, include provisions in a Prenuptial Agreement in relation to the care of and contact with children. This is because the courts will not bind a child into an agreement entered into by its parents. A Prenuptial Agreement which aims to set in stone arrangements for a child is therefore unlikely to find favour with a judge, especially if it was agreed years before the separation or divorce.

Any agreement you may wish to enter which regulates the arrangements for your children, or other non-financial matters should be put into a separate document and not in the Prenuptial Agreement itself. This is to protect you from a situation where a judge finds the whole of your agreement unenforceable. There is no special form for such a document; any simple written agreement setting out your arrangements will be sufficient for the court as evidence of your intentions, should you divorce or separate.

▶ 'Dos' and 'don'ts'

This eKit is specifically designed to be used by you as a couple. It is advisable that you both take independent legal advice before entering into the agreement, so that it will be easier to persuade a judge to take the Prenuptial Agreement into account in any divorce proceedings. This means that you should each get advice from separate lawyers. After reading the requirements of a Prenuptial Agreement under the law on pages 8 to 9 turn to pages 12 to 15 for details of how to complete the draft agreement included in this eKit and then prepare your own draft for your respective lawyers to cast their eyes over.

The aim of this eKit is to help loving couples enter into an agreement that will help them to avoid distress and bitterness (as well as legal costs) if their relationship goes wrong. It is not to encourage them to fall out. So here are some 'dos' and 'don'ts' when approaching this issue:

- Clearly you need to discuss your wish to enter into a Prenuptial Agreement with your partner. Ideally, you should address this before or soon after you have decided to marry. Do not simply send the details of the Prenuptial Agreement to your partner (especially not through your lawyer) without discussing it with them first. The marriage ceremony should take place at least 21 days after the Prenuptial Agreement is signed. If the agreement is entered into fewer than 21 days before the marriage, it is less likely to be persuasive on a judge should you divorce, because a short time period between the execution of the agreement and the ceremony can be construed as evidence of duress. This can invalidate the agreement. Ideally, give your partner several months to consider and discuss the agreement with you. If you do not get married within six to 12 months of signing the agreement you should draw up and sign another one.
- Do explain to your partner why you have this desire to regulate a relationship breakup; for example, you may have already had a messy divorce or have children from a previous



relationship whom you want to protect financially.

- Do reassure your partner that the agreement is up for negotiation and is not to be made only on your terms.
- Do discuss what you feel are the most important terms.
- Do exchange full and truthful details of your income and assets with your partner.
- Do contact a mediator, counsellor (e.g. from Relate) or other suitable third party to help you negotiate without argument, if you fall into a disagreement.
- Do not include non-financial matters in your Prenuptial Agreement. Put them in a separate document. This can take any form – even a letter – and can include such things as how often one of you will have your mother to stay or how often the garden will be done – in short, anything!
- Do not attempt to rewrite the law on divorce* and avoid making your agreement over-complicated. Remember, if it is not clear, it will not be upheld by a judge; so keep it simple. You cannot cover every eventuality, so it is recommended that Prenuptial Agreements are revised and re-executed every time something important happens (e.g. a birth), or every five years; the court made it clear in the *Radmacher v Granatino* decision that if it is not fair to hold the parties to their agreement, it will not do so. If a new agreement is executed during the course of the marriage, the agreement is then called a Postnuptial Agreement, but it is otherwise the same as a Prenuptial Agreement in its form, content and effectiveness.
- Clauses regarding property ownership need additional legal documents to be prepared in order to be effective; see page 10.
- Do remember that what is important is that you love each other and want to be with each other. This is not an exercise in planning to fail. You simply want certainty and dignity if things go wrong.

Once you have taken into account all of the above, you must make decisions about the following points, as these will form the basis of your Prenuptial Agreement:

- Items you both own separately now and which you will always own separately.
- What will become of any particularly valuable joint asset and how it should be treated in the event of separation or divorce.
- What will happen to the ownership of any windfall which either of you receives during your relationship (whether you are living together or not); for example, an inheritance or lottery win.

Once you have decided what you want the Prenuptial Agreement to cover, you must ensure that the legal requirements of a Prenuptial Agreement are met (see below). In this eKit, we have provided the basic template that most couples will wish to complete. However, you can customise it to include matters such as:

- What events will render the agreement or parts of it invalid (e.g. illness, redundancy, birth of a child, etc).

* The Law Commission has indicated that it will recommend that Prenuptial Agreements be treated as binding, where they distinguish between marital and non-marital property (see page 11).



- Who will be responsible for paying household bills.
- What the penalty will be, if any, in the event that one of you doesn't stick to the terms of the agreement (e.g. failing to pay half of the bills).
- What you will leave to each other on death, although you will still need to make a Will.

► The legal requirements for a Prenuptial Agreement

The legal requirements for a Prenuptial Agreement are in a state of flux since the recent *Radmacher v Granatino* case because the requirements set down in that case were not identical to those previously indicated by the Courts or in line with the recommendations of institutions such as the Law Society. The Law Commission is currently working on a report about Prenuptial Agreements which may well lead to legislation that will clarify matters. In the meantime, it is wise to ensure you implement all the various suggestions that have been made by the courts and other bodies such as The Law Society, to ensure your Prenuptial Agreement stands the best chance possible of being treated as binding. The following test should therefore be complied with:

- you must both understand the agreement;
- you should both, independently, be properly legally advised about whether the content is fair (although in *Radmacher v Granatino* the husband had no legal advice and was still held to be bound by the terms of his Prenuptial Agreement because he was an investment banker and because he was a 'man of the world' and he had had ample opportunity to obtain legal advice);
- there must be no pressure on either of you to sign the agreement;
- if you are pregnant, your partner must know about it;
- you must exchange information about your financial circumstances, which ideally, should be full, frank, clear and accurate. In the *Radmacher v Granatino* case the court thought it was only necessary for each party to have the information material to their decision, it is the writer's view that to give less than a clear picture of your financial circumstances could cause problems in the future, particularly as the law is likely to change. A convenient way to give financial disclosure is to fill in Appendix A in the Prenuptial Agreement in this eKit to show what information you have exchanged. It is a good idea to give your partner supporting documents – such as bank statements – as evidence of your financial situation;
- one party must not exercise control over the other to persuade them to sign the agreement, by saying, for example: 'If you don't sign this Prenup then I won't marry you!'; the court has made it clear that the emotional state of the parties at the time they enter the agreement will be an important factor; and
- there must not be any fraud, duress or mistake surrounding the agreement; whether a misunderstanding will invalidate an agreement is not at present clear.

In addition, the court will consider whether:

- There has been any unforeseen change of circumstances; for example, a disability occurring to one party, since the agreement was made. It is important therefore to keep