

Nuptial Agreements: The validity of Pre-nuptial agreements in Ghana

1.0. Introduction

Marriage is a contract between the persons involved in it. Parties to a marriage contract or an intending marriage contract may enter into Nuptial Agreement(s). The purpose of a Nuptial Agreement is to have in place an understanding between the persons involved in the marriage in the event of the cessation of the marriage either by death or dissolution through divorce. Agreements entered into before marriage are called Pre-nuptial agreements and those entered into after the marriage are called Post-nuptial agreements.

Nuptial Agreements are said to provide certainty and security in the event of a cessation of the marriage and enables couples have a full knowledge of the financial picture¹ before and or after the marriage. Couples also enter into Nuptial Agreements to supersede many of the default marital laws that would otherwise apply in the event of the cessation of the marriage divorce, such as the laws that govern the distribution of properties.

The legal effect of Nuptial Agreements varies between countries in what content they may contain and under what conditions and circumstances any such agreement may be declared unenforceable. On many occasions, foreign courts have made pronouncements on the enforceability of Nuptial Agreements, expressing the opinion that they are binding on the parties and enforceable. In the case of *Radmacher v. Granatino*², the Supreme Court of England indicated its willingness to enforce Nuptial Agreements in the following words,

"courts should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."

Post-nuptial agreements have been defined as contracts agreed upon by spouses after marriage, which outlines amongst others, the ownership of financial assets in the event of a divorce. They also regulate the duties and responsibilities of spouses during the marriage and in some instances, address the settlement of a spouse on the dissolution of the marriage. Although such agreements may vary from country to country, they must be in writing, voluntarily entered into by both parties, require full disclosure of relevant information at the time of execution, contain reasonable terms, and must be signed by both parties.³ Such agreements may be entered into when the parties are still together or at the point they are separating or have separated.

The key difference between Post-nuptial agreements and Pre-nuptial agreements is the period at which they are entered into. Pre-nuptial, as the name implies, comes from two (2) words, 'pre' and 'nuptial'. It is a truism that the word 'pre' means and or is understood to mean before and or preceding whilst the word 'nuptial' means matrimonial and or marriage. A Pre-nuptial agreement is an agreement made by parties intending to contract a marriage, which agreement sets out the rights of parties to properties in the event of the dissolution of the marriage and or death of a party to the marriage. It is not in doubt that a Pre-nuptial agreement would normally have as its parties the two (2) persons who intend to enter into

¹ <https://www.forsters.co.uk/nuptial-agreements/nuptial-agreements-introduction>

² [2010] UKSC 42

³ https://www.investopedia.com/terms/p/postnuptial_agreement.asp

the contract of marriage. It is however the view of the author that in polygamous societies where the law recognizes polygamy, it may be possible for a man who intends to marry two (2) persons to enter into a Pre-nuptial agreement with more than two (2) persons.

Although of relevance and worthy of discussion, Post-nuptial agreements would not be discussed in this article as the concern of this article is a Pre-nuptial agreement entered into by two (2) persons who intend to contract a valid marriage as recognized by the laws of Ghana.

In Ghana, we have three (3) types of marriages, the customary law marriage⁴, marriage under the ordinance⁵ and Mohammedan marriages⁶. Upon the dissolution of a marriage either by the death of a spouse or divorce, property distribution becomes an important part and or a natural antecedent upon the dissolution. Parties enter into Pre-nuptial agreements to ensure that they decide before contracting the marriage how properties they own, whether acquired before the marriage, properties jointly acquired during the marriage, and properties individually acquired during the marriage will be distributed.

Considering the absence of legislation specifying how property acquired during the subsistence of a marriage or jointly acquired by a couple is to be distributed, the courts refer to the 1992 Constitution and case law on the distribution of property jointly owned by spouses. The courts have had to distinguish between the self-acquired property of spouses before marriage, property acquired by spouses separately during marriage, property acquired jointly by spouses during marriage, and property acquired by a spouse in a marriage with the contribution of the other spouse.

