

Pre and postnuptial agreements

By Dan Marsh, Attorney at Law

If you enter into marriage with another person who has substantially less net worth, it is extremely advisable for you to enter into a prenuptial agreement, particularly if you are near retirement age, or if you are the wealthier party and you do not wish to risk losing your separate property in a subsequent divorce, or risk having your estate involved in a dispute over separate versus community property after your death. Obviously, your estate on your death may be larger if it has not been diminished by a divorce decree that awarded a substantial portion of your separate property to your spouse.

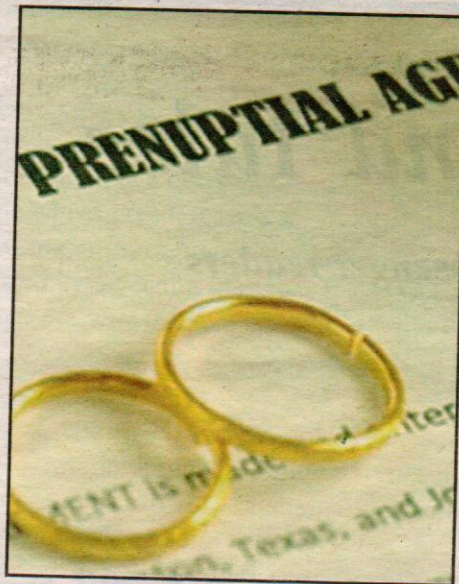
A prenuptial agreement, sometimes called a premarital agreement, is a written contractual agreement, often primarily about the division of assets if a divorce later occurs. In Washington state, RCW 26.09.080 provides that a Superior Court in a divorce action can divide both the community and separate property of the parties "as shall appear just and equitable..."

Consequently, a person's separate property acquired before marriage, or by gift or inheritance, can be divided between the divorcing parties. Such a result can seem harsh if you are the wealthier party, near the age of retirement, and do not have time to acquire replacement assets and were not guilty of misconduct.

However, a Washington Superior Court will honor a valid prenuptial agreement that states all of your separate property should be awarded to you in the event of a divorce.

At present, prenuptial agreements are governed by case law as there is no Washington statute concerning them. A valid prenuptial agreement in Washington must satisfy the following criteria specified in the case "Marriage of Matson," 107 Wn.2d 479 (1986):

- It must be fair at the time of execution, i.e. reasonable provision must be made for the less wealthy spouse.
- Full disclosure of both parties' assets and liabilities must be made.



- The agreement must be voluntarily entered into, with each party having full knowledge of his or her rights and the opportunity to obtain independent legal advice.
- Each party must have sufficient time to consider the agreement before its execution.

Prenuptial agreements in mixed marriages are particularly important in preserving your separate property assets for children of prior marriages and/or for your estate. If you failed to get a prenuptial agreement before your marriage, you should consider negotiating a post-nuptial agreement, sometimes called a mid-marriage property settlement agreement, to protect your separate property. However, a mid-marriage agreement is valid only if it was fair and equitable when it is enforced, and when it was executed. (Pacelli v. Pacelli, 725 A.2d 56, [N.J. Super. Ct, App. Div. 1999]). This is a higher standard than is required for a prenuptial agreement to be enforced, which only has to be fair at the time it was executed.

In summary, to protect your separate property assets for your children or for your estate, a prenuptial agreement, or postnuptial agreement, is prudent and necessary, and if done right and handled properly, will prevent loss of your separate property assets.