

A house divided



Legal expert, **Graham Dorman** looks at 'pre-nups' in property joint-ownership

The Law Commission has published proposals for statutory recognition of pre-nups and what joint owners of property can do to protect themselves, should they ever need to part company.

Married or not, couples planning to buy a home together often find themselves ill-prepared when their relationship breaks down and assets such as real estate need to be divided. If the Law Commission proposals for giving pre-nuptial agreements a statutory basis holds sway, married couples fearing a worst-case scenario will be able to agree in advance how property would be divided, without a costly legal battle. However, co-habiting couples and friends or siblings wishing to buy property together remain vulnerable – unless they take steps to protect their interests in some form of non-nuptial property pre-nup.

PRE-NUPTIAL AGREEMENTS

Currently, marital property agreements (pre-nups) entered into by prospective spouses do not enjoy statutory enforceability and the determination of the rights and obligations of the parties arising out of such agreements is left to the courts to decide. This is an unsatisfactory regime so far as the parties are concerned, giving an element of doubt as to the division of assets freely decided upon by the parties prior to tying the knot. However, following the high-profile battle between German heiress Katrin Radmacher and her ex-husband in 2010, the UK Supreme Court found that a pre-nup can be legally binding.

So, what is a pre-nup and is it something which all intending married couples should be looking at, given how the Law Commission's proposals are likely to affect enforceability?

Pre-nups are intended to protect the particular assets of one or other of the intending spouses from the consequences of the division of marital property that otherwise might be the position should the marriage fail and divorce ensue.

The assets which a party may wish to protect could be pre-marital wealth, family, inherited or gifted assets.



Pre-nups are not for everybody; the assets of the majority of married couples facing marriage breakdown would not warrant such an agreement and, in the event of divorce, these couples will be more concerned with dividing the marital assets according to their needs. Pre-nups have traditionally been the concern of the more wealthy and often make headline news. However, with the significant increase in second marriages, producing children with split parentage, the need for agreeing in advance the division of, and entitlement to, assets is becoming ever more keenly felt.

Pre-nups have not been the subject of statutory protection largely as a result of moral concerns over the status and integrity of marriage. It has been considered that such agreements may devalue the wedding vows ("for richer, for poorer") and perhaps encourage the parties to seek divorce.

The Law Commission consultation could pave the way to the legalisation of pre-nups, possibly with restrictions; agreements could be binding but subject to an overreaching role of the courts for approval. It is likely that only agreements that have been freely entered into and where both parties have given full disclosure of assets and received detailed legal advice would qualify for protection. It is also possible that only special assets may be subject to protection, eg inherited and gifted wealth and not, say, assets accrued during the course of a marriage.

The Law Commission will also need to consider the position of any children of the marriage and that of any spouse who may find him or herself reliant on state assistance due to the other taking away the protected assets.



Friends wishing to buy property together remain vulnerable unless they take steps to protect their interests in some form of property pre-nup.



tenants in common. In the event that a declaration setting out the respective interests is not made, then the courts, in the event of dispute, will start from an assumption that each party holds an equal one half share, until evidence is produced to the contrary.

The Declaration of Trust will recite the fact of the joint purchasers' acquisition of the property and the monetary contributions each has made to the purchase price and expenses. A formula will then be calculated to determine the percentage ownership of each party in the property. This may be complicated by factors such as who is to pay the mortgage and/or other outgoings and the cost of any repairs and improvements to the property. A mechanism should also be put in place giving each party the ability, within a set time frame, to acquire the interest of the other on a first-refusal basis, plus stating how that interest is to be valued. Failing that, the agreement should include a provision that the property be placed on the market for sale in which event the net proceeds would be divided in accordance with the formula.

For those leaving nothing to chance, a Declaration of Trust could include terms for repayment of a mortgage, debt and outgoings

It seems certain that demand for some form of pre-purchase property agreement is here to stay.

THE 'NON-NUPTIAL' PRE-NUP

As a property lawyer I am regularly asked to advise on the safeguards that can be put in place where houses and flats are purchased by couples who may not have marriage in mind. In these instances the client must be advised as to the different forms of joint ownership and the mechanisms for the division of the proceeds of sale in the event of the parties bringing the arrangement to an end.

As a general rule, married couples purchase property in their joint names as joint tenants meaning that they each own the whole of the property. Accordingly, in the event of the death of one party, the property passes automatically by "survivorship" to the other. There may be occasions, perhaps as part of Inheritance Tax planning where married couples have children from a previous marriage, when both parties will opt for what is known as tenancy in common which is the exact opposite of a joint tenancy. With a tenancy in common each party owns a specific share in the property which does not automatically pass to the survivor in the event of his or her death but instead will pass under the terms of the deceased's will or in accordance with the rules of intestacy if a will has not been executed.


Non-married joint owners, be they cohabiting partners or friends may be advised to purchase the property as tenants in common if they wish to safeguard their own interest and for that interest to pass to their nominated beneficiaries by will.

These arrangements should be documented by execution of a Declaration of Trust, a non-nuptial equivalent of a pre-nup, prepared by the property lawyer as part and parcel of the conveyancing process. This document recording the agreement of the parties is crucial since the Land Registry does not get involved with trusts (they are "behind the curtain" of the legal ownership) save for recording that the property is held by the owners as

liabilities, ownership of contents and access to the property following a split. A legally binding agreement can go a long way to limiting the aggravation and unreasonable behaviour that frequently accompanies cohabitation breakups. For this reason, independent legal advice for both parties is strongly recommended when executing a Declaration of Trust prior to purchasing a property, to ensure that the agreement is given no inherent bias towards one or other party.

Should cohabitation happily end in matrimony however, the parties may wish for a tenancy in common to be bought to an end and replaced with a joint tenancy more accurately reflecting the parties' common interests following marriage. Equally a joint tenancy may easily be severed by either party giving a notice of severance to the other and the same be recorded at the Land Registry. At that time the execution of a Declaration of Trust should be carefully considered.

However the Law Commission recommendations develop, it seems certain that the demand among property-buying couples for some form of pre-purchase property agreement is here to stay. Given the cost of litigation when relationships end in acrimony, some form of property pre-nup and, indeed, the purchase of adequate legal expenses insurance at the outset, are invaluable if clients want to secure for themselves the option of a smooth parting of the ways.

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