

Marital Agreements: Prenuptial & Postnuptial

Just the FAQs

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The legal implications of marriage are seldom appreciated or fully understood. Many newlyweds have questions and concerns about a variety of practical issues, but feel uncomfortable raising the concerns. This can increase anxiety levels, which in turn leads to challenges in the marriage. The sad reality is that over one-half of all marriages end in divorce. This FAQ is intended to address the issues that are often raised by individuals who are contemplating marriage or who have recently married.

What is a marital agreement?

A marital agreement is an agreement that addresses the rights and responsibilities of two parties in a marriage. They can be executed before marriage ("prenuptial agreement") or after marriage ("postnuptial agreement"). Marital agreements can be used for any individuals who are or will be married, while cohabitation agreements can be used for people who live together but are not married and/or people in Registered Domestic Partnerships. For the purposes of this FAQ, we are only covering marital agreements and for shorthand may use examples that refer to the parties as husband and wife.

What are the advantages of a marital agreement?

For many, just raising the issue of a marital agreement is difficult. It may suggest that one spouse does not have confidence that things will work out. It may be viewed as defeatist by its very nature. However, a marital agreement is inherently beneficial because it encourages open communication between the parties so that each fully understands the expectations of the other. Additionally, it gives each party the certainty of knowing what to expect in the event of a death or divorce. That certainty alone may allow both parties to relax more and actually improve the chances of the marriage succeeding.

Are marital agreements enforceable?

Yes. Most courts today will enforce a marital agreement if it is voluntarily entered into and if the terms are fair. In Washington, courts generally will uphold a marital agreement if (1) the court decides that the agreement provides a fair and reasonable provision for the spouse not seeking the enforcement of the agreement; (2) there is a full disclosure of the amount, character, and value of the assets of each party; and (3) the agreement is entered into voluntarily, after each party has received advice from independent counsel and with full knowledge by each spouse of his or her rights.

For example, one should not expect the agreement to be enforced if the husband is the only one with substantial assets; the agreement is drafted by his attorney; it provides nothing for the wife in the event of divorce or the husband's death; the wife has no opportunity to review it in advance and consult with her own attorney; and the agreement is presented to her the just before the wedding and told to simply sign it.

Generally, Courts will not interfere with the specific provisions of a marital agreement unless one of the following circumstances applies: (1) a provision in the agreement is against public policy; (2) a provision in the agreement relieves a person of a spousal support obligation in circumstances under which the other spouse may become destitute and dependent on welfare of the state; (3) a provision regarding the amount of child support is so low as to adversely affect the welfare of the child; and (4) a provision is made regarding child custody, because the parties cannot preempt the court's power to make an independent determination as to what is best for a child.

What are some issues addressed in a marital agreement?

1. Property Ownership/Earnings

A marital agreement should identify the separate property of each spouse and any jointly owned property. The agreement should specifically state what will happen if the couple commingles funds, improves an asset owned by just one spouse (such as a home), or pays the mortgage on such an asset owned by just one spouse.

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For example, the couple may want to specifically state that the non-owner spouse should have no claim for reimbursement for his/her contribution to the other's property.

2. Debts

A marital agreement should state which party is responsible for the debts that each party incurred prior to marriage and it will be necessary to ensure that he/she has funds to pay such debt. Unless otherwise changed by a Marital Agreement, in Washington, once a couple marries, each party's salary or earned income is community property. Can one spouse pay his/her pre-marriage student loans with community property? Can a spouse pay the mortgage on the separate property residence he/she brings to the marriage with community funds? Does the indebted spouse need to repay the other spouse?

3. Waiver of Statutory Property Rights

If the parties do not intend to be bound by their own state laws with respect to property ownership and property debts, they need to specifically waive those rights.

4. Divorce

The parties also need to deal with what happens in the event of a divorce. If they intend to provide that neither spouse will have any interest in the property of the other, they need to specify that. They also need to deal with the issue of whether either spouse is going to be entitled to spousal support, maintenance, or alimony from the other.

