

# NUPTIAL AGREEMENTS & WEALTH MANAGEMENT



**TRACEY MILLER**  
Family Law



## Average marriages in the UK <sup>1</sup>

# 240,854

in 2013




## Number of divorces in the UK <sup>1</sup>

# 114,720

in 2013



Women in late 20's vs Men in late 30's have highest divorce rate

## 71% of these divorces were for first marriages <sup>4</sup>




## Biggest UK divorce settlement <sup>5</sup> £337m

## 42% of marriages are expected to end in divorce <sup>3</sup>



Average length of time it takes to finalise a divorce <sup>2</sup>

<b>7</b>	<b>18</b>
MONTHS	DAYS

N.B. If you both agree.



## 18 Divorces per hour <sup>1</sup>

in 2013

1) [www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2013](http://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2013)  
 2) [www.divorce-online.co.uk/blog/how-long-does-a-divorce-take/](http://www.divorce-online.co.uk/blog/how-long-does-a-divorce-take/)  
 3) [www.ons.gov.uk/ons/rel/vsob1/divorces-in-england-and-wales/2011/sty-what-percentage-of-marriages-end-in-divorce.html](http://www.ons.gov.uk/ons/rel/vsob1/divorces-in-england-and-wales/2011/sty-what-percentage-of-marriages-end-in-divorce.html)  
 4) [www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2013](http://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2013)  
 5) [www.theguardian.com/law/2014/nov/27/jamie-cooper-hohn-largest-divorce-settlement](http://www.theguardian.com/law/2014/nov/27/jamie-cooper-hohn-largest-divorce-settlement)



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## **Introduction:**

Within a divorce practice there are frequently situations where one party at the start of a marriage or a civil partnership has already gained or has the real potential of gaining significant wealth quite unrelated to the contributions of the future marital or civil partner.

The source of such wealth may be the result, for example, of past or future family inheritance, any number of wider family trust settlements or a developed or developing family business with significant prospects of success.

It may, of course, be already owned by the individual, being the fruits of a career or business up to that point or, indeed, that which has been retained following a previous relationship which has ended.

Such sources of wealth or potential, of course, may also arise during the marriage itself.

The risk which the breakdown of the legal relationship of marriage or civil partnership poses to such wealth or its potential is considerable.

This is often not just the concern of the intended spouse or civil partner holding the same, but frequently also a concern to the wider family members or business associates whose own financial interests are inter-related and for whom the need of the divorcing (etc) individual to raise capital or sell off assets from mutual trust or corporate funds held to meet the claim of the other spouse is their problem too.

Wealth planning advice has, of course, to date developed any number of trust and other devices to seek to mitigate this well recognised risk.

However, for the reasons shown below, short of denying the family member (etc) any engagement at all in the wealth creation or its potential – which in most cases to those involved would be unacceptable and impracticable – the holding of any interest, actual or contingent, even by discretionary trust, is reachable by a Family Court under the divorce law of England and Wales and for most purposes capable of being interfered with directly or indirectly by court order.

Following, however the well publicised decision of the Supreme Court in **Radmacher v Granatino** [2010] UKSC 42 and the subsequent **Law Commissions' Report** (Feb 2014) '*Matrimonial Property, Needs and Agreements*', there is now for the first time a real prospect of a significant change in the Law in this area.

Within the foreseeable future, based upon the Law Commission's recommendations, it is likely that Parliament will by amending legislation permit parties in advance to opt out of the Court process upon divorce (etc) on the basis that they have reached a Qualifying Nuptial Agreement ('QNA') which settles how their finances are to be distributed when the marriage breaks down.

This real prospect of change is in recognition of the growing judicial awareness resulting from changing public opinion, that the previous *paternalistic* approach of the Courts to what was right for married partners was out-moded and married parties were entitled to substantial autonomy in having their own '*choices and agreements*' in their relationship recognised upon a subsequent divorce.

Even without the introduction of the QNA, the law now in its approach to a nuptial agreement signed by the parties and particularly a pre-nuptial agreement signed in contemplation of the marriage (etc) is a world apart from where it lay just a decade before when they had a long history of being considered as contrary to public policy.

It is, therefore, this development and its impact on Wealth Planning which this pamphlet seeks to explain and highlight.

## **Tracey Miller Family Law:**

With over 25 years of experience in the legal industry, **Tracey Miller Family Law** provides quality services and advice covering all areas of family law, including advising upon and the drafting of both pre-nuptial, post-nuptial and civil partnership agreements as well as cohabitation agreements.

The business is situated at **Semmes House, Rumford Court, 12 Rumford Place, Liverpool, L3 9DG**, but has an international client and contact base. Authorised and Regulated by Solicitors Regulation Authority SRA number 570909.

