

Postnuptial Agreements

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There are three different types of marital agreements, each requiring a different standard of review by a judge. The three are: prenuptial agreements, postnuptial agreements and separation (divorce) agreements. This blog post will focus on postnuptial agreements.

What is a postnuptial agreement?

A postnuptial agreement is a contract between two spouses. This agreement is different than a pre-nuptial agreement in that it is signed **during** the marriage. A postnuptial agreement is entered into assuming that there will be an ongoing, viable marriage.

There are two basic rules or principals that should be followed to safeguard your postnuptial agreement: (1) full and fair disclosure; and (2) separate and independent counsel.

What should you consider when drafting a postnuptial?

In general, you will want to consider and discuss the following with your spouse:

- Discuss all the assets and debts of your relationship as well as future income opportunities.
- Be open and honest about your assumptions and expectations of how property would be handled in the event of death or divorce.
- Draw up and sign the agreement with the help of two lawyers. It is critical that you are each represented independently to maintain the legality of the contract.
- Revisit the contract periodically, especially if your lifestyle or financial status changes drastically. If you move to a different state, check to make sure the laws or legal precedents don't affect the status of your contract.

What should be included in a postnuptial?

*This is not an exhaustive list and you should obtain separate independent counsel before drafting or signing any agreement or contract.

- List all assets, liabilities, income, and expectations of gifts and inheritances.
- Describe how post-marital debts will be paid.
- Decide who, or if both of you, will own the marital residence and secondary homes in the event of death or divorce.
- Specify the status of gifts, inheritances, and trusts either spouse receives or benefits from, whether before or after marriage.
- Clarify what will happen to each type of property, whether jointly or individually owned, such as real estate, artwork and jewelry.
- Figure out alimony, maintenance, or spousal support, or provide for a waiver or property settlement instead of support (to the extent allowable by law).
- Detail death benefits, stating what you will provide for in your will.

What about postnuptial agreements in Massachusetts?

The Supreme Judicial Court (SJC) found that postnuptial agreements in Massachusetts are enforceable if certain conditions are met. These conditions, outlined by the court, are as follows:

- The opportunity for each party to obtain ***separate independent legal counsel*** of their own choosing;
- No ***fraud*** or ***coercion*** in obtaining the agreement;
- All assets fully disclosed by each party ***before*** the agreement was executed;
- Each party ***knowingly*** waives ***in writing*** the right to a judicial equitable division of marital property and assets in the event of divorce;
- The ***terms*** of agreement are ***fair and reasonable*** at the time of execution and at the time of divorce.