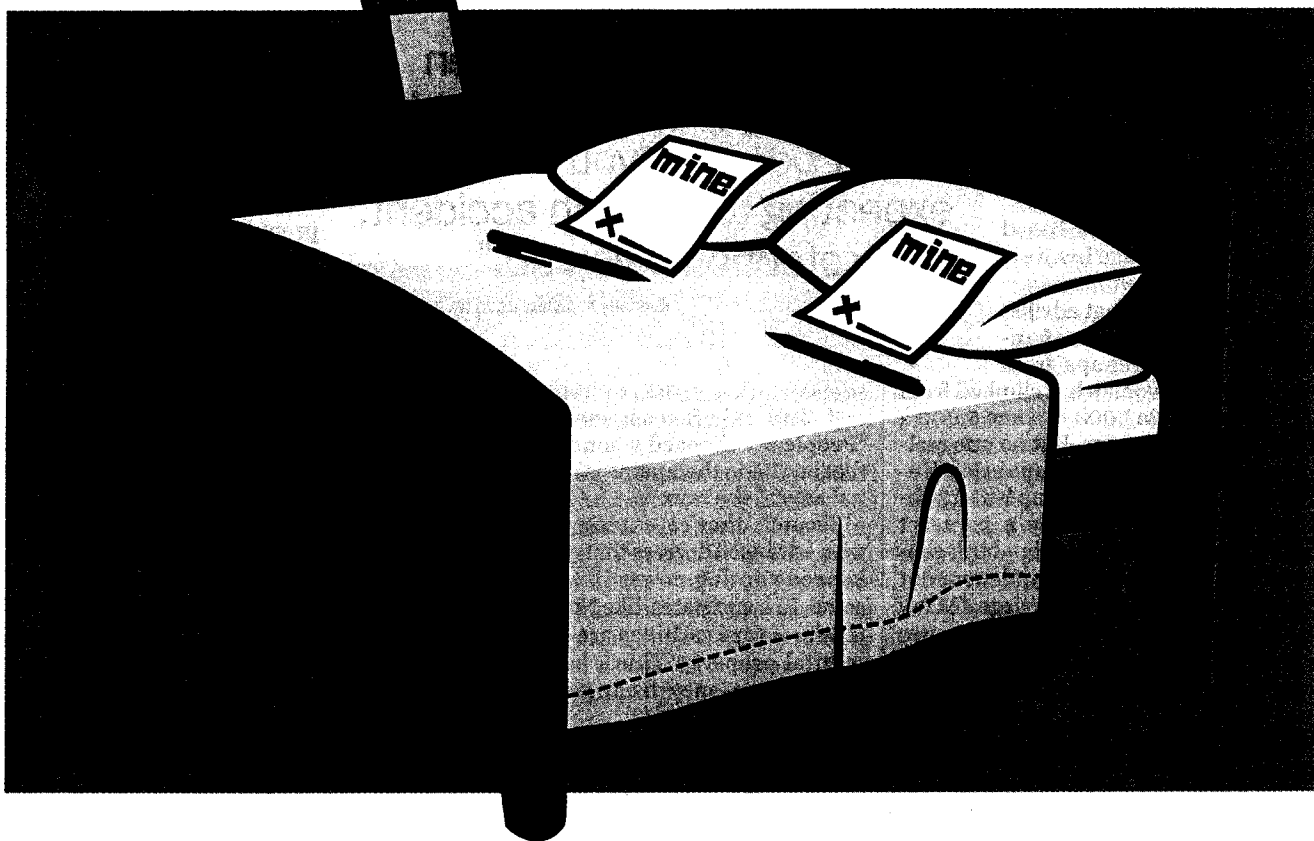


PRIME TIME

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Planning for Love and Money

A prenuptial agreement certainly isn't romantic, but it could prove indispensable

By Kerry Hannon

When Lisa, an artist, was sheepishly asked by her soon-to-be spouse, a Washington, D.C., attorney, to sign a prenuptial agreement, she flat out refused. "I thought it was sure to doom our marriage," she says.

Lisa, who did not want to be identified further, is not alone. Being asked to sign a prenup is a sensitive request. It conjures up feelings of distrust and heartlessness.

It's as if your fiancé is planning the exit strategy even before the honeymoon.

Love me do? Most people think of marriage as the ultimate emotional and spiritual bond. By all accounts, Paul McCartney felt that way when he married Heather Mills four years ago. Now that the pair has split, legal experts estimate he could lose up to a quarter of his estimated \$1 billion fortune because he reportedly felt that asking her to sign a prenup was unromantic.

