

A prenup for Harry and Meghan?

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Should Prince Harry and Meghan Markle have a prenup?

Dr Sharon Thompson, Senior Lecturer in Law at Cardiff University, has kindly written this timely post on the possibility of Prince Harry and Meghan Markle entering into a prenuptial agreement. Sharon is the author of the acclaimed book *Prenuptial Agreements and the Presumption of Free Choice*.

Almost as soon as actress Meghan Markle's engagement to Prince Harry was announced, *The Times* **published** advice from English family lawyers suggesting the couple sign a prenup. 'It is absolutely vital', one interviewee said, because 'there will always be concerns that in case of any future divorce, royal assets could end up being lost'.

However, this view must be treated with caution. I will explain why by addressing the arguments put forward in *The Times* article and by drawing on research from my book *Prenuptial Agreements and the Presumption of Free Choice* (Thompson 2015).

1. A prenup will prevent royal assets from being lost

Prenups now have decisive weight in England and Wales since the Supreme Court decision *Radmacher v Granatino* [2010] UKSC 42. This means the court will usually give prenups effect unless the agreement is unfair, leaving one of the parties in a position of real need while the other party enjoys a sufficiency or more.

Prenups are one way of ensuring that family wealth stays in the family if the couple splits up, and so calls for Harry and Meghan to sign one are unsurprising. However, this does not mean a prenup is, as *The Times* reported, 'absolutely vital' in their circumstances. Indeed, the perception that a prenup is the *only* way to protect royal assets fuels misconceptions as to how property and finances are divided according to the default law in England and Wales. Spouses are by no means guaranteed to half of everything. In the event of divorce, a spouse's claim to assets acquired through gift, inheritance or before the marriage is weak. And so these assets will only be distributed if this is necessary to meet the needs of the spouse on relationship breakdown, or if the assets are intermingled with property acquired by the spouses together during their marriage.

Meghan is giving up her acting career to marry Harry. She is financially independent now, but is likely to become financially dependent on Harry in future. If she later divorces him, and has signed a prenup contracting out of any claim over Harry's wealth, her economic sacrifices cannot be valued. Meghan will be signing away her legal right to be compensated for giving up her successful career and future earnings. My research found that unfortunately prenups are often used in this way in practice, even with

famous actresses like Meghan. When interviewing an attorney in New York about his client's experiences of prenups, he told me:

"I had a famous actress about a month ago and she was marrying someone with a lot of money, and he wanted a prenuptial agreement. I had to explain to her that famous actresses don't make money forever. Famous actresses who are having children don't usually get movie roles offered to them ... [S]he was also talking about giving up a lot of her career to be with this man ... giving me the speech that a lot of women are saying to me. I don't need that money, I'll be fine ... Everyone wants to feel independent and not act like they're dependent on someone else's money but ... you may be making a lot of sacrifices, don't put yourself in the position when you have two, three children, not being able to support them. Or recognise that you could support them but in an entirely different lifestyle than you are going to enjoy during the marriage" (Thompson 2015, 195).

This anecdote is obviously different from Meghan's circumstances, but it is not entirely dissimilar either. Meghan's negotiating position depends on her being able to foresee and value her future economic sacrifices, royal duties and potential reproductive labour (I am assuming she will not be responsible for domestic labour in the marriage as a member of the royal family). Valuing these types of non-financial contributions and sacrifices is much more difficult than it would be for Harry to calculate his wealth.

2. A well-drafted prenup can strengthen a marriage

This argument is the strongest of those put forward in *The Times* article – a prenup can be beneficial provided it is *well-drafted*. It is important, however, that couples are clear on what a well-drafted prenup looks like.

My study in New York found that attorneys use a variety of techniques to ensure a prenup is well-drafted and will not later become unfair. For instance, one attorney encourages his clients to be open about the amount of wealth they want to protect under a prenup. He told me it is better for the moneyed spouse to exaggerate his or her net worth than to underestimate it when a prenup is being drafted, and he asks clients to produce underlying financial documents, business entities, bank account statements, stock brokerage statements, trust agreements and documents of a similar nature. In his view, inadequate financial disclosure can prevent parties from understanding the precise financial consequences of the prenup. Yet English case law shows that if there *is* a lack of disclosure the weight of a prenup will not necessarily be affected in future (*V v V* [2011] EWHC 3230 (Fam)).

More generally, another attorney I spoke to told me what they considered to be a good prenup:

“A good prenup, the one I did today actually, had good benefits for both parties. Yes, it doesn’t give the wife nearly as much as she might get if the parties did not have an agreement, but it guarantees a certain level” (Thompson 2015, 89).

This type of security is important for individuals like Meghan who are making career sacrifices for the relationship. If Meghan signs a prenup that prevents a court from considering the sacrifices she has made, then financial security should be guaranteed by the terms of the agreement.

Whether all of this strengthens marriage is unclear, but **it will be important** for Meghan to consider the consequences of a prenup if she is asked to sign one. Research shows that couples are hopelessly unrealistic about the probability of their relationship breaking down, which can lead individuals to sign prenups simply because they don’t think they will ever come into effect (L Baker and R Emery ‘Why Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage’ (1993) 17(4) *Law and Human Behaviour* 439).

3. A prenup would benefit Meghan because most of Harry’s wealth is held in trusts

Another argument in favour of a royal prenup for Harry and Meghan is summarised in *The Times* article by Toby Yerburgh, partner and head of family law at Collyer Bristow:

“Most of Harry’s wealth will be held in trusts, and the trustees will be much more likely to allow Harry and Meghan access to more of it if they know that it will stay in the royal family for future generations. This would benefit Meghan, given that her ability to work may be curtailed once she is married. That is a significant change for someone who has been well-remunerated in her career to date.”

The accuracy of this statement depends on many additional unknown factors, including the type of trusts Harry’s wealth is held in. In practical terms, there is a small possibility a prenup could be relevant to the trustees’ exercise of discretion when distributing trust property. Once trustees decide to distribute trust assets to Harry, he gains absolute title to that property, which Meghan will potentially have a claim over as his spouse. If at the relevant time the trustees are deciding whether to distribute trust assets to Harry *and* he doesn’t have a prenup *and* their marriage is on the rocks, this combination of factors could influence the trustees’ decision over whether Harry should get the assets. However, with respect to Mr Yerburgh this assessment is speculative at best. Trustees cannot fetter their discretion in advance, so they cannot decide to never distribute the trust property because Harry has not signed a prenup. And so it is unlikely that the absence of a prenup will prevent Harry and Meghan from enjoying the benefit of any assets held on trust during the marriage.

Mutually beneficial prenups are possible and should be encouraged. But it is important to remember that the focus of prenups is often on wealth at the expense of other factors. Therefore, whilst it is certainly wise to consider entering a prenup to set out what will happen to property in the event of divorce, it is important not to be overly sanguine about the benefits of these agreements, or to conclude they are ‘absolutely vital’ as suggested in *The Times*. Prenups can have a detrimental effect if circumstances change, as they often do. It is difficult to predict what will happen to a relationship before marrying. Even if there is a plan in place over whether to have children, where to live or how finances will be managed, couples’ situations evolve in ways that are often unforeseeable (even to someone entering a second marriage, like Meghan) at the time a prenup is signed.

The Times is currently calling for prenups to be given statutory backing in England and Wales, but it is of critical importance that any statutory reform still leaves flexibility for changing circumstances to be accounted for on divorce. Prenups are not a quick fix for the law of financial provision on divorce. As a result, legislative reform must be treated with caution, as binding prenups might ultimately provide a straitjacket for the court that would make dealing with problems affecting the law in this area even more difficult.

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