

Prenuptial and Postnuptial Agreements: Hoping for the best (but preparing for the worst)

Working through issues at a time when the relationship is in its most loving and affectionate stage increases the likelihood of a cooperative resolution.

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A prenup memorializes each party's understanding of the property and financial rights of each spouse in the event of the end of the marriage either by death or divorce.

Three years ago my clients sold their business and came into significant wealth. Prior to the sale, they had engaged in some advanced estate planning and created grantor retained annuity trusts (GRATs) in order to efficiently transfer some of the sale proceeds to their two children, one married and one single. The GRATs were quite successful, transferring large sums outright to each child.

In anticipation of the distribution, I raised the idea of a postnuptial agreement with the married child and suggested that she seek the advice of legal counsel. The answer I got was not a surprise: "We don't need one... our marriage is rock-solid and couldn't be better." *Less than one month* after the termination of the GRAT and distribution of nearly \$20 million dollars into a joint account, my clients called in a bit of a panic. Their son-in-law had moved out and the marriage was in trouble.

What it is

Premarital agreements (also called prenuptial agreements or "prenups") are a common, well-accepted agreement entered into before a marriage ceremony. A post-nuptial agreement is a similar arrangement entered into after a couple is married. For convenience, the balance of this article will speak in terms of prenuptial agreements, but the concerns raised and concepts discussed apply equally to post-nuptial agreements.

Marriage is so much more than romance and religion. The institution of marriage creates legal rights and obligations between partners. A prenup memorializes each party's understanding of the property and financial rights of each spouse in the event of the end of the marriage either by death or divorce. Even though most couples aren't thinking about death and divorce when they get married, about one-half of all marriages in America end up in divorce proceedings, and everyone dies. In light of these statistics it is prudent to at least consider a prenuptial agreement.

In the United States, prenuptial agreements are recognized in all states and the District of Columbia (though they may not always be enforced). Though state laws vary, there are five elements that are generally required for a valid prenuptial agreement:

- it must be a written agreement;
- the parties must enter into the agreement voluntarily;
- there must be full disclosure of assets and liabilities;
- the agreement cannot be unconscionable; and
- the agreement must be properly executed (similar to what is required for a deed).

What it does

Each state has a body of "family laws" that determine how property is handled during marriage *and* after marriage. In many states spouses are entitled to share and receive ownership of property and debt acquired during the marriage as well as take ownership of some portion of the marital estate following the death of a spouse. These laws can vary widely from state to state and it is not uncommon for couples to want and agree to dispose of their property in a manner that varies from what state legislatures have prescribed.

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Although prenups are most frequently thought of as a means to keep wealth in the bloodline, they can be used to accomplish much more:

- Protect one spouse from assuming the debts of the other. Without a prenup, creditors can go after marital property even though only one spouse is the debtor. To avoid this, limit your debt liability in a prenuptial agreement.
- Determine how property will be passed upon death. If there are children from a previous relationship and you want to ensure that they inherit some of your property, or if you have family heirlooms or a business you wish to keep in your bloodline, consider including provision in a prenup. Always keep in mind that prenuptial agreements are only a part of ensuring that your estate plan is carried out how you see fit. Remember, that you must also create and secure other documents such as wills and living trusts.
- Clarify financial rights and responsibilities during and after a marriage. Use a prenup to detail financial responsibilities during a marriage such as retirement contributions, income tax filing status, management of household bills and expenses, management of credit card spending and payments, maintenance of life insurance, and provision of educational expenses. While some states prohibit predetermination of alimony, other states do allow it.
- Define property distribution upon divorce. With a prenup you can resolve many disputes before they arise. Provisions are also typically included to require alternative dispute resolution by means of non-judicial mediation.
- Give the agreement a termination date. A “sunset provision” may be inserted into a prenuptial agreement, specifying that after a certain amount of time, the agreement will expire. In a few states the agreement will automatically lapse after the birth of a child, unless the parties renew it. In other states, a certain number of years of marriage will cause a prenuptial agreement to lapse.
- Parties to the agreement can elect to have the law of the state they are married in govern both the interpretation of the agreement and how property is divided at the time of divorce. In the absence of a “choice of law” clause it is the law of the place the parties divorce, not the law of the state they were married, that decides property and support issues.

