

A Prenup For The Rest Of Us: Rethinking The Premarital Agreement

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What do you think when you hear the word “prenup?” If you are like most people, when you hear prenup you might think rich or celebrity. And you’d be right. Prenups, or as they are called by family lawyers, premarital agreements, are often used by those with significant assets, actors, entertainers and others with much to lose in a divorce. The legal fees to create a prenup can cost \$5,000 to \$50,000 or more, and are much more palatable for the wealthy.

This is unfortunate, however. I think the use of a prenup should extend beyond the rich and famous. My goal is to make the case for a “prenup for the rest of us.” This prenup for the rest of us would be an affordable legal document completed before marriage that protects the interests of men and women of average wealth from the fighting and legal jockeying that often occurs during divorce. It is not uncommon for a divorce to cost more than the expense of a wedding and honeymoon. A clear and precise prenuptial agreement reduces attorney fees and accounting costs in the event of a divorce.

Humans are really good at forming relationships— however you define a relationship and however short it may last. We are hardwired for love and connection. So while we are masters at coming together, we are terrible at separating well. The neurotransmitter-induced high we experience when the relationship is new makes molehills out of mountains, but when we are divorcing the claws come out and we seek blood. The rational and logical part of our brain gets hijacked by our emotions, which means it is probably not the ideal time to have a calm and sensible discussion about who owns what. In a relationship I had many years ago that was ending, I remember arguing over a cookie sheet. Yes, a \$10 cookie sheet. It is no wonder that when hundreds of thousands, if not millions, are at stake, couples lawyer up and dig in for a long and expensive fight. According to Paul J. Nelson, Esq., a Certified Specialist in Family Law and Managing Partner at Nelson Kirkman, a boutique law firm in Newport Beach, California, "I have seen couples with only half a million in assets pay upwards of \$250,000 in combined attorney fees fighting over issues that could have been pre-determined in a simplified prenuptial agreement."

As it is, once you file for divorce each spouse must make certain income/expense and asset/liability disclosures to the other. But why wait until you are going through a divorce to make these disclosures? Wouldn't it make a lot more sense to do this before marriage? The adage that in criminal court you see bad people at their best, and in family law court you see good people at their worst, is accurate. The advantage of listing all of your assets and debts before you get married is that nothing has been commingled yet, and if it has because of cohabitation, this is the time to make it clear who owns what. This has the potential to reduce arguments about the division of assets and the massive legal and accounting fees often required to make your case.

Mr. Nelson states, "By assigning property to each spouse at the outset of the marriage, the parties will undoubtedly save energy, frustration, time, and money. Under California law if a party owns property prior to marriage, it will be separate property upon divorce. Problems arise when refinances occur during marriage or loan principal is paid down using community property funds. These are expensive and difficult things to prove in court especially after a marriage of longer than 7 to 8 years as documents are simply not available. A prenuptial agreement would control and obviate the need to try to find

documents that just may not exist any longer."

Furthermore, I would also argue for not just a one-time disclosure of assets and debts before marriage, but for *annual* disclosure – maybe make it part of the federal tax return. As assets are acquired or sold and finances change, there would be a documented trail of ownership. As an added benefit, annual disclosure would protect unsuspecting spouses. One of the tragedies of divorce is when one spouse has been financially unfaithful – maybe they have substantial gambling losses they kept hidden or they have a large credit card balance unbeknownst to their spouse. In a divorce, each spouse is jointly liable (this means each spouse is 100% responsible for payment) for these debts. When it comes to income tax debt, even the IRS – who rarely is linked to compassionate in a word association game – provides some protection through "[innocent spouse relief](#)." But your other debtors in a divorce will hold the innocent spouse fully liable. This can create a world of hurt for the spouse trying to start a new life.

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But wouldn't all this talk of financial disclosure and a prenup for the rest of us be bad for a nascent relationship? Awkward maybe, but I don't think it would be bad. In fact, I think it could be beneficial to talk about money, assets, and finances before and during a relationship. If the research that shows [money disputes are the best predictors of divorce](#) are correct, I think disclosure will lead to more discussions and better understanding.

As a divorce financial planner who often works with the "[out spouse](#)" – the spouse who is not experienced handling the finances – I see the effects of financial furtiveness and it is not pretty. I've never worked with a client going through a divorce who lamented, "I wish I knew less about our finances during the marriage." Financial disclosure increases the opportunity for understanding and involvement. If the captain is steering the ship into rocks, the earlier you see the problem the better the chance you can save the ship and your life.

Of course traditional prenups include more than asset and debt disclosures. A well-drafted prenup also often tackles issues such as how assets obtained during marriage should be divided in divorce, marital support, how to handle separate debts, etc. These are all things that could also be disclosed and/or discussed in a prenup for the rest of us document, but at a minimum, I would start with an asset and liability disclosure requiring both spouses to acknowledge and sign annually.

These disclosures are required in a divorce, so why not make them requirements when you get a marriage license? What do you think? Good idea? Bad idea? How can we make divorces less like the financial weapons of mass destruction they normally are and at the same time protect spouses in the process?