Legal Matters®

Family Law
winter

Prenups: No longer just for the rich and famous

Prenuptial agreements used to be only for celebrities, but in the last few years they have become dramatically more common in the U.S., and now it's quite ordinary for middle-class couples to ask for them.

There's no one single reason for the change. Rather, a number of factors are working together to make prenups more acceptable – including:

• The recession. Many people have seen the value of their homes, pensions and investments shrink dramatically, and they are concerned about protecting what they have left. In addition, a lot of people want to shield themselves from debts brought to a marriage by the other spouse.

• Women are more likely to bring substantial assets to a marriage. Years ago, the vast majority of prenups were initiated by men, but today it's increasingly common for women to ask for a prenup.

• A growing number of people are entering into second marriages (or third or fourth marriages), and they want to protect children from prior relationships.

• Many people today have memories of bitter divorce battles between their own parents, and they want to prevent that from happening to them.

• The social stigma of prenups is far less than it used to be, as more and more people view them as a straightforward financial planning device.

• At the same time, the law involving prenups has become clearer, so people can enter into them with more certainty.

Prenups can be a valuable technique for sheltering assets, avoiding expensive divorce battles, and protecting children. However, it's important to remember that signing a prenup doesn't solve every problem. Even if you sign a prenup, you have to remember to take certain actions (and avoid certain actions) during the marriage in order to preserve the validity of the agreement.

For instance, even if a prenup says that your pension or 401(k) plan will remain separate, your spouse must generally still sign a waiver *after* the marriage takes place in order to satisfy the

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What 'counts' in divorce? See if you can guess

It's often unclear whether certain of a couple's assets or certain types of income "count" in divorce proceedings. Take a look at the following questions, and see if you can guess what the courts decided. (Remember that the actual outcome could vary from state to state and in slightly different situations.)

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A woman won $2.7 million in a medical malpractice lawsuit. Ten years later she got divorced. Can her husband share in the money?

No, said an Iowa court. The couple had placed the money in an investment account and had lived off the proceeds for a time. The court said that since the husband had lived off the proceeds for a while, it was only fair to allow the wife to keep whatever amount was left, "so that she is adequately compensated for her physical injuries, pain and suffering, and future medical expenses."

In deciding how much child support a mother needs, does her "income" include the amount that is deducted on her paycheck for Social Security and Medicare taxes, heath insurance premiums, and 401(k) contributions?

No, said a North Carolina court. These amounts shouldn't be included because they are related to a future benefit. They aren't available to the mother for her immediate support, and she can't access them to help raise the children.

Two years after divorce, a father inherited $400,000 from his aunt's estate. Should his child support payments increase as a result?

Yes, said the Texas Court of Appeals. All assets and income that are not specifically excluded under state law must be included when determining child support, the court said – including an inheritance from a third party.

A husband filed for divorce after he retired. His employer was paying $846/month for his retiree health benefits. Can his wife share in this?

No, said the Indiana Supreme Court. The wife had calculated that the future benefits had a present value of $102,000, and she argued that they were a marital asset subject to division. But the court ruled that "employer-provided health insurance benefits do not constitute an asset once they have vested in a party to the marriage."

Termination of parental rights includes rights of the child's grandparents

When someone's parental rights are terminated, this also terminates the rights of the person's relatives – including the child's grandparents, an Illinois appeals court recently ruled.

In this case both natural parents' rights were terminated, and the child's foster parents petitioned for adoption.

The natural father's parents objected. But the court said they had no right to contest the adoption, since once the father's parental rights were terminated, their rights were terminated as well.

Social Security benefits used to calculate child support

Social Security benefits received by a father count when figuring out his child support obligation, the Mississippi Supreme Court recently ruled.

The father's only source of income was Supplemental Security Income benefits. After a paternity case, he was ordered to pay 14 percent of his income for child support.

The father objected, pointing to a federal law that says Social Security benefits can't be withheld for child support payments.

The court agreed that it couldn't order the Social Security Administration to *withhold* his payments. But it could still order him to turn part of the money over to the mother after he received it, the court decided.

