I'm getting married. Do I need a prenup?

Congratulations! You are engaged and a wedding is in the works. Just one question remains: Do you need a prenup?

The answer is: it depends.
For the majority of the 2.5 million couples tying the knot in 2022 (the most since 1984, according to The Wedding Report), the answer is no. Specifically, for those not previously married and without significant personal or family assets, a prenup may not be necessary. Nonetheless, there are some situations where a prenup does make sense.

What a prenup can and cannot do

A prenuptial agreement has two primary purposes: to decide how to divide property upon divorce and to determine what the surviving spouse will be entitled to receive when the first spouse dies. Postnuptial agreements, entered into after the marriage, largely serve the same function as prenuptial agreements, though they can be subject to additional scrutiny in court.

Prenups can also delineate who will pay certain expenses during the marriage such as healthcare and health insurance. However, these agreements cannot allocate responsibility for child custody or payment of child support. States vary on whether they permit waiver or limitation of alimony or spousal support.

For a first marriage, property division in the event of divorce is usually the main concern, but in a second marriage, division upon death may be more important.

No one enters a marriage thinking they will divorce, but before walking down the aisle, consider consulting a family law or estate planning attorney to find out if a prenup is right for you.

Division of property upon divorce

In the absence of a prenup, the law takes a common-sense approach to the division of property upon divorce. It decides what belongs to both spouses and can be divided upon divorce (marital property) and what belongs only to each individual spouse (non-marital property).

Upon divorce, marital property is split according to what a court deems reasonable and fair based on any number of factors, ranging from what each spouse earns to who does the housework and child care. Non-marital property stays with its owner.

Here are some general rules on the categorization of property:

- Marital property includes assets acquired as or with income earned by either spouse during the marriage.
- Non-marital property includes assets owned by each spouse in his or her individual name before the marriage and gifts to or inheritances of each spouse, whether received before or during the marriage.
- Assets held in an irrevocable trust funded by someone else (whether by lifetime gift or death), are generally considered neither marital nor non-marital property, and thus cannot be allocated to either spouse in divorce. That said, a spouse's beneficial interest in a trust (i.e. to income) could affect how a court apportions property or determines spousal support obligations in the absence of a valid prenuptial agreement.
- Retirement assets accumulated during the marriage, such as 401(k)s and IRAs, are considered marital property, even though these accounts cannot be held jointly.
- Non-marital property can become marital property. For example, moving assets to a joint account can transform non-marital property into marital property.

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In the nine community property states in the U.S., any property acquired during the marriage while the couple resided in a community property state, aside from gifts and inheritances, will be split equally upon divorce.

In the 41 non-community property states, marital property at divorce is apportioned based on each spouse's contributions during the marriage and each spouse's needs upon divorce. Some states that are not community property states nonetheless have laws that allow couples to "opt-in" to community property by executing community property trusts.

A prenup allows spouses to rewrite these and other default rules. Spouses can decide which items will remain theirs and how property will be allocated between them regardless of what the law says, subject to certain limited exceptions.

A common situation is for a prenup to define an interest in one spouse's family business as non-marital property and thus exempt the business interest from apportionment in a divorce. This point is especially important when either spouse works in the business or when funds earned during the marriage could be used later to operate the business, which could cause the business to become marital property.

For many young people just starting out, a prenup is usually not necessary because they do not yet have significant assets to protect. Property acquired during the marriage is divided at divorce and property owned before the marriage is not. Since gifts and inheritances are non-marital property regardless of when they are received, any such gifts and inheritances will generally stay with the receiving spouse even after divorce.

Division of property upon death

Prenups can also rewrite how property will be allocated upon death. This is most relevant in second marriages because spouses of more advanced age or with kids from the first marriage may not want large portions of their estates going to second spouses.

Generally speaking, you cannot disinherit your spouse. State laws set minimums for what spouses must receive. Courts can intervene if a spousal gift does not meet these minimums, which are determined from either from assets of the probate estate, an augmented estate including the probate estate plus certain other statutorily specified assets, or the couple's community property, as applicable. In the absence of a will, state law dictates what a spouse and other heirs will receive.

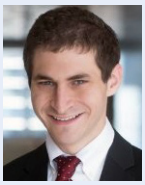
However, with a prenuptial agreement, one or both spouses can waive their rights to the share to which they would otherwise be legally entitled or agree to a fixed payment from the other's estate. Doing so can make a lot of sense in a second marriage where each spouse has sufficient assets of their own and wants to ensure their own children benefit from their individual assets.

Challenges to prenups

Just because you have a prenuptial agreement, it is not necessarily legally binding. In general, courts and state law will examine some of the following considerations to determine whether an agreement is enforceable, in whole or in part.

- Was the prenup signed in the days or even hours before the wedding? Generally, the further in advance the betrothed signed the agreement, the better.
- Did one spouse threaten to break off the engagement if the other did not sign the agreement?
- Did one spouse physically or verbally threaten the other while making the agreement?
- Did the agreement have one-sided terms that were extremely unfair to the other spouse at the time the agreement was made, or that are extremely unfair in light of circumstances at the time of divorce?
- Did one spouse fail to fully disclose their assets to the other? In other words, did the other spouse not have the opportunity to understand the property rights being relinquished?

To mitigate the impact of these issues on enforceability, each spouse should retain separate counsel for the prenup. Independent advice for each spouse reduces the appearance of duress, unfairness, or deception.



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Is a prenup for you?

No one enters a marriage thinking they will divorce, but before walking down the aisle, consider consulting a family law or estate planning attorney to find out if a prenup is right for you. When it is, it can prevent unnecessary angst later if a marriage doesn't last. This is especially true for people with assets or other people to protect.

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