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Estate Plans and Prenups

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Prenuptial agreements aren't just about protecting assets in case of a divorce.

Increasingly, such contracts are being used as an estate-planning tool by men and women, says the American Academy of Matrimonial Lawyers, a trade group based in Chicago. Prenups are particularly popular because of demographic shifts toward marrying later in life after people have already accumulated significant assets they want to keep separate.

"More people are remarrying later and baby boomers are starting to take estate planning seriously," says Katherine Stoner, a partner at law firm Stoner Welsh & Schmidt in Pacific Grove, Calif., who has written about prenuptial agreements. "There's a greater acceptance" of prenups.

Most people use prenups to hold on to property and assets accumulated before a marriage. About 80% of prenups cover the issue of "protection of separate property," according to a membership poll by the matrimonial lawyers' group released last month. Other common issues covered in prenups are "division of property" and "inheritance rights."

Growing Popularity

Lawyers say prenups are growing more popular because more people are getting married later in life after already accumulating wealth, and more people are getting married for a second or subsequent time and want to preserve property and assets for children from prior marriages.

A prenup can protect those assets from becoming mixed in

with the assets and property accumulated during the marriage that would be divvied up as part of someone's estate after death.

Lawyers caution that it is important to coordinate a prenup with the couple's wills and trusts. Prenups and trusts are contracts and can override a will or help build a case to contest a will. Tracy Craig, an estate lawyer at Mirick O'Connell in Worcester, Mass., says people should redo their wills when remarrying and make sure their estate plans match what was promised in the prenup.

"A prenup is a bare minimum of what you agree to do," she says. "You can always go back and do more."

Without a prenup or trust in place, a surviving spouse has the right to claim one-third to one-half of a deceased spouse's estate outright, depending on the state, lawyers say. A typical prenup waives the claim to that amount of the spouse's estate in return for other considerations, such as being named the beneficiary of a life-insurance policy or being designated the recipient of income from a trust.

Some estate-planning lawyers are recommending domestic or foreign asset-protection trusts as an alternative to prenups. Unlike prenups, such trusts don't have to be mutually negotiated. The trusts are a way of ensuring that property, such as a small business, remains separate after a marriage begins by transferring it irrevocably to a trust managed by a trustee.

For example, say one spouse owns a business with his adult children that makes up 75% of his net worth, and he wants to pass that business on to the children when he dies and not unintentionally turn it over to a sur-

living spouse and her family. A prenup or trust can keep that property separate so that the kids get the business while the surviving spouse gets the remainder of the estate.

A Flash Point

Primary or vacation homes often become a flash point between surviving spouses and stepchildren. A qualified personal-residence trust can be set up as part of a prenup to ensure the surviving spouse can stay in the home for a set period or for life while setting the home aside to be inherited by the children when the surviving spouse dies, lawyers say.

A trust can also hold retirement-plan assets for the benefit of children, but a spouse has to waive rights to be a beneficiary in a 401(k) plan.

Getting the conversation going about who gets what money, property and assets is the biggest hurdle, says Emily Bouchard, a managing partner at the Wealth Legacy Group in San Rafael, Calif., who coaches people on blending stepfamilies.

One couple came to her at an impasse just eight weeks before their wedding. The man had been married before. The bride-to-be had an inheritance, and the groom had a track record of making poor financial decisions, Ms. Bouchard says. He wasn't willing to waive spousal support in any prenup agreement, and she was unwilling to let it go.

They came up with their own solution. The bride gave a gift of stock to her husband, agreeing to give up any rights or income from that stock.

"It wasn't something a financial planner would have advised, but emotionally it worked for her," Ms. Bouchard says.