

PRENUPTIAL **ESSENTIALS**

An Introduction to
Prenuptial Agreements

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Table Of Contents

Do I Need a Prenuptial Agreement?	2
How to Create a California Prenup	7
What to Discuss BEFORE Creating a Prenuptial Agreement	11
How to Talk to Your Partner about a Prenup	19
5 Estate Planning Moves Every Engaged Couple Should Consider	23
Conclusion	26

Do I Need a Prenuptial Agreement?

So you're getting married. Congratulations! Becoming engaged is often an exciting and busy time. There's a wedding to plan, perhaps a honeymoon to book, and a myriad of other ways in which two lives must be combined. Many engaged couples may also wonder: Do we need a prenuptial agreement?

In this blog post, we'll cover what a prenuptial agreement is, who needs one, how to create one, and what happens if you don't create one in California.

What's a Prenuptial Agreement?

A prenuptial agreement (aka "prenup") is an agreement entered into before marriage that outlines what will happen to the income and assets owned by each partner in the event of divorce, separation, or death.

By creating this legal document, you can indicate that the separate property you owned before your marriage will remain separate (meaning yours alone), instead of being subject to California community property laws.

You may wish to create or update an Estate Plan and a prenuptial agreement at the same time as you prepare to marry. That way, you can include your future spouse in your Estate Plan and/or ensure that any children you may have from a prior marriage will still receive an inheritance when you pass away.

Why Create a Prenuptial Agreement?

Here are 4 reasons you may want to create a prenuptial agreement:

#1 You want to clarify your financial rights and responsibilities. A prenup is a financial agreement that provides a clear and transparent outline of each partners' rights and responsibilities. Clarity provides peace of mind and a solid understanding of your future financial life.

#2 You want to avoid a long, messy fight over money if you ever divorce. Most couples don't get married planning to later divorce. But keep in mind the divorce rate; [40-50 percent of marriages end in divorce](#), and that number rises for subsequent marriages.

If your marriage is one that ends in divorce, a prenuptial agreement helpfully specifies how your property will be divided and whether either spouse will receive spousal support.

#3 You want to protect yourself from liability for your future spouse's debts. According to recent statistics, the average American under the age of 35 has around [\\$67,000 in debt](#). The average American student loan debt is around [\\$30,000](#). A prenuptial agreement can protect you from being held liable for your future spouse's debts in the case of divorce, separation, or death.

Prenuptial Essentials

#4 You want to make sure that your children from a prior relationship will inherit your separate property after your death. If you have children from a prior relationship, you may want to ensure that they'll inherit your separate property after you die. This is another reason to create or update an estate plan before getting married.

An estate plan and a prenuptial agreement are two useful tools for protecting your children's future inheritance. Without a prenup and estate plan, a large portion of your property will likely go to your surviving spouse after your death.

Who Needs a Prenuptial Agreement?

In the past, prenuptial agreements were sometimes thought of as being only for the very wealthy, or for marriages where one future spouse had a much higher net worth than the other. Signing a prenup was skeptically viewed as a bad omen that the marriage might not last.

In recent years, prenuptial agreements have begun shedding these negative stereotypes. They're now a smart choice for most couples. They're also more popular than ever, and not just amongst the super-wealthy. Sixty-two percent of lawyers say they've seen an increase in the total number of clients seeking prenups during the past three years, according to a [recent poll](#) by the American Academy of Matrimonial Lawyers.

Why are prenups becoming more common? Here are two possible reasons:

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#1 People are marrying later in life. Many modern couples marry later in life compared with previous generations. By the time they marry, partners are more likely to bring financial assets, student loans, or other debts to the marriage. This makes prenuptial agreements more beneficial and necessary than they used to be.

#2 People are more familiar with divorce. Many of today's Millennials are themselves children of divorced parents, making them more likely to be aware of the statistical risk of divorce and more open to the idea of a prenuptial agreement.

So who needs a prenup? Creating a prenup is generally a wise choice if you have financial assets, debts, or children from a prior relationship, or if you want to gain clarity regarding your financial future. In other words, it's a smart idea for almost anyone planning to get married!