The courts have a herculean task of determining on a case-by-case basis, the "equitable" portion to be given to each party in light of the mandate as provided in Article 22(3)(b) of the 1992 Constitution which states as follows,

22. Property Rights of Spouses

(3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article— (a) spouses shall have equal access to property jointly acquired during marriage; (b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.

This leaves one wondering if, the presence of a Pre-nuptial agreement between the parties before the marriage, saves the court the task of determining the portion due a spouse upon the dissolution of the marriage. One question therefore looms large; Are Pre-nuptial agreements, commonly referred to as 'pre-nups', valid and upheld in Ghana? In a society such as Ghana, where family ties are revered and community values hold significant sway, the notion of entering into a legal contract before marriage may be seen to be an indication of a lack of trust by some. However, as Ghana continues to embrace globalization and economic evolution, the dynamics of relationships and matrimonial arrangements are evolving as well.

⁴ Graham v Graham

⁵ Ibid

⁶ Barake v Barake

2.0. Pre-nuptial agreements

Pre-nuptial agreements also referred to as marital contracts were used as far back as ancient Egypt, over 2000 years ago⁷. In certain jurisdictions, they specified the property each spouse would bring to the marriage, the bride's dowry and the bride's wealth that the groom would pay to the bride in exchange for marrying her. These agreements were entered into by the parents of the couple. The concept of Pre-nuptial agreements was to protect women who were not granted the right to own their own property and choose their spouses, as well as access the husband's property if he died. Furthermore, they were used to protect the sizeable wealth of spouses in the event of a divorce.

Pre-nuptial agreements became prevalent in the eighties as a result of women who were getting married and intended to pursue their career outside the marriage. The United States is one of the countries that has since time in memorial made provision for Pre-nuptial agreements in their laws, specifically in the Uniform Pre-nuptial Agreement Act. The Uniform Pre-nuptial Agreement Act was passed by the Uniform Law Commission in 2012 and has been adopted by twenty-eight (28) states in the United States of America together with Columbia. The Act sets out clear requirements which must be present for marital agreements to be enforceable.

The Uniform Premarital and Marital Agreements Act (UPMAA), formerly referred to as the Uniform Premarital Agreements Act (UPAA) was an updated and revised version of the UPAA which sought to establish procedural and substantive safeguards for marital agreements to ensure that they conform to the standard of premarital agreements⁸.

A Pre-nuptial agreement has been defined as a contract entered into by a couple before marriage that enables them to select and control many of the legal rights they acquire upon marrying, and what happens when their marriage eventually ends by death or divorce⁹. Jurisdictions such as South Africa¹⁰, France, Switzerland, Sweden, Norway, Germany, Denmark, Poland, Finland, and Brazil have laws regulating Pre-nuptial agreements. Ghana as well as jurisdictions like India, have no laws governing Pre-nuptial agreements since Pre-nuptial agreements are very rare in these jurisdictions. Pre-nuptial agreements have gained popularity in other jurisdictions and may be slowly etching a popular space in Ghana.

The essence of a Pre-nuptial agreement is for parties to agree on what goes to either of them by way of distribution of property upon the dissolution of the marriage. The properties which form the subject matter of a Pre-nuptial agreement may include property acquired individually by each party before the marriage or properties acquired jointly during the subsistence of the marriage.

Pre-nuptial agreements, like usual contracts may be in writing, oral or partly written or oral. In most cases, Pre-nuptial agreements are in writing and stipulate clearly the terms of the agreement as entered into by the parties. In the case of *Radmacher v Granatino supra*, the court in its judgment referred to the proposal of Government for safeguards that should guide

⁷<https://brodiefriedman.com/historyprenups/#:~:text=Marital%20contracts%2C%20also%20referred%20to,would%20bring%20to%20the%20marriage.>

⁸ https://en.wikipedia.org/wiki/Uniform_Premarital_Agreement_Act

⁹ https://en.wikipedia.org/wiki/Prenuptial_agreement

¹⁰ Jeremy D. Morley: "*Prenuptial Agreements in South Africa*".(Available online)

prenuptial agreements. The proposal states that a prenuptial agreement would not be legally binding where,

