

## Briefing Note

### Preuptial Agreements in Scotland

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#### What is a Prenuptial Agreement?

A Prenuptial Agreement is an Agreement entered into between a couple prior to their marriage or civil partnership with a view to regulating the treatment and division of certain assets in the event of any subsequent separation or divorce. The use of Prenuptial Agreements is becoming increasingly popular in Scotland.

Prenuptial Agreements will usually seek to ring-fence certain assets to protect them from claims on separation or divorce. It is also possible to make specific financial provision for one spouse or the other in the event that the marriage comes to an end.

#### Ring-fencing of Assets

In Scotland the assets and liabilities which are to be divided between spouses on divorce are known as “matrimonial property”. Matrimonial property includes all assets and liabilities acquired by the parties between the date of marriage and the date of separation. Subject to some important exceptions, (including a property acquired prior to marriage for use as a family home) assets acquired prior to the marriage do not form part of the matrimonial property. Specifically excluded from the definition of matrimonial property are any assets gifted by a third party to, or inherited by, a party during the course of the marriage. Provided that non-matrimonial assets remain in the same form, they will not form part of the matrimonial property. However, if a non-matrimonial asset is realised and invested in a new asset during the course of the marriage, the new asset will comprise matrimonial property, albeit subject to what is known as a “source of funds” argument:- namely that the value of the asset in question should be divided unequally in favour of the party whose non-matrimonial property funded it. It is important to note that this argument is entirely discretionary and cannot be relied upon as a certainty.

With the above in mind, one of the primary purposes of a Prenuptial Agreement is often to provide further protection in respect of any assets which derive from a party’s non-matrimonial property. Therefore, in addition to any pre-marital, gifted or inherited assets being specifically excluded from the definition of matrimonial property (which is a reflection of the legal position in Scotland), Prenuptial Agreements often seek to provide that any assets deriving from that non-matrimonial property are also to be excluded from the definition of matrimonial property.

#### Specifying Financial Provision

Prenuptial Agreements can also make specific financial provision for one party in the event of separation or divorce.

## Enforceability

The question of whether Prenuptial Agreements are enforceable has not yet been fully tested before the Scottish courts. As a matter of course, however, the Scottish Courts are reluctant to interfere with an Agreement entered into between two adults of sound mind and the widely held view is that Prenuptial Agreements will be upheld provided that they are fair and reasonable at the they are entered into. To maximise the prospects of this happening, it is important to ensure that each party has ample opportunity to consider the terms of the Agreement prior to the marriage. Independent legal advice for both parties is also very important.

## Further Advice

We have a lot of experience in drafting Prenuptial Agreements. If you are considering whether a Prenuptial Agreement may be right for you or if you would like more information or advice in relation to such agreement please do get in touch with us.