

# Creating effective pre-nups for an adviser's tool-kit

*Asia's HNW and UHNW populations are taking the impact of divorce on their wealth increasingly seriously by using pre-nuptial agreements more and more frequently, says Marcus Dearle of Berwin Leighton Paisner (BLP).*

Pre-nuptial agreements (PNAs) can be an effective way for advisers to help their wealthiest clients navigate a sensitive subject to prepare them more effectively for the potential fall-out of divorce.

Yet these are tricky agreements to put together. In many cases, they are required as both partners do not have

To do this well demands meticulous attention to detail as well as forward thinking. After all, a marital split can have a serious dent on an individual's wealth.

As a result, the agreements require advisers to think carefully about how they create them and handle or guide the discussions.

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equal levels of assets. Plus, since PNAs typically get drafted during happy times, lawyers or advisers might be tempted to simplify them, which can lead to important clauses being omitted.

"I have got to be hugely diplomatic, but at the same time keep my financial hat on, because I am there to save money by protecting the family from a huge potential hit on divorce, even losing half



**MARCUS DEARLE**  
Berwin Leighton Paisner

their wealth," says Marcus Dearle, a partner in BLP's Hong Kong office who heads the law firm's innovative Family|AssetProtect team in both

London and Hong Kong. He is also an expert in multi-jurisdictional PNAs and cross-border matrimonial litigation.

#### DIGGING DEEPER

It's not just the wording of the PNA that matters. "I'm just as concerned about the conversations going on in the background and whether the financially-weaker party is genuinely content to sign up," says Dearle.

"I actually ask for the email, Facebook and WhatsApp messages between the parties where there is any mention of the PNA or the discussions surrounding it. I want to know exactly what messages are going backwards and forwards," he adds.

"Sometimes, seemingly innocuous messages like 'I'm actually only signing because your father wants me to/told me to', are deliberately planted so that they can be deployed at a later date, long after the excitement of the wedding has died down and the relationship has broken down – consequently making the agreement far more difficult to enforce," adds Dearle.

He says this is because this is potential evidence of duress.

"An arguable case of duress can make a PNA worthless.

Much of the English case law on the enforceability of PNAs concerns these

#### Across generations and genders

*Pre-nups have become more and more popular with clients of all ages; they are also surprisingly common in cases of millennials tying the knot.*

*This is due to these individuals not only looking to protect their real estate assets, but also any creative ideas they may get during marriage, according to a Bloomberg report in November 2016.*

*Further, millennial women are driving the push for pre-nups, despite it being a contract that the groom traditionally laid out when men were the primary breadwinners.*

### "I actually ask for the email, Facebook and WhatsApp messages between the parties where there is any mention of the PNA."

The detail matters and the risks are of serious concern. HNW and UHNW PNAs shouldn't be done on the cheap or on the back of an envelope.

Failing to spot and deal with a message from a financially-weaker party, for instance, indicating that he or she is actually not happy to sign when this contradicts the more positive position being officially communicated through the lawyers, is a danger signal – and could cost millions if not handled swiftly and effectively, he explains.

sorts of issues and also over issues of financial disclosure and legal representation - or rather lack thereof."

#### FORUM SHOPPING

Another important issue that Dearle says should be covered in a PNA, in order to protect a client, is on the question of jurisdiction; this means where a divorce case will take place in case the marriage comes to an end.

"If you are acting for the financially-stronger party who is based in Hong

Kong, or outside Hong Kong with a substantial connection to Hong Kong, it is worth considering, if the circumstances allow, including an exclusive jurisdiction clause in the PNA in a jurisdiction where the divorce courts are less generous than Hong Kong for the financially weaker party," says Dearle.

"And you should also warn your client to seek advice the moment there is a problem in the marriage," he advises,

"It may be necessary to file for divorce in the more beneficial jurisdiction for your client's circumstances – and to move fast." This is known as 'forum shopping'.

"But", Dearle continues, "even if the wealthier party is a Hong Konger based,

say, in the US, that client needs to be warned that the financially-weaker party might also be wanting to indulge in some long distance forum shopping, too, and file a divorce petition in Hong Kong whilst still living in the US.”

“An unexpected request from the other Hong Kong spouse to move temporarily back to Hong Kong from the US with the children just might be an early clandestine forum-shopping move – cloaked in the guise of the spouse needing to spend more time with elderly parents.”

Yet a mere 4 months of ‘integration’ of the children at school in Hong Kong could be enough to switch the children’s habitual residence to Hong Kong and strengthen the chances of the divorce proceeding in Hong Kong.

in Hong Kong will make the decision as to whether the PNA is enforced or not – even if the PNA has been prepared and executed outside Hong Kong,” he explains.

On this question, recent English case law – which Hong Kong is likely to follow – brings some potentially good news for the wealthier party.

‘Reasonable needs’ does not automatically mean there will be an award of very substantial capital outright in Hong Kong following the English cases of MacLeod and Radmacher (as endorsed by the Hong Kong Court of Final Appeal case of SPH), where funds are made available for housing for the children on trust during their minorities only. “Watch this space,” says Dearle.

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To protect against this scenario, the financially-stronger party should, as a precautionary measure – just in case the other party might be allowed to continue to proceed with the divorce in Hong Kong – responsibly ensure that the financial provision in the PNA at least covers the ‘reasonable needs’ of the other party, adds Dearle.

“Don’t forget, if the divorce does proceed in Hong Kong the family court

Hong Kong is still considered the divorce capital of Asia.

Its laws place a relatively large amount of power in the hands of the financially-weaker partner in a marriage.

It has seen some high profile – and expensive – divorce settlements, such as the case of property scion’s ex-wife Florence Tsang Chiu-wing, for whom Dearle acted. ■

### **A clear and technical head**

*Advisers should not be wary of complicated and complex PNAs just because they are drafted in good times when a couple are getting along. A family lawyer cannot act for both parties. However, says Dearle, it is not obligatory for both partners each to have a separate set of professionals to do their drafting; “but,” he continues, “from the financially-stronger party’s perspective, in the event that the financially-weaker party takes up this option, which is not uncommon, then the efforts to ensure that that person has had the opportunity to obtain independent advice should be carefully recorded in a waiver clause in the PNA.”*

*Managing clients’ expectations can often be a challenge too. What happens if the other party says ‘no’, refuses to sign and there is a break-up of the relationship? “Managing expectations is all in a day’s work for our team,” says Dearle. “But sufficient time needs to be devoted to each and every case in order to be able to do so. The answer is you might be in difficulties if you haven’t warned the client about all the potential ramifications before he pops the PNA proposal. Failing to prepare for and manage the human aspects of the job could lead to significant embarrassment and even negligence actions.”*

*In a HNW or UHNW case international experience and in-depth expertise is vital, he adds. “When hundreds of millions of (US) dollars are at stake, you need to be able to handle yourself and your client if you have to advise, for asset protection reasons, not to proceed with the marriage if their partner will not sign a PNA.”*