

Research Briefing

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Pre-nuptial agreements



Summary

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Summary

This briefing deals with the law in England and Wales except for section 6 which deals with the position in Scotland.

What is a pre-nuptial agreement?

A pre-nuptial (or pre-marital) agreement is an agreement made by a couple before they marry or enter into a civil partnership, which sets out how they wish their assets to be divided if they should divorce or have their civil partnership dissolved.

What is the legal status of pre-nuptial agreements?

Pre-nuptial agreements are not automatically enforceable in courts in England and Wales.

Traditionally, pre-nuptial agreements were unenforceable as being against public policy. However, in [a landmark ruling in 2010](#), the Supreme Court ruled that courts should give effect to a pre-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. The ruling does not make pre-nuptial agreements binding in all cases; the fairness of upholding any particular agreement will be considered by the court on a case by case basis. However, some pre-nuptial agreements will now have effect in the absence of circumstances which would make this unfair.

Law Commission recommendation for enforceable agreements

In February 2014, following consultation, the Law Commission published its final report, [Matrimonial Property, Needs and Agreements](#). Among other things, it recommended the introduction of “[qualifying nuptial agreements](#)” as enforceable contracts that would enable couples to make binding arrangements for the financial consequences of divorce or dissolution. These agreements, which would have to meet certain requirements, would not be subject to the court’s assessment of fairness. Couples would not be able to contract out of meeting the financial needs of each other and of any children.

At the time of writing, the Government has not yet made its final response to this recommendation.

Law Commission project on financial remedies on divorce

The Law Commission has started preliminary work on a [new project assessing the reform options for the laws governing finances on divorce and the ending of a civil partnership](#). As part of the new review, the Law Commission intends to scope whether the issues covered in its Matrimonial Property, Needs and Agreements project need to be reviewed beyond its 2014 recommendations.

In April 2023, Lord Bellamy, Parliamentary Under-Secretary of State for Justice, said [the Government did not intend to legislate on pre-nuptial agreements while this new review is taking place](#).

Private Member's Bills

Baroness Deech (Crossbench) has introduced a Divorce (Financial Provision) Bill [HL] as a Private Member's Bill in several parliamentary sessions, most recently in the [2021-22 session](#). Among other things, her bills would have provided for binding pre-nuptial and post-nuptial agreements, with some exceptions. None of the bills have completed their passage through Parliament.

The position in Scotland

In Scotland, whilst pre-nuptial agreements have not been the subject of extensive case law, as a general concept they are generally regarded as being enforceable and not contrary to public policy.

Specifically, sections 9 and 10 of the [Family Law \(Scotland\) Act 1985](#) make provision for 'matrimonial property' in Scotland to be shared fairly on divorce. Fair sharing is usually equal sharing unless 'special circumstances' justify different proportions. [Special circumstances include an agreement between the parties as to the division of matrimonial property on divorce](#).

There are some restrictions on a couple's freedom to contract. It is now well-established that by virtue of section 16 of the 1985 Act, the court has power to set aside a pre-nuptial agreement when it was not "fair and reasonable" at the time it was entered into, and subsequent case law has developed this test with reference to a number of individual principles. The fact that the terms of an agreement led to an inequitable outcome is not itself enough to justify varying it or setting it aside.

1

Division of assets on divorce

A couple may agree between themselves how to divide their assets on divorce, often, with the help of legal advice, taking into account what they consider might be ordered if the matter were taken to court.¹ Their agreement may be embodied in a “consent order” approved by the court.

When this is not possible, an application for a financial order may be decided by the court. Financial provision may be awarded to either party to the marriage, depending on the facts of the case. Under [section 25 of the Matrimonial Causes Act 1973](#), the court has very wide discretion regarding the division of assets on divorce. The court must take into account all the relevant circumstances of the case (and particularly the matters set out in the section), priority being given to the welfare, while a minor, of any child of the family who has not attained the age of eighteen. The court must also consider whether it is possible to make a “clean break”.²

The [Civil Partnership Act 2004, Schedule 5 Part 5](#), sets out similar provisions in relation to financial provision applications on dissolution of a civil partnership.