- *where there is a child of the family, whether or not that child was alive or a child of the family at the time the agreement was made*
- *where under the general law of contract the agreement is unenforceable, including if the contract attempted to lay an obligation on a third party who had not agreed in advance*
- *where one or both of the couple did not receive independent legal advice before entering into the agreement*
- *where the court considers that the enforcement of the agreement would cause significant injustice (to one or both of the couple or a child of the marriage)*
- *where one or both of the couple have failed to give full disclosure of assets and property before the agreement was made*
- *where the agreement is made fewer than 21 days prior to the marriage (this would prevent a nuptial agreement being forced on people shortly before their wedding day, when they may not feel able to resist)."*

3.0. Legal basis of Pre-nuptial agreements

The law on Contracts in Ghana is governed by the Contracts Act, 1960 (Act 25) as well as the received common law. In the 12th edition of Cheshire, Firfoot and Fumston's Law of Contract, Contracts are said to be;

"agreements made either by word of mouth or in writing"

The author states that the essence of an agreement whatever the form lies in the idea of assent, which affirms a party's willingness to be bound by the terms of the agreement. It states as follows,

"Behind all forms of contract, no doubt, lies the basic idea of assent. A contracting party, unlike a tortfeasor, is bound because he has agreed to be bound. Agreement is however is not a mental state but as an act, is a matter of inference from conduct".¹¹

Contracts are based on agreements between individuals which are recognized by the law as binding on the parties and giving rise to enforceable legal rights. Contracts may vary in size, content, form and nomenclature depending on the peculiar terms contained in it¹². A contract

¹¹ Page 28, 12th Edition of Cheshire, Firfoot and Fumston's Law of Contract

¹² The Law of Contract, Christine Dowuona Hammond

is an agreement in which parties have voluntarily promised to perform certain obligations and are legally bound to so do.

In the Supreme court case of *Union savings and loans limited v Rosco investments ltd and Abass Abubakar*¹³, where it was stated as follows,

"In the case of Printing and Numerical Registering Co. v. Sampson (1975) L R 19 EQ 462 at 507 Sir George Hessel said:

"If there is one thing more than another which public policy requires, it is that men of full age and understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and enforced by courts of justice."

The Supreme Court gave a stamp of approval to the English authority above in the case of Oppong v. Anarfi (2011) SCGLR 556 where it was held as follows:

"The law was settled that a party of full age and understanding would normally be bound by his signature whether he read and understood it or not, particularly in the absence of the requisite evidence that the other party had misled him. Therefore where parties had embodied the terms of their contract in a written document, extrinsic evidence or oral evidence would be inadmissible to add to, vary, subtract from or contradict the terms of the written instrument. Thus mere negligence in not reading a document before signing could not amount to the defence of non-est factum."

The law is therefore settled that a valid contract is binding on the contracting parties. The only instance where a party may not be held bound to an agreement is if the contract is tainted with a vitiating factor such as fraud, duress, undue influence, illegality, or lack of capacity amongst others. On this, the court held in *Nana Osei Afrifa v Eugene*¹⁴ that

"The law will enforce the mutually agreed transaction agreed between parties arrived at arm's length and in the absence of any of the vitiating factors such as fraud, unconscionability, illegality and the like

Therefore, as far as the parties voluntarily entered into it, they are held to be bound by the terms of the Agreement unless they can prove vitiating factors including, duress, fraud or misrepresentation, undue influence, contractual incapacity of a party to the contract or illegality of the prenuptial agreement"

Furthermore, in the case of *Ahenfie Cloth Sellers Association v Philomena Mensah and 3 others*¹⁵, the court in holding that the loan agreement was harsh and excessive and therefore illegal and unenforceable sought to define 'illegal contracts' in the following words,

"Osborn's Concise Law Dictionary, 8th edition, at page 169 defines illegal contract as: "A contract that is prohibited by statute (e.g. one between traders for minimum resale prices) or at common law as being contrary to public policy (such

¹³ (2017) JELR 65173 (HC)

¹⁴ (2019) JELR 63874 (HC)

