

**What is a premarital agreement (PMA)?**

A premarital agreement (“PMA”), sometimes called prenuptial agreement or “prenup,” is a contract that people sign before getting married. Its purpose is to define rights and obligations, including settling issues such as property or debt division, and/or spousal support (i.e., “alimony”) if the marriage ends because of separation or divorce. It allows the parties to protect assets that they’ve acquired before or during marriage. Without such agreement, state law will determine these issues. A “PMA” simply allows the couple to follow their own rules in as much or little detail as they wish.

**Is a premarital agreement a good idea?**

Approximately 50% of all first marriages end in divorce. That percentage goes up for second and third marriages. Entering into a PMA is smart financial planning. Marriage is not just an emotional and physical union, it's also a financial union. A PMA, and the discussions that go with it, can help the parties clarify their expectations. In the event of divorce, it can eliminate some of the disputes and emotion that are often involved, thereby making the divorce process easier.

A fairly negotiated PMA can also provide some certainty about the financial impact of a divorce. For instance, how property will be distributed, or whether a party will have any limits on an obligation to pay, or right to receive spousal support.

Couples without a PMA will have their assets distributed according to state law, if they disagree about who should get what at time of separation or divorce. Assets could end up in the hands of your spouse's children from a previous marriage, instead of your own kids. Assets could go to an unsupportive mate who contributed little or nothing, while you worked hard at a business or profession that eventually became an enormous success.

**Who uses premarital agreements?**

Premarital agreements are often used by individuals who are marrying for the second time and have assets that they want to preserve for children of their first marriage. Another growing category (perhaps because many people are marrying for the first time later in life) is individuals who have been in the work force for sufficient time to buildup assets, or have interests in valuable family assets, which they do not want to be affected in the event of divorce. In addition, some individuals may want a PMA to control not only the distribution of assets, but also the amount and duration of spousal support.

Examples of people's circumstances, in which a PMA is helpful, include:

- High net worth individuals: those with considerable cash, stocks, bonds, mutual funds, profit-sharing plans, 401(k)s, IRAs, defined benefit or contribution retirement plans, or other investments.
- Real property owners: those with substantial equity, including rental income.
- Professionals and business owners: those with professional degrees or licenses (in a divorce, these may be considered assets that produce income), sole proprietors, member of partnership(s), or principal shareholder in a private corporation.
- Persons with children from a former marriage: those marrying for a second or third time, who want to guarantee that all or a specific portion of their assets are passed on to their children of a former marriage.

**How much does a premarital agreement cost?**

Depending on your location, you may expect to pay \$2,000 - \$5,000 for an attorney-prepared PMA<sup>1</sup>. The cost of a PMA is based upon the complexity of the couples' finances and desired terms, as well as the amount of negotiation necessary to reach an agreement.

Attorneys who draft and/or review premarital agreements may request an initial retainer and charge an hourly rate for their time. Others charge a flat fee. You should discuss these billing options when you consult with an attorney.

**Who pays for the premarital agreement?**

It is preferable for each party to pay their own attorney fees. However, it is not uncommon for one party to help pay, indirectly, the fees of the other party. Even if one party helps pay the other's fees, each party's lawyer is legally and ethically obligated to represent the interests of only their client, regardless of who paid the fees. To ensure that the PMA is enforceable, each spouse must be represented by his or her own independent counsel.

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<sup>1</sup> Beware of non-attorney drafted PMAs for obvious reasons, including lack of litigation experience relative to PMA enforcement. Litigation experience enhances drafting skills, as well as the ability to advise a client on potential pitfalls.

**What is a good way to approach the subject of a premarital agreement?**

Do it as early as possible. The mention of a “prenup” should hopefully not come as a surprise if you and your partner have been completely open with each other as the relationship evolved and eventually became serious. Let your partner know that you believe this agreement is important so both parties have a sober expectation of what will happen, financially speaking, in the event of divorce. It is also important to convey that having a discussion about a PMA, or desiring one, does not mean you have doubts about your partner or the marriage.

**Could a premarital agreement mean the parties don't trust each other?**

No. A premarital agreement is grounded in realism rather than a lack of trust. For existing parents who are marrying for a second time, s/he may simply want to protect her/his children. Younger couples may feel that a PMA will save time, expense, and heartache if the marriage does not work out, thus allowing them to move on with their lives faster, without getting bogged down for years due to the emotional damage and lingering effects caused by a nasty divorce.

**What can be agreed to in a premarital agreement?**

Premarital agreements can address a variety of rights. Under a PMA, the engaged couple defines their individual rights to certain property acquired before and during marriage, including the distribution of that property upon separation or divorce. Parties to a PMA may establish terms regarding:

- Rights and obligations of each party in any property of one or both, whenever acquired and wherever located;
- Right to buy, sell, transfer, lease, assign, encumber, or otherwise manage and control real and personal property;
- Rights to equity in a life insurance policy, including control of the death benefit designation;
- Disposition of property upon the occurrence or nonoccurrence of a specific event;
- Day-to-day practical matters, such as establishing a joint account for living expenses;
- Under certain circumstances, a limitation on, or obligation to pay, spousal support;
- Making of a will, trust, or other testamentary arrangement;

- Choice of law governing the PMA; and
- Any other issue not in violation of public policy or statute.