Another Commons Library briefing, [Financial provision when a relationship ends](#) provides more information.³

¹ This briefing refers generally to spouses, marriage and divorce but similar considerations are relevant to civil partners, civil partnerships and dissolution.

² [Matrimonial Causes Act 1973 section 25A](#) and [Civil Partnership Act 2004 Schedule 5, part 5, para 23\(2\)](#)

³ Commons Library research briefing SN-05655, [Financial provision when a relationship ends](#)

2

What is a pre-nuptial agreement?

A pre-nuptial agreement (sometimes referred to as a pre-nup, a pre-marital agreement or an ante-nuptial agreement) is an agreement made by a couple before they marry, or enter into a civil partnership, which sets out how they wish their assets to be divided if they should divorce or have their civil partnership dissolved. The agreement may be updated after the marriage or civil partnership as the couple's circumstances change.

Pre-nuptial agreements are one type of marital property agreement. Other types include:

- **post-nuptial agreements:** these might be similar to pre-nuptial agreements but would be made after marriage or civil partnership, and
- **separation agreements:** these might be made when a couple are about to separate or have already separated and in anticipation of an imminent divorce or dissolution.

3 Are pre-nuptial agreements legally binding?

Pre-nuptial agreements are legally binding in various countries, but they are not automatically enforceable in courts in England and Wales. In a landmark ruling in October 2010, the Supreme Court held, by a majority of eight to one, that courts should give effect to a pre-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. The fairness of upholding any particular agreement will therefore be considered by the court on a case by case basis.

Further information about this court decision is set out below.

3.1 *Radmacher v Granatino*

In October 2010, in the case of *Radmacher v Granatino*, the Supreme Court set out the circumstances in which a pre-nuptial agreement should be binding.⁴

The facts

The wife was a German heiress, said to have a fortune of £100m. The husband, who was French, was a former investment banker who, during the course of the marriage, left banking and embarked on research studies at Oxford. They had two children. In 1988, four months before their marriage, the couple entered into a pre-nuptial agreement in Germany, in which each agreed not to make a claim against the other in the event of divorce. The agreement would have been enforceable in both Germany and France.⁵

Despite the agreement, following their separation in 2006, the husband made a claim for financial provision and the High Court awarded a lump sum of £5,560,000.

Court of Appeal decision

In July 2009, the [Court of Appeal](#) allowed the wife's appeal and set out its views on the status of pre-nuptial agreements for the purposes of section 25

⁴ *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42

⁵ *Radmacher v Granatino* [2009] EWCA Civ 649, para 62

of the Matrimonial Causes Act 1973.⁶ Lord Justice Thorpe said that, in spite of his own comments in a 1995 case,⁷ in some cases, courts should give “due weight” to pre-nuptial agreements:

Thus, pending the report of the Law Commission, in future cases broadly in line with the present case on the facts, the judge should give due weight to the marital property regime into which the parties freely entered. This is not to apply foreign law, nor is it to give effect to a contract foreign to English tradition. It is, in my judgment, a legitimate exercise of the very wide discretion that is conferred on the judges to achieve fairness between the parties to the ancillary relief proceedings.⁸

Lord Justice Thorpe agreed with the conclusion in a 2008 Privy Council case⁹ that “wholesale reform is for Parliament and not the judges, particularly now the Law Commission is at work”.¹⁰

Information about the Law Commission’s project is set out in the next section of this briefing.

Supreme Court decision

The husband’s appeal to the Supreme Court was dismissed.¹¹ In October 2010, in a majority judgment (eight to one), the Supreme Court advanced a proposition, to be applied in the case of both pre- and post-nuptial agreements:

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.¹²

This means that some pre-nuptial agreements will have effect in the absence of circumstances which would make this unfair. The ruling does not make pre-nuptial agreements binding in all cases but, in some cases, an agreement can have decisive weight.

