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Kathleen Pender Net Worth

Planning to get married? Who has the info on prenups? I do.

Kathleen Pender
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As wedding season approaches, brides- and grooms-to-be find themselves obsessing about things like limos, honeymoons, bachelor parties and - for those with wealth or a previous marriage - prenuptial agreements.

"Right now I'm probably doing four or five prenups for June weddings," says Tanya Prioste, a family law attorney with Larkin Spears in Palo Alto.

There are no reliable figures on how many couples enter into prenuptial agreements, but attorneys say their numbers are growing as more people marry later in life and multiple times.

San Francisco family law attorney Stephen Ruben sees more Baby Boomers entering into such contracts after marriage - known as post-marital agreements - as their parents die. "They want to preserve their inheritances so it doesn't go to their spouse. They want it to remain within the bloodline," he says.

The purpose of a prenuptial or post-marital contract is to override state laws that govern who owns what during and after marriage.

In California, a community property state, any assets a spouse owns before marriage are that spouse's separate property. If one spouse receives a gift or inheritance during marriage, that also remains the spouse's separate property. Upon death or divorce, each spouse retains his or her separate property, assuming it has remained separate.

During marriage, anything either spouse earns or acquires with those earnings is community property, owned 50-50. This is true regardless of how much each spouse earns and whether they keep separate bank accounts. Upon death or divorce, each spouse is entitled to half the community property.

The same generally holds true with debt: Any debts incurred before marriage are each spouse's separate responsibility, whereas debts taken on during marriage are a joint responsibility.

Things get complicated when couples mix community and separate property. If they deposit a paycheck into a separate account, part of the account becomes community property. If they use separate funds to pay the mortgage on a home they bought together, that money could become community property.

In California, domestic partners who register with the secretary of state have the same property rights and responsibilities as married couples.

Couples can override these laws by entering into prenuptial or post-marital arrangements.

Should you have a prenup? Here are some questions and answers to help you decide.

Q: Who should have a prenup?

A: "Everybody ought to consider one. In the process, they will learn what state law says about property rights once they marry," says Katherine Stoner, a family law attorney in Pacific Grove (Monterey County) and co-author of Nolo's "Prenuptial Agreements: How to Write a Fair and Lasting Contract."

You should definitely consider a prenup if:

-- You've been married before, especially if you have children.

"The stepparent does not have responsibility for children from a previous marriage," Ruben says.

If the parent pays child support out of community property, that parent might have to reimburse the community after divorce. "You might want to define and clarify existing spousal and child support obligations before you couple again," Ruben says.

-- You have substantial assets.

As part of a prenup, spouses must fully disclose income and all their assets. This "sets a baseline for what (existed) before marriage," Stoner says.

Some people see full disclosure as a reason to avoid prenups.

-- You started a business before marriage. If you work in the business during marriage, part of the appreciation in the firm's value will become community property, absent a prenup.

-- One partner has a big debt.

In a prenup, you can clearly establish that it is one spouse's separate debt and that any community property used to repay the debt is reimbursable upon divorce.

Young couples without lots of assets or kids probably don't need a prenup, but they should understand the difference between separate and community property and how to keep them segregated. (See question below).

Q: What can a prenup do?

A: It can redefine what will be separate and community property. "You can say that earnings during marriage are going to be separate property of the person who earned them," Stoner says.

Spouses can waive their right to spousal support after a divorce. The spouse waiving the right must have an attorney for the waiver to be valid, "and it can't appear to the judge that it would be unconscionable to enforce it," Stoner says.

In one case, both spouses had waived alimony, but one spouse became permanently disabled and the judge ordered the other one to pay support, Ruben says.

You can waive certain rights you are entitled to if your spouse dies. For example, state law allows a judge to use some of a deceased spouse's separate property to support the surviving spouse for a certain amount of time, Stoner says.

These issues are best addressed in conjunction with an estate plan.

Q: What can't you do in prenup?

A: You cannot override state laws regarding child support, visitation and custody rights.

You cannot impose penalties for infidelity. California is a no-fault divorce state, which means either spouse can get out of the marriage for any or no reason and that conduct during marriage won't affect the division of assets.

There is one exception, Ruben says. If you have been convicted of domestic violence, you could be prevented from securing spousal support from the spouse you abused.

Some couples are writing nonfinancial clauses into their prenups, such as what church they will attend or whether they will have kids. These clauses are generally not enforceable. "The day-to-day management of your life is not something the courts want to get into," Ruben says.

Q: Do I need an attorney?

A: Ideally, each spouse or domestic partner should have a separate attorney. In California, each party "has to be advised in writing to seek independent counsel," Ruben says. If you don't get your own lawyer, "You have to be fully informed of all the terms of the agreement and acknowledge (in writing) that you understand it."

Q: How soon should I start a prenup?

A: In California, both parties must receive the agreement at least seven days before it is signed.

The process should begin months before that, but the prenup should be completed fairly close to the wedding to reflect the value of the assets shortly before marriage.

Q: Can I keep separate property separate without a prenup?

A: Yes, if you are careful.

If you have premarriage money in a bank or brokerage account in your name, make sure you reinvest earnings into the same account. Don't put your paycheck into the separate account. Avoid paying community debts with money from a separate account. If you own a rental property, pay the expenses out of the rental income.

If you use separate property to make a down payment on a community house and get divorced, state law allows you get back the amount you put toward the down payment, but no more. You won't get the appreciation on that investment as separate property.

Some couples set up trusts before marriage to help keep separate property separate.

"You can't accidentally put your wife or husband on the account. A check made out to a trust can't be deposited into a joint account," says Joan LeBlanc, a trust and estate attorney with Larkin Spears. A trust does not guarantee that you won't commingle your funds, but, "It's just going to be harder to mix your money up."

Q: Are registered domestic partners treated differently from married couples?

A: When it comes to state law, no. However, they could be treated differently under federal law, which does not recognize domestic partnerships.

If a married couple divorces, spousal is tax-deductible (for the payer) and reportable as income (for the recipient) under federal law.

If a registered partnership breaks up, state law might require support payments, but they are neither reportable nor deductible on federal tax returns.

Q: How do I get a prenup?

A: Many family lawyers do prenups. You also might need the help of an estate lawyer.

Prices range widely. Southern California divorce lawyer Peter Walzer says, "My prenups are around \$15,000 to 20,000."

Stoner says, "I have done them for less than \$1,000."

To cut costs, learn as much as you can about prenups and discuss what you want it to do before meeting with a lawyer.

Online resources

For more on premarital agreements, see:

-- Legal publisher Nolo's Web site at links.sfgate.com/ZDGC.

-- California divorce lawyer Peter Walzer's Web site at links.sfgate.com/ZDGD.

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