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Prenuptial and Postnuptial Agreements

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Fact Sheet: Nuptial Agreements in English Law

Overview

A nuptial agreement (NA) is a contract made by two individuals before or during marriage, outlining how their assets will be divided in the event of a divorce. Understanding the court's approach to asset division in the absence of a nuptial agreement is crucial to ensure fairness and clarity when agreeing financial arrangements to be included in a nuptial agreement.

Court's Approach to Asset Division Without a Nuptial Agreement

In divorce cases, the court's primary goal is to achieve fairness in the division of assets. However, the concept of fairness is subjective and can vary significantly between the parties involved. The court takes several critical factors into account when determining how assets should be divided:

Key Factors Considered by the Court

(1) Needs

Housing The court prioritises the housing needs of the parties, particularly when children are involved. The living arrangements should not differ significantly between the parties.

Income Requirements The income needs of both parties will be assessed, potentially leading to orders for spousal maintenance if one party requires financial support after the divorce.

Future Needs Additional factors, such as earning capacity, pensions, and potential inheritances, are also taken into account.

(3) Other Circumstances

The court examines various additional factors, including:

- The standard of living enjoyed before the marriage breakdown.
- The ages and earning capacities of the parties.
- The length of the marriage.
- Contributions made by each party, including non-financial contributions such as raising children.
- Conduct that may be inequitable to ignore, although this must be extreme to be considered relevant.

(2) Compensation

This concept was introduced in the case of *Miller v Miller; McFarlane v McFarlane* [2006] UKHL2024 and was intended to address disparities arising from traditional roles within the marriage. For instance, if one partner had sacrificed their career to support the family, the court sought to ensure they were fairly compensated for loss of income. However, this concept has limited applicability in practice and often takes a backseat to more pressing needs.

(4) Sharing/Equality

After considering the above factors, the court typically measures any proposed order against the principle of equality. Fairness often equates to an equal division of assets unless justified otherwise. Factors that may lead to unequal division include the length of the marriage, pre-marital or inherited assets, and the necessity for one party to maintain a certain standard of living post-divorce.

Status of Nuptial Agreements

These agreements are not binding in law. However, in recent years, both pre nuptial and post nuptial agreements have gained increased recognition and enforceability in English law. Courts are now more inclined to uphold these agreements, provided they meet specific requirements:

Conditions for Validity

(1) Free Will

Both parties must enter the agreement voluntarily and with a clear understanding of its implications. The agreement should be signed 28 days prior to marriage.

(2) No Undue Pressure

The negotiations must be conducted without coercion.

(3) Sufficient Disclosure

Parties must disclose their financial situations.

(4) Fairness and Reasonableness

The agreement must not undermine the reasonable needs of either party at the time of divorce.

(5) No Unconscionable Conduct

The agreement should be free from any unconscionable conduct, such as fraud or misrepresentation.

(6) Legal Advice

It is advisable for both parties to seek independent legal advice before entering into a nuptial agreement, ensuring they fully understand their rights and the implications of the agreement.

Frequently Asked Questions (FAQs)

What is a nuptial agreement?

A nuptial agreement is a contract between two people that specifies how their assets will be divided if they divorce.

Are nuptial agreements legally binding?

They are not legally binding in England & Wales but if the criteria as set out above is met in full then they carry substantive weight and will likely be upheld.

What happens if a nuptial agreement is not fair?

If the agreement does not meet the reasonable needs of either party, the court may not uphold it or can vary the terms of the agreement.

Can pre-marital assets be excluded from division?

Yes, pre-marital and inherited assets can be excluded, provided both parties' needs are met.



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