A pre-nuptial agreement will not prevent a divorcing party from asking the court to decide how assets should be divided, but, depending on the

⁶ [Radmacher v Granatino](#) [2009] EWCA Civ 649. Section 1 of this briefing sets out information about section 25 of the Matrimonial Causes Act 1973

⁷ In *F v. F* (Ancillary Relief: Substantial Assets) [1995] 2 F.L.R. 45 at 66, Thorpe J. (as he was then) said: “The rights and responsibilities of those whose financial affairs are regulated by statute cannot be much influenced by contractual terms which were devised for the control and limitation of standards that are intended to be of universal application throughout our society.” Quoted at [Radmacher v Granatino](#) [2009] EWCA Civ 649 para 12

⁸ [Radmacher v Granatino](#) [2009] EWCA Civ 649 para 53. An “[ancillary relief order](#)” is also known as a [financial order](#).GOV.UK, [Money and property when you divorce or separate. Get the court to decide](#) (accessed 16 October 2023)

⁹ [MacLeod v MacLeod \(Isle of Man\)](#) [2008] UKPC 64

¹⁰ [Radmacher v Granatino](#) [2009] EWCA Civ 649, para 25

¹¹ [Radmacher \(formerly Granatino\) v Granatino](#) [2010] UKSC 42

¹² As above, para 75

circumstances, the court might make its decision in the light of the terms of that agreement.

The fairness of upholding any particular agreement will be considered by the court on a case by case basis:

There can be no question of this Court altering the principle that it is the Court, and not any prior agreement between the parties, that will determine the appropriate ancillary relief when a marriage comes to an end, for that principle is embodied in the legislation. What the Court can do is to attempt to give some assistance in relation to the approach that a court considering ancillary relief should adopt towards an ante-nuptial agreement between the parties.¹³

The Supreme Court said it would not be desirable to lay down rules that would fetter the flexibility the court requires to reach a fair result.¹⁴ However, the Court considered that, in future, it would be natural to infer that parties who entered into a pre-nuptial agreement, to which English law was likely to be applied, intended that effect should be given to it.¹⁵

In this case, the pre-nuptial agreement was freely entered into and both parties fully appreciated its implications.

Three issues arose in relation to the agreement for the court to consider:

(i) **Were there circumstances attending the making of the agreement which should detract from the weight which should be accorded to it?** Parties must enter into an ante-nuptial agreement voluntarily, without undue pressure and be informed of its implications. The question is whether there is any material lack of disclosure, information or advice [69].

(ii) **Did the foreign elements of the case enhance the weight that should be accorded to the agreement?** In 1998, when this agreement was signed, the fact that it was binding under German law was relevant to the question of whether the parties intended the agreement to be effective, at a time when it would not have been recognised in the English courts. After this judgment it will be natural to infer that parties entering into agreements governed by English law will intend that effect be given to them [74]

(iii) **Did the circumstances prevailing at the time the court made its order make it fair or just to depart from the agreement?** An ante-nuptial agreement may make provisions that conflict with what a court would otherwise consider to be fair. The principle, however, to be applied is that a 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 [75]. A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family [77], but respect should be given to individual autonomy [78] and to the reasonable desire to make

¹³ As above, para 7

¹⁴ As above, para 76

¹⁵ As above, para 70

provision for existing property [79]. In the right case an ante-nuptial agreement can have decisive or compelling weight [83].¹⁶

Applying these principles to the facts, the Supreme Court ruled the Court of Appeal had been correct to conclude there were no factors which rendered it unfair to hold the husband to the agreement.

