

FAMILY LAW

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PRENUPTIAL AND POSTNUPTIAL AGREEMENTS

FINANCIAL PLANNING BEFORE AND AFTER MARRIAGE

By Bettina D. Hindin, Esq.

‘GOOD FENCES MAKE GOOD NEIGHBORS.’

- ROBERT FROST, MENDING WALL

Robert Frost in his brilliant poem *Mending Wall* succinctly expresses his belief that respect, clear boundaries, and defined space between individuals is necessary if relations between the two are to remain amicable and good. But, are borders truly necessary or are they rather regressive? Are humans naturally driven toward connection and cooperation, or do deep-rooted, mistrustful instincts always hold us back?

The answer is as unique as the individuals engaged in the matter at hand. And the matter at hand – in all realms – will dictate, at that moment, beneficence, or battle. In the province of marriage, and divorce, benevolence as opposed to battle can be best ensured with a financial insurance policy: a prenuptial or a postnuptial agreement.

A prenuptial agreement is a written contract entered into by a couple prior to marriage or a civil union that enables them to select and control many of the legal rights they acquire upon marrying, and what rights they have when their marriage eventually ends. Prenuptial agreements are interchangeably referred to as premarital agreements or antenuptial agreements because they are written contracts that couples make before getting married.

Like a prenuptial agreement, a postnuptial agreement sets forth the rights and obligations of each spouse during the marriage, and what happens when the marriage ends by the death of a spouse or divorce. The most obvious difference between a premarital agreement and a postnuptial agreement is that a couple enters into a postnuptial agreement after they are already married.

The terms of prenuptial agreements and postnuptial agreements (or just, “marital agreements”) are very personal to a couple, and no two marital agreements are alike because every person is unique. However, prenuptial agreements and postnuptial agreements generally cover the same topics and concepts, and so there is a tremendous amount of

overlap between the terms addressed in marital agreements signed before or after marriage.

From a big-picture perspective, the content and terms of marital agreements are generally driven by a couple’s desire to “opt out” of certain default state laws that would otherwise determine their marital rights, but which laws might not be bad for them and/or might lead to fighting in the event of a divorce. Both premarital and postnuptial agreements are generally written to allow a couple to agree on terms that supersede and replace those default state marriage and divorce laws that often force couples to lawyer up and battle it out in court, such as:

- The ability to keep separate property separate (free from marital claims) during the marriage;
- Whether a spouse can seek spousal support (e.g., alimony) in a divorce;
- How to fairly divide joint marital property in the event of divorce;
- Whether a surviving spouse can claim an elective share or “take against” the estate of the deceased spouse; and
- Whether a spouse can make a marital claim against the retirement savings and benefits of the other spouse upon divorce.

A well-drafted marital agreement can eliminate conflict in a divorce because most of the issues that cause spouses to fight are already decided. If prepared correctly, a premarital or post-nuptial agreement should increase the chance that a divorcing couple can avoid a trial and keep things friendly.

Couples should sign a premarital agreement several weeks or months before their marriage to avoid a potential challenge to the enforceability of the contract on the grounds that it was signed under duress (time-pressure). A prenup only becomes effective when a couple actually gets married, as opposed to when they sign the agreement.

Executing a prenup a few weeks before the wedding is particularly important when only one party has legal representation for the agreement, because signing early makes it harder for the non-represented party to argue that he/she was deprived of the opportunity to have the document reviewed by an independent attorney. In contrast, a postnuptial agreement becomes effective immediately when signed.

Why do couples sign postnuptial agreements?

Post-nuptial agreements are not nearly as popular as prenuptial agreements, but a post-marital agreement may be the only choice for couples who wait until the last minute to consider a premarital agreement. Sometimes people get so wrapped up in planning their wedding that they don't even think about getting a prenuptial agreement until it is too late. Other married couples have a specific reason or event that precipitates their desire to put a postnuptial agreement into place. For example, a spouse who unexpectedly inherits substantial assets from a relative may wish to sign a postnuptial agreement that keeps such inherited property "separate" during the marriage, free from marital claims in the event of a divorce. Or, if a spouse is worried about future infidelity by a spouse who has been unfaithful, signing a post-marital agreement is a logical way to outline the consequences of a lack of faithfulness in a marriage.