5. Property Division

If there is a divorce, the agreement should state how the property is to be divided. For instance, it could state that each party is entitled to his/her own separate property and half of the community property, or it could allocate more assets to one party who gave up a career to raise children.

6. Death

The agreement should specify whether either party has an obligation to leave anything to the other in the event of death. In a community property state such as Washington, each spouse is deemed to own one-half of all property acquired during marriage, and thus the deceased spouse can only dispose of his or her half interest in the community assets.

7. Income Tax Returns

The agreement should state whether the parties are going to file a joint income tax return and should allocate the tax liability for each party's separate income.

8. Retirement Plan Benefits

The agreement should state whether each spouse will be required to be the beneficiary of the other's retirement plan or if the participant will have the option to choose his/her own beneficiaries. This is often important if the participant wants to leave the plan benefits to children from a prior marriage.

9. Closely-Held Family Business

If either party has a closely held family business, the agreement should contain a provision that would allocate the business-owning spouse all interest in the family business, and award the non-business-owning spouse an amount equivalent to any interest he/she may have acquired in the business, to be satisfied with other assets.

10. Children

If either or both spouses have children by a prior relationship, the agreement should identify how these children will be supported and from what source of funds. If the couple plans to have joint children, the agreement should state this and any particular issues that may need to be addressed. Some couples wish to memorialize some difficult

decisions they've already made, such as what religion to raise the children, and whether they will be educated in public or private school. It is often important to deal up front with issues that you believe will cause issues down the road.

11. Cohabitation

If the couple lived together before marriage, the agreement should consider waiving any rights that either party may have obtained against the other by virtue of that cohabitation prior to marriage.

What happens to property that I bring to the marriage?

Property that each person owned prior to marriage continues to be that person's separate property after marriage. In addition, the income earned on that separate property after marriage belongs only to the spouse who owns that separate property; provided, the separate property is not comingled with community property or the other spouse's separate property.

What happens to property that I earn after marriage?

Income earned during marriage, by either spouse, and assets acquired with those earnings, become the community property of the husband and wife. Community property is deemed to be owned 50/50 by each spouse. This means that if the husband works and the wife stays at home, husband's income and all property acquired with the husband's earnings becomes the community property of both the husband and wife. This is true even if all accounts are titled solely in the name of the husband.

That sounds simple. Are there any traps of which I should be aware?

Yes. One trap exists when a spouse uses his or her separate property to pay for the couple's ordinary living expenses. In that case, the law treats those expenditures as gifts from one spouse to the community. Suppose wife came to the marriage with a large brokerage account. The couple worked, but wife became pregnant and stayed home with the child, while husband continued to work. The couple decided to use the brokerage account to pay for their living expenses while saving husband's earnings for retirement. The couple is draining down wife's separate assets to pay community expenses and building/saving community funds.

Another trap exists when one spouse's separate property is so commingled with the couple's community property that it becomes impossible or impractical to determine who owns what. For example, assume that the wife had a large separate property bank account balance before marriage, that the couple deposited their respective paychecks into that account, that they also each deposited separate property in the account, and that they made various expenditures from that account, both for joint investments and for various separate property investments. In that case, the funds may have been so hopelessly commingled that it will be impossible to differentiate community property from separate property. Bottom line - if the separate property cannot be readily proven to be separate property, the entire account will be treated as community property.

A final trap that exists is when community property funds are used to improve, enlarge, or pay for a separate property asset. Again, assume that the wife has a separate property residence before marriage which was encumbered by a mortgage. If the parties make the mortgage payments on that separate property residence with community property funds, the result in some states will be that all or a portion of that residence will be deemed to be community property because of the contributions by both spouses. In other states, the residence will still be treated as the separate property of the wife, but the husband will be entitled to be repaid for the value of his contributions towards the mortgage on that residence.

