

Agreements help protect assets

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If you marry someone with substantially less net worth, it is extremely advisable that you enter into a prenuptial agreement.

This is particularly true if you are near the age of retirement or are the wealthier party and do not wish to risk losing your separate property in a subsequent divorce or having your estate after your death involved in a dispute concerning what was your separate property and what was your community property. Obviously, your estate on your death may be larger if your estate has not been diminished by a divorce decree that awarded a substantial portion of your separate property to your spouse.

A prenuptial agreement, sometimes called a premarital agreement, is a written contractual agreement, often focusing on the division of assets if a divorce later occurs.

In our state, RCW 26.09.080 provides that a superior court in a divorce action can divide both the community and separate property of the parties "as shall appear just and equitable." Consequently, a person's separate property, which is property acquired before marriage or by gift or inheritance, can be divided between the divorcing parties.

Such a result can seem harsh if you are the wealthier party, are near the age of retirement and do not have time to acquire replacement assets and were not guilty of misconduct.

However, a Washington Superior Court will honor a valid prenuptial agreement that states that in the event of a divorce all of your separate property is to be awarded to you.

At present, prenuptial agreements are governed by case law as there is no Washington statute concerning them.

A valid prenuptial agreement in Washington must satisfy the criteria specified in the case *Marriage of Matson*, 107 Wn.2d 479 (1986), namely that:

1. It must be fair at the time of execution, i.e., reasonable provision must be made for the less wealthy spouse.
2. Full disclosure of both parties' assets and liabilities must be made.
3. The agreement must be voluntarily entered into with each party having full knowledge of his or her rights and the opportunity to obtain independent legal advice.
4. Each party must have sufficient time to consider the agreement before its execution.

Prenuptial agreements in mixed marriages are particularly important in preserving your separate property assets for children of prior marriages and/or for your estate. If you failed to get a prenuptial agreement before your marriage, you should consider negotiating a postnuptial agreement, sometimes called a midmarriage property settlement agreement, to protect your separate property.

However, a midmarriage agreement is valid only if it was fair and equitable when it was enforced and executed (*Pacelli v. Pacelli*, 725 A.2d 56, [N.J. Super. Ct, App. Div. 1999]). This is a higher standard than is required for a prenuptial agreement to be enforced, which only must be fair at the time it was executed.

In summary, to protect your separate property assets for your children or for your estate, a prenuptial agreement or postnuptial agreement, is prudent and necessary, and if done right and handled properly, will prevent loss of your separate property assets.