No matter what the prenup’s driving purpose, it usually makes more sense to discuss these issues and memorialize their resolution before the marriage at a time when a couple is in a loving, cooperative relationship as opposed to the potentially combative environment generated by the end of a marriage.

What it doesn’t do

State law can also limit the provisions of prenuptial agreements:

- All states prohibit provisions that would require one spouse to engage in an illegal activity. The most common example is to require participation in filing a false income tax return. Such provisions can put the validity of the entire document in question.
- States also do not allow prenuptial agreements to predetermine issues relating to children of a marriage. An agreement to raise children in a certain religion will generally not be enforced. Questions regarding children, particularly custody and access issues must always be decided in the children’s best interests and therefore cannot be agreed upon in advance.
- For similar reasons, child support payments are generally not included in a prenuptial agreement.

When both parties have legal representation it is far more difficult to make a case that one side did not understand the legal ramifications of what he or she signed.

- Waiver of the right to alimony is a provision commonly struck down by courts. It is strictly prohibited by a few states like California. Other states look down on it and limit the ability to give up that right. However, some states do allow alimony waivers. Be sure to check with counsel and the applicable state laws.
- Case law indicates that judges scrutinize prenuptial agreements for anything that tends to offer a financial incentive for divorce. If a provision can be read to encourage divorce, courts will generally set it aside.
- Courts will also not enforce agreements that make rules about personal matters (as opposed to financial matters). A prenup cannot include who does specific chores, where to spend the holidays, whose name to use, details about child-rearing, or what relationship to have with certain relatives.

How to do it

Both parties to a prenup should have lawyers represent them separately. Separate lawyers increase the likelihood that the agreement will later be enforced in a court of law. When both have legal representation it is far more difficult to make a case that one side did not understand the legal ramifications of what he or she signed.

In some cases, parties may wish to have unrelated witnesses present during the signing. This is done to reinforce/provide proof of the fact that neither party has been coerced into the agreement. Some attorneys even recommend videotaping the signing ceremony. Some states, such as California, require that the parties be represented by counsel if spousal support (alimony) is limited by the agreement.

But how is the topic raised in the first place? As with all things, being honest and direct is the best policy.

Successful discussions on the topic of a prenup generally take place over time and are implemented over time. There is no set period of time that an enforceable prenuptial agreement must be completed and executed prior to the wedding ceremony, but keep in mind that prenups can take four weeks or more from initial discussions to signatures. Signing a prenup after wedding invitations are sent (or right before the ceremony) may suggest undue influence or duress if it comes before a judge at a future time.

Questions and concerns should be encouraged and addressed with a focus on the inevitable marriage. Any issues should be worked out in a collaborative manner. Again, working through these issues at a time when the relationship is in its most loving and affectionate stage increases the likelihood of a cooperative resolution.

Hope for the best

Remember my clients and their daughter who was the beneficiary of a very successful GRAT? The good news is that daughter and son-in-law worked out their differences and the marriage is even stronger than before. Had it gone otherwise the division of the GRAT proceeds could have been something other than what my clients had envisioned.

Prenups can be very powerful and limit parties' property rights and ongoing financial obligations during the marriage and after a divorce.

State laws provide a "one size fits all" mechanism for the division of property rights and obligations upon divorce or death. Prenuptial agreements allow a couple to customize the treatment of assets in those circumstances. Prenuptial agreements are, at best, a *partial* solution to controlling *some* of the risks of marital property disputes in times of divorce or the death of a spouse. Even so, they can be very powerful and limit parties' property rights and ongoing financial obligations during the marriage and after a divorce. At death, prenups can act as a contract to make a will and/or eliminate all rights to property, probate homestead, probate allowance, right to take as a predetermined heir, and the right to act as an executor and administrator of a spouse's estate.

It is quite difficult to set aside a properly drafted and executed prenup when both parties are represented by good legal counsel. Seek the guidance of experienced family law or domestic relations attorneys.

– Jeff Brooks, Senior Wealth Strategist

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