¹⁵ [2010] DLSC 2545

as agreements in restraint of marriage). It is void and neither party can recover money paid under it." Black's Law Dictionary, 7th edition, at page 322 also defines illegal contract as: "A promise that is prohibited because the performance, formation, or object of the agreement is against the law. Technically speaking, an illegal contract is not a contract at all, so the phrase is a misnomer. "An illegal contract is one which is null and void; it is of no effect whatsoever and is clearly unenforceable. It affects both parties to the contract and none of them can enforce it. A typical instance of an illegal contract is agreement by drug dealers to trade in drugs. Another instance of such transaction was in Addy v. Irani Brothers [1991] 2 GLR 30 where the plaintiff sued for money illegally acquired by selling goods above the legally controlled price and for foreign money acquired through changing money at "black market." The subject matters in that case, like drugs, were illegal and were therefore irrecoverable through the courts. None of the parties can sue on any such agreement or contract because the law does not protect even parties found to be innocent but who can at the same time be described as being in pari delicto. It is a contract which literally does not exist and it is in that sense it is said to be a misnomer to describe such a transaction as a contract or agreement".

As can be seen from the above referred to cases, although a contract or agreement may be complete in all respects, it will be declared unenforceable due to the illegality of its purpose. A contract is illegal if it violates public policy or a statute, for one cannot contract against the provisions of statute. Indeed, in the consolidated case of *Republic v High Court, Kumasi; Exparte Bank of Ghana and others (Sefa and Asiedu Interested parties) (No.1); Republic v High Court, Kumasi; Exparte Bank of Ghana and others (Gyamfi and others Interested parties) (No.1) (Consolidated)*¹⁶ the Supreme Court confirming the decision of Date-Bah JSC in the earlier case of *Republic v Fast Track High Court, Accra; Exparte Ghana Lotto Operators*¹⁷ stated as follows,

" ... A court could not shut its eyes to the violation of a statute as that would be very contrary to its raison d'être ... No judge had authority to grant immunity to a party from the consequences of breaching an Act of Parliament."

It is a truism that following from this position, parties to a marriage cannot contract against the provision of the Children's Act 1996 (Act 560) in a Pre-nuptial agreement which sins against the provisions of this Act. Act 560 provides for the manner in which the affairs of children of a marriage would be dealt with upon the dissolution of the marriage. It stipulates the court with jurisdiction and the factors to be considered in determining the matters relating to custody and maintenance for children in a marriage. Any Pre-nuptial agreement in which the parties have agreed to go contrary to any provision contained in Act 560 would be unenforceable to the extent of the violation of statute.

Furthermore, parties cannot by agreement oust the jurisdiction of the courts over a Pre-nuptial agreement. The court, per the Marriages Act 1985 (Cap 127) and the Matrimonial Causes Act, 1971 (Act 367) has been given the mandate to adjudicate over the dissolution of marriage and all ancillary matters that follows same. Therefore, spouses cannot by an agreement seek to agree to the manner in which the marriage would be dissolved.

¹⁶ (2013-2014) 1 SCGLR 477

¹⁷ (2008-2009) 2 SCGLR 1088

Pre-nuptial agreements are simply contracts and therefore all incidents applicable to a valid contract are applicable to same, including the rules that parties to a contract are bound by the terms of the contract except in the presence of vitiating factors. Furthermore, a party's failure to perform its obligations under a contract would be classified as a breach of the contract.

4.0. Contractual estoppel

Pre-nuptial agreements are contracts and ideally should be made in writing for the purposes of certainty of terms. It is important to note the implications of a written pre-nuptial agreement on the parties to it. "Writing" has been defined by law as including any medium that puts the agreement in a recordable form. *Section 25 of the Evidence Act 1975 (NRCD 323)* provides,

"Except as otherwise provided by law, including a rule of equity, the facts in a written document are conclusively presumed to be true as between the parties to the instrument, or their successors in interest"

When parties conclude a binding contract acknowledging that a particular state of affairs exists, they are bound by the terms contained therein. Neither party can unilaterally opt out of the contract as the contract is binding on that party in the absence of any of the vitiating factors of a contract. In the case of *Peekay Intermark Ltd v Australia and New Zealand Banking Group Limited*¹⁸, Moore-Bick LJ stated as follows,

"Where parties express an agreement... in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerned those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel"

Again, in the case of *Boateng vrs Melbond Microfinance Company Limited*¹⁹ at holding 1(b) it is stated as follows,

"on the authorities, when a document containing contractual terms was signed, then in the absence of fraud or misrepresentation, a party of full age and understanding was bound to the contract to which the party appended the signature."

