

Post Nuptial Agreements

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In these times of unparalleled financial uncertainty, pressure upon troubled relationships is at a peak. Leading London divorce firms have reported a huge increase in enquiries since rumours of redundancy in the City began, and with bonuses drying up and share prices tumbling, those contemplating divorce are ever more anxious about the fate of their assets in the event that their marriage becomes another casualty of the current economic meltdown.

If the issue of asset division is determined by the court in divorce proceedings because the couple cannot reach agreement, the way in which the wide ambit of discretion is applied can lead to a result which pleases neither party.

The decision of the Privy Council just before Christmas in the recent case of *MacLeod v MacLeod* could not have been more timely. In a judgement given by the leading family judge Baroness Hale, delivered in the highest appeal court applicable to Jersey, the legal position regarding pre and post nuptial agreements has been clarified.

Mr and Mrs MacLeod were married in Florida before moving to the Isle of Man. Mr MacLeod was significantly older than his wife and had made his substantial fortune before they met. On the day of their wedding they signed a prenuptial agreement.

When their marriage later ran into difficulties, they entered into a postnuptial agreement which provided more generously for the wife but not to the extent of the award that she would have received in divorce proceedings. A year later, the couple separated and Mrs MacLeod applied to the court for a more generous settlement than either agreement had provided. The case was initially heard in the Isle of Man court but two subsequent appeals led it to the doors of the Privy Council for judgment.

While recognising that prenuptial agreements can be an important factor in guiding the court as to an appropriate division of assets upon divorce, the Privy Council stated firmly that it is for Parliament alone to bestow binding status upon them. It went on to highlight the sharp distinction between prenuptial and postnuptial agreements, which

derives from the risk that a prenuptial agreement can be used as a bargaining tool to ensure a favourable outcome upon divorce in return for a willingness to marry, whereas a postnuptial agreement provides a couple already committed by marriage greater autonomy in relation to their existing circumstances.

Provided the couple enter into the agreement voluntarily after full financial disclosure is made and legal advice has been taken, the court will uphold it regardless of whether either party later changes their mind.

Consequently this decision is highly significant for couples no matter the extent of their assets, who are contemplating either marriage or divorce. It confirms their option to take matters into their own hands rather than leaving it to the divorce courts to decide how their assets are divided. This applies whether the matrimonial assets consist simply of the family home and a pension or run to multi-millions.

All litigation is expensive but divorce proceedings involve emotional as well as financial cost. Those wanting financial certainty in the event of divorce

now have the opportunity to secure it by means of a postnuptial agreement and those already having the benefit of a prenup would be wise to consider the greater security of postnup.

Should you have any questions or requests for further information, please contact:

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