What Happens without a Prenuptial Agreement in California?

California is a [community property state](#), meaning that a marriage or domestic partnership makes two people one legal "community." Therefore, property acquired by the couple during the marriage or partnership is "community property". Debt acquired by the couple during the marriage or partnership is "community debt".

In the event of a divorce, a judge will need to determine how these community assets should be divided. Your prenuptial agreement will be taken into consideration at that time, as long as it was properly created under California law.

Prenuptial Essentials

Usually, community property and debts are divided equally between the two partners. But real life financial situations are often messier than theoretical ones. Over time, many couples commingle community property and separate property. This can make it complicated for a judge to determine how the assets should be divided in the case of a divorce.

While a prenuptial agreement won't solve every problem or guarantee a given outcome with absolute certainty, it can outline important information about what property you owned and what your original intent was for those assets at the time of your marriage.

Prenuptial vs. Postnuptial Agreements

Let's say you don't get around to creating a prenuptial agreement before the wedding. Maybe you had a whirlwind romance, a brief engagement, and there wasn't enough time to meet with separate attorneys before you tied the knot. Are you completely out of luck now?

Fortunately, you can still create a postnuptial agreement. This document is similar in content and purpose to a prenuptial agreement. The main difference is that a postnuptial agreement is created after the wedding. A postnuptial agreement is still beneficial and better than nothing at all.

However, a prenuptial agreement is preferable to a postnuptial agreement. Here are two reasons why it's worth planning ahead and getting a preup before the wedding:

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1. With a prenuptial agreement, you and your future spouse can choose to part ways if you cannot reach a mutually agreed-upon financial arrangement.
2. Some divorce judges view postnuptial agreement skeptically. They may assume that since the marriage had already taken place, the spouses felt obligated to sign it. Therefore, a risk exists that a postnuptial agreement may not hold up in court as well as a prenuptial agreement.

We recommend starting the process of creating a prenuptial agreement well ahead of time, at least two months before the planned wedding date. If you absolutely cannot create a prenuptial agreement, consider substituting a postnuptial agreement instead.

How to Create a California Prenup

Once you decide to create a California prenuptial agreement, you may wonder what this process entails. Here's how to create a California prenuptial agreement, step by step.

Step 1: Each party should hire a separate attorney.

Both parties should find a separate, independent attorney to represent their interests when creating a prenuptial agreement. Each party brings different assets to the marriage and will want to protect different priorities. While one party can waive their right to independent counsel, this creates further requirements that must be met in order for the prenuptial agreement to be enforceable.

Preuptial Essentials

How can you find a knowledgeable attorney? Consider asking your estate planning attorney for assistance or a referral. Because a new marriage often means updating your estate plan to incorporate your new spouse or provide for children from a previous relationship, many estate planning attorneys also draft premarital agreements. If they don't personally do this work, they will likely be able to refer you to an attorney who does.

Step 2: Both parties disclose their finances, including all assets and debts.

Both parties will need to list all of the assets and debts they are bringing to the marriage. Be sure to be honest and thorough in making this list, as failure to disclose information could leave the prenup vulnerable to being overturned in court later on.

Many prenuptial agreement attorneys will ask you to fill out an intake form prior to your initial consultation. The intake form can also serve as a helpful tool, prompting you to list your assets one category at a time.

Step 3: Both parties privately discuss their financial future.

While not absolutely required, it's a good idea for both parties to have a private, candid discussion with each other regarding their future financial life together. Decide whether you will have joint or separate bank accounts, who will pay bills, how you will file taxes (separately or jointly), and how large purchases will be made. Getting on the same track financially can save a myriad of marital problems later down the line.

Step 4: The attorneys draft and review the prenuptial agreement.

Typically, one of the attorneys will draft the prenuptial agreement. Then the other attorney reviews it and makes suggested changes. The process continues until both parties are satisfied with the terms of the document.

