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QUALIFYING NUPTIAL AGREEMENTS

PRIVATE CLIENT

Pre-nuptial and post-nuptial agreements (together "marital agreements") cannot currently be enforced per se as contracts in England, despite a provision in our 1973 divorce law which contemplates post-nuptial maintenance agreements. Rather, a court order is required to "give effect to" the terms of the agreement. Since the courts will only give effect to marital agreements to the extent that they consider the terms to be fair, they remain subject to the court's assessment of what is fair to the parties in the circumstances. Marital agreements cannot stand on their own two feet, however carefully thought-through they are. As such, they offer limited certainty to the parties.

As a result, in its long-awaited report on Matrimonial Property, Needs and Agreements (the Report), the Law Commission has recommended the introduction of "qualifying nuptial agreements" (QNAs). QNAs are intended to provide for the first time an enforceable legal basis on which couples may contract with each other under English law. They would be enforceable as contracts, effectively in the same way as any other, commercial contract and independently of the courts' assessment of fairness. QNAs will therefore partly reduce the courts' discretion to make financial orders.

The Commission's hope is that the introduction of QNAs will offer greater predictability, autonomy and control.

KEY FEATURES OF A VALID QNA

A draft bill produced by the Commission describes the features of a valid QNA by reference to the following criteria.

They must:

- be contractually valid on traditional principles (so must be free of undue influence or misrepresentation);
- be made by deed;
- contain a statement signed by both parties confirming that they understand the agreement is a QNA that will partly remove the courts' discretion to make financial orders; and
- not be made within 28 days immediately before the wedding or celebration of civil partnership.

In addition, the Commission recommends that parties should not be allowed to waive two key features: at the time of making the agreement, each party must have received:

- disclosure of material information about the other party's financial situation; and
- independent legal advice.

WHAT IS A QNA NOT DESIGNED TO COVER?

A key feature of QNAs is that they cannot deal with:

- future needs for housing;
- childcare;
- an income; or
- any other aspects of "financial needs".

The Commission expresses the view that, given the potential vulnerability of parties contemplating marital agreements, this feature is essential to protect parties from pressure, whether deliberate or involuntary. It also brings them in line with normal practice in other European jurisdictions, where even with matrimonial regimes integral to the DNA of the system, "needs" remain open to the judge to deal with.

Of course, it would still be open to parties to make marital agreements encompassing financial needs, but these would (a) still not be enforceable as contracts and (b) remain subject to the courts' assessment of fairness under tried and tested principles. Nevertheless, parties may still welcome the opportunity to agree in principle what level of provision they think is appropriate to meet any anticipated financial needs, and what form that provision should take.

QNAs IN PRACTICE

In addition to high net worth individuals seeking to protect their personal wealth, QNAs may also be attractive to couples who are less wealthy, but are marrying or entering into a civil partnership later in life at a stage when each is financially independent and has sufficient assets to meet his or her own needs. QNAs are also likely to appeal to those couples who enter the jurisdiction with a marital agreement concluded in another legal system and are seeking similar protection for their assets after their move (see further below).

The attractions of a QNA will clearly vary from couple to couple. For individuals who anticipate that they will accrue significant wealth during the relationship, whether in their own name or jointly with their partner, the key advantage may lie in the fact that, subject to provision for financial needs, a QNA would allow the parties to state exactly how, if at all, they wish the assets to be divided, excluding the possibility that the courts may deem such wealth to be "matrimonial property" and divide it equally between the parties.

For other couples, the key advantages will lie in the fact that a QNA would enable each party to protect specific property acquired prior to the marriage or civil partnership. Where the matrimonial home is in the sole name of one of the parties, for example, a QNA would allow the parties to state that the non-owning party should release any claim to, or interest, in the property upon the breakdown of the relationship. The provisions of the QNA could also usefully extend to what is to happen where the specific asset is sold and replaced, or where it has grown in value as a result of active management or investment by the non-owning party.

Financially independent couples marrying later in life are likely to welcome QNAs not only as a means of allowing each party to continue their financial independence, but also as a means of ensuring that assets are preserved for any children from a previous relationship.

MARITAL AGREEMENTS IN OTHER JURISDICTIONS

Notably, the Report and draft bill at present contain no recognition mechanism for foreign arrangements. Furthermore, it is our view that the requirement for QNAs to be made by deed, and the requirements for independent legal advice and disclosure of material financial information, will prevent the majority of overseas agreements from qualifying as QNAs. It is likely therefore that couples who have availed themselves of equivalent arrangements in their "home" jurisdiction will need to have consideration of the new English system at the top of their planning list alongside tax questions and the practical logistics of the move.

CONCLUSION

The introduction of QNAs should prove welcome to couples seeking to protect their personal wealth, whether acquired prior to, or during, the relationship, and provide them with greater autonomy and flexibility in how such assets are to be dealt with on divorce.

Couples who have an existing marital agreement entered into in an overseas jurisdiction should be advised that the existing agreement may well not qualify as a QNA, and will therefore be subject to the court's discretion as before. Such couples should nevertheless be encouraged that the proposed introduction of QNAs should give them a means of replicating the protection afforded to their assets under the overseas agreement in an agreement that will be enforceable in England and Wales.

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