

Prenuptial Agreements Continue to Grow in Popularity

WEALTH PLANNING

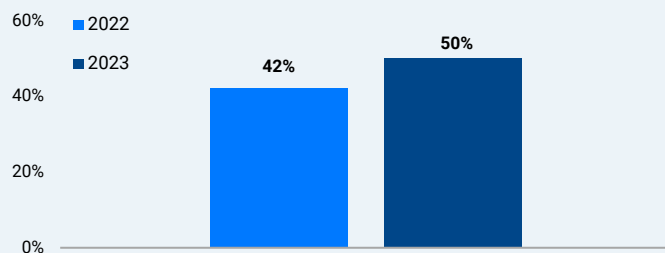
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Once seen as a legal contract required by only wealthy individuals, the perception of a prenuptial agreement has shifted over time. Their popularity, especially among Gen Z and Millennials, has steadily grown in recent years (see Chart 1 and Chart 2)¹. While there is much discussion on the reason behind the trend, it's largely attributed to shifting demographics that influence wealth such as people getting married later in life, marriages with greater equality in income earnings, increased levels of debt, and a recognition of higher divorce rates.

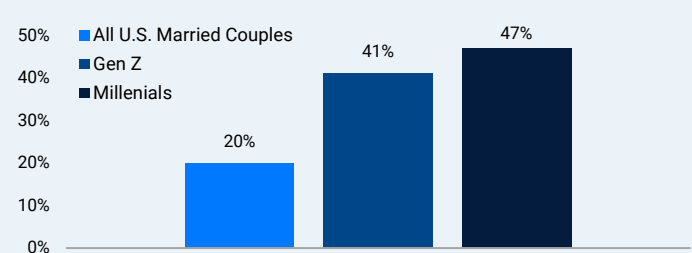
But what exactly is a prenuptial agreement, who benefits from it, and should everyone have one?

Chart 1 | U.S. Adults who Support Use of Prenuptial Agreements



Source: Axios-Harris Poll published September 23, 2023

Chart 2 | U.S. Adults with Prenuptial Agreements



Source: Axios-Harris Poll published September 23, 2023

What Is a Prenuptial Agreement?

A “prenuptial agreement” is defined as “an agreement between individuals who intend to marry. It affirms, modifies, or waives a marital right or obligation during marriage or at separation, dissolution, death of one of the spouses or the occurrence or nonoccurrence of a specific event.”² Prenuptial agreements are distinct from other types of marriage-related agreements, such as cohabitation agreements, marital agreements and marital settlement agreements. Each of these types of agreements comes with its own rules regarding what duties are owed by the parties to each other and how the process should unfold.

Prenuptial agreements are unique because they are agreements made in contemplation of marriage. Generally, negotiating a prenuptial agreement provides an opportunity to iron out the details of marriage, particularly regarding each spouse’s finances. One might think, “That’s

some way to begin a marriage!” However, in most instances, quite the opposite is true. While media and movie portrayals of prenups usually overdramatize them to be one-sided and antagonistic, most prenuptial agreements are completed amicably, providing for each parties’ rights to spousal support (alimony) and the division of property at divorce. When couples are transparent and communicate expectations before marriage, they are typically better equipped to handle inevitable issues as they arise during their marriage.

A Prenuptial Agreement Supersedes State Law

When couples marry without a prenuptial agreement and later divorce, state law where they reside applies. Upon divorce, state law determines the following: how property is characterized and divided, who should provide support, amounts of both alimony and child support, and the

¹ Axios-Harris poll published September 23, 2023. <https://theharrispoll.com/briefs/america-this-week-wave-187/> ; <https://www.axios.com/2023/09/24/prenup-rates-us-marriage>

² The Uniform Premarital Agreement Act of 1983 (UPAA) has been adapted in some form by 27 states while 2 states have adopted the more recent Uniform Premarital and Marital Agreements Act of 2012.

duration of that support. State law may be rigid about how assets are split and support is provided, which can create major disputes and disagreements even when discussions start out amicably. For example, California, a community property state, provides that all assets acquired during marriage be split equally between spouses¹. While New York, a common law state, requires that all assets be equitably distributed².

Suitability Beyond Generational Wealth

Although prenuptial agreements may not be necessary for most marriages, they can be advantageous in many circumstances. The traditional scenario is when a marriage involves families of significant wealth, and there is a need to protect assets created by the parents that have been or will be passed down. However, when one spouse enters a marriage with an independent business or large investment portfolio for example, it can also be beneficial to protect that separate interest in a prenuptial agreement to avoid and/or limit a potentially costly divorce. Spouses who execute a prenuptial agreement have the ability to structure exactly what they want to happen in the future considering both the initial asset and the potential for continued growth and community (both spouses) contributions.

Fiscal + Emotional Advantages

Beyond superseding state law as earlier discussed, there are several legal advantages to establishing a prenup:

- Relative certainty regarding the fiscal outcome of a divorce
- Reduced divorce timeline by avoiding the need for a court settlement
- Keeping the details of a divorce private, with only the required divorce filing public record
- A reduction in the number of issues needed to be litigated and/or negotiated
- Reduced legal fees - money spent on a prenuptial agreement can be money saved at divorce

In addition to legal advantages, there are potential emotional advantages for spouses who have a prenuptial agreement. The discussion of a couple's finances prior to marriage can pre-empt some of the most common issues related to finances that may arise after the wedding. Particularly those around established businesses, management of earnings, and long-term financial goals. When a couple takes the time to negotiate a prenuptial agreement, the discussion can be invaluable and almost always sets the tone for open and honest communication

during their marriage. In addition, these discussions can uncover irreconcilable differences that may not come up in the normal course of a relationship. Although uncomfortable and unpleasant, it is usually less costly for a couple to call off a wedding than it is to dissolve a marriage.

Ensuring Enforceability

When constructed properly by an estate attorney, prenups typically remain enforceable. However, it is possible for either spouse to challenge the terms of their prenuptial agreement at the time of divorce. A challenge does not mean that the agreement will be found to be unenforceable, but can cause headaches in terms of legal fees and the tone of the divorce. The primary way each spouse can protect themselves, and ensure their prenup is as enforceable as possible, is to retain separate counsel who are proficient in family law and specialize in drafting prenuptial agreements. Without an attorney's guidance and expertise, it would be easy for a spouse to enter into what he or she thinks is an enforceable prenuptial agreement, only to discover at the time of separation that the agreement was not drafted properly and is not enforceable.

Acceptable terms and restrictions for prenuptial agreements may vary widely from state to state, which means that prenuptial agreements can cover a wide array of topics. However, it's important to note that prenuptial agreements are usually unenforceable to the extent that they restrict any rights that affect children - adversely affect a child's right to support, or otherwise modifying a custodial responsibility, including custody or parenting time.

Is a Prenuptial Agreement Right for You?

Whether or not to draft a prenuptial agreement is a decision that each engaged couple will have to make together. On one hand, it may feel uncomfortable because it feels like a couple is planning for their marriage to fail. On the other hand, it can be a wise step to ensure a couple's financial interests are protected -- both individually and as partners -- especially if they have a business, significant assets, or expect a significant inheritance. While Millennials and Gen Z couples have increasingly decided that prenuptial agreements have merit, the value for each relationship is as unique as that couple. If you or a loved one are contemplating marriage, it may be wise to reach out to your financial advisor and/or estate attorney to discuss whether a prenup makes sense for you.

¹ California Family Code Section 2550

² New York Domestic Relations Law Section 236(B)(5)(d)

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