

What comes first: Love, marriage or prenup?

FEED MARKETING ADVISORS

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WHEN thinking about marriage, is the question that comes to mind “Will you marry me?” or “How about a prenup?”

A prenup — prenuptial, premarital or antenuptial — agreement happens before marriage. At its most basic, it resolves questions of support and the division of property when a marriage ends, whether by dissolution of the marriage or by a spouse’s death. For those owning a family agribusiness, a prenup may be critical to its future and succession planning.

In years past, most premarital agreements were prompted by an older couple, often entering a subsequent marriage, seeking to protect their wealth for children from a prior marriage. No longer is that the case.

Millennials and future generations consider the idea of a prenup as a matter of course. As couples marry later in life, they have already established a level of financial success and security they don’t want to lose if they wind up being among the roughly half of marriages that end in divorce. Before relationships get too serious, couples are discussing willingness to enter into a prenup.

Cohabitation is no substitute for a prenup. A number of states, among them some top 10 agricultural states such as Iowa, Kansas and Texas, recognize common law marriages. You might be married and not know it! Still more states allow palimony claims that give live-ins some of the same rights as if married. A prenup or cohabitation agreement makes good sense in these cases as well.

Romancing the prenup. Bringing up the possibility of a prenup is not particularly romantic, but does love truly conquer all? Love means very little in the throes of divorce litigation. Attorneys look for whatever might prompt a con-

cessionary tone.

That often is the opposing spouse’s or family’s fear of losing or interrupting a family business. Troubling, too, is laying bare to competitors and the public the business finances and innermost secrets as the divorce battle rages on.

Those not directly involved in the litigation — parents, siblings and co-owners — are summoned for depositions to nudge the couple to: “Resolve that divorce, ... whatever it takes!”

Not every battle is resolved through a prenup, but many can be.

Women in agriculture and agribusiness. The importance of prenups is of growing importance with the increasing involvement of women in agriculture and agribusiness.

According to the U.S. Department of Agriculture, some one-third of America’s farm operators now are women. Many more women have ownership in and are taking charge of family-owned agribusinesses. Women also are becoming leaders in associated professions as researchers, economists, veterinarians and others.

With this change has come new challenges in prenups. No longer is it just the son or brother seeking to protect the family enterprise but the daughter or sis-

ter as well.

Setting aside years of gender inequality and traditions isn’t always easy but necessary. This is as important in prenup discussions as finances.

Not every spouse, regardless of gender, in a business leadership or ownership role is able to maintain a successful marriage. Likewise, not every spouse can maintain the level of self-esteem needed to be in a secondary professional and financial role to a financially secure spouse engaged in a family business.

Finding the proper marital balance — much as Queen Elizabeth and Prince Philip found — is key. They gave strength to each other in their respective and accepted roles, with a good dose of tolerance for each other. Can the engaged couple do the same? Facing the realities of a prenup and what’s at stake for each can help lead to that balance.

Making a valid prenup. All states recognize prenups. A majority of states have enacted a uniform law specifically allowing for premarital agreements. Those states that have not done so still recognize them, nonetheless.

A prenup may consider a wide range of issues. They routinely relate to support or spousal maintenance and property. It is often necessary to include provisions



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granting property or support to a spouse where resources vary significantly or the spouse would not otherwise be self-supporting. Some states limit waiver of support or spousal maintenance.

Most any other issue may be addressed in a prenup, so long as it does not violate public policy or a criminal law.

Now that most states no longer consider marital misconduct in awarding support or dividing marital property, another increasingly common provision limits awards in the event of infidelity or domestic abuse. Prenups sometimes expire after a number of years of marriage, although typically there is no requirement that they do so.

Special rules apply for qualified retirement plans such as a 401(k), even if addressed in the prenup. A spouse must be named as the beneficiary unless knowingly waived *after* being married. Prenups may address this, but there has to be a follow-up to implement the provision if these rights are waived. The same rules don't apply to plans such as individual retirement accounts. Of course, estate plans generally need to be updated to

implement the terms of the prenup.

A prenup must be entered into knowingly. This means the parties must know the finances and circumstances of the other as well as the nature of the rights being waived or affected. The agreement must be voluntary and fair under the circumstances. Each party should have their own attorney or the ability to consult an attorney. This is a must. The prenup is to be in writing.

It is important to have an attorney familiar with prenups involved in the discussion, negotiations, drafting and execution of the prenup. A sound prenup isn't a canned form but the result of thoughtful discussion and consideration. Don't wait until the wedding bells start to ring, because that's often a reason for courts to ditch a prenup.

Nonmarital or separate property. An important protection in the event of divorce — but not death — is that a person may retain any nonmarital or separate property as their own. States provide that a court must award a person property that was acquired before marriage or obtained by gift or inheritance, among other

property. This means that some family business interests might well be protected in the event of divorce, but still, death might need to be addressed.

A few states allow a divorced spouse to participate in the appreciation of even nonmarital or separate property during the marriage, which, again, is a good reason for a prenup. Also, property may be considered for other purposes unless the prenup states otherwise.

Property purchased or obtained as part of one's employment during the marriage would not be nonmarital or separate property. Buying stock or ownership interests from a parent, sibling or others, even the business itself, would be up to a judge to award absent a prenup. This is yet another important benefit of a prenup. The prenup can treat all interests of a family business, whenever and however acquired, as nonmarital or separate.

Pop the champagne. When the wedding day comes, pop the champagne. A prenup helps make the wedding a cause for family celebration and not a time for worry about the family business. ■