

A FRIEND IN DEED

Pre- and post-nups can insure your marriage against a costly demise, say Ayesha Vardag and Richard Todd

'PRE-NUPS ARE NO LONGER MET WITH TUTS OF DISAPPROVAL, OR, AT WORST, A SWIFT UPPERCUT'



Illustrations by Sonia Hensler

You know the scene. A silent family-law solicitor sits with dripping hair. A hissing wife is escorted from the High Court by her Praetorian Guard of wannabe divorce lawyers. And there, in the corner, a shattered Sir Paul McCartney sits, head in hands. He is £3 million down in legal costs, on top of the £24.3 million settlement he has been forced

to grant his ex-wife, Heather – and has had to go through the humiliation of being cross-examined by her. ‘Why on earth didn’t I get a pre-nup?’, he thinks.

Why not, indeed. Had he married in England twenty years ago, he might have been advised that the English courts do not recognise pre-nups. But times are changing. The idea that two consenting adults

can regulate their own financial affairs in marriage is now widely accepted in England. Pre-nups have also become more socially acceptable. No longer is the very suggestion met with tuts of disapproval or, at worst, a swift upper cut and the hurling out the window of the engagement ring. And it's not just the pre-nup that is becoming more popular. The number of post-nups is rising too, in particular in business circles.

How should the wealthy approach the delicate subject of marriage insurance? My advice is to see a top lawyer before you get married. It is easy to argue that while you, of course, are reluctant to draw up a pre-nup because it is so terribly vulgar and unromantic, others want you to draw up an agreement. This is a particularly easy argument to make in the case of a second marriage, where there are dependent children, or when one party is likely to inherit a large sum.

But, increasingly, business interests can also be invoked. Businesses want to protect themselves and their partners. Take two men who are in partnership, running a £50 million hedge fund. They are required to show sufficient confidence in their product by keeping their own money in it. Then one of the pair divorces. And the really bad news is that his wife wants the divorce case heard in London.

English law used to ensure that only the 'reasonable needs' of the financially weaker party – usually the wife – were met. This changed in 2000, when Pamela White, a former farmer's wife who had worked in the family business, felt that she was entitled to enough of its assets to buy her own farm.

Having been refused the lump sum she wanted by the judge in the original court case because the farm would have had to be broken up to release sufficient assets, White finally took her case to the House of Lords and won. Since then the principle of 'a fair division of assets' – a crucial component of which is a greater recognition of an individual's non-financial contribution to a family and business – has been reinforced by a number of high-profile cases, prompting one English High Court judge to remark: 'Sometimes the golden goose has to go to market.'

So, in the case of the £50 million hedge fund, there would have to be a fire sale to get the wife the prodigal £12.5 million, which would create a liquidity crisis and loss of confidence in the business. The lesson is clear. If you have a large business or expect to grow one, get a pre-nup.



'IT MAY SOUND UNROMANTIC, BUT A POST-NUP CAN BE THE BEST WAY TO KEEP PEOPLE TOGETHER'

Some Manhattan hedge funds now demand marrying senior partners draw one up.

But what if you are already married? Is it too late to get some protection, should the worst happen? No. You can get a post-nup. Paradoxically, such agreements can be stronger – if properly drawn-up – than pre-nups, not least because it is impossible for one party to say the other bullied them into signing the document with the wedding only a short time away.

Here, again, recent changes in the English law are helpful. The courts in England have always jealously guarded their right to oversee any financial awards on divorce. But the idea that divorcing couples can reach their own agreement after marriage is growing. In the recent case of *Crossley vs. Crossley*, Lord Justice Thorpe said in his judgment: 'It does seem to me that the role of contractual dealing, the opportunity for the autonomy of the parties, is becoming increasingly important.'

So, how to get a post-nup? And when? The best time is when there is a material change in circumstances. This can be anything from the husband or wife making or inheriting a substantial sum to the couple planning to start a family. Again, it may sound very unromantic but our experience is that a post-nup can be the best way to keep two people together.

Spouses can use post-nups to insulate themselves from common strains in a marriage, notably changing financial circumstances and infidelity. Most important of all, agreements can save troubled marriages by enabling couples to see a way out of the woods. The courts pay close attention to the background, circumstances and motivation behind any decision taken during marriage when analysing the enforceability of post-nups.

To make sure an agreement is binding, each party should go separately to a lawyer, so that the courts can verify that:

- both parties understand the agreement;
- both parties were properly advised;
- there was no untoward pressure on either party to sign the agreement;
- both parties were full and frank about their financial resources;
- child provision was taken into account.

Negotiating an agreement of this kind is something that Sir Paul should have done after missing his chance on a pre-nup. After agreeing a post-nup, all he would have had to do is fill in some financial disclosure forms and have a deed drawn up. In a case like his, the cost would probably have been between £5,000 and £10,000. It's a lot of money, but rather less than the £3 million he paid for his contested proceedings.

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