

The ABCs of Matrimonial Agreements

While divorce trials are often the stuff of gut-wrenching movies and television, most divorces are actually resolved through agreements between the parties. Family law attorneys have an array of agreements that can help you navigate your way through marriage, and, if all else fails, to ease you through a divorce.

Couples are often confused about what kind of matrimonial agreement might be advisable or necessary for them to execute both before and during their marriage. Common questions include:

- Are prenuptial agreements only for the very wealthy?
- Our prenuptial agreement no longer makes sense given our current circumstances. What now?
- What if we want to separate our lives and finances but not formally divorce?

Whether you are entering or exiting a marriage, matrimonial agreements can bring clarity and consensus to what are often complicated and emotionally charged decisions.

What is a matrimonial agreement?

A matrimonial agreement is an agreement between a couple that can be made before or during a marriage. To be valid in court upon divorce, the agreement must:

- (1) Be in writing (no oral agreements);
- (2) Be signed in front of a notary (i.e., “subscribed by the parties”); and
- (3) The notary witnessing the signing must sign a particular acknowledgment that each person is who they say they are (i.e., it must be “acknowledged or proven in the manner required to entitle a deed to be recorded”).

Matrimonial agreements can cover a range of topics, for example:

- (1) How will marital or separate property be determined upon a divorce?
- (2) Which partner is entitled to maintenance (also known as “alimony”) and the amount and duration of maintenance in the event of divorce?
- (3) May you or your partner disinherit the other upon death?
- (4) How will you and your partner handle child support and custody issues if you separate and/or divorce?

That said, a matrimonial agreement may not deal with unborn children and because a court is always concerned with the “best interests” of the child, even agreements with provisions about

existing children may be set aside later by a court. But when done correctly, matrimonial agreements can be a powerful way to provide clarity and simplicity in the event of a separation or divorce.

What are the different types of matrimonial agreements?

- **Prenuptial Agreements:** A prenuptial agreement or “prenup” is a matrimonial agreement entered into before marriage that determines financial issues upon divorce and/or upon death.

Why might a prenup be necessary?

- (1) Wealthy families often encourage family members to have a prenup in place to protect a party’s inherited assets, trust distributions, or other gifts from their family of origin.
 - (2) While many states already protect these kind of inherited assets/family gifts upon divorce, prenups allow a couple the freedom to move without fear that those assets might no longer be protected under the laws of their new home state or country.
 - (3) Parties in second marriages frequently use prenups to ensure that the “fruits” of the first marriage go to the children of the first marriage when they die.
 - (4) Separately, a couple might want to deviate from existing law and make their own rules upon divorce. For example, instead of agreeing to a state’s default law that treats income earned during a marriage as “marital” property, a couple may decide they want to keep all of their own income upon divorce and maintain it as “separate property.” This would not be possible but for a prenup.
- **Postnuptial Agreement:** A postnuptial agreement or “postnup” is a matrimonial agreement entered into after marriage—ostensibly when the couple is planning to stay together and not separate or divorce.

Postnups are less common than prenups and are typically executed for one of the following three reasons:

- (1) The couple needs a postnup because they did not execute a prenup before their wedding for whatever reason (e.g., they ran out of time) and the postnup serves the same function as a prenup.
- (2) The couple needs a postnup to address a specific issue (e.g., they plan to buy a home with a down payment gifted by the wife’s parents, who want to ensure the gift remains their daughter’s separate property).
- (3) The couple needs a “hail mary” postnup because of a crisis or tipping point in the marriage (e.g., a spouse uncovers infidelity but agrees to remain in the marriage if certain financial provisions are agreed to in the event of a divorce).

A postnup can be more complicated than other agreements in that it is both backward looking (How do we deal assets previously acquired and currently held by the couple?) and forward looking (How do we deal with hypothetical assets acquired in the future?).

- **Separation Agreement:** A separation agreement is an agreement entered into by a couple that covers the terms of their physical separation and separation of assets before an action for divorce has been filed. Separation agreements typically address:
 - (1) Division of Assets: How should a couple agree to divide financial assets like cash and investment accounts, real estate, retirement, pensions, business partnerships, etc., in a way that is fair that feels fair to both parties?
 - (2) Custody and Parenting Decisions: What kind of parenting schedule makes the most sense for the parties and what procedure should the couple put in place to ensure parenting decisions are made in a way that works for their family?
 - (3) Child Support and Maintenance: Which spouse should be paying child support and/or maintenance to the other and how much?
 - (4) Marital Residence: Which spouse will remain in the marital residence during the separation? Are the parties co-owners of the marital residence, and if so, should one spouse buy out the interest of the other or should the parties sell the home to a third party?
 - (5) Estate: How should the parties plan to leave certain assets to their children in light of the separation?
 - (6) Taxes: How should the parties plan to file their taxes during and after the separation?

Once a separation agreement has been executed, either party may use then use the separation agreement to obtain an uncontested divorce.

- **Settlement Agreement:** A settlement agreement typically covers the same topics as a separation agreement, except it is entered into after an action for divorce has been filed. In other words, it essentially “settles” all issues that have been raised or could be raised in the divorce action. Once a settlement agreement is signed, the next step for most couples is to finalize the paperwork that the Court needs to grant the divorce.

How do I know whether a separation or settlement agreement is right for me and my spouse?

Many couples choose to live for many years under a separation agreement because it allows them to jointly file their taxes and remain on each other’s health insurance. Other couples choose to move forward with a settlement agreement so that retirement assets can be transferred (which cannot be done until a Judgment of Divorce is issued by the court) and the parties can remarry.