

Getting a separation agreement like Bill and Melinda Gates

- Describe how separation agreements work
- Identify the advantages of separation agreements
- Describe the courts' approach to separation agreements



By **Anita Mehta**

Bill and Melinda Gates recently announced their separation after twenty seven years of marriage.



This divorce is notable for two reasons, firstly because Bill Gates is listed as the fourth wealthiest man in the world (at \$124 billion).

Secondly, because unlike many divorces of the rich and famous that we have seen recently, they have resolved the related financial remedy proceedings discreetly and

consensually with the assistance of their lawyers in a separation agreement.



Separating high net worth couples in England and Wales can learn some lessons from the Gates divorce, despite the difference in jurisdiction

Bill and Melinda Gates reside in Seattle, in the USA. The media in the US have accessed the divorce petition, which states that 'this marriage is irretrievably broken down', but are unable to access the separation agreement.

The children of the couple are now grown up and there are clearly sufficient funds for the spousal support not to be required. Therefore, it is simply a question of dividing up their fortune.

Other separating high net worth couples in England and Wales can learn some lessons from the Gates divorce, despite the difference in jurisdiction.

High net worth couples in this jurisdiction, like in the US, are able to enter in a separation agreement.

Separation agreements in the UK

The law as to the status of agreements in England and Wales is the same whether it relates to a pre-nuptial agreement (before marriage) or a post-nuptial agreement (separation agreement).

While pre-nuptial agreements have pierced the cultural consciousness through the mediums of television and celebrity gossip columns, separation agreements are not so well known. Nevertheless, they can prove to be effective in the right set of circumstances.

The important point to remember is that no agreement can totally oust the jurisdiction of the court in England and Wales. Our courts will always retain jurisdiction to ensure that agreements are fair. The key principle is that: *"The court 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."*

According to the Supreme Court, in Radmacher (formerly Granatino) v Granatino [2010] UKSC 42 (<https://www.bailii.org/uk/cases/UKSC/2010/42.html>).

When considering what weight the court will attach to any agreement, the court will take into account:

- Both the husband and wife must enter into the agreement of their own free will, without undue influence or pressure, and informed of its implications;
- Each party should intend that the agreement should be effective;
- Are any of the standard vitiating factors: duress, fraud or misrepresentation, present? Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have.
- Unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position

to secure an unfair advantage, would reduce or eliminate it.

- When the Court considers whether it would be fair to hold the parties to their agreement, it will ensure that the reasonable requirements of any children of the family are not prejudiced by the agreement.

The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy.

The Supreme Court considered this to be particularly true, where the agreement of both parties addresses the existing circumstances, that is, a separation agreement, rather than merely addressing the contingencies of an uncertain future.

Therefore, agreements negotiated at the point of separation, which subsequently breaks down, because one or other party thinks they should have more, may very well find that the court holds them to the agreement if they entered into the agreement freely, with sufficient legal advice.

It is worth noting that the court is unlikely to consider an agreement fair – whether negotiated before or after marriage - that sees one party retaining all of the wealth and the other in a predicament of real need.

Although while the court will always ensure that one party is not left without the means to financially sustain themselves, there is a world of difference in the financial remedy courts between an award based on a generous needs based assessment, and an award designed to alleviate real need.

What agreements can, and regularly do, regulate is the share of wealth that the party who has not been the creator of such wealth receives. In that situation the agreement would meet the needs of the other party, perhaps to a generous level, but would not give them a share of wealth beyond meeting need.

Therefore this is particularly relevant for high-earners, particularly those who acquired significant wealth, or created the foundations for significant wealth, before the parties marry.

The same considerations would apply whether the agreement was negotiated in a different jurisdiction or within this jurisdiction. For instance, if a couple had negotiated a separation agreement in a different jurisdiction, but one of the parties subsequently issued in England and Wales as they were habitually resident here, the court in this country would apply the same considerations set out above when deciding what weight to attach to the agreement. It is always the case that the court in this country is able to consider what weight to attach to the agreement; therefore it could be considered binding or it could be disregarded depending on the circumstances.

Separation agreements can have positive benefits for both parties – there are not just benefits for the wealthier party – for example, by avoiding a bitter court battle.

This is particularly important of course where the parties have children, but even in cases when they do not, there is a huge emotional toll from lengthy court battles.

In some parts of the country, including in London and the south east, litigants can currently expect a wait of up to two years from issuing to a final trial because of the delays in the court system caused by the pandemic.

That is an incredibly long time for the parties to live with the uncertainty about the outcome, and feeling they are unable to move on knowing what assets they have available.

Obviously legal fees only increase over that length of time, so by the time the case finally reaches trial, the positions of both parties are very entrenched. The advantage of a separation agreement is that lawyers can be engaged, and the agreement can be negotiated as soon as all the evidence is available.

Kept private

The other significant advantages of post-separation agreements for high net worth individuals are that they are usually negotiated in private – outside of the public eye.

Who can forget the lurid details of Heather Mills and Paul McCartney's marriage, and the examination of whether their recollections about their marriage and relationship were true.

How will their daughter, Beatrice, feel when she reads the published judgment from the financial remedy proceedings that her mother gave inconsistent and inaccurate evidence?

Whilst court proceedings in this country are usually kept anonymous, there are circumstances and occasions where high profile court battles have been made public.

With reputations on the line, keeping a divorce out of the public eye is a desirable outcome for many high net worth couples because it minimises the impact on the party's wider personal, family life, and indeed their professional life also.

The messier the divorce, and the more high profile the couple, the more likely the press will come knocking.

Furthermore, couples are not just restricted to dealing with their finances in a separation agreement; they can also regulate how their children are cared for. Obviously an agreement between parents can deal with who the children live with and how they spend their time, but couples could also reach agreement on, for example, which school the children attend, whether they practise a particular religion or even what extra-curricular activities they attend.

There is often so much more that can be achieved if a couple still has an amicable relationship – on top of this, there can often be a significant saving in costs when the couple are able to negotiate an agreement rather than run up fees in court battles.

The reality is that more and more high net worth couples are choosing to negotiate pre-nuptial agreements about their finances before their marriage. If it is an international couple, they may wish to consider accessing advice from specialists in more than one jurisdiction in order to do their best to ensure that the agreement is given as much as weight as possible in the relevant jurisdictions.

However, for any couples who did not negotiate a pre-nuptial agreement, or for a couple where the pre-nup is out of date and irrelevant, the use of a separation agreement is worth bearing in mind.

It allows the parties the opportunity to negotiate their differences away from the court arena – and the possible media, or public, intrusion that can entail – with the confidence that the court is likely to attach weight to the agreement so long as the factors above are met.

This will allow both parties to walk away on the terms they both agreed to, stepping into the next phase of their life with financial clarity having limited their legal fees.

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