A premarital agreement should:

- **Define separate vs community property.** Separate property stays in the name of the partner to whom it belongs. In the event of a divorce, the person who originally brought it into the marriage keeps it. Shared or community property should also be defined, along with a method for splitting it in the event of divorce.
- **Decide how existing debts will be paid.** Will the person who brought the debt into the marriage retain it after the marriage?
- **Define spousal support (alimony).** In the event of a divorce, will either spouse be required to pay alimony?
- **Define what happens to real estate.** In the event of a divorce, does a shared home need to be sold? How will the proceeds be divided?
- **Define who will pay taxes.** In the case of a divorce, who will pay any taxes owed?
- **Define how long the prenuptial lasts.** If the document contains a “sunset clause”, this clause specifies a date on which the agreement expires. Without this clause, the prenuptial agreement lasts indefinitely.

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The agreement should NOT include any of the following, which will not be upheld by a California court in the event of a divorce:


- Any terms about child custody or child support
- Any terms about spousal maintenance requirements if the signing spouse opted out of retaining independent legal counsel.
- Any terms that require a spouse to commit illegal acts
- Any terms that are unfair, unjust, exploitative, or deceptive
- Any terms requiring that one spouse change their appearance (such as losing weight)
- Any terms regarding the relationship

Step 5: Finalize and sign your prenuptial agreement.

[Under California law](#), the final form of the document must be in the hands of each party at least seven days prior to signing the document. You must sign your premarital agreement in the presence of a notary in order to be valid. Most law firms provide notary services.

Be sure that both parties retain a copy of the document. Place it in a safe place where it will not be lost, such as a safe or safety deposit box. Your attorney should also keep the document in your file, especially if you also have an estate planning file with them.

What to Discuss BEFORE Creating a Prenuptial Agreement



**15 TOPICS TO DISCUSS
BEFORE CREATING A
CALIFORNIA PRENUP**

| Avoiding Litigation | Assets & Debts | Business Ownership | Career Plans | Credit | Death & Disability | Duration of Prenup | Fault | Gifts from Family | Higher Education | Marital Property | Managing Assets & Income | Spousal Support & Alimony | Taxes |

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You may be wondering what sorts of issues you should discuss with your partner prior to creating a prenuptial agreement. Using a thorough prenup checklist can help both partners think through relevant financial issues carefully before meeting with separate attorneys to draft a prenup. Here are 15 topics to discuss with your partner before creating a prenup.

Avoiding Litigation

Do you want to add a clause to your prenup that states that in the event of a divorce, you choose to use an alternative dispute resolution process (like mediation) and avoid litigation?

Assets and Debts:

Each partner should make a complete list of all premarital assets and debts in their name.

Next, consider:

- How will you handle premarital assets and debts in the event of a divorce? Will they remain separate property and go back to the person who accumulated them before the marriage? Or will your separate property be commingled with your marital property?
- If one person's pre-marital property is used to pay off the other person's premarital debts (for example school loans), will the paying party need to be reimbursed, or is it a gift?
- If you use premarital property to buy a home you'll own together, will the paying party need to be reimbursed, or is it a gift?
- Are back taxes owed? If so, how will they be paid- jointly or individually? From which checkbook?

Business ownership

If you or your partner own a business as your separate property, consider:

Prenuptial Essentials

- Would your prenuptial agreement include an indemnification (agreement to repay an obligation) on the business debts and taxes—business, personal, back taxes, payroll taxes?
- Would your prenuptial agreement include an indemnification (agreement to repay an obligation) on the business debts and taxes—business, personal, back taxes, payroll taxes?
- Do you want to make provisions for forensic accountant or auditing books in the event of a separation or divorce?
- Do you want an agreement on how much income will be contributed to the household and how much might be kept separate?
- What if a premarital business starts a new business or subsidiary after the marriage?
- What if one of you works for the other person in a premarital business? There can be many “out of job market” issues, so negotiating your terms of employment with your spouse before joining the business can be an important step.

Credit

Have you seen each other’s credit reports? Consider:

- Does either of you have bad credit? Will you and your spouse jointly sign on new credit obligations?
- Discuss joint credit issues, as well as issues like pledging your home as collateral on business, or using a home equity line of credit to fund a business or tide it over in an economic downturn.

