

Should I Get a Prenuptial or Postnuptial Agreement?

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Michigan courts have long favored people's rights to reach agreements about how to handle their assets and finances upon death and divorce. There are many advantages to people entering into such agreements – they force discussions about family finances, allow people to make decisions while in a positive state of mind, protect pre-marital, separate and family property, provide for children from other relationships, and help couples plan what should happen in the event the marriage ends. While both pre and post nuptial agreements ("prenup" and "postnup") have similar purposes and are drafted with similar provisions (the only practical difference is that one is signed before the marriage and one after the marriage), they are evaluated under different legal standards.

The general requirements of both types of agreements are similar – they should be in writing, and cannot be obtained through fraud, duress, misrepresentation or nondisclosure of material facts. The agreements should not be unconscionable when executed. One major difference in the two agreements is the concept of consideration – what each person receives in exchange for making the agreement. With prenups, the marriage itself is the consideration. Since postnups are executed after the marriage, parties have to identify other benefits each of them is receiving in exchange for what they are agreeing to do or forego.

Courts have been less likely to uphold postnuptial agreements due to the theory that they encourage separation or divorce, which is considered contrary to public policy. However, in recent years, the courts have acknowledged that under certain circumstances, postnuptial agreements can be a useful tool to preserve marriages or that they can be enforced as any other contract.[1] Key facts seem to be stating an intention to remain married, being separated at the time of the agreement and having a fair agreement. The case law is still evolving.

Family law attorneys are also watching for cases and legislation after a 2016 Michigan Supreme Court prenup case that held that parties' ability to contract around the court's equitable powers to decide what is fair in a divorce may not be absolute.[2] The case did not invalidate prenups, but it is well worth consulting an attorney to discuss the facts of your situation to see what additional issues or language need to be considered.

A third type of agreement that is growing in popularity as more couples opt to live together in lieu of marriage is a cohabitation agreement. Unmarried couples should formalize as much as possible in writing, since they have limited recourse in the courts based on their actions and verbal agreements. Even without a formal agreement, you can jointly own real estate, vehicles, bank accounts and debt.

Couples can name each other as beneficiaries on retirement accounts and life insurance policies. However, civil courts are not able to compensate for implied agreements or provide equitable relief, as they do in divorces. Michigan law does not recognize (for the most part) common law marriages. For example, what if a couple has a verbal agreement to share all expenses 50-50, and one person leaves? Without a formal agreement in writing (and depending whose names the bills are in), the jilted partner could be stuck without recourse.

If your circumstances allow for a prenuptial agreement to be executed, that will be a more definitive option. However, if issues arise after the marriage and you and your spouse are willing to consider a post-nuptial agreement, the pros and cons/risks of such an agreement should be discussed with an attorney. And, if you are unmarried and residing with your partner, do not rely on promises; it is best to formalize the financial arrangements to ensure a more orderly separation should the relationship come to an end.

[1] *Lentz v. Lentz* 271 Mich. App. 465 (2006), *Hodge v. Parks*, 303 Mich. App. 552 (2014)

[2] *Allard v. Allard* 499 Mich 932 (2016)

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