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# Legal Matters®

## Why might you need a postnup agreement?

**Y**ou've probably heard plenty about prenuptial agreements, where engaged couples put down in writing exactly what they're each entitled to should the marriage end in divorce.

What you're probably less familiar with are postnuptial agreements, which are similar contracts that a couple enters into after they get married. While such agreements may not be necessary in all situations, a recent New York case illustrates just how helpful a well-written postnup can be.

In that case, the husband filed for divorce in 2019, claiming "irretrievable breakdown in the marriage." The wife had filed for divorce on two prior occasions. The second time she filed for divorce, the couple ended up staying married, but they also negotiated and signed a postnuptial agreement that identified each piece of property, whether each item constituted separate property or marital property, the timing to distribute marital property in the event of a divorce, the amount of child support the husband would pay and an agreement that the husband would pay \$11,833 in alimony each month for five years. Both parties were represented by attorneys in the negotiation and drafting.

When the husband filed for divorce in 2019 and sought to incorporate the postnuptial agreement into the terms of the divorce, the wife argued that it should be invalidated. Specifically, she claimed

the agreement was obtained by fraud and coercion and that its terms were "unconscionable" (in other words, they were so one-sided that it should "shock the court's conscience"). She demanded that the court look into the terms surrounding its negotiation.



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But a family court judge denied the request and ordered that the agreement be enforced, noting that the wife failed to show any triable issue of fact. This saved the husband significant money in litigation expenses while likely locking in more favorable terms than he might have obtained without a postnup.

So in what types of situations might you consider a postnup? If you

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## Reduced income after business sale may not reduce alimony



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A recent New Jersey case illustrates that if you sell your business while paying alimony to your former spouse and then take a lower paying position, a court might not consider this “changed circumstances” justifying a reduction in payments.

In that case, a dentist earned nearly \$450,000 a year operating his own practice when he and his wife divorced in 2012. Two years later, he sold the practice for \$570,000, structured as a down payment plus \$96,000 annually for the next five years. He then went to family court requesting an alimony reduction, citing a “change in circumstances.” The judge denied his request, calling the switch “both voluntary and temporary.”

At that point, the dentist went to work as an employee at a dental clinic for half what he was making before. In 2016, after working there for two years, he opened a new practice of his own. He went back to court for an alimony reduction, and this time the judge cut his alimony payments by a third.

But the New Jersey Appellate Division reversed the decision, finding that the lower court didn’t properly investigate whether the husband was acting in good faith or whether he was deliberately creating “changed circumstances” to thwart the original alimony order. The case has now been kicked back to

the trial court to make such a determination.

Meanwhile, a Massachusetts case shows that even if you get a reduction, it may not take effect right away. In that case, a divorcing husband was assigned his 50-percent ownership in a business as a non-marital asset. Afterward, he sold the company and took a position with the new owners for a lower salary. He then asked the court to lower his alimony obligation because of his reduced income.

A judge granted the modification, but said it wouldn’t take effect for another five months, at which point the husband would no longer be getting installment payments from the sale that the judge said represented a significant temporary increase in his income over what he was making at the time of the divorce.

The husband argued on appeal that the delay violated a state alimony provision requiring courts to disregard income from assets divided during the divorce.

But the Massachusetts Appeals Court ruled that the provision didn’t apply because the judge considered the husband’s temporary extra income to decide if he had a “material change” warranting modification, not to calculate how much he would pay going forward.

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## Husband with ‘buyer’s remorse’ can’t re-do divorce settlement



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The recent experience of a Tennessee man shows how important it is to be represented by your own attorney in your divorce.

In that case, the wife filed for divorce after 28 years of marriage. The parties quickly executed a marital dissolution agreement and filed it with the court. The agreement called for the husband to pay \$500 each month in alimony over the next five years.

It also split up the home and other property. The agreement specifically stated

that the husband had the opportunity to consult with an attorney, but he didn’t do so.

When the case headed toward a hearing, the husband got a case of “buyer’s remorse” and asked for an extension before the court approved the agreement. He also asked for three months of marital counseling to save the marriage.

The court rejected his request, approved the agreement as executed and issued the final divorce degree.

The husband, now represented by an attorney, asked that the court reconsider, claiming he signed the agreement under “duress.” The court ruled against him, expressing skepticism that his wife could have overpowered his free will.

