Briefing

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Binding Pre-Nups – sensible planning or an attack on the foundations of marriage?

The Law Commission's draft legislation, published today, would allow Pre-Nups to be made into binding contracts. It is a socially radical proposal and it will no doubt be greeted with a range of extreme responses. Some will see it as positive, supporting marriage by allowing people to plan their lives, others as contrary to the vows that are made in the marriage ceremony.

Historically the courts showed their disapproval by finding that these agreements were not just unenforceable, but against public policy and therefore absolutely void. This legal disapproval no doubt reflected a wider uneasiness in society about planning for divorce at the time of planning a marriage.

But legal and social attitudes have changed; Pre-Marital Deeds are the norm in Europe, and the courts will now be strongly influenced by Pre-Nups. Many people see them as a way of controlling the wide discretion and unpredictability of the English divorce system, or as a means of protecting family money against claims.

The Law Commission has now gone a step further by preparing legislation for "Qualifying Nuptial Agreements" which the courts would have to follow, and enforce. Some will still see this as an assault on the institution of marriage, but analysis of the detail shows that there is greater subtlety in the proposal than the headlines may suggest.

What is a Qualifying Nuptial Agreement?

These enforceable contracts (which could be entered into before or during a marriage or a Civil Partnership) would only be strictly enforceable on divorce for some people. That is because the "Qualifying Nuptial Agreement" (QNA) will in practice only be a binding contract where there is an excess of assets over what is required to meet needs.

The QNA can therefore:

- set out the proportions in which assets, pensions and/or income should be divided;
- state which assets or classes of assets should be shared or excluded from sharing;
- isolate specific assets which should not be sold or shared.

At the time of the divorce this agreed division would be a binding contract, but crucially the court would have power to vary the provisions in the QNA if that was necessary to meet needs, or otherwise if it was in the interests of a child of the family. So the party in the weaker financial position would still be able to ask the court for financial provision, if their needs were not met by the terms of the QNA.

It would be possible to have hybrid agreements, part of which would be a QNA (contractually enforceable) and part of which would propose and agree how needs should be met. The latter part could strongly influence the court, even if it was not a binding contract.

The Law Commission is also recommending a stricter definition of needs, and has asked that the Family Justice Council should prepare guidelines about the level at which housing and income needs should be met. The expectation is that disputes in the courts about needs will be diminished by that guidance.

Practicalities

To achieve binding status, certain preconditions must be met before the document would be a QNA:

- it must be made no less than 28 days before the marriage or civil partnership (or after the marriage);
- there must be disclosure of all material financial and other facts;
- there must be no coercion or pressure (and disparity in bargaining position will not in itself be deemed to be coercion or pressure); and
- both parties must have independent legal advice.

Who will want them, and who won't?

QNAs would be most suitable for:

- "second time round" couples who want to protect assets for their children from their first marriage;
- Those who have substantial assets now which will comfortably meet needs, or who expect to acquire substantial assets in future, and who want to avoid the unpredictabilities of the court system and have certainty;
- Couples with international connections, who want to replicate the marriage contracts that are commonplace in many other countries, particularly in continental Europe;
- Those with a special inherited asset to protect, often influenced by parents who will not hand the assets down without the protection of an agreement.

Those with more modest resources could still set out a financial agreement in a document that could be influential, even if it did not have the status of a QNA.

Pre-Nups are not for everyone, and many people starting their married life will still take the view that they do not want to be thinking about what will happen if things go wrong.

Will it become law, and if so when?

The Law Commission is making a recommendation to Parliament for legislation to be made; it believes that it will create greater certainty in an area of the law that is currently rife with uncertainty, and that there is cross-party support for this initiative to clarify the law.

It seems unlikely that it will make it to the statute book in this Parliament. And would either a future Conservative or Labour government want to introduce legislation that gives the impression of protecting inherited wealth?

Even if it does not make it to the statute book yet, the courts often take account of Law Commission proposals, and are already (since the ground-breaking case of *Radmacher/Granatino* in 2010) treating them as strongly influential.

Love them or not, Pre-Nups are here to stay.

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