Four common misconceptions about prenuptial agreements

When it comes to marriage, money can be an emotionally charged subject. But few topics evoke a more passionate response than the prenuptial agreement. Despite their reputation as romance killers, however, prenups can be an effective way for many couples to achieve their financial and estate planning goals.

To recognize the potential value of prenups, however, you first need to discard the many misconceptions that surround them. Here are four of the most common ones.

1. Prenups lead to divorce. Having a prenup doesn't cause divorce any more than buying auto insurance causes you to have a car accident. Think of a prenup as marriage insurance. Like auto insurance, you hope you'll never need it, but you'll be glad you have it if the worst happens.

A recent Harvard Law School study concluded that a solid prenuptial agreement actually improves the chances of a successful marriage by getting couples to talk about what kind of marriage they want and what the legal consequences should be if one spouse veers off course.

2. Prenups are only for the rich and famous. Celebrity prenups typically make the gossip pages, but such agreements can be valuable tools for any couple that wants some control over what happens to their assets in the event of divorce — or death.

From an estate planning perspective, prenups are particularly useful if you have children from a previous marriage or you own a business you wish to leave to family members who work in the business. Most states give the surviving spouse rights to a substantial portion of the deceased spouse's estate, regardless of the terms of the will.

In community property states, for example, the surviving spouse has a 50% interest in all community property, which includes most property acquired during the marriage (other than by gift or inheritance). Most other states give the surviving spouse the right to an elective share of the deceased spouse's estate (one-third, for instance) that supersedes the will.

These rights can easily derail your plans, but a carefully drafted prenuptial agreement can override them and ensure your wishes are carried out.

3. Asking for a prenup is like saying "I don't trust you". On the contrary, preparing a prenup encourages an open discussion of financial matters and requires each person to fully disclose all of his or her assets, liabilities and income sources. If a prenup doesn't include a complete financial inventory, there's a risk that it later will be challenged on the grounds that one spouse didn't fully understand what he or she was agreeing to.

Even if you and your betrothed trust each other implicitly, it's useful to spell out your wishes clearly to make sure there's a meeting of the minds and there are no surprises down the road. And even though you may feel confident that your future spouse would never exercise the right to "take against the will," what if he or she becomes incapacitated and has left the decision to a guardian or other designee? A prenup can ensure that both spouses' wishes are clearly communicated to all concerned.

4. A prenup takes advantage of the "poorer" spouse. It's true that affluent people sometimes insist on prenups to prevent new spouses from laying claim to their assets in the event the marriage fails. But a prenup doesn't necessarily take advantage of the less wealthy spouse.

Courts are unlikely to enforce a prenup that would leave a spouse destitute. Typically, both parties to a prenup are financially independent; if not, the agreement should at least provide the poorer spouse with sufficient resources to meet his or her basic needs.

Also, a prenup doesn't prevent one spouse from sharing the other spouse's wealth if the marriage is a success. Many agreements are designed to provide the poorer spouse with a share of the wealthier spouse's assets that increases in proportion to the duration of the marriage.

Even in a "marriage of equals," a prenup can provide important advantages. In addition to ensuring that the terms of your will are respected, a prenup can protect your assets against your spouse's creditors (and vice versa) by clearly defining each spouse's separate property.

Finally, there are many situations in which a prenup can be used to *enhance* your spouse's wealth, rather than limit it. For example, if a couple agrees that one spouse will raise the children, a prenup can assure that the stay-at-home spouse will receive a greater portion of the couple's wealth than the divorce laws would provide.

Plan carefully

A prenup can help you achieve a variety of financial and estate planning goals and add an element of certainty to your plans. To be effective, the agreement's terms must be carefully drafted in compliance with applicable state law. And to ensure that the agreement can withstand a challenge on grounds of undue influence, mistake or fraud, it should be prepared well in advance of the wedding day and each party should have separate legal representation.

Already married? A postnuptial agreement may be the answer

If you didn't draft a prenuptial agreement before you were married, you still have an option: a postnuptial agreement. Many states permit postnuptial agreements, but they require special care. Why? Because courts are particularly watchful for any signs of fraud or undue influence.

Also, keep in mind that, for a contract to be legally binding, each party must provide "consideration." In other words, each party must exchange something of value, such as money, property, services or a promise. With a prenuptial agreement, the marriage itself serves as consideration. But a postnuptial agreement requires additional consideration, such as a mutual release of marital property rights or a transfer of certain property from one spouse to the other.

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