On appeal, the Tennessee Court of Appeals upheld the decision and determined that the wife was entitled to attorney fees she incurred defending the appeal.

## What happens when a spouse dies during divorce proceedings?

Political scion Robert F. Kennedy Jr. married his wife Mary in 1994 and filed for divorce in 2010. But the divorce dragged on, and two years later, with the divorce still pending and the parties headed for trial on custody issues, Mary died at age 52.

Mary's family wanted to take charge of funeral arrangements, but Kennedy won the rights to her remains because they were still married. That's only the beginning of the types of issues that can arise when one spouse dies during a pending divorce. With so many Americans having died from COVID-19 over the past two years, it's more important than ever to talk to a family law attorney about how one spouse's death during a divorce could affect the proceedings.

In the meantime, here are some things to consider.

First, death dissolves the marriage, which ends the divorce proceeding. At that point, a judge can no longer rule on issues not already decided, such as property rights, custody and support, but it can still enforce decisions it made before the spouse died.

Additionally, property owned in "joint tenancy" by both spouses carries a right to survivorship, meaning that the surviving spouse now owns the entire property. That means anyone else the non-surviving spouse might have wanted their interest to go to will have no right to it, unless the couple severed their

joint tenancy when they decided to get divorced. In that case, the non-surviving spouse's interest would likely pass to his or her heirs.

Another source of contention could arise regarding property in a will. If the spouses left their property to one another in their respective wills, and the non-surviving spouse did not make a new will before she died, her property would go to her surviving spouse regardless of what she would have wanted, even if they were in the process of splitting up. If she died "intestate" or without a will altogether, state inheritance laws would determine who gets her property. In most cases, the surviving spouse would inherit anywhere from half to all of her estate.

If the deceased spouse had debts, unless she contacted her creditors before she died to let them know a divorce was pending and that she and her spouse were separated, the spouse would most likely be responsible for any debt she accrued after separation.

This illustrates why it's important to talk to a family lawyer as soon as you think you may be getting divorced. He or she can help you take steps to carry out your wishes in the event of the unforeseen.



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## Why might you need a postnup agreement?

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have a shaky marriage like the one described above, it's worth considering. Additionally, you might create a postnup to protect an asset you inherited from your own family during your marriage. If you have commingled inheritance money with your other accounts, a judge could potentially treat it as a marital asset to be divided, but with a postnup in place you might keep it.

Another situation may be if you and your spouse own a business. Instead of fighting over the business during a divorce, you could agree in a postnup as to how to value it and how to divide up its worth.

You can also use a postnup to provide for the spouse who opted to stay at home with the kids, staying out of the job market and sacrificing potential earning power.



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It's important to know up front, however, that not all states recognize postnuptial agreements and some that do recognize them may refuse to enforce those they don't consider to be "fair and just." That's why it's critical to consult with a family law attorney where you live.



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## Rewriting a will after divorce



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If you're getting divorced and you have a will that leaves your assets to your spouse, when you pass away your ex-spouse could inherit your property, depending on the state where you live. If that's not what you want, now is the time to talk to your family lawyer about changing your will or writing a new one.

Some states have laws that automatically revoke any gifts to a former spouse who's listed in a will. In some of these states, even bequests to relatives of a former spouse, such as stepchildren, step grandchildren, step-nieces and step-nephews, will be revoked. If that's your wish, you don't really need to do anything (although you should still talk to a lawyer to make sure you live in such a state). If that's not your wish, however, then you might need to take affirmative steps to insure your ex-spouse or his/her family members are still provided for.

If your spouse is listed as your executor, meaning he or she is in charge of distributing your estate according to your wishes, you may want to change that as well, unless it's your wish that your ex-spouse

handle your affairs. Again, some states have laws that automatically remove an ex-spouse as executor, but you'll still want to decide who to replace them with.

While you're at it, you should also review with your attorney any assets that you're passing on outside a will, such as benefits from a life insurance policy, payments from a retirement account or assets in a bank account. If your spouse is listed as the beneficiary, they'll receive the benefits unless you make the necessary changes (or unless you live in a state that automatically revokes such designations upon divorce).

Finally, if you have custody of your children and pass away unexpectedly, your ex-spouse would likely gain custody. If you're not comfortable with that and have good reason for your concern, you could state your objection in your will and name someone else as your children's guardian. A court will still likely determine custody based on the children's best interests, but such a statement could serve as evidence in a custody proceeding.