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# Pondering a Prenup

## What is a premarital agreement?

A premarital agreement (often called a prenuptial agreement or prenup) is a contract between two people who plan to marry. It defines their property rights when their marriage ends by death or divorce and may address other issues, such as spousal support, payment of expenses during the marriage, and titling of assets. However, a premarital agreement cannot predetermine the custody of or support for a child if the marriage breaks up.

## What does a premarital agreement cover?

Premarital agreements generally determine the rights of the parties to property—real estate; pensions; cash savings; a business; cars, furniture, and other tangible personal property—when one spouse dies or the parties divorce. They can provide that each party keeps whatever is titled in his or her name and will split assets titled in joint names if they divorce. Some agreements provide that each will keep premarital, gifted, and inherited assets and that they will equally share assets resulting from working and saving during the marriage. The agreement can provide that each can choose to leave nothing to the other at death or can require the first to die to make a will or a trust for the benefit of the other spouse. The agreement can provide that neither will pay spousal support if they divorce or that either can ask for support or for a predetermined amount and duration of support.

## Do I need a premarital agreement?

It depends on your situation. An older couple with assets and children from prior marriages may want their assets to go to their own children and grandchildren, and not to a new spouse, at death. A premarital agreement can allow for that. They may want to agree in advance about division of property or spousal support in the event they divorce so as to avoid a contested divorce. Even a younger person entering a

first marriage may benefit from having a premarital agreement if he or she has received, or expects to receive, a substantial inheritance, is a business owner, or makes a substantial income.

## If my fiancé and I have little property and a modest income at the time we marry, do we need a prenup?

Perhaps not. But see above answer.

## I want a premarital agreement. What should I do to make sure it's a valid contract?

To be valid, a premarital agreement must be signed voluntarily and not under duress or coercion; parties should give each other a fair and accurate statement of assets, debts, and amounts and sources of income; and the agreement should not be extremely unfair. These are the minimum standards for validity.

It's best to meet the highest standards for validity. Doing so will better protect you if there is a dispute about validity. Hire a lawyer, get the proposed agreement drafted, and provide it to your fiancée well in advance of the wedding so that she has enough time to decide whether to sign it, negotiate for changes, or cancel the wedding. Be willing to negotiate; a negotiation means a transaction was voluntary. Encourage your fiancée to get legal advice before signing. In some cases, it is appropriate to offer to pay her legal fees. Do not insist on terms that are likely to cause your fiancée to become impoverished at the end of the marriage.

## I've heard premarital agreements are often challenged in court and that it is easy to get one declared invalid.

This is a myth. Courts rarely invalidate premarital agreements.

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### When can I change my will?

While this varies state to state, in New York, a surviving spouse has a right to one-third of a deceased spouse's estate, even if the deceased spouse's will only provides the surviving spouse with a dollar amount and his or her dirty laundry. A prenuptial or postnuptial agreement, however, can allow spouses to waive their rights to their shares of the other's estate. So, unless you have such an agreement in place, if you are separated from your spouse, until you have a final, duly executed separation agreement that provides a waiver of that right of election, you still have to maintain a will that provides that your spouse will receive his or her legal share of your estate. And, when divorce proceedings start, automatic orders actually prohibit you from making any changes to your will or to life insurance or other insurances.

### Will I lose my alimony payments if I move in with my new significant other?

Unless your agreement provides that your cohabitation after some period of time terminates your alimony payments, that

living arrangement will not cause you to lose your alimony. In New York, however, your support could be in jeopardy if you are "holding out" yourself and your new significant other "as husband and wife"—but that standard would be very hard for your ex to prove.

### How do I get my ex-spouse to co-parent with me?

If I had an answer for that, I would be a very rich woman. Unfortunately, when there is a bad dynamic and a lot of hurt and resentment, it carries over into the co-parenting arena. Some people utilize the services of a parenting coordinator to try to referee these issues and get parents to be able to successfully co-parent. I recently participated on a panel where a therapist who I highly regard explained that, until the parties have closure on their relationship, they are incapable of successfully co-parenting. This therapist works with divorced couples and their new spouses and significant others to obtain that closure so that they can release those emotions that are constantly playing in a loop and just focus on their children. **FA**

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## Pondering a Prenup

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### What form must a premarital agreement take?

It must be in writing and signed by both parties.

### My fiancé's business attorney is going to draft a prenup for us. Is that okay?

Your fiancé's attorney cannot ethically represent both of you. You should have your own independent lawyer to advise you.

### Must I hire my own attorney for the prenup?

The law does not *require* you to have your own lawyer, but you should. A premarital agreement is an important legal document that will affect your property rights when your marriage ends in death or divorce. It is in your best interest to get legal advice before you sign it to make sure you understand the proposed terms and to negotiate for changes, if appropriate. Getting legal advice before you make such an important decision is much better than finding out after you get married that you made a mistake in accepting your fiancée's proposed terms. Once you are married, you will not be able to change the terms unless your spouse agrees, even if the agreement is unfair to you.

### How much will it cost?

The cost varies widely. It depends on the amount of work involved, the complexity of the issues to be resolved in the agreement, how much negotiation there is, and the experience of the lawyer representing you.

### Should I pay the lawyer for my fiancé?

Yes, if you are the person seeking the agreement and you have substantially more assets than your fiancé or if your fiancé cannot afford to hire his own lawyer. Courts approve of this because it gives your fiancé access to legal advice that he might otherwise not receive and gives him a meaningful opportunity to negotiate the terms. Do not try to hand-pick your fiancé's lawyer or interfere with the advice he or she gives.

### If we later move to another state, will the prenup still be effective?

States generally enforce a premarital agreement signed in another state. But a court of the new state could reject the agreement if it violates an important policy of that state. For example, in some states, courts will not enforce an agreement that was extremely unfair when signed or that has become extremely unfair. That's why it is generally best that the agreement meet the highest standards for validity.

### If I am forced or pressured into signing the agreement, what rights do I have?

A premarital agreement is not enforceable if a party was coerced into signing it. To prove coercion, the person attacking the agreement must prove that he or she had no choice. Courts rarely find coercion. A person who receives an unfair agreement, even close to the wedding, can refuse to sign and cancel the wedding—a choice between two bad options is still a choice. It's a mistake to think it's okay to sign a bad premarital agreement because a court will throw it out later. Such a result is highly unlikely. **FA**