Death or Disability

If you don't meet with an estate planning attorney to create or update an estate plan prior to the wedding, it's imperative that you do so soon after your marriage, especially if you have children from a previous relationship. This will ensure that your assets and debts are handled the way you intend if you were to pass away.

Duration of the Premarital Agreement:

In your premarital agreement, you can designate how long the document remains in effect. A "sunset clause" allows you to set an expiration date on the agreement. Consider:

- Will the agreement ever expire? For example: After you have children together, or after 10, 20, 30, or 50 years of marriage?
- If you separate, does it matter who chooses to end the marriage or why?
- Will you wish to renegotiate the agreement at a specific time, like after 5 years of marriage or the birth of the first child?

Fault

California is a "no-fault" divorce state, meaning that the partner filing for the divorce does not have to prove that the other partner did something wrong (like an affair, substance abuse, etc.). But consider:

Would it make a difference to you in your property settlement or spousal support if you felt one person contributed more to the breakdown of the marriage than the other person?

Gifts from Families

If one partner's parents or relatives give a large monetary gift, loan, or home down payment, consider:

- Would this gift be separate property (of the spouse whose family gave the money), or community property (belonging to both partners)?
- If the gift is a loan, who would be responsible for repaying it, and how and when? How formal will you be with the documentation if it is a loan?

Higher Education

Sometimes one spouse will pursue higher education, leaving the other spouse to support them while they pursue a degree. Consider:

- Will one of you be attending college, graduate school, or professional school during the marriage? Will one of you have to support the other during this time? How will you deal with this sacrifice made by one person if the marriage doesn't work out?
- How will any student loans that are taken out be repaid?
- Would the expectations about income and earnings change if one person wants to go back to school after you've been married for several years?

Marital (aka Community) Property

Marital (or "community") property refers to assets and debts that you will accumulate together after your marriage. Consider:

Prenuptial Essentials

- How will you handle the income and assets you accumulate together? Will they be joint and split equally, or will you use another arrangement?

Managing Assets and Income

Before getting married, consider and discuss the following aspects of managing assets and income together as a couple.

- Who will make the financial decisions and handle the checkbook? Will you do it together, or will one person be the primary financial manager?
- How will you handle large purchases as a couple? Does your spouse need to ask you before making a large purchase like a vehicle or luxury item?
- How will the household bills get paid, and whose responsibility is it to pay them?
- Will you have joint bank accounts, separate bank accounts, or both?
- Have you discussed your long-term financial goals (like retirement) and how each of you will contribute?
- Will the decision-making authority be different for pre-marital assets or debt?
- If one of you owes spousal or child support from a previous relationship, how will those payments be made- from joint property/income, or separate? If you separate or divorce, would the other spouse want or expect reimbursement for these payments made during the marriage? What if the obligation is informal, like voluntarily paying for an adult child's college tuition?

Spousal Support and/or Alimony

In California, spousal support is gender-neutral, meaning that either partner can request it from the other. Consider:

- Will there be any limitations on the amount, terms, and duration of support?
- In California, [spousal support](#) is often calculated as 40% of the paying spouse's net monthly income, reduced by one-half of the receiving spouse's net monthly income. Do you want to make terms about spousal support or alimony that are different from this norm?
- Do you both expect to work, and to contribute to the household? What are those expectations? Even if you think you're in agreement, make sure you're both going into the marriage with the same expectations about earnings and work.
- Would there be a circumstance that would lead to one partner not working, such as a health problem or birth of a child? What about going back to school? Does that change how you feel about spousal support or alimony?

Taxes

As a married couple, your finances will be intertwined for tax purposes unless you agree otherwise in your premarital agreement. Consider:

- Will you be filing your taxes separately or jointly?
- Does either partner currently have tax debt? If so, who will be responsible for that debt? Keep in mind that a refund received after the marriage could be seized to pay this premarital debt.

