

Practical Advice

From the Family Law Practice

Understanding the Benefits of Postnuptial Agreements

What is a Postnuptial Agreement?

While prenuptial agreements are fairly well known, fewer people are familiar with their equally practical cousin, the postnuptial agreement. In contrast to prenuptial agreements, made by two adults preparing to enter into marriage, postnuptial agreements are made between spouses who are already married to determine the fate of assets – including personal property, real estate, business interests, retirement accounts, investments and debts – at the conclusion of a marriage, whether through death or divorce.

Why Enter a Postnuptial Agreement?

Few married couples like to think about the potential end of their union, but creating a postnuptial agreement is a practical, proactive step that can avoid ambiguity in the event a marriage ends for any reason. This is especially true when one or both spouses have complex financial holdings, or are small business owners. Some couples create postnuptial agreements in order to reduce potential financial conflicts during their marriage.

In other cases, they are entered into during times of marital difficulty to create certainty around the ownership of individual and joint wealth.

Postnuptial agreements cover a broad range of assets, and should be created with the assistance of a family law attorney, as well as financial advisors, real estate attorneys and estate planning attorneys. Specific reasons to create a postnuptial agreement include to:

- Take the place of a prenuptial agreement when there is not enough time to create one
- Maintain or create asset separation (businesses, real estate, etc.)
- Resolve marital problems without turning to divorce
- Make financial decisions with expert guidance at an amicable time
- Unite marital assets

These agreements confer a wide variety of benefits, including:

Changing the Character of Property

Entering into a postnuptial agreement allows spouses to formally agree upon the character (ownership) of property, and whether those assets will be community property or separate property. Doing so can avoid confusion over such matters and even contribute to reducing potential future disagreements by establishing an up-front understanding. It's also a good way to determine the ownership of property that is transmuted to, gifted to, or inherited by, an individual spouse after marriage.

Confirmation of an Oral Agreement Between Spouses

Spouses often enter into oral agreements, but these are impossible to enforce in the event of divorce. Our recall of conversations is far from flawless, and differences of opinion over the ownership of assets can provide difficult to resolve. Postnuptial agreements allow a married couple to memorialize and formalize their oral agreements to avoid enforceability issues.

Limiting Rights in a Decedent Spouse's Estate

Some spouses use a postnuptial agreement as an estate planning tool to confirm their wishes upon death, similar to a will or a trust. This can be particularly helpful when one or both spouses have children from a previous marriage. These agreements can establish the distribution of certain assets, including community property shared with the spouse, when multiple parties are involved. Estate planning attorneys should be part of this process to ensure that the postnuptial agreement is consistent with the will or trust.

Providing an Added Degree of Certainty

A postnuptial agreement gives spouses more certainty and control in the event of a divorce than applicable default statutory rules. If a divorce takes place, the parties can at least plan their next steps with some degree of confidence, rather than confronting a pile of accounting invoices and looming questions over who gets what. If a couple files for divorce without a postnuptial agreement and the case proceeds to court, the judge will be the ultimate asset divider. Often, without a formal agreement, rights to all or a percentage of assets cannot be determined without a costly accounting nightmare.

About Fox Rothschild's Family Law Practice

Fox Rothschild's Family Law Practice has a presence in multiple states across the U.S. Our attorneys have experience with virtually every issue that may arise in a family law case and are backed by national resources. We understand that family law matters are personal, and that clients must live with the consequences of their decisions. We offer the advice and counsel of experienced attorneys who not only support clients through a difficult time, but also guide them to ensure sound thinking for their plans for the future.

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