A party to a prenuptial agreement which is in writing is therefore conclusively presumed to have agreed to same and is mandated to abide by the terms of the agreement upon enforcement of same. Section 26 of the Evidence Act NRCD 323 states as follows,

"Except as otherwise provided by law, including a rule of equity, when a party has by his own statement, act or omission intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest"

¹⁸ [2006] EWCA Civ 386

¹⁹ (2018-2019) 1 GLR 791

5.0. Why Pre-nuptial agreements?

It is not in doubt that property settlement lead to acrimony after dissolution of marriages in some divorce cases. This may be due to the fact that parties never anticipated the dissolution of the marriage and the subsequent distribution of property whether acquired during the pendency of the marriage or property acquired before the marriage but which hitherto the divorce proceedings was jointly used by the married couple. It therefore becomes beneficial if the parties to a marriage entered into a Pre-nuptial agreement to govern the distribution of property.

Pre-nuptial agreements may come with certain benefits including granting a party to a marriage the opportunity to keep their property acquired before marriage without any risk of losing same upon the dissolution of the marriage; protecting a spouse from the accumulated debt of a spouse to avoid any liability in respect of the debt during or upon a dissolution of the marriage; making the divorce process less complicated and elongated as most of the complications and acrimony associated with the dissolution of marriage is with the distribution of the properties acquired during the subsistence of the marriage; and protecting a child from a prior marriage by supporting that child with marital income.

6.0. Enforceability of Pre-nuptial agreements in Ghana

It is the position of the writer that Pre-nuptial agreements are valid in Ghana and can be enforced in the courts. The writer's position finds justification in the provision of the 1992 Constitution of Ghana, the Matrimonial Causes Act, the Contract Act, and the Evidence Act of Ghana.

In Ghana, the Constitution is the supreme law of the land. This position is encapsulated in Article 1(2) of the 1992 Constitution which reads as follows,

" This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency be void,"

This doctrine has been affirmed in various decisions of the Supreme Court, including the case of *Justice Abdulai v. The Attorney General*²⁰ which stated the following:-

"It must be noted that the 1992 Constitution establishes constitutional supremacy as against parliamentary supremacy. Under parliamentary supremacy, as pertains in the United Kingdom, Parliament is sovereign and all laws, decisions, procedures of Parliament are final and cannot be subject to judicial review by the Courts. The courts merely apply the legislation made by Parliament and may not hold an Act of Parliament to be invalid or unconstitutional...Under our current constitutional dispensation, the sovereign people of Ghana have adopted for ourselves a Constitution, where it is expressly declared in Article 1(2) that the Constitution, not Parliament, shall be the supreme law of Ghana to which all other laws must conform"

²⁰ (2022) JELR 109669 (SC)

The constitution provides in Article 18 that every person has the right to own property either alone or together with another person. Article 18 provides as follows:-

“

- (1) *Every person has the right to own property either alone or in association with others*
- (2) *No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others”*

This provision empowers a person to choose the manner in which his or her property is held and further ensures that the interference with this right is, except in very few exceptional circumstances, curtailed. If the constitution guarantees a person's right to own property and the option to choose to own it with others or dispose of it, the same constitution cannot be said to restrict the right of the person to regulate the ownership of his or her property by a Pre-nuptial agreement. Any assertion that stipulates that a Pre-nuptial agreement is invalid would be a contravention of the constitution as same seeks to curtail the right of an individual to freely own and dispose of his or her property at any time and in whatever manner that party deems fit.