Dissenting judgment

Lady Hale gave the dissenting judgment. She considered the nature and status of marriage and its legal consequences:

Marriage is, of course, a contract, in the sense that each party must agree to enter into it and once entered both are bound by its legal consequences. But it is also a status. This means two things. First, the parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and for the state. Nowadays there is considerable freedom and flexibility within the marital package but there is an irreducible minimum. This includes a couple's mutual duty to support one another and their children. We have now arrived at a position where the differing roles which either may adopt within the relationship are entitled to equal esteem. The question for us is how far individual couples should be free to re-write that essential feature of the marital relationship as they choose.¹⁷

Lady Hale said the law of marital agreements was “in a mess and ripe for systematic review and reform”, but she noted the Law Commission could make detailed proposals for legislative reform for Parliament to consider.¹⁸ Lady Hale considered this particular case had “very unusual features” and that difficult issues could not be resolved in an individual case.¹⁹ She also considered the gender dimension:

Above all, perhaps, the court hearing a particular case can all too easily lose sight of the fact that, unlike a separation agreement, the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually although by no means invariably she – would otherwise be entitled... In short, there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman.²⁰

Lady Hale disagreed with the majority on a number of points,²¹ and considered there might be important policy considerations justifying a different approach for agreements made before and after a marriage.²²

¹⁶ [Supreme Court press summary, Radmacher \(formerly Granatino\) \(Respondent\) v Granatino \(Appellant\) \[2010\] UKSC 42 On appeal from the Court of Appeal \[2009\] EWCA Civ 649](#) (PDF), 20 October 2010. References in square brackets are to paragraph numbers in the judgment.

¹⁷ [Radmacher \(formerly Granatino\) v Granatino](#) [2010] UKSC 427, para 132

¹⁸ As above, paras 133-4

¹⁹ As above, para 136

²⁰ As above, para 137

²¹ Set out in para 138 of the judgment

²² [Radmacher \(formerly Granatino\) v Granatino](#) [2010] UKSC 427, para 162

3.2

The current position

Following the decision of the Supreme Court in *Radmacher v Granatino*, the enforceability of any particular pre-nuptial agreement will depend on the court's view of its fairness. Accordingly, there is still a degree of uncertainty as to whether a court would make an order which reflects the terms of the agreement.

In a judgment delivered in 2014, Mr Justice Holman set out the law on nuptial agreements, stressing that it is the court, and not the parties, that decides the ultimate question of what provision is to be made. He said the question of whether it would “not be fair to hold the parties to the agreement” would “necessarily depend on the facts”, but provided some guidance:

- i) A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children;
- ii) Respect for autonomy, including a decision as to the manner in which their financial affairs should be regulated, may be particularly relevant where the agreement addresses the existing circumstances and not merely the contingencies of an uncertain future;
- iii) There is nothing inherently unfair in an agreement making provision dealing with existing non-marital property including anticipated future receipts, and there may be good objective justifications for it, such as obligations towards family members;
- iv) The longer the marriage has lasted the more likely it is that events have rendered what might have seemed fair at the time of the making of the agreement unfair now, particularly if the position is not as envisaged;
- v) It is unlikely to be fair that one party is left in a predicament of real need while the other has 'a sufficiency or more';
- vi) Where each party is able to meet his or her needs, fairness may well not require a departure from the agreement.²³

In 2014, the Law Commission summarised the uncertainty of the effect of pre-nuptial and post-nuptial agreements, noting that they were being used with increasing frequency:

Pre-nuptial and post-nuptial agreements (referred to together here as “marital property agreements”) used to be extremely unusual in England and Wales. They are, by contrast, familiar in other jurisdictions. In recent years they have become more commonplace here, and lawyers have told us that they are instructed to draft them with increasing frequency. However, they cannot be enforced as contracts and they cannot take away the parties' ability to ask the court to make financial orders nor the courts' powers to make orders. As a result, the only way to achieve legal finality is to ask the court to

²³ *Luckwell v Limata* [2014] EWHC 502 (Fam) paras 129 to 132

make orders that reflect the terms of the agreement; and the Supreme Court has said that this should be done unless the agreement is unfair.