Tracey Miller Family Law has worked for years with one of the country's most experienced divorce family finance specialist barristers, Mr Ashley Murray, who practices as Ashley Murray Limited of Ashley Murray Chambers, Horton House, Liverpool L2 3PF.

Ashley was the first family barrister to specialise only in family financial remedy work in the North over two decades ago. He is also a Recorder with over 24 years of sitting experience and is uniquely ticketed in addition to family and criminal court sittings to adjudicate on appeals from financial remedy decisions of district judges.

Ashley is a co-author of the standard legal textbook 'Cohabitation, Law, Practice and Precedents' (6<sup>th</sup> Ed) Jordans Publishing and is particularly responsible for the section relating to Pre-nuptial Agreements. He has had numerous articles published relating to divorce finance law and pre-nuptial agreements. He was also the original protagonist for the successful 'Money Judge' system now in place on the Northern Circuit.



## **What are Pre and Post Nuptial Agreements:**

These are agreements in writing (and usually by deed) signed by parties intending to marry or enter into a civil partnership (Pre-Nuptial) or who have already gone through a ceremony of marriage or civil partnership (Post-Nuptial). Cohabitation agreements are, of course, where there is no present intention of marriage or civil partnership.

Nuptial agreements commonly set out the purpose of the agreement, being to determine in advance of any breakdown of the marriage the agreed division of any assets and interests held by the parties jointly or individually at the time of the agreement or subsequently and the nature of any ongoing income support, in order to save future costs of litigation and provide certainty of outcome.

The agreement will also invariably include the making of similar provision by Will and provide for regular review of its terms as well as confirming that the parties wish for the law of this jurisdiction to apply and specifically exhibit the nature of each party's financial circumstances.

There are numerous possible variables in regard to the additional terms to be included dependent upon the specific requirements of the parties involved.

## What are the Powers of the Court:

Upon divorce (etc), the Family Court can broadly order between the separated spouses the following range of financial remedies under ss **22 to 24, 25B and 25C** of the **Matrimonial Causes Act 1973**:-

- Maintenance for either and by parental agreement any children of the family;
- Lump sum payment or payments;
- A property adjustment order;
- The sale of property;
- A variation of an existing prenuptial or postnuptial settlement;
- A pension order

Such powers relate to the parties' resources wherever they may be whether in or outside the jurisdiction.

The Court further has power to review any financial agreement (**ss34 and 35**).

The Court can make a range of interim orders relating to injunctions restraining either party from using or moving their resources, if in doing so, they would reduce the other party's share in advance of a final divorce (etc) determination (**s37**).

In the event of death, the Court has parallel powers to make 'reasonable provision' for any of the deceased's dependents under the **Inheritance (Provision for Family and Dependent's) Act 1975**.

## **Application and Impact of the Powers on Divorce:**

The Courts have since **White v White** (2000) applied the above powers according to what the Judge considers fair in the circumstances of the individual case, without discriminating between the roles adopted in the marriage (etc) roles. Fairness has been described as having, at least, three strands, being '*needs, compensation and sharing*' and since **Radmacher's** case, the approach has encompassed recognition of the '*choices and agreements*' made during the marriage.

Whether by use of discretionary trust or estate planning or the provisions of a family company's Articles of Association, whereby limitations may exist upon the transfer of shares held, the powers held are such that none of these situations can effectively exclude the Family Court's ability of redistribution of the parties' existing or contingent interests upon a divorce (etc).

The Family Court can, for example, rewrite the terms of a pre or post nuptial discretionary trust, it can use '*judicious encouragement*' upon reluctant trustees to exercise their powers in favour of a spouse beneficiary, it can provide for a deferred payment of a lump sum should there be a future benefit potential or for the transfer of company shares between divorcing parties upon a shareholder's agreement pending eventual sale – to name just a few.

The list of variables of different orders within the table of orders above is almost endless dependent upon the circumstances of any given case.

## The importance of the Pre or Post Nuptial Agreement:

Even without a QNA being introduced by amending legislation, the progressive acknowledgment to date by the Courts upon divorce (etc) of the terms agreed previously between spouses has become, possibly, one of the most effective ways in which the wealth of one of the parties can be protected from a wide ranging redistribution upon the breakdown of the marriage or civil partnership.

In **Radmacher v Granatino**, the Supreme Court made it clear that:-

*'The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement' (para 75).*

The Majority of the Supreme Court judges, therefore, considered that as long as there had been:-

- Material disclosure beforehand of the parties' financial positions; and
- Independent legal advice made available as to the effect and meaning of the proposed agreement; and
- An exercise of a free will by the parties to the agreement; and
- Provision by the agreement which was fair in that it, at least, met the reasonable needs of the weaker financial party

then under the s 25 factors listed under **Matrimonial Causes Act 1973**, (ie 'all the circumstances of the case' and 'conduct which it is inequitable to disregard') the agreement reached would be regarded as a 'magnetic factor' in the exercise under s 25 and likely to be used as the template for the Court's order upon a divorce.