**Can I protect my children, or my future children, in a premarital agreement?**

Regarding child custody and visitation, parents cannot establish their respective custodial time via a PMA in the event of separation or divorce. Likewise, when it comes to child support, parties cannot waive rights to pay or receive such payments ahead of time via a PMA. In other words, children, or future children, cannot have their rights altered by a PMA.

A court will order custody, visitation, and/or child support, based on the parties' circumstances at the time of any court hearing, assuming parents can't reach an agreement on their own as part of the separation/divorce process. Parents can't use a PMA to restrict or alter a court's determination on custody, visitation, or child support.

Regarding bequests of property, there are methods, other than a PMA, to protect children or future children, such as through inter vivos trusts. However, because estate planning issues are better addressed via estate planning documents, rather than premarital agreements, they are not addressed here. An estate planning lawyer is the proper person to speak with for these issues.

**How does a judge decide whether to uphold the premarital agreement?**

A judge may conduct a separate trial (called bifurcation) concerning a PMA and its terms. If the PMA was properly drafted and the parties satisfied all the prerequisite steps before execution (discussed further below), courts should uphold the terms and enforce its provisions.

**Does a premarital agreement affect a state's divorce law?**

Yes. When you sign a PMA, you are altering your rights, including sometimes giving up rights that you would normally have under your state's divorce law.

**Is a premarital agreement always enforceable?**

No. The validity and enforceability of a PMA will be governed by state law. Laws vary from state to state. In California, a PMA will be considered enforceable regarding the parties' rights and obligations only if:

- in writing and signed by both parties sufficiently before marriage;
- it is not unconscionable (meaning it's not so one-sided and oppressive that no person in

- his/her right mind would sign it, unless under duress, coercion, or induced by fraud);
- each party accurately disclosed in writing all material information, and such disclosures were made sufficiently in advance of the date of marriage;
  - enforcement would not essentially eliminate all of one party's marital rights;
  - it was signed no less than one week in advance of the wedding to avoid the appearance of coercion. In California, per Family Code section 1615, a PMA must be signed no sooner than 7 days after the time a party is presented with it, and simultaneously advised to seek independent counsel to review;
  - it does not leave one of the parties destitute.

Finally, parties should avoid frivolous provisions. For example, requiring your spouse to maintain a certain personal health regime, dress a particular way, perform specified sexual duties, etc. These types of demands can lead to revocation of the entire agreement.

**How long does it take to draft and sign a premarital agreement?**

The time needed depends on the complexity of the couple's finances, as well as the amount of negotiation necessary for agreement. Parties should allow at least 60 days to negotiate and prepare the agreement for signature. It is also advisable to have the agreement ready for signature at least 30 days before the wedding. Hence, one should start the process at least three months before the date of marriage.

**Should my premarital agreement address "commingling" of separate and joint property?**

Yes. Most couples inadvertently commingle assets, thereby muddying the water between his, hers, and theirs. For example, if during marriage a person sells "separate property" and deposits the proceeds into a joint account, and then later uses funds from that account to purchase another asset, such as a home, dissecting ownership interests at time of divorce can be difficult and costly. A carefully drafted PMA can avoid this problem by specifying what happens in the event funds are commingled.

**How does a PMA affect "separate" and "community" assets?**

Separate property owned before marriage does not automatically become community property upon marriage. It will remain separate property so long as it is maintained separately during the marriage (meaning, it's not commingled with community assets or funds, or not otherwise transmuted

from separate to community property). For instance, if you already own a home or investment portfolio when you get married, and maintain those assets as separate property during marriage (not transmuted), those assets would be still be considered your separate property upon divorce. Separate property is not subject to division at divorce, despite having no PMA. Each party keeps his or her separate property.

In contrast, a PMA is necessary to prevent the creation of community property during marriage in certain circumstances. For instance, if no PMA, contributions during marriage to “separate” assets, which come from “community” funds or sources, could create a community interest in those assets.

A common example of creating a community interest in separate property is from community contributions during marriage to a retirement plan that existed before marriage, such as a 401(k) or other defined contribution plan. Additionally, any increase in the value of a defined benefit plan that existed before marriage, as a result of a spouse’s labor exerted during marriage, is considered community property. Consequently, absent a PMA, a spouse will gain a community interest in the other’s house or retirement plan, even if such assets existed before marriage.

Apart from the community gaining an interest in one party’s separate property, any property acquired during marriage with community funds (e.g., earnings from work – a community source) would be considered “community property.” All community property is subject to equal division upon divorce.

A PMA allows parties to alter the characterization (legal definition) of their property. Thus, upon any separation or divorce, they can carry out their mutual intent regarding allocation and distribution of all their respective property interests, including preservation of specific assets as “separate.”

**What else should I know?**

PMA terms can be tailored to couple’s desires. There is no one-size-fits-all. You should talk to an experienced family law lawyer to learn about rights and obligations you may have at separation or divorce. You can then discuss whether you want to alter such rights and obligations via a PMA.

If you have any questions, please feel free to contact us. We look forward to helping you.