Prenuptial Essentials

- Does either partner have questionable tax deductions or a lighthearted attitude toward filing taxes? Does that worry the other partner?

Working

What are your views on non-monetary contributions, like raising children or managing the household? Most states recognize these types of contributions during a marriage, but it's important that you communicate your ideas on these types of roles prior to marriage.

Consider:

- What kinds of jobs and income do you expect each partner to have?
- Does either of you anticipate a career change at any point in time?
- How would you feel if your spouse changed careers, such as to a high-risk job (like military or police) or a job with less pay (teacher or nonprofit sector)?
- When do you plan to retire – as early as possible, or do you plan to work as long as possible?
- Do you anticipate both partners continuing to work after having children, or would one of you stay home? For how long?
- How will you handle decisions about moving locations, like if one spouse is transferred for work to another state or wants to move closer to extended family after having children?

There are many issues to consider and discuss before creating a prenuptial agreement. An experienced attorney can help you craft a prenuptial agreement that reflects all of these nuanced situations.

How to Talk to Your Partner about a Prenup



Here's a common scenario: You want to create a prenuptial agreement before you marry your romantic partner, but you're not sure how to talk to your partner about a prenup. Maybe you're worried they'll get upset, or misinterpret your desire as a lack of faith in your future marriage's success.

While starting a conversation about prenuptial agreements can seem intimidating, the right approach can help your discussion go as smoothly as possible. Here are five tips on how to talk to your partner about a prenup.

Prenuptial Essentials

Tip #1: Start the discussion early.

In a previous chapter, we explained that in order for a California premarital agreement to be enforceable, your fiancé(e) will need to have at least seven days between first receiving the premarital agreement and signing it. But besides the legal reasons to start this conversation early, there are also the emotional and interpersonal considerations.

Wedding planning is stressful and emotional enough without adding in postponed financial negotiations and the additional expense of hiring separate attorneys. Suddenly springing the idea of a prenup on a future spouse after the wedding invitations have already gone out isn't really fair to them. We've seen weddings postponed and relationships ended when a prenuptial discussion was postponed for too long.

Ideally, start discussing the idea of a prenup while you're still dating. Long before you plan to propose, explain why creating a prenuptial agreement is important to you.

Tip #2: Be honest and empathetic.

Honesty is the best policy, both in personal relationships and finance - and a prenup involves both! Be tactful but honest about your underlying motivation for wanting a prenuptial agreement. Maybe you were "burned" before in a past relationship. Perhaps you crave a sense of financial security after growing up in a financially insecure household. These types of insights can help your partner understand where you're coming from.

Prenuptial Essentials

Also try to put yourself in your partner's shoes as you consider the best way to present the topic. If there is a significant gap between your financial positions, your partner may initially react with confusion or fear if you bring the topic up abruptly or in a heated moment.

Instead, try starting the conversation by first expressing affection and a desire to collaborate on a future together. Starting on a positive note can establish trust and prevent feelings of insecurity from arising when the concept of a prenup is raised.

Tip #3: Present the prenup as a win/win.

Express your desire to collaborate on a prenup that is advantageous to both parties. Often the partner who initially requests a prenup tends to be in a better financial position, but a prenup isn't only about protecting that partner's interests. A prenup offers clarity and outlines many aspects of the couple's financial future, from spousal support to dividing debts to avoiding future litigation.

A prenup can provide a sense of future financial security for the partner who owns fewer assets too. They may be comforted to know that if the relationship ends, they won't be left without any resources. A well-drafted prenup benefits both parties by offering the security of knowing what to expect in the future.

Tip #4: Think of a prenup as a way to plan your future financial life.

As you and your partner discuss the various financial topics that arise in creating a prenup, you'll cover a wide range of key decisions affecting your shared financial future. Many couples find it challenging to bring up the potentially sensitive topic of money with a partner. Others get caught up in a whirlwind romance and neglect to discuss pragmatic details like finances.

Creating a prenuptial agreement helps you overcome these obstacles and guides you through critical financial conversations that every couple should discuss before tying the knot.

Tip #5: Work with an experienced guide.