‘Skype visitation’ ordered when mother moves out-of-state

A mother can relocate with her children from New York to Florida if she pays for visitation via the “Skype” service that will provide a real-time broadcast between her children and their father over the Internet, a New York court recently decided.

The mother wanted to move from Long Island to Florida with the couple’s two children, ages nine and six. She planned to move in with her parents because the New York home was in the late stages of foreclosure and she was unemployed. The father was a recovering alcoholic who lived in employer-provided housing and couldn’t afford trips to Florida.

He objected to the move, especially because he had recently completed rehab and was trying to become a permanent presence in the children’s lives.

The court said that allowing the children to move to Florida was the best thing for them, since it would be traumatic for them to lose their home and they might otherwise become homeless.

However, the court ordered the mother to pay for “appropriate Internet access via a Skype device which allows a real time broadcast of communications between the [father] and his children.” It ordered her to “make the children available three times per week for not less than one hour per connection to communicate via Skype with their father.”

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Moving 60 miles in Michigan

In another case involving a relocating parent, the Michigan Supreme Court decided that a mother could move 60 miles away and enroll her children in new schools.

Ordinarily, a parent in the state who moves away has to prove that the move is in the best interests of the children.

But the court said the father in this case couldn’t object to the move because his own parenting time wasn’t greatly affected.

The father can still see the children on weekends, the court said. As for visits during the week, the father’s work schedule only allowed him to make mid-week visits one week out of seven – and the court said that while the 60-mile distance made these visits more inconvenient for him, from the children’s perspective it made little difference.

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Ex-wife remarries; husband stops paying insurance

A divorced husband could stop paying for his ex-wife’s health insurance when she got engaged and moved in with her fiancé, the Iowa Supreme Court recently ruled.

The couple’s divorce decree required the husband to pay up to $300 per month for the wife’s health insurance. He obliged, but wanted to stop paying when the wife no longer needed the coverage.

The question was whether the insurance coverage was part of the wife’s support – which could be modified by a court if her needs changed – or part of the couple’s property settlement, which couldn’t be changed.

The court said that in this particular case, the insurance payments were part of the wife’s support, and so they could be cancelled later by a judge.

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requirements of federal pension law. If your spouse doesn’t sign the waiver, then the federal law will override your prenup, and your spouse may be entitled to a share of your pension.

Also, suppose you have a investment account and your prenup says that it will remain your separate property. You’ll want to be careful not to add your spouse’s name to the account, file joint tax statements that include the account, or use joint assets to pay taxes relevant to the account. Each of these things could potentially undermine the agreement by suggesting that you have made the account joint property.

If you have any questions about prenuptial agreements, we’d be happy to help you.

Value of husband's business interest is reduced at divorce

After 27 years of marriage, a Colorado couple got divorced. The husband's main asset was a share of an oil and gas company that was worth $2.5 million. However, for purposes of dividing the couple's property, the divorce judge reduced the value of the husband's share by one-third, to about $1.6 million.

The judge explained that this was a "marketability discount." The idea of a marketability discount is that, while the husband's interest might have been "worth" $2.5 million if you simply divided the value of the business by his percentage interest, it wouldn't be "worth" $2.5 million if he tried to sell his interest to a third party. That's because a third party probably wouldn't want to pay full value for a minority stake in a business, given that he or she would be a minority owner and would have no control over the operations.

Marketability discounts are common in certain types of accounting. For instance, the value of a share in a family business is often reduced for tax purposes because few people would want to be a minority owner in someone else's family business.

The wife argued that marketability discounts shouldn't apply, and in fact don't apply in many situations. For instance, in Colorado, if a corporation buys out a dissenting minority shareholder, it's not allowed to apply a marketability discount in calculating the value of the shareholder's interest.

The case went to the Colorado Supreme Court, which sided with the husband and said that a marketability discount in divorce is different from a discount in the case of a shareholder buyout.

The court didn't say that marketability discounts should *always* be applied in divorce cases, but it said the judge was reasonable in deciding to apply one in this case.

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