



# After the Honeymoon

Postnuptial agreements can lay the groundwork for a financially blissful marriage.

By Judy Martel

**N**EARLY THREE YEARS AGO, John was headed for a divorce he did not want. After more than a decade of marriage—his second and his wife's first—she filed, John says, “clearly for financial reasons.”

A former senior corporate executive, John earned the good life. He retired in the early 1990s with a stack of low-basis stock from his employer. He borrowed against it for income and, while the stock performed well, the couple lived lavishly. John bought his wife extravagant jewelry—spectacular diamond and ruby necklaces priced at more than \$50,000 each. They bought two upscale homes that have since appreciated. But when John's stock plunged in value a few years ago, the marriage began to plummet as well. Budgeting became a necessity, and, though not in dire financial straits, John had to begin paying back his loans.

John resides in a community-property state, where divorce courts say that all assets acquired during a marriage belong equally to both spouses, unless either one can prove that the property is separate. But when one spouse owns assets that increase in value after the marriage—say, a house that appreciates—this becomes complicated. Without detailed records, a clear distribution of property becomes difficult. “It's not a simple question,” John laments, adding that his own record keeping left much to be desired.

Because of this, the court would divide all John's assets if the marriage collapsed. “I realized that if we got a divorce, we each would have less in income and assets,” he explains. Dissolving the marriage would mean “we'd spend a huge amount on legal counsel and would have to sell our assets to pay the debt on the stock.” Given that he and his wife were already living separate lives, and “it was a long time since we'd had a real marriage, we agreed to

treat [our marriage] like a business deal.”

John and his wife cemented the deal with a postnuptial agreement, the rare cousin to the prenuptial agreement. Like the prenup, the postnuptial is a contract that spells out a couple's financial responsibilities and entitlements, and overrides state law regarding spousal rights to inheritance. As a binding contract, a postnuptial is conceptually the same as a prenup, but is signed after the marriage, says **Arlene Dubin**, partner with Sonnenschein Nath & Rosenthal in New York, and author of the book *Prenups for Lovers*. “They can cover the waterfront, or they can cover one issue.”

## PROFLIGATE PROTECTION

Dubin says postnuptials can be useful in several situations. As in John's case, a postnup can be a first step in saving a marriage stretched to its limit by financial strain. Other couples simply want to set ground rules for the financial matters that have accumulated during marriage. Postnups are appropriate if one spouse harbors some financial insecurity that could lead to a festering problem in the marriage. “I had a couple where the man was a loose spender, and there was a lien on the apartment,” Dubin says. “The wife couldn't handle it, and we needed to separate her affairs. We put the apartment in her name so she felt some sense of security. As far as I know, they are still married.”

In another of Dubin's cases, the husband received an inheritance from his uncle and wanted his wife to quit her job and travel with him. With no legal claim to any part of the inheritance, she was reluctant to give up her income, but a postnuptial agreement provided her enough financial security to leave her job.

Stevie Casteel, a trusts and estates attorney with King & Spalding in Atlanta, says she drafted a postnuptial for a couple who had businesses and liabilities in each of their names. They sought the contract to clarify ownership and responsibilities for the businesses and their separate and joint property. “Divorce was not contemplated at all,” Casteel says. “They just wanted to govern their economic situation.” Casteel says that if a postnuptial is not pursuant to a divorce, she most often drafts one when couples have built

**TOP VIEW** | Postnuptial agreements are relatively rare legal contracts that specify a couple's financial responsibilities and entitlements and override state law regarding spousal rights to inheritance. While conventional wisdom holds that most postnuptials are harbingers of divorce, many of these agreements are signed to provide a level of economic security and to resolve financial issues before they become problematic.



**"THE MAN WAS** a loose spender, and there was a lien on the apartment. The wife couldn't handle it, and we needed to separate her affairs."

separate businesses, or one or the other is involved in an existing family business. "Postnups provide a measure of economic security and resolve economic issues," she adds.

In some cases, postnups simply fill a legal void for a couple that, for whatever reason, failed to execute a prenup. Couples who have no joint assets at the time of marriage often fail to foresee the future when they will have financial means. After several years of marriage and estate building, they begin to ponder their financial situation should the marriage dissolve.

In other instances, a prenup is postponed or not drafted at all because couples are in the throes of wedding planning and cannot set aside the time, or are afraid of quashing romance. As John now bemoans, "I got married because I was in love, not because I thought I would get a divorce." He brought up the subject of a prenup prior to his wedding, but his wife refused to sign it. In hindsight, he wishes he had insisted. "We should have had a prenup because she had no money and I had it all. It would have made this activity over the past two-and-a-half years a lot easier."

