

Prenuptial Agreements – Who Needs Them?

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A prenuptial agreement is a contract between prospective spouses before they marry, which governs certain issues in the event of divorce or death, such as property division, spousal support, and rights of a surviving spouse. No doubt, this is not the sort of topic one ordinarily wants to discuss while picking out floral arrangements and color patterns for upcoming nuptials. However, prenuptial agreements (PNAs) are often vital to protecting yourself, and your family, in the long-run. Additionally, open communication is a crucial component to any successful relationship. Dealing with many of these issues in the beginning guarantees everyone is on the same page as to how finances and other critical areas will be handled during the marriage. So who really needs a PNA and why? What do they entail, and how can they protect you? Let's briefly discuss.

WHO?

Most often, we think of a celebrity or wealthy individual when envisioning who needs a PNA. But PNAs are not limited to a select few, and can often help many with their long-term strategic financial planning. By way of example, those who are in the process of solidifying their career or establishing a business – and, along the way, building a notable net worth – will often secure a PNA in order to protect their assets, such as business interests, real estate, or pensions and other retirement plans, not just as they are today, but for the future. These assets will inevitably increase in value during the course of the marriage, often due to “marital effort,” thereby conceivably making them subject to equitable distribution during a divorce proceeding. Those who have previously been married or have children from a prior relationship may also want a PNA in order to protect their children's interests. Similarly, parents or family members will often help a child secure a PNA before a marriage in order to protect family assets, such as a family trust or business, as well as potential inheritances.

WHAT?

People also often have misconceptions about what a PNA entails, but the truth is that a PNA can be as expansive or limited as you want. Most often, PNAs do cover as much as possible, including (i) how assets will be divided in the event of divorce, usually with all assets acquired before the marriage

and even during the marriage remaining that individual's separate, "non-marital" asset; (ii) waiver of alimony or an agreement of a set amount of such support; and (iii) waiver or other contemplation of a surviving spouse's rights in the event of the other party's death, such as to elective share and other statutorily protected rights. But, PNAs don't have to be this expansive, and instead can be tailored to each individual's needs and preferences. Only want to protect the family business or a potential inheritance? The PNA can be limited solely to that asset or occurrence. Want to address assets, but not income earned during the marriage? That can also be accomplished. By way of another illustration, some individuals want their PNA to cover what occurs in the event of divorce, but not death, thereby leaving those rights in place. A

PNA is a two-way street, and both spouses can be protected by negotiating various terms, such as agreeing on a settlement payment amount in the event of divorce in exchange for certain waivers. The PNA is what you make it, and it can be as broad or narrow as fits your needs.

WHEN?

A concern frequently faced is when someone realizes they should have gotten a PNA before that blissful wedding day, but failed to do so. An agreement called a Postnuptial Agreement, however, can still be secured during a marriage, and accomplishes all the same goals as a PNA.

WHERE?

Where is the PNA actually used? That is the great thing about PNAs, as I often tell clients it is simply a back-stop – a protection put in place IF you want it or ultimately need it. Accordingly, while the PNA can (and should!) govern various matters, it doesn't have to be the ultimate dictation of every issue during the marriage. By way of example, while the PNA may contemplate that any income earned during the marriage is the earning spouse's separate asset, most PNAs still provide the earning spouse with the ability to make such funds joint (and, therefore, a marital asset), if they so choose. Accordingly, the power is in the earning spouse's hands as to how much, if any, funds he or she would like to keep separate or make joint, whereas, in the absence of the PNA, funds earned during the marriage as a result of marital effort or skill are likely to be deemed marital assets. Similarly, while a PNA may provide various waivers for a surviving spouse in the event of a spouse's death, parties may (and often do) enter into subsequent estate planning documents that provide for their spouse. While this may seem contradictory to the PNA waivers, the point is that the PNA's purpose is to afford the spouse the option as to whom they wish to bequeath their estate – whether their spouse or not – which powers may otherwise be restricted without a PNA. And that is the benefit of the PNA – it is your choice as to how these financial decisions will proceed during the marriage, but at the very least the PNA is in place to afford you the protection before it is too late.

WHY?

Why does one really need a PNA? As indicated above, there are a myriad of reasons to secure a PNA, all of which ultimately point to ensuring a protected financial future. And certainty. Although one hopes a divorce never occurs, a PNA can serve to streamline the divorce process, thereby minimizing fees and costs, as well as stress and emotional pain. For example, rather than both parties hiring financial experts to determine the value of the family business in which a spouse has an interest, and litigating over the differing values and what portions of the amount are "marital" vs. "non-marital", thereby bringing the family into a messy divorce action, a PNA not only resolves but prevents such issues before they even arise by simply contemplating the family business remains with the owner spouse and is not subject to any equalization in the distribution of the marital estate. A PNA ensures such important financial matters are determined in advance on your terms, serving not only to safeguard them, but assist in any future divorce or other proceeding to ensure such wishes are honored.