

“WHAT’S LOVE GOT TO DO WITH IT?”

In times past, premarital agreements (also called prenuptial agreements) were associated with only the rich and famous. Because people are becoming more informed and sophisticated about planning their estates, some people are obtaining prenuptial agreements as part of planning for marriage. This is especially true where a couple planning to marry have accumulated assets and have the goal of providing for their own children from prior marriages as well as providing for each other.

A prenuptial agreement is essentially a contract that overrides the provisions of the civil, family, and probate codes which govern how property and liabilities will be treated upon death or divorce. If you are married, everything you own will be treated as either community property or separate property. As a practical matter, most property acquired through wages or earnings during the marriage is considered community property. Property acquired before marriage, or by gift or inheritance during marriage, is generally separate property so long as it has been kept separate from the community property. Through a premarital agreement, spouses can identify and characterize the property that they had before marriage as “separate.” They can also agree whether property acquired during the marriage will be characterized as community or separate. The contract then sets forth how the assets will be treated upon divorce or death. It can also specify who will take responsibility for certain liabilities and debts.

Premarital agreements can be misused and lead to nasty court fights where one party clearly had unequal bargaining power and was taken advantage of. We can all think of cases where a wealthy person (let's say a rich old man) marries someone with essentially no assets (let's say a pretty young woman) and, upon divorce or death, the wealthy person manages to retain everything he or she had before marriage through a premarital agreement, leaving the spouse with absolutely nothing. Because of this, there are certain formalities that must be observed to have an enforceable premarital agreement. First, each party to the agreement should be represented by an independent attorney. Second, each party must prepare a financial statement listing assets, income, and financial obligations. The financial statements must be exchanged prior to the signing of the agreement. Third, the agreement should not be made at the last minute -- it should be clear that there was adequate time for consideration and negotiation.

A premarital agreement can be an important component of a comprehensive estate plan. It can work “hand in glove” with a living trust to ensure that you control the administration and distribution of your estate in a way that is custom tailored to your personal and family situation.