



An interview with pre-nuptial expert Nick Bennett

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With pre-nuptial agreements on the rise, Charlotte Skea-Strachan, a Senior Associate in the Family department asks Nick Bennett, formerly of Payne Hicks Beach and who recently returned to the bar, some of the questions most frequently asked about prenups and postnups (formally called Prenuptial and Postnuptial Agreements).

Charlotte: Thank you for giving us your time and experience on this subject. With so many long postponed weddings finally taking place, why do you think that more and more people are choosing to enter into Pre or Postnuptial Agreements?

Nick: The main reason that these agreements have boomed in popularity is that people see the hugely damaging effect that a divorce can have on a couple's finances and, if they have children, their ability to be good parents together afterwards; as well as the baffling unpredictability of the system. Unlike many other countries, there are few fixed rules with regard to finances when getting a divorce here, such as what happens to assets one person had before the marriage. Albeit with guidance from historic cases, each case is decided on its own facts. With a range of different judges bringing their individual experience to bear, there will always be a wide range of outcomes. A Pre or Postnuptial Agreement helps a couple to achieve a measure of certainty and predictability.

Charlotte: Is it not rather unromantic to be predicting the downfall of a marriage before it has started? In what circumstances is it sensible to consider a Prenuptial Agreement, and how can it help couples?

Nick: It probably is unromantic when you are in the middle of wedding preparations to be thinking about a prenup. However, perhaps the best way to think about it is as an insurance policy against a divorce. Most insurance policies are a hassle, and the premium is an irritating expense; but it is protection against the worst happening. Of course it is not easy in the lead up to getting married to contemplate a divorce, but with good professional advice and guidance, and if the negotiations are done in plenty of time before the wedding, an agreement can be drawn up and finalised relatively quickly and painlessly.

For many families in the UK an agreement will not be necessary; but anyone with at least a modest surplus of assets over their basic needs should at least think about taking legal advice on whether it is a good idea.

Agreements can help because, as I say, they can give clarity and certainty as to the outcome of any future divorce without leaving it open to the caprice of the English legal system. The parties therefore know the likely outcome; they can save the legal costs and disruption if there is a divorce or a separation; and they can have the negotiation now rather than having to go through what can be

extremely difficult proceedings at a time when the relationship between them has broken down.

Charlotte: If someone's future husband or wife says that they need to have a Prenuptial Agreement, will they need to have legal advice on it?

Nick: Technically nobody *needs* to have legal advice on an agreement, but they definitely should. If you are effectively negotiating a divorce in advance, you want someone who knows what they are talking about to advise you on the future outcome. The financial impact on divorce can be colossal, and you need to know what is likely to happen. From the point of view of the person who wants the agreement, if their fiancé or fiancée *doesn't* have legal advice, it risks the agreement not being upheld on divorce. So often we find that the person pressing for the agreement positively wants to pay for the other to have good advice.

Charlotte: What is a Postnuptial Agreement, and is it only possible if you already have a prenup?

Nick: Very simply, a Postnuptial Agreement is a Prenuptial Agreement after the parties have married. It has exactly the same status under English law. The only difference is the timing. We would usually encourage people to have a Prenuptial Agreement so that everything is dealt with in advance of their marriage, but anyone can enter into one of these agreements at any time. You do not need to have a Prenuptial Agreement to enter into a Postnuptial Agreement.

Charlotte: The million dollar (or pound) question; are Pre, or Postnuptial Agreements valid under English law? If not, what difference does it make if you do have one?

Nick: Looking first at the word "*valid*", English law is different from most other countries as Pre or Postnuptial Agreements are not contractually binding. An English Judge hearing a divorce has the power to say that although the parties signed it, he or she has the power to ignore it. However, since the Supreme Court case of *Radmacher* in 2010, the circumstances in which a judge *would* ignore it have been significantly limited. The default position is that the agreement will govern the terms of the divorce unless it creates some unfairness.

We then need to think about what "*unfairness*" means. This could be procedural unfairness, meaning a problem with the circumstances in which the agreement was signed. There might, for example, be a lack of financial disclosure or legal advice, or one party may have put unfair pressure on the other to sign. More frequently the "*unfairness*" is financial unfairness. The Prenuptial or Postnuptial Agreement will not be enforced if it effectively leaves either party in a "*predicament of real need*". Judges are considering this concept in detail, but essentially the Court is looking at where the economically weaker spouse will live, and how much income they will have to live on. It all depends on the circumstances, but a judge can change the provision that has been made for them under the terms of the Pre or Postnuptial Agreement if the weaker spouse would be left in financial need.

Charlotte: Can couples choose as part of a Pre or Postnuptial Agreement which country a divorce is going to be heard in? What difference does that make and will it always be followed on a divorce?

Nick: Just as a Prenuptial Agreement is not strictly binding under English law, but is influential on a divorce, so the same applies to an agreement on *where* a married couple will divorce. It will not technically affect the English court's power to hear a divorce; but it is a clear way to show an English judge that he or she should let this case be dealt with elsewhere. There is clear case-law supporting the idea that the judge will decline to hear the divorce in those circumstances. This can be crucial as the difference financially between a divorce in England and elsewhere can be very stark. Therefore a couple should explicitly say in their agreement if they want a divorce dealt with in their home country. It will not always be followed, but an English judge is likely to do so without a good reason to the contrary.

Charlotte: Will Brexit have any effect on agreements already entered into, and will a couple will need to think about revisiting them? What does it mean for Pre or Postnuptial Agreements going forward?

Nick: Brexit will not have any effect on the English Court's approach to Pre or Postnuptial Agreements in itself. This is a matter of domestic English law, so was never affected by European law. However, the rules setting out where a divorce can happen *were* an aspect of European law and so that has changed. This is a complex subject, but certain European legal rules had the effect that couples were able to litigate their divorce outside England even if they were both living here; and the English court had to accept that. Brexit changes this. If a Pre or Postnuptial Agreement signed before Brexit has detailed arrangements for aspects of the divorce to be dealt with elsewhere in Europe, in the expectation that those European legal rules would apply, the agreement should definitely be revisited; but that is not necessary if the agreement is a purely domestic English one.

If you are interested in learning more about pre-nuptial agreements or revisiting existing arrangements further details are available here, alternatively please contact Charlotte Skea-Strachan by email, or call on 0207 465 4300