That means that people who want to make agreements in advance know that the agreement may not be enforced and that when they go to court financial orders will be made which may or may not follow the terms of the agreement, depending upon the court's views about fairness. That in turn will depend upon issues such as the availability to the parties of legal advice, the extent to which they entered into the agreement with full awareness of its implications, the level of provision made for need, and so on. Although advisers have over recent years become more used to drafting pre- and post-nups that they think the court will uphold, they cannot say for certain what the eventual outcome will be.²⁴

²⁴ Law Commission, [Matrimonial property, needs and agreements: the future of financial orders on divorce and dissolution. Executive Summary](#) (PDF), 2014, paras 1.26-1.27

4 Law Commission projects

4.1 Matrimonial Property, Needs and Agreements

Law Commission consultation

In 2009, the Law Commission started a project to examine the status and enforceability of marital property agreements (pre-nuptial, post-nuptial and separation agreements).²⁵ Its 2011 consultation paper, [Marital Property Agreements](#) reviewed the law and discussed options for reform.²⁶ The project was subsequently extended in 2012 to cover two further issues of financial provision on divorce or dissolution of a civil partnership: financial needs and the definition and treatment of non-matrimonial property.

Law Commission report

In February 2014, the Law Commission published its final report, [Matrimonial Property, Needs and Agreements](#) (PDF),²⁷ together with an [Executive Summary](#) (PDF).

Among other things, the Law Commission recommended the introduction of “qualifying nuptial agreements” as enforceable contracts which would enable couples to make binding arrangements for the financial consequences of divorce or dissolution. These agreements would not be subject to the court’s assessment of fairness.

Certain requirements would have to be met in order for the agreement to be a “qualifying nuptial agreement”:

The agreement must be contractually valid (and able to withstand challenge on the basis of undue influence or misrepresentation, for example).

The agreement must have been made by deed and must contain a statement signed by both parties that he or she understands that the agreement is a qualifying nuptial agreement that will partially remove the court’s discretion to make financial orders.

The agreement must not have been made within the 28 days immediately before the wedding or the celebration of civil partnership.

²⁵ Law Commission, [Matrimonial Property, Needs and Agreements](#) (accessed 16 October 2023)

²⁶ Law Commission Consultation Paper No 198, [Marital Property Agreements](#) (PDF), 11 January 2011

²⁷ Law Commission, Law Com No 343, [Matrimonial Property, Needs and Agreements](#), 27 February 2014

Both parties to the agreement must have received, at the time of the making of the agreement, disclosure of material information about the other party's financial situation.

Both parties must have received legal advice at the time that the agreement was formed.²⁸

The Law Commission recommended it should not be possible for a party to waive their rights to disclosure and legal advice.²⁹

Couples would not be able to contract out of meeting the financial needs of each other and of any children. Agreements about financial needs would still be subject to the court's scrutiny for fairness. A qualifying nuptial agreement would not remove the parties' ability to apply for, and the courts' jurisdiction to make, financial orders to meet their financial needs.³⁰

The Report included a draft Nuptial Agreements Bill, which would introduce qualifying nuptial agreements in England and Wales.

Government response

Simon Hughes, who was then Justice minister, wrote to the Law Commission on 8 April 2014 and 18 September 2014. The Law Commission has said these two letters together formed the then Government's interim response to their recommendations, summarising their content as follows:

The Government considered that there was unlikely to be time for the Nuptial Agreements Bill to progress through Parliament before it was dissolved in March 2015.

Accordingly, it took the view that the Government's final response regarding nuptial agreements should await the next Parliament, giving the new Government time to consider our policy recommendations on this topic and the Bill.³¹

At the time of writing, the Government's final response has not yet been made.³²

4.2

Financial remedies on divorce

The Law Commission has started preliminary work on a new project assessing the reform options for the laws governing finances on divorce and the ending

²⁸ Law Commission, [Matrimonial Property, Needs and Agreements: The Future of financial orders on divorce and dissolution, Executive Summary](#) (PDF), February 2014, para 1.35