But marriage, especially for mature boomers, of whom 28 percent have been

married twice or more, in many respects is a business. Simply put, a prenup is a document or pact signed before your marriage that details how your financial assets, such as real estate, cars, savings, investment portfolios, and pensions, will be doled out when the marriage ends either in divorce or the death of a spouse. And there are liabilities to consider as well. Your heart's delight may have debts and liabilities you know nothing about. College loans, for example, may be due that could amount to a hefty \$70,000 or more. If the person you're planning to marry has

been married before, he or she may have children to rear. The agreement, however, can't cover some issues related to children, such as child support or custody.

While starry-eyed McCartney seemingly put love before money, more and more couples aren't doing that. They're slipping the contract, which is valid in all 50 states and the District of Columbia, onto their wedding planning to-do lists along with picking a cake and a caterer. "There has been a meteoric rise in prenuptial agreements and postnups in the last five years," says Arlene Dubin, a matrimonial attorney at Sonnenschein Nath & Rosenthal in New York City and author of *Prenups for Lovers*. She estimates that her prenup business has doubled since 2001.

At the New York-based Equality in Marriage Institute (www.equalityinmarriage.org), a nonprofit that advises couples, the number of inquiries about prenups from both men and women has climbed from 1,500 a month in 2003 to some 5,000 a month so far this year. But no one really knows how many prenups exist. Unlike a divorce filing, a prenup isn't a public document but simply a contract signed between two people—both represented by separate and independent legal counsel—before a marriage. "Many couples keep these spouse-to-spouse arrangements between themselves and their lawyers," says Dubin. "They're awk-

ward about them in some way. One recent client was so embarrassed she didn't even tell her mother."

The current boom in prenups makes perfect sense. "Couples are looking at marriage like a business contract for several key reasons," says Dubin. First, they are getting married later in life than previous generations, often in their mid-30s. By then, they have accumulated

massive generational shift in wealth.

Finally, there's the gloomy fact that half of all marriages end in divorce. Second-time-arounders, particularly aging boomers with children from a first marriage, are more likely to meet head-on the difficult and delicate discussion of signing a prenup. They've already slogged through the financial mess of a failed marriage and often want to ensure that their children receive their intended inheritance. "Having a prenup is like putting on a seat belt when you drive your car," says Courtney Knowles, a spokesperson for Equality in Marriage. "You don't click it because you are expecting to have an accident. It's protection if you do," he says.

Splits. If you don't have a prenup and can't come to an agreement with your soon-to-be ex-spouse during the divorce proceedings, your state laws will dictate division of the assets. In community property

states—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin—you will probably get half of everything. In other states, assets will be split by the court depending on factors such as how long you were married and what you actually accumulated together. Domestic marital law is very subjective, says Dubin. It's not black and white. "Prenups may override state law in most situations," she says.

For the agreement to be valid, it's criti-

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Courtney Knowles, Equality in Marriage

some wealth in 401(k) retirement plans and IRAs and often a home or a condo. "People are shocked when they realize that an IRA in their name is really a marital asset," she says.

Second, they're entering marriage with advanced degrees that will have enhanced earning power in the years to come. In some states, like New York, potential future earnings are considered marital property. Third, boomers are inheriting money from parents in a

CHECKLIST

Tax Traps Can Snare Your Capital Gains

Now that Congress has ended some of the uncertainty over the capital-gains tax by extending the current favorable treatment of investment profits through at least 2010, you would think everything is fine.

Not so. There are still issues involving how the tax is applied and growing attention to capital-gains tax that goes uncollected because of evasion and confusion.

Here is a map for tiptoeing through the capital-gains thicket:

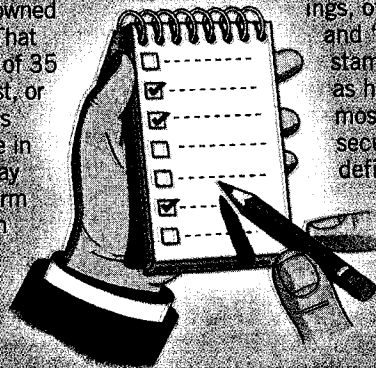
✓ **Different investments, different tax rates:** Long-term gains from selling stocks, mutual funds, and many other investments are taxed at a top rate of 15

percent if the asset was owned longer than 12 months. That compares with a top rate of 35 percent on wages, interest, or short-term gains on assets sold within a year. People in the lowest tax brackets pay only 5 percent on long-term gains through 2007, then nothing through 2010.

But there's a rub that irritates art dealers, investors in coins and precious metals, and others who roam about outside the stock market. Profit from paint-

ings, other artwork, antiques, and "collectibles" such as stamps and coins is taxed as high as 28 percent, almost double the top rate on securities. Included in the definition of a collectible

are gold and silver bullion. Also collectibles, says the IRS, are investment coins that substitute for bullion, such as the American Eagle and the recently introduced American Buffalo, though some dealers and collectors



cal that each of you hires your own lawyer. You don't want your spouse to argue that there was any conflict of interest. Thousands of attorneys specialize in matrimonial law and handle prenups frequently. For more information, check out the American Academy of Matrimonial Lawyers (www.aaml.org), the American Bar Association (www.abanet.org), or www.equalityinmarriage.org.