Furthermore, under the said Article 18, every person has a right to own property either jointly and in association with any person. It is further provided that no person can be deprived of his property except in accordance with law. If, therefore in exercise of this right, parties have entered into a Pre-nuptial agreement which provides and or protects specific properties from spouses, it would be unconstitutional for same not to be enforceable by any court. It is the view of the author that it is not wrongful and or illegal and or against any legislation to enter into a Pre-nuptial agreement in so far as the terms of the agreement are not offensive and or against public morality. The standard for dealing with whether a Pre-nuptial agreement is valid is the same standard for dealing with whether contracts are valid.

The nature of the Pre-nuptial agreement will determine whether it is enforceable. The fact that parties are at liberty to enter into contracts is sacred. It is a further truism that it is not uncommon for most contracts to have dispute resolution clauses which deal with how disputes are to be resolved. It is not suggested that such dispute resolution clauses are illegal and or wrongful.

Furthermore, divorces are legal in Ghana and even the constitution provides in Article 22(2) that parliament should enact laws regulating property rights of spouses in the event of the death of a spouse or dissolution of the marriage. The Matrimonial Causes Act 1971 (Act 367) has specific provision on the power of the court with respect to property settlement which was applied in the case of *Ribiero v Ribiero*²¹ where the court stated as follows,

"Historically then, until the Married Women's Property Act of 1884, women in Britain had no basic rights to property in their own right. Their proprietary rights were completely subservient to their husband's. With the 1884 Act, the position changed

²¹ [1987 - 1988] 2 GLR 464

and a wife received statutory powers to acquire, hold and dispose of property as her separate property as a femme sole without the intervention of any trustee. And though a discretion was given to the court by section 20 of the 1884 Act "to make such order with respect to the property in dispute, it thinks fit", this discretion was never interpreted as conferring a power in the court of awarding property to an unentitled party merely because it was equitable to do so. Thus in Gissing v Gissing [1970] 2 All ER 780 at 793, HL Lord Diplock gave the warning that where the legal estate vested solely in a husband, the beneficial interest in a matrimonial home can only arise where a clear provable intention is demonstrated that the beneficial interest was not to belong to whom the legal estate was vested but was to be shared between them, as for instance by a pre-nuptial agreement or other settlement"

If therefore parties before contracting a marriage decide to enter into a Pre-nuptial agreement to govern the distribution of property that cannot be said by any stretch of imagination to be wrongful in so far as the contents are not offensive to the existing law.

It is the view of the author that in so far as a Pre-nuptial agreement is entered into, in terms of which are not against any legislation, then same is enforceable as between the parties and binding on their successors. The fact that a Pre-nuptial agreement has constitutional backing is evident by the provisions of Article 18 of the 1992 as stated in the preceding paragraphs.

As has been established in the previous paragraphs, a Pre-nuptial agreement is a valid contract as it involves a set of promises between parties which gives rise to enforceable legal obligations. The parties to Pre-nuptial agreements, based on the principles of contract law applicable in Ghana as well as the law on evidence are bound by the terms of the agreement. Furthermore, the court is required to give effect to agreements entered into by parties and by extension, Pre-nuptial agreements entered into by parties.

The writer however admits that, not all Pre-nuptial agreements are valid or enforceable by the courts. Where the Pre-nuptial agreement is tainted with fraud, or one party was coerced into signing the contract or unduly influenced to enter into the agreement, such an agreement cannot be enforced by the court. Furthermore, where the contract contravenes, the 1992 constitution or any law in force in the country or is illegal due to the presence of harsh, unconscionable and excessive terms, such a prenuptial agreement may not be enforceable by the court.

7.0. Conclusion

The concept of Pre-nuptial agreements being illegal and unenforceable are without any foundation. Pre-nuptial agreements, just like any contract has to be in compliance with the existing elements of a valid contract. It is also a constitutional right as provided in Article 18 of the 1992 Constitution that every person has a right to own property either alone or with others. If therefore parties voluntarily enter into a Pre-nuptial agreement to ensure that individual ownership of property acquired before marriage and or acquired by alone in the cause of the marriage is secured, same is valid and supported by the 1992 Constitution.