Pre Nuptial Agreements, They're All The Rage..... Aren't They?

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This is an agreement that some couples may enter into before their marriage/civil partnership takes place. The idea is to set out how their assets will be distributed if they divorce or there is Dissolution. They are very common in some European countries and are often used to protect longstanding family property.

Pre Nups, as they are commonly called, frequently hit the headlines in this country. You'd therefore be forgiven for thinking that they are always enforceable in this country - but they're not!

As a family and divorce lawyer I am sometimes asked to either draft a Pre Nup or deal with one as part of the divorce process.

Consider Elizabeth and John's situation; they are going to be married soon. Elizabeth has adult children from her previous marriage and she owns her own home. John has no children and whilst he owns his house it is worth a lot less than Elizabeth's. They have agreed that Elizabeth will leave the bulk of her house to her children and not to John. In order to protect the house for her children, not only can this be included in Elizabeth's will but also set out in a Pre-Nuptial agreement. Elizabeth is hoping that should they divorce, her property will still be available for her children.

Whilst it is a good idea to set this out in an agreement, Elizabeth will still be at the mercy of the court if John changes his mind and they do divorce. Pre-Nuptial Agreements can only be considered by a judge alongside many other criteria such as the housing needs of the parties and their level of income. If children have been born after the marriage it is unlikely that a court would make an order that would reflect the terms of the agreement. In Elizabeth's case there is probably more of a chance that a judge could be persuaded to make an order roughly in line with the terms of the arrangement.

Recent case law has suggested that to be even considered by a court a Pre-Nuptial Agreement should be signed by the parties at least twenty eight days before the marriage. Not, as in one case I dealt with, a party being presented with a Pre Nup one week before the wedding and being told that if they didn't sign the wedding was off!

Both parties should have made full financial disclosure to one another and both should have had legal advice before signing.

Of course the safest way to protect assets is to set up a trust prior to the marriage taking place. But that's another story altogether!