



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](#).



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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; they are just persuasive on judges. Prenuptial Agreements cannot therefore guarantee what the outcome will be in all cases. However, the law is moving towards accommodating them. 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. 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.

▶ 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

* Countries that recognise Prenuptial Agreements (subject in many cases to judicial approval):

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).



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. Both of you should take independent legal advice before entering into the agreement, as 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 11 to 14 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 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 pages 9 to 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).
- 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.