

## 4 Reasons to Sign a Postnuptial Agreement (And 1 Reason Not To)

By Gwynneth Anderson Thursday, May 19, 2011

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USA Today reports that while only 3% of those with a spouse or fiancé have actually signed a prenuptial agreement, there are no specific statistics at this time on the number of people who signed postnuptial agreements. Attorney Michele Sacks Lowenstein of Lowenstein Brown tentatively estimates that perhaps 1.5% of all married couples have one.

Most people know about prenuptial agreements even if they haven't signed one themselves. Ask about

postnuptial agreements and chances are a questioning look will appear on their faces.

Are these things possible? Are they even legal?

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### Postnuptial Agreements: A Short History

The confusion is understandable. Court acceptance of postnuptial agreements is only a relatively recent phenomenon. During the 1800s, U.S. common law held that a husband and wife could not make a legally binding contract between themselves. The reasoning behind this theory was simple. A husband and wife merged together into one at the time of marriage. How then could a party of one make a binding agreement with itself?

Only after the 1950s, did the law gradually begin recognizing the rights of wives to make binding

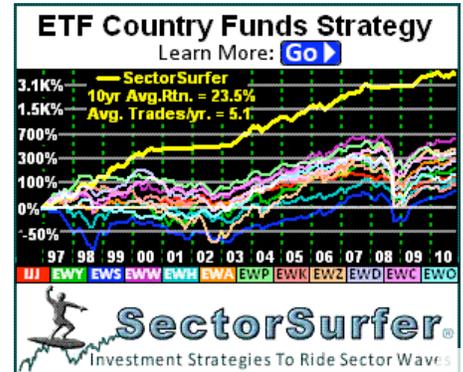
contracts regarding their separate property with third parties. It wasn't until 1985 that some states finally began recognizing the postnuptial agreement's validity as long as the agreement satisfied the same validity tests as a prenuptial agreement.

### What is a Postnuptial Agreement?

"A postnuptial agreement is a contract between spouses. It is similar to a prenuptial agreement except that it is entered into and signed, after the marriage," says Jeffrey A. Landers, president and founder of Bedrock Divorce Advisors, LLC. "In order to be valid, the agreement should include the same important elements as a prenuptial agreement, i.e., in writing, full disclosure of assets, separate counsel, no unseemly or frivolous demands and enough time to review the document before signing it."

Yet even with these precautions, there are still a number of states that do not recognize these agreements. The reason for the heightened skepticism is simple, points out Landers. With a prenuptial agreement, the couple enters into an agreement much like two business people entering into a contract. Neither party has any legal family law rights on the other. Theoretically, if they don't like the contract, either one can walk away. However, the situation changes dramatically after the marriage.

"The married couple now has well defined legal rights regarding support and property division. They are considered to be in a fiduciary relationship with each other (meaning each party has to act in the best interests of the other party)," says Landers. "Therefore, any transactions between them will be viewed with caution. By negotiating a postnuptial agreement, one party will typically be giving up some of those rights. Based on the theory that individuals have less bargaining power once they are



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married, this is why postnuptial agreements will usually be held to a higher standard of fairness than prenuptial agreements."

### Who Should Get a Postnuptial Agreement?

Lowenstein lists out four types of people who should consider signing a postnuptial agreement and a one type who's just looking for trouble.

**Type 1: Oops, we ran out of time!** Weddings are synonymous with details, lots and lots of stressful details. For couples who intended to sign a prenuptial agreement but ran out of time before the big day, Lowenstein recommends going ahead with a postnuptial agreement instead. "Just because you didn't do it and should have, doesn't mean it's too late," she points out.

**Type 2: Same sex couples considering a domestic registered partnership.** If there is any group of people who need either a prenuptial or postnuptial agreement, this is the one. Why? "The precariousness of their legal situation," says Lowenstein.

"Same sex couples should sign these agreements because they don't know what state they will end up living (or dying) in. Thus, they need an enforceable contract completed in a gay friendly state to reduce the chance of one partner ending up in probate court fighting family and siblings."

**Type 3: Revisiting the past.** Couples who signed prenuptial agreements years ago and who are still happily married should realize that family law changes rapidly. A clearly defined, 10-year-old prenuptial agreement might be vague by today's family law standards.

"People forget what they agreed to," says Lowenstein. "They get a divorce and don't realize that they didn't comply with the terms of their prenuptial agreement. Perhaps they didn't establish separate bank accounts or they accidentally commingled joint accounts for stock options, potentially raising the presumption that this is joint community property."

**Type 4: I have lots of assets. Now what do I do?** Older couples who never entertained the idea of a prenuptial agreement but suddenly realize they now have significant assets, should discuss this option prior to [estate](#) planning.

"These people weren't careful enough in their pre-marital planning and now say, 'Oh, I want to provide for my grandchildren,' or, 'We've been using my husband's pension to pay the [mortgage](#) on my house -- does this give him a community interest?' These are the people who should discuss a postnuptial agreement in order to avoid a potential probate contest," Lowenstein advises.

**Type 5: Looking for trouble.** The least desirable candidate for a successful postnuptial agreement is the person who realizes their fortunes are on an upswing and perhaps they should carve out the community interest in the assets before the courts carve it out for them. "In this case, you're just setting the grounds for divorce," says Lowenstein. "If you get married without a pre-nup and later on, you realize there may be some complex legal issues surrounding your assets, negotiating an agreement at that point is in many ways, negotiating the terms of your divorce."

### The Takeaway?

There's a stark difference between people negotiating a postnuptial agreement for estate planning purposes or for those who simply ran out of time versus people who never discuss it until several years into the marriage. That's when a postnuptial agreement becomes a concern to only one person, not both.

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