²⁹ As above, para 1.36

³⁰ As above, para 1.31

³¹ Law Commission, [Matrimonial Property, Needs and Agreements](#) (accessed 16 October 2023)

³² As above

of a civil partnership.³³ It aims to publish a scoping paper in September 2024. As part of the new review, the Law Commission intends to scope whether the issues covered in its Matrimonial Property, Needs and Agreements project need to be reviewed beyond its 2014 recommendations.³⁴

In April 2023, Lord Bellamy, Parliamentary Under-Secretary of State for Justice, said the Government did not intend to legislate on pre-nuptial agreements while this new review is taking place, adding:

The Government favour a holistic rather than a piecemeal approach to any future legislative reform in this area.³⁵

Lord Bellamy said, “Prenups are undoubtedly an important issue” but also that “it affects a relatively small and privileged cohort, and it must take its place in the queue on that basis”.³⁶

³³ Law Commission, [Financial remedies on divorce](#) (accessed 16 October 2023)

³⁴ As above

³⁵ [HL Deb 25 April 2023 c1097](#)

³⁶ [HL Deb 25 April 2023 c1098](#)

5

Private Member's Bills

Baroness Deech (Crossbench) has introduced a Divorce (Financial Provision) Bill [HL] as a Private Member's Bill in several parliamentary sessions, most recently in the 2021-2022 session.³⁷ That bill, which had the long title, "A Bill to amend the Matrimonial Causes Act 1973 and make provision in connection with financial settlements following divorce", made no further progress.

In the 2017-19 parliamentary session, Baroness Deech's bill (with the same name and long title) finished its stages in the House of Lords and was introduced in the House of Commons, but failed to complete its passage through Parliament before the end of the session.³⁸ A [Lords Library research briefing](#) provides information about the Bill as introduced in the Lords.³⁹

Clause 3 would have provided for binding pre-nuptial and post-nuptial agreements, subject to a number of exceptions.

At Lords second reading on 11 May 2018,⁴⁰ Baroness Deech explained how the intended effect of this provision would improve the current position:

The Law Commission recommended that prenuptial agreements should be binding and that the old bias against them was ended in the Supreme Court decision in *Granatino*. However, so many conditions are attached to their binding nature by the Supreme Court that couples now spend a fortune on litigating over whether or not the prenuptial agreement is in fact binding...

My Bill would put prenups on a statutory footing, with few conditions except those that normally apply to avoid fraud and duress in contracts. It may not quickly become the custom in this country for engaged couples to enter into such a contract, although it is *de rigueur* in most of continental Europe. For older couples who would like to enter a second marriage but are fearful that if the second marriage went wrong the children of the first marriage would lose out to the second husband, the ability to sign a prenup would allow them to marry with reassurance that the children would be protected and would not lose out.

Countries which allow prenups do not have higher divorce rates than we do, an argument put forward by those opposed to them. It seems to make little difference. Giving them statutory force would have the advantages of improved predictability of outcomes, meeting public expectations that they can make their own arrangements and maybe encouraging marriage for those who, with

³⁷ [HL Bill 45 of 2021-22](#)

³⁸ The bill was introduced as HL Bill 26 in the Lords and as Bill 310 2017-19 in the Commons. Further information with links to the Bill and debates is available on the [Parliament website](#).

³⁹ [Divorce \(Financial Provision\) Bill \[HL\]: Briefing for Lords Stages - House of Lords Library \(parliament.uk\)](#), 2 May 2018

⁴⁰ [HL Deb 11 May 2018 cc375-404](#)

past bad divorce experience, may be reluctant to commit again to a potentially financially ruinous legal situation.⁴¹

Baroness Vere of Norbiton replied for the Government. In respect of clause 3 she said:

The Government are considering a similar recommendation, made by the Law Commission, which has additional safeguards. ... We are considering introducing nuptial agreements and we will make our position known on this recommendation in due course.⁴²

⁴¹ [HL Deb 11 May 2018 c377](#)