The same problem can arise if, for example, the husband personally remodels and improves the wife's separate property. Those personal services could subject the wife to a claim that the improvements were so significant that the husband, at a minimum, has a claim to a right of reimbursement.

What happens if we married in a non-community property state and then moved here? Or vice versa?

This is a common occurrence. Many couples live in a state where the earning spouse builds up assets in his/her name. They then move to a community property state. The issue is whether all of the assets in the one spouse's name will continue to be the separate property of the owner-spouse or whether they will become community property.

In Washington such assets are treated as "quasi-community property." This means that if a party dies, the assets will be deemed community property if they would have been community property had the couple lived in Washington at the time the asset was acquired. For example, assume that a couple was married in New York. They acquired all of their assets from husband's earnings after marriage and he titled them all in his name. The couple then moves to Washington and husband dies. Because the assets would have been community property if the couple had been living in Washington at the time the assets were acquired, the entire estate would be considered community property.

Many couples do the reverse move as well – they move from a community property state to a non-community property state. A number of states have adopted the Uniform Disposition of Community Property Rights at Death Act. This legislation protects each spouse's one-half interest in property acquired as community property even after the couple moves to a non-community property jurisdiction.

Am I liable for the debts of my spouse?

The general rule is that a pre-marriage creditor of one spouse can reach that spouse's separate property and that spouse's half of the community property. The non-debtor spouse's separate property is still off limits. But for debts incurred during marriage, a creditor may be able to proceed against the separate property of both of the spouses if the debt was incurred for "necessities," such as food, clothing, and shelter.

The planning strategy is to determine before marriage whether one party has a substantial amount of premarital debt, and more importantly, how that debt is going to be paid. If one spouse does have a substantial amount of premarital debt, the couple should determine whether the law permits the debtor spouse's creditors to proceed against the community property of the non-debtor spouse. If the community property of the non-debtor spouse is up for grabs, steps may need to be taken to protect that property. At a minimum, the couple should consider entering into a marital agreement that will clearly identify and protect the separate property of the non-debtor spouse.

Should we update our Wills and Trusts following marriage?

Absolutely! Washington law states that if you have a Will that was executed prior to marriage, your spouse is entitled to a share of your estate. The share is the amount that he/she would have received had you died without a Will. However, the statute does not provide any tax saving or creditor protection strategies. In other words, the state will ensure that your spouse gets something, but it will not be economical to get it to him/her. Therefore, after marriage, all couples should update their estate plans to ensure that the funds pass where intended in the most tax efficient and economical manner.

How does our marriage affect our insurance planning and existing policies?

The need for more life insurance is an issue that should at least be considered, especially if one spouse is financially dependent on the other, there is a plan to have children, or children of a prior relationship need protection.

How does our marriage impact the retirement plans that we have?

ERISA is the law governing most retirement plans. It states that the surviving spouse is the beneficiary, unless he or she waives this right. If the plan benefits are one party's separate property and he/she wishes these benefits to pass to someone other than his/her spouse, it should be addressed in a marital agreement.

How do I protect my estate for my children of a prior marriage?

Protecting your estate for children from a prior marriage is often a top planning priority for the newlywed. If the entire estate is left to the children, the surviving spouse may be in the difficult position of not being self-sufficient. However, if everything is left to the surviving spouse, the children may fear they will never receive an inheritance. Although there are a variety of planning options, we have generally found that a combination of two basic strategies often do the job of protecting the rights of a spouse's children from a previous relationship while providing for the interests of the new spouse: QTIP Trusts and Life Insurance. These are each addressed in separate FAQs.

While this FAQ focuses on applicable Washington State law, it is important to realize that the laws related to Marital Agreements often vary from state to state. Therefore, clients should be advised to consult with counsel in their own jurisdiction for specific advice on particular issues. For more information on marital agreements in Washington, please contact Helsell Fetterman's Estate Planning Department.

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