Pre-nuptial and post-nuptial agreements

Personal tax



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As recent changes encourage wealthholders to consider making gifts during their lifetime to avoid inheritance tax, we consider the benefits that may be gained from pre-and post-nuptial agreements.

Families face an evolving legal and tax landscape that demands careful planning, particularly when it comes to safeguarding family wealth. With changes to agricultural and business property relief set to come into force in April 2026, the traditional approach of passing assets on death has become less viable for farmers and business owners.

Families are now being driven to transfer assets sooner than anticipated, prompting critical questions about how to protect these ‘crown jewel’ family businesses, farms or inherited assets from potential division in the event of divorce. This is where pre-nuptial and post-nuptial agreements – more colloquially known as ‘pre-nups’ and

‘post-nups’ – will become even more significant.

What are pre-nuptial and post-nuptial agreements?

A pre-nuptial agreement is entered into before a marriage or civil partnership, setting out how assets – including property, debts and income – will be divided in the event of divorce. A post-nuptial agreement achieves the same aim but is signed after the marriage has taken place (whether only a few weeks after or many years after). Importantly, both can ringfence family wealth, such as farms or businesses, protecting them from claims by a spouse, whilst still sharing any assets built up by the spouses during their marriage.

These agreements are not just useful for the ultra-wealthy. They are increasingly relevant for families making lifetime gifts of substantial assets, including those made earlier than planned due to tax changes. Unsurprisingly, parents or grandparents passing down assets want to ensure that these are preserved for future generations and not lost through potential divorce settlements.

Pre-nuptial (and post-nuptial) agreements are not enforceable as contracts in courts in England and Wales. However, in the landmark case of *Radmacher v Granatino* [2010] UKSC 42, the Supreme Court ruled that courts should uphold a nuptial agreement freely entered into by both parties, with a full understanding of its implications, unless it would be unfair to do so in the given circumstances. This means that the court will assess the fairness of each agreement on a case-by-case basis.

The impact of changing tax rules

Recent tax changes have significant implications for estate planning. Agricultural property relief and business property relief have been capped at 100% relief for up to £1 million of combined asset value. Anything above this threshold will now benefit from only 50% relief, so incurring a 20% tax liability on death. As a result, farmers and business owners must consider making gifts during their lifetime to avoid substantial inheritance tax on death. If they survive for seven years after making the gift, the assets fall outside their estate for inheritance tax purposes.

This shift means that families are increasingly assessing the benefits of transferring assets outright to the next generation earlier than they otherwise would. Yet this raises key concerns. Are the recipients ready to manage such significant assets? Are they married, or could they marry badly? If so, how can families protect the wealth being transferred?

There is a common misconception that it is too late to protect family assets once children are already married. However, a post-nuptial agreement can be entered into at any time, regardless of how long a couple has been married. For families gifting assets, especially substantial ones like farms or businesses, this is a crucial point.

A timely trigger for a post-nuptial agreement might be the transfer of what is, in essence, an early inheritance. For example, a family may gift a farm to their child for tax mitigation reasons. While the family's intention is to preserve the asset for future generations, there is a risk of unintended consequences, such as the child divorcing and half the farm passing to their ex-spouse. In this scenario, a post-nuptial agreement would provide a clear and enforceable means of protecting the asset.

What can and cannot be included in pre-nups and post-nups

It is essential to understand what these agreements can and cannot include under English family law.

What can be included:
Pre-nuptial and post-nuptial agreements can outline how family wealth (gifts, inheritances, trust interests, or shares in family businesses) will be protected. They can also specify how those assets built up during the marriage, such as property, savings and pension pots, will be shared.

What cannot be included:
Agreements cannot exclude claims for child maintenance or any financial provision for (future) children. This is a matter of public policy and cannot be overridden.

One key challenge lies in the treatment of assets that have been gifted or inherited but are later used during the marriage. For example, if a couple lives in a family estate during their marriage, excluding the value of that property in a divorce settlement can be complex. The spouse who does not have ties to the estate may

have enjoyed an elevated lifestyle that cannot be replicated post-divorce, creating further complications.

Tax considerations

While divorce settlements themselves are not taxable, tax can arise when realising assets to fund a settlement. For instance, a spouse may have to sell shares in a business or other property to raise the cash for a settlement. If this results in a capital gains tax liability, it must be factored into the agreement.

Financial disclosure given as part of a pre-nuptial or post-nuptial agreement typically includes the then gross asset values, with a note acknowledging that tax may be payable when realising those assets in the future.

Regarding the inclusion of wider provisions in agreements, some agreements address not only divorce but also what happens on the death of one party. For example, family assets might be structured to ensure they ultimately pass down the bloodline. This can be particularly helpful in the case of remarriages, as it clarifies how assets will be treated, reducing uncertainty and potential disputes.

Practical considerations

For a pre-nuptial or post-nuptial agreement to be upheld in court, it must meet certain practical and fairness requirements:

- Firstly, each party must receive independent specialist legal advice before signing the agreement.
- The agreement must be fair at the time of signing and remain fair in the future circumstances which come to be considered if the marriage breaks down. This is where litigation can arise, as one party may argue years later that the agreement no longer reflects their current needs.
- For pre-nuptial agreements, best practice is for the agreement to be signed at least 28 days before the wedding to avoid claims of undue pressure.

While some practitioners advocate for regular reviews (e.g. every few years or after significant life events like the birth of a child), this approach carries risks.

Clients often prefer not to build in ongoing costs or uncertainty. Instead, they should be advised to revisit the agreement if something significant changes, such as relocation to another jurisdiction where supplemental agreements may be needed.

Planning for the future

With changing tax rules driving families to transfer wealth earlier, pre-nuptial and post-nuptial agreements are more important than ever. They provide a clear framework for protecting family assets, ensuring they are preserved for future generations. By ringfencing inherited or gifted wealth, whilst the spouses still share the assets they build up together during their marriage, these agreements strike a fair and practical balance.

Families should act proactively, ensuring their children or grandchildren, whether newly married or long-term spouses, have the appropriate agreements in place. With specialist advice, careful planning and clear documentation, families can protect their ‘crown jewels’ for generations to come.

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