

## THE INTERNATIONAL FAMILY LAW GROUP

### iGuides to family law and practice

#### Marital agreements

Many people on entering a relationship, during a relation or on its termination want to enter into an agreement about financial aspects of the relationship, to record what agreements have been reached, expectations for the future or to resolve and avoid any litigation. Whilst it is still not yet fully part of the English culture, an increasing number of people are asking about premarital agreements.

This note sets out in summary the position and what can be done

The starting point is that English family law cannot be bound under any circumstances by any agreements, arrangements or other forms of settlement. It has an absolute discretion to do what is fair and just in every case. If this means ignoring agreements reached by the couple themselves then the court will do so. For very many years, agreements were routinely ignored.

In the past decade there has become a much greater awareness of the importance of giving some weight, perhaps a considerable amount of weight, to the agreements reached by a couple themselves. In the past 12 months or so, several decisions of the English family courts have given a strong indication that in appropriate circumstances the court will follow agreements. The agreements have been described as having a magnetic importance to the outcome of the case. There is considerable pressure for reform of the law to make them binding, and judges are reflecting this in giving greater weight to agreements.

England will invariably require at least the following before it will give any material way to any agreement:

- each party has had separate independent specialist legal advice
- each party has given full and frank disclosure of their financial and other relevant circumstances
- there has been no duress, misrepresentation or mistake
- the agreement is within the general parameters of what a court would otherwise consider was fair

In these circumstances, the court is much more likely to follow the terms of an agreement even if it might otherwise have made a different order.

There are the following forms of agreement:

- Pre-marriage agreement, which is not binding on any divorce in England even if it would have been binding in a country where it was entered into. However a divorce court will take it into account if the above conditions have been complied with. In essence, it will often depend on what developments especially unexpected developments have occurred since the agreement was entered into
- Marital agreement, which is sometimes the same as a pre-marriage agreement although entered into during the period of the marriage. A recent decision of the Privy Council has highlighted certain somewhat technical and procedural differences between marital agreement pre-marriage agreements.
- Civil partnership agreements, which are invariably treated the same as the marital equivalents
- Separation agreements, entered into between a couple often with their lawyers on the breakdown of the relationship in intended to set out what will subsequently be made into a court order. Because of the risk that one party might subsequently go back on the agreement and seek greater provision, it is the much better to proceed direct to a final order where possible
- Agreements made in mediation, which are treated as privileged, without prejudice, and can rarely if ever be openly referred to unless and until the couple have confirmed they are both prepared to go

ahead with the mediated agreement after legal advice

- Cohabitation agreements, which have none of the problems of marital and civil partnership arrangements. This is a purely contractual arrangement and provided the conditions above are generally complied with, there is every good reason to believe that the court will follow the agreement as if it were a contract.
- Jurisdiction clauses in marital agreements. These state that if there are subsequently any court proceedings regarding the relationship, then they should take place in a particular country. The English courts will give these clauses very substantial weight in the consideration of which country should deal with the divorce or other family proceedings.
- Applicable law clauses in marital agreements. These state that if there are subsequently any court proceedings regarding the relationship, then the couple want a particular country's laws to be applied. England only ever applies English law and will therefore construe this as a jurisdiction clause.
- Foreign pre-marriage and other marital agreements. England has a major problem with foreign agreements. Invariably they have been entered into without independent legal advice and disclosure, sometimes under some pressure and duress and they are often in terms which in English court will consider a very unfair. The English courts have therefore ignored them, which has caused much disquiet abroad where such agreements are binding, irrespective of how unfair they may be. This is because hugely greater weight is placed on the agreement itself.

Where any agreement is likely to have any international element, it is wise to be entered into after consultation with lawyers in the other countries with which the family may have had or may have in the future some connection.

We strongly encourage attempting to resolve all matters without court proceedings, and therefore we try to reach an agreement wherever possible. We believe that some couples in some situations premarital or other relationship agreements can be very valuable including thinking through in advance expectations on financial matters and other situations which can arise during a relationship. We recommend care and caution in drafting such agreements and in deciding, if applicable, whether to seek a final order instead. Nevertheless written agreements can be hugely valuable.

*This is taken from "A Practical Guide to International Family Law" (Jordans 2008) by David Hodson, with acknowledgement. Further details can be found within the book and from David Hodson.*

This iGuide is for information only and specialist legal advice should always be taken. For further details contact The International Family Law Group at 020 3178 5668 and [www.iflg.uk.com](http://www.iflg.uk.com).

**(c) February 2009**