Accordingly, upon the present law, even before any amending legislation, parties who enter into a nuptial agreement post the **Radmacher** case, in the above circumstances, are already likely to be held to their agreement.

## **The QNA:**

The Law Commission's recommendation concerning the introduction of the QNA is undoubtedly radical.

For the first time, if introduced, parties about to be married will by the terms of a pre-nuptial agreement, which satisfies the conditions of a QNA, in effect, be opting out of the Court process in terms of their own divorce financial remedy distribution. As long as the agreement reached satisfies the minimum conditions which constitute a QNA, then the recommendation is that the Court will be unable to interfere and the QNA signed will prevail.

Such an amendment to the law will have significant impact upon the effectiveness of Wealth Planning overall.

In such circumstances, it is essential good practice that the drafting of PNAs now anticipate in their requirements the requisite essentials which the Law Commission have suggested should be met to constitute an effective QNA. This is not because such a PNA would legally constitute a QNA, since such legislation is thought unlikely to be retrospective in effect. However, it is anticipated that the Courts, if faced by such a PNA, would, in such circumstances, be highly likely to more readily implement its terms upon divorce distribution.

## **The Advantages to Wealth Management:**

The Law Commission expressly anticipated in their report the more obvious applications of the QNA to certain situations, being in the advance protection of family gifts and inheritances, in the protection of specific property from divorce distribution, in providing for the certainty of a clean break upon divorce between wealthy parties and in providing for future financial certainty and in excluding the 'sharing principle' otherwise to be engaged upon divorce.

Clearly, too, there has been an increase in interest from those with wealth wanting not only to seek advice on tax planning but also to protect their wealth for future generations.

Family finance lawyers are observing a wide difference in the divorce settlements of big money cases dependent upon whether the parties have entered into a nuptial agreement or not. (Even those PNAs which ultimately are deemed to have failed to provide for the 'reasonable needs' of the weaker financial party on divorce are recognised as still having had an impact on the outcome of division chosen by the Court).

In addition, the advantages of having an effective PNA in place not only increases the prospects of avoiding the bruising exposure to media enquiry of a prolonged divorce financial dispute where, in particular, public celebrities may be involved, but also, in general terms, is best able to avoid the risk of some of the huge legal fees of such court room battles.

These agreements are therefore now an absolutely essential tool within any balanced wealth management planning portfolio where family wealth is or may be engaged.

## **Professional Expertise:**

Advising of the benefits of such agreements and securing their engagement are of course two different things.

It must be remembered that by their very name PNAs involve emotional as well as financial and fiscal considerations and the balancing of these is not always 'a marriage made in heaven'.

The best chance of securing a signed PNA is to ensure the deployment of legal advisors not only aware what the client with the wealth wants but also to be able to advise and guide the way to what is likely to be achieved without also seriously harming the emotional relationship which underlies it.

Because of the rapid increase in acknowledgment of the PNA at law, the reception to discussing the terms proposed by lawyers acting for the other party is far more positive and constructive than in the past and many such discussions lead to amicable and successful outcomes with potentially huge benefits to the level of wealth protection secured.

Experience and skilful and sensitive handling are, therefore, crucial.

## **Professional Fees:**

There is no doubt that as the Law Commission found there exists nationally a very wide range of legal fees charged for the exercise of advising upon and drafting a PNA with London lawyers charges being significantly the highest.

Of course, for lawyers there are well known risks to such work since the client being advised may turn out to be tomorrow's Bill Gates and what appears now to be modest wealth protection requirements covered by a PNA may turn out later to have a pivotal role in quite a different financial landscape.

Tracey Miller Family Law are aware of the expectations of clients and welcome any discussions on packaged fees for work undertaken at professionally sensible levels for the time engaged and the risks being undertaken.

### **In Conclusion:**

We believe we can provide a value added and high level bespoke service of advising clients of any wealth management organisation in relation to the range and content of agreements which can impact upon a later Court's determination upon the breakdown of a relationship.

We also are confident that we can engage on the client's behalf one of the most experienced specialist counsel available in this area of work.

We are – Tracey Miller Family Law.







tel 0151 515 3036  
fax 0151 515 3037

[www.traceymillerfamilylaw.com](http://www.traceymillerfamilylaw.com)

**TRACEY MILLER**  
Family Law

Semmes House  
Rumford Court  
12 Rumford Place  
Liverpool  
L3 9DG