Full disclosure is paramount. Both you and your future spouse must divulge detailed financial information, including all assets, income, and premarital debts. You need to think about what will happen to premarital property in terms of appreciation over the course of your marriage. What's more, you will want to clarify what will happen to jointly held and individually owned property such as artwork, jewelry, or real estate. You might determine spousal support should you divorce, or provide a waiver or property settlement instead of support when possible.

Prenups aren't just about the money, though. You can determine who will get custody of your Labrador retriever, or who will be responsible for child care and what religious upbringing your child will have, among other lifestyle issues.

In general, a prenup can be a useful financial planning tool and a way to communicate about a difficult subject. Some people use it to plan for how all finances

will be managed during their marriage. After all, money is the No. 1 thing couples argue about. Anything goes. But the most important thing is that you discuss your financial lives openly before you marry.

The pact must be signed voluntarily by both of you and far enough in advance of your wedding day that no one can claim to have signed under duress. Two or three months ahead is advisable. If there

a guidebook such as Equality in Marriage's *The Commitment Conversation* (\$10). Then you can meet with your lawyers to fine-tune the document.

It's never too late to draw up an agreement, even after you have been married for a while. A postnuptial agreement is just as valid as a prenup but subject to greater scrutiny in some states, and it is set up in the same way. You should seriously consider this option if you inherit a large sum of money or have a fat cash infusion from selling a business.

Nothing new. While popping the "P" word is the latest rage, religious marriage contracts have been around for centuries. At some Jewish weddings, a husband gives his wife a *ketubah*, a written contract that defines a husband's obligations to his bride. An Islamic marriage contract sometimes governs where the couple will live and who will carry out which household duties.

As for Lisa, her marriage did end in divorce a few years later, doomed not by the dreaded prenup but by the tenuous nature of entwining two human lives. In the end, she figures, she might have landed a better divorce settlement if she had signed the prenup. When it came time to divorce, she was so shell-shocked, she simply walked away. With a prenup, she would at least have been guaranteed something. As Dubin points out, "There's romance, and then there's reality." ●

WHO NEEDS A PRENUP?

Anyone who is bringing a lot of assets to the partnership (\$100,000 and up, including all retirement accounts)

Anyone who has children from a prior marriage

Anyone who has his or her own business or is a partner in a company

Anyone on a fast career track who is likely to earn a hefty salary in the future

Anyone who is paying for his or her spouse to get an advanced degree likely to result in significant future earnings

are bad feelings about signing a prenup, you might consider setting a future date on which the contract will expire.

Writing a prenuptial agreement isn't cheap. It will cost you anywhere from \$1,000 to tens of thousands, depending on how complicated it is. To save some bucks, you might draft an agreement ahead of time. You can hire a mediator for a fee typically below what you'd pay for a lawyer's time. Or you can write a preliminary pact together with help from

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mistakenly believe otherwise.

Gilbert Edelson, administrative vice president of the Art Dealers Association of America, says the treatment of artwork penalizes those who assist cultural growth by investing in such items. The higher tax on precious metals punishes portfolio diversification, argues Michael DiRienzo, executive director of the Silver Institute. He notes that even exchange-traded funds that track the price of gold and silver are subject to the higher capital-gains tax. (ETFs are a type of security that trades like a stock.)

Bills to extend the lower capital-gains rate to artwork and precious metals have been introduced in Congress, but the outlook for passage anytime soon is not good for art and only modestly better for metals.

✓ **Surprise! You have taxable income:** Mutual fund investors are sometimes surprised to receive a capital-gains distribution when a fund sells shares from its portfolio. The distribution is immediately taxable even when the investor automatically reinvests the payout into the same fund and thus receives no current cash. Legislation to defer tax in such cases has been introduced in both houses of Congress, but again, enactment is a long shot.

✓ **The depreciation trap:** In another twist, capital gains can be tricky to figure for people who sell real estate on which depreciation has been deducted. They may face a special tax rate of 25 percent on at least some of the gain.

With all the rules, some investors innocently foul up. Others exploit cracks in IRS

enforcement to understate income. Misreporting of capital gains may cost \$17 billion a year in lost tax revenue, says Democratic Sen. Evan Bayh of Indiana, who has introduced legislation to require more reporting to the IRS by stockbrokers and mutual fund firms. They must now report only the amount received by an investor when securities are sold. Bayh's proposal would require them to also report the cost of such securities, thus enabling a check on the amount of profit a taxpayer reports.

Enhanced reports would hinder understating gains. But a June report by Congress's Government Accountability Office says that better reporting could also benefit a sizable contingent of confused people who mistakenly overreport their gains.

—Leonard Wiener