A postnuptial agreement can protect each spouse's interests in the same way as a prenuptial agreement since they can (and often do) opt-out of the same "default" state marital laws and address the same topics. If a couple desires a premarital agreement but gets married before they have a chance to enter into one, then a postnuptial agreement provides them another contractual means to take control of their marital rights. A postnuptial agreement can also serve as a mechanism to allow married individuals to agree to alter their marital rights in reaction to some unexpected event (like the examples provided above), tailored to their specific needs at that point in their lives.

However, if a couple plans to enter into a postnuptial agreement instead of a prenup, they are taking a risk (assuming they had sufficient time to get a prenup). Anyone who plans to enter into a postnuptial agreement after their wedding must accept the high risk that the couple might never agree to the final terms of a postnuptial agreement.

What causes that risk? Both parties lose all negotiating leverage and any real incentive to compromise after they say "I do". Once married, neither spouse has a compelling reason to sign a contract that affects their marital rights if it isn't the perfect deal. A couple who decides to enter a postnuptial agreement after their wedding could discover (too late) that they have very different expectations about their marital rights. Many postnuptial agreements drafted by attorneys never get signed because the negotiations broke down and the couples ended up getting divorced.

Moreover, since spouses are considered fiduciaries of each other in many jurisdictions, postnuptial agreements generally require the parties to be extra diligent in fully disclosing all of their separate assets and liabilities to each other prior to signing. The enhanced disclosure requirements for a postnuptial agreement provides additional motivation to plan ahead to enter into a prenuptial agreement. Since premarital agreements can always be amended mid-marriage if needed depending on what life throws at a couple, it is usually preferable to enter into a written marital agreement before marriage, if possible.

Offit Kurman's pre- and post-marital agreements

Unlike many law firms, we do not use cookie-cutter prenuptial or postnuptial agreements that you can find online for pennies and then resell them to clients for thousands. We also do not prepare five to six page bare bones prenuptial agreements because those do not sufficiently protect people due to New York's vast and complex legal requirements. We draft all the prenuptial agreements with an eye towards how a judge would review it in order to help make sure that it will be approved by any judge.



Depending on your needs, most of our prenuptial and postnuptial agreements are 25 to 45 pages long and can cover almost every possible divorce issue (except child-related issues) – not just those you currently face, but also what you may face in the future, such as inheritance, retirement, current and future business ventures, and the change of circumstance that occurs from moving, changing jobs, or birthing children.

Our prenuptial and postnuptial agreements will reflect your specific circumstances: spousal support or division assets can depend on how many years you are married before the divorce, whether you have children or not, what sacrifices you made, among other factors. We can draft your agreement to keep everything separate or we can draft it to share some of your assets.



Bettina D. Hindin is an accomplished and experienced matrimonial litigator, recognized for her skill and expertise in the investigation and analysis of the complex financial issues that arise in matrimonial, domestic relations, Surrogacy and Assisted Reproductive Technology (ART), and LGBTQIA matters. She is an acknowledged expert in the field and has appeared often as a commentator on these issues for MSNBC and CNN.

Ms Hindin's experience in handling diverse transactional matters in all areas of domestic relations, LGBTQIA law, and family law, including divorce, separation, annulment, maintenance, child support, support modification, custody, visitation, relocation, paternity, surrogacy, equitable distribution, and asset valuation. Outside of the courtroom, Ms Hindin's extensive experience also includes the negotiation of pre-nuptial and post-nuptial agreements, settlement agreements, and non-marital agreements.

She has successfully tried a myriad of matrimonial, child custody, surrogacy, and support cases before the Family Courts and the Supreme Courts of the State of New York and argued appeals in the appellate courts of the state. Ms Hindin provides clients with all of the requisite elements of matrimonial counseling on the most sophisticated level. A forceful litigator, she is particularly attuned to the interplay of litigation and settlement techniques required to produce optimal results.

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