

Happily married? Then it's time for a post-nup agreement

BY LYNN J. MAIER

Marriage is an economic partnership in which both parties can benefit from a written contract. As most couples have not entered into written agreements before marriage, there is also an opportunity to do so within a marriage. To achieve this goal, postnuptial agreements have been created to codify the obligations and responsibilities of each partner.

Over time, husbands and wives can acquire significant wealth — money, assets, and property — both together and on their own. With the first wave of two-income couples now reaching their 50s and 60s, many couples are now drafting postnuptial agreements, to clarify how those assets will be distributed. Indeed, many attorneys indicate that in the last decade there has been a significant increase in requests for postnuptial agreements.

It's likely that more couples — happily married or not — should consider protecting themselves. Unfortunately, most consider these agreements to be a prelude to a breakup or an admission of a lack of trust. As a society we have learned that it is prudent to prepare for all eventualities, including disability, death and divorce. Moreover, a postnup provides an opportunity for a couple to analyze their assets, debt and to look at their economic lives.

The good news is that by entering into a postnup, the marriage may become stronger. It gives couples a chance to air grievances, express insecurities, address differences in spending habits, and money, and most important, settle on terms they are willing to follow. Often the process can reveal and resolve hidden issues that may have strained the marriage. Once they are reduced to writing, the couple can move forward.

While postnups primarily deal with money issues, they also can cover items such as financial priorities, questions of insurance and health and even household chores. For example, if one spouse is caring for an ailing parent, the agreement can give that spouse peace of mind that the other spouse will continue to support that parent in the event of divorce or the caregiver-spouse's disability or death.

Postnups may assume a greater importance in second marriages for they permit couples to reconcile priorities about care and support of children from the first marriage. The creation of a postnup can be cathartic and eliminate misconceptions and erroneous perceptions that may only grow worse over time.

Postnups are essential when one or both spouses own a business, or may be inheriting property. Under New York's equitable distribution law, a spouse is entitled to a share of the business in a divorce. Although inheritances are considered the "separate property" of the spouse who receives the inheritance, if the inheritance is commingled, it may become an asset of both spouses. Pursuant to New York's Estates, Powers and Trusts Law, a spouse is entitled to a portion of

the deceased spouse's estate. In a postnuptial agreement, husband and wife, for example, can determine how to provide for the surviving spouse equitably while keeping the family business intact. Wills and estate planning should be coordinated in conjunction with the postnuptial agreement.

A recent development in family law is the development of the collaborative process, which is particularly well suited to preparing a postnuptial agreement. In this process, each spouse retains separate attorneys representing his or her individual interest. The parties and their attorneys meet together to formulate an agreement based on individual and family needs and interests. Open discussion and transparency are essential to the process, and full financial disclosure is required. It is done in a positive light for the purpose of preserving the relationship and to provide a template for the future.

If the marriage does dissolve, the postnup becomes the framework for a separation agreement, saving emotional stress and the financial cost of negotiating with your partner when things have turned sour. We strongly urge married couples to discuss tough issues when things are going well, and before battle lines are drawn. Not only will it be easier to reach agreement, but there is an opportunity to draw a blueprint for a bright future.



Lynn J. Maier is a partner in the White Plains law firm of Kurzman Eisenberg Corbin & Lever, L.L.P. Reach her at hmaier@kelaw.com.