⁴² [HL Deb 11 May 2018 cc400-1](#)

6 The position in Scotland⁴³

The law in Scotland on pre-nuptial agreements is different from that in England and Wales. Whilst pre-nuptial agreements have not been the subject of extensive case law, as a general concept they are generally regarded as being enforceable and not contrary to public policy.⁴⁴

Specifically, sections 9 and 10 of the [Family Law \(Scotland\) Act 1985](#) make provision for ‘matrimonial property’ in Scotland to be shared fairly on divorce. Fair sharing is usually equal sharing unless ‘special circumstances’ justify different proportions. Special circumstances include an agreement between the parties as to the division of matrimonial property on divorce.⁴⁵

In practice, pre-nuptial agreements are commonly used to ring-fence certain assets, in order to exclude them from the statutory definition of ‘matrimonial property’. Pre-nuptial agreements making comprehensive provision to override the legislative principles otherwise governing the division of matrimonial property on divorce are more unusual, and a [2021 article by a legal practitioner](#) expressed the view that such agreements are more likely to be subject to a later legal challenge.⁴⁶ On the other hand, the new edition of a leading family law textbook takes a more liberal view of the likely permitted content of pre-nuptial agreements.⁴⁷

In terms of the general position in Scots law on pre-nuptial agreements, there are some restrictions on a couple’s freedom to contract. It is now well-established that by virtue of section 16 of the 1985 Act, the court has power to set aside a pre-nuptial agreement when it was not “fair and reasonable” at the time it was entered into, and subsequent case law has developed this test with reference to a number of individual principles.⁴⁸

⁴³ Information provided by Sarah Harvie-Clark, Scottish Parliament Information Centre (SPICe) on 11 October 2023

⁴⁴ See, for example, *Thomson v Thomson* 1981 SC 344, a case relating to the terms of a pre-nuptial agreement, where the validity and enforceability of such an agreement was assumed by the parties and the judge in the case

⁴⁵ [Family Law \(Scotland\) Act 1985](#) s10(6)(a)

⁴⁶ Quail, T Pre-nups: Questions of Protection, J.L.S.S 2021, 66(4), 18-19. Available at: <https://www.lawscot.org.uk/members/journal/issues/vol-66-issue-04/pre-nups-questions-of-protection/>. See also an older practitioner article covering this topic: MacBride, C and Kendall, F, Wedded to the Pact? J.L.S.S 2010, 55(12), 10-13. Available at: <https://www.lawscot.org.uk/members/journal/issues/vol-55-issue-12/wedded-to-the-pact/>

⁴⁷ Sutherland, Elaine (2022) Child and Family Law, Volume II, Third edition, paras 3-223-3-224

⁴⁸ The case of *Kibble v Kibble* 2010 SLT (Sh Ct) 5 clarified that section 16 could apply to pre-nuptial agreements as well as to agreements made on the separation of the parties, as previously there had been uncertainty associated with this point. The leading case of *Gillon v Gillon (Number 3)* 1995 SLT 678 sets out the individual principles to be applied in determining whether or not to set aside an agreement under section 16

Significantly, the fact that the terms of an agreement led to an inequitable outcome is not itself enough to justify varying it or setting it aside.

In addition, there may be other restrictions on the freedom to contract based on certain (limited) public policy grounds. For example, it has been argued that any attempt to achieve a financial penalty for certain conduct, such as infidelity, or substance abuse, would be objectionable in public policy terms because the statutory system of financial provision on divorce in Scotland is intended to operate without regard to any fault-based considerations.⁴⁹ However, one of the issues with the Scottish legal system is the relative lack of case law involving challenges to pre-nuptial agreements, particularly on more unusual and far-reaching provisions. This means that the academic and practitioner commentary on the permitted scope of pre-nuptial agreements tends to involve an element of speculation and uncertainty, rather than being a definitive statement of the current law.

⁴⁹ Sutherland, Elaine (2022) *Child and Family Law*, Volume II, Third edition, para 3-224

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