Even if there is a prenup in place, couples realize years later that the contract has become outdated, or unforeseen circumstances arise, requiring a postnup. One common scenario occurs when one spouse moves off the career track to raise the couple's children. Their joint



objective is the same, but one party holds the financial clout. A postnup can provide financial security to the spouse who has given up income.

#### DUE CONSIDERATION

Michael LoVallo, a partner at Sachnoff & Weaver in Chicago, prefers that couples who are anticipating drafting a contract do it in the form of a prenup, if at all possible, rather than waiting until after marriage. Not only is the time before marriage an opportune period to establish a financial understanding, but the marriage itself automatically grants privileges to a spouse, complicating the negotiations. Once the marriage takes place, "the spouse already has rights, and then you're asking someone to give something up in many cases," like the rights



to automatic state-granted spousal benefits, LoVallo points out. "It's harder from a bargaining point of view."

The mechanics of drafting a postnuptial are much the same as with prenups. Both are binding contracts. Each party should have separate legal counsel to avoid accusations of coercion in the future, and full financial disclosure is required. All contracts, LoVallo says, must feature some give and take to be legal. In order to hold up in court, the postnuptial needs to demonstrate what the spouse is obtaining in exchange for relinquishing benefits. Typically, the consideration given to the spouse is an amount in a trust, or a

will. In most states, spouses have rights to a certain share of an estate, unless the spouse waives those rights through a prenup or postnup. For example, New York and Florida have a provision called "elective share," which entitles the spouse to one-third of an estate. If one spouse is already wealthy and gives up the right to elective share, that other spouse can transfer that portion of the estate to the children. This tactic makes postnuptials popular with couples of means who have children from previous marriages and want to pass more assets to them.

Couples should also coordinate estate plans and wills with postnuptial agreements; the postnuptial usually requires the execution of consistent estate planning documents. "You've obligated yourself [in the postnuptial] to provide financially at death, or even before death, say for children's college educations or to contribute to current trusts," Casteel says. "I've never seen a postnuptial that doesn't address what happens at death." In the event the other documents are not coordinated with a postnup, then the postnup—as



"WE SHOULD have had a prenup because she had no money and I had it all. It would have made this activity over the past two-and-a-half years a lot easier."

a contractual agreement—takes precedence. "The spouse has a claim against the estate," Casteel adds.

#### COMPROMISE AND CONCILIATION

Attorneys advise patience when drafting postnups. Sifting through assets accumulated in a marriage and reaching a legal agreement takes time. Months can pass before the process comes to fruition, and there is a substantial amount of back and forth between attorneys and couples. "The agreement was not as clean and neat as I've described it," John says. "I had to try to meet her emotional needs to get her to sign it. We had to compromise."

The Uniform Premarital Agreement Act drafted by the National Conference of Commissioners on Uniform State Laws, a group of attorneys that designs model laws for state legislatures, supports prenups. Most states have adopted the act, but it does not apply to postnuptial agreements. Instead, postnuptial rules vary on a state-by-state basis. In some states, Dubin says, postnuptials are scrutinized more closely by the courts, under the notion that one spouse might

have financial leverage over the other following a marriage, while a prenuptial agreement assumes that both parties enter the marriage with separate lives and assets. Dubin admits, however, that she does not see postnups challenged in the courts very often. "When done properly, they will hold up," she maintains. She expects states will follow Colorado's example and model legislation to govern postnuptials after the Uniform Premarital Agreement Act.

As prenups have become more common and accepted since the mid-1980s, married couples who did not know that they existed are becoming interested in exe-

cuting a postnuptial contract. It is difficult to determine the number of postnuptial contracts; couples are not required to record them, and many spouses build in confidentiality agreements that essentially gag all parties involved. Many couples simply do not want to discuss them. "It's kind of a tricky thing," Dubin explains. "If the husband brings it up, a lot of people automatically think of divorce. I try to disabuse people of that. A postnup is not a separation agreement. It is written with the intent that a couple will stay married."

For his part, John was hopeful that the postnup would pave the way for a better marriage. It has kept the couple together legally, but they continue to live apart. "I've been trying for a long time to rebuild our marriage," he says. "We've at least set the groundwork for some hope of reconciliation." ■

*Judy Martel is a certified financial planner and a vice president at Asset Management Advisors, a multifamily office. She has written for Worth, Robb Report, Town & Country and other publications. judy.martel@amaglobal.com*