

Advantages And Disadvantages Of A Post-Nuptial Agreement

Advantages Of A Post-Nuptial Agreement

The advantages to you of entering into a Post-Nuptial Agreement include:

- **Clarity.** You can make it clear to one another that certain property belongs to you alone and will not be shared during the marriage or on any future divorce. Such property is often referred to by family lawyers as “non-matrimonial property”. The definition of non-matrimonial property is unclear in case law, but can be clearly defined in the Post-Nuptial Agreement so that you can both be aware of the extent of each other’s non-matrimonial property and the value of any property you are giving up the rights to share.
- **Certainty.** You can agree at the outset of your marriage how your finances will be divided if you later separate or divorce. This should save you both the uncertainty, time and stress of litigating about your finances if you do later separate or divorce.
- **Transparency.** You should both provide financial disclosure of your assets and income in the Post-Nuptial Agreement, so you will both know and understand the value of each other’s assets, which will assist you in your negotiations.
- **May save money.** While you will both incur legal fees for preparing and advising on the terms of the Post-Nuptial Agreement; it is much less expensive to negotiate and draft a Post-Nuptial Agreement than to litigate about the division of your finances should you later separate or divorce.
- **Protection of assets.** You can protect assets you may wish to “ringfence” from one another, such as inherited assets, family heirlooms, an interest in a family business, gifts received from a third party, or property acquired before the marriage. If the Post-Nuptial Agreement ringfences any such property, the Court is less likely to award a share of that property to the other party on any future divorce.
- **Debt protection.** If either of you incur significant debts, either now or in the future, the Post-Nuptial Agreement can be used to protect your assets from being used to satisfy those debts.
- **Compensation for loss of career.** You can agree that if, during the marriage, either of you give up a potentially lucrative career to care for the family, 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 can be difficult to convince the Court to award an element of “compensation” for loss of career, but provision for compensation in the Post-Nuptial Agreement is likely to be upheld by the Court.
- **Protection of family members.** If either of you has children from a previous relationship or marriage a Post-Nuptial Agreement can protect the financial interests of those children by ensuring certain assets are ringfenced for them in the Post-Nuptial Agreement.
- **Minimises acrimony on divorce.** Setting out how assets are to be divided on divorce in the Post-Nuptial Agreement should lead to fewer arguments about finances should you later divorce and result in a more amicable relationship between you.
- **Improves communication.** Discussing financial issues can be one of the most difficult aspects of marriage. Dealing with this now can strengthen a relationship and support good communication in the marriage.
- **Protection of business partners.** If either has an interest in a family or small private business the Post-Nuptial Agreement can protect that interest and prevent disruption to the business if the marriage breaks down in the future. This could prevent a situation whereby either of you are awarded an interest in the business and has or have to participate in its running with family members or business partners.

- **Provision on death.** The Post-Nuptial 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 in the agreement.
- **Freedom to agree your own terms.** You may have a creative plan for dividing your assets if you divorce. A Post-Nuptial Agreement provides you with the freedom to agree your own terms without the Court imposing a solution on you.

Disadvantages Of A Post-Nuptial Agreement

The disadvantages to you of entering into a Post-Nuptial Agreement include:

- **Not legally binding.** As I mention above, a Post-Nuptial Agreement will not necessarily be binding, as currently the Court remains able to make financial orders on the breakdown of a marriage. The Court will uphold a Post-Nuptial 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 uphold the agreement. Therefore, you could spend considerable time, money and effort negotiating the terms of the Post-Nuptial 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 child(ren). If either of you wish to make provision for existing children in the Post-Nuptial Agreement, you can do so, but you must be aware that circumstances change and, for example, a child may have to retake a year at school. Making provision for future children is fraught with difficulties as the Post-Nuptial 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 because the jurisdiction of the Child Maintenance Service (CMS) cannot be ousted by agreement between the parents and a parent can apply to the CMS for a maintenance calculation at any time.
- **Choice of law clause not effective.** If either of you has a connection with a different jurisdiction then issues of legality could potentially arise. If you wish the Court in another jurisdiction to deal with any future breakdown of your marriage, a clause in the Post-Nuptial Agreement stating that fact will not bind the English Court. However, if Post-Nuptial Agreements are usually binding in that other jurisdiction, that will be a strong indication to the English Court that you both intend to be bound by the terms of the Post-Nuptial Agreement.
- **Changes in circumstances.** A Post-Nuptial Agreement cannot predict what will happen during the marriage and significant changes in circumstances may occur. For example, you could have children, lose your job or become incapacitated. Should circumstances change, a Post-Nuptial Agreement that does not cover the changes will lose its relevance and is unlikely to be upheld by the Court.
- **Review.** To increase the likelihood of a Court upholding the terms of the Post-Nuptial Agreement on the breakdown of the marriage, there should be a review clause that triggers a review of the terms on a significant change in circumstances, such as the birth of a child or bankruptcy. A review of the Post-Nuptial Agreement will result in further time, legal fees and perhaps difficulties agreeing any changes that should be made to the agreement. As a review is likely to be made when there has been a significant change in circumstances, the timing of renegotiating the terms of the Agreement may be awkward.
- **Vulnerability of economically weaker party.** To ensure the Post-Nuptial Agreement is fair to both parties and has the best possible chance of being upheld by the Court, you must both be aware of the implications of each clause and whether it is of benefit to you. I can advise on of you accordingly and the other would also need independent legal advice, but only the two of you can decide how you wish to proceed having had the benefit of legal advice.
- **Mistrust.** A party may perceive a request for a Post-Nuptial Agreement as an implication he or she cannot be trusted and is seeking to gain financially from the marriage. Such request may also cause a party to worry that his or her spouse is planning to end the marriage, this can put strain on the relationship.

- **Inheritance issues.** If either of you waives inheritance rights in a Post-Nuptial Agreement and the other of you were to die while you are still married (and did not provide properly for the other in a will) you may be in a precarious financial position. I would advise that neither of you should waive your inheritance rights as this would likely result in the Court considering the Agreement unfair.
- **Legal fees.** A Post-Nuptial Agreement can save a significant amount of money if there are later divorce and/or financial proceedings, but if the marriage survives, the legal fees spent in drafting and negotiating the terms of the Post-Nuptial Agreement will effectively have been wasted.

We hope this clarifies the reasons why you may wish to proceed (or not) with the Post-Nuptial Agreement. If you have any further questions, or would like to instruct a solicitor to help set up a post-nuptial agreement, you can get in touch using the contact information at the bottom of this page.

Further information and assistance

If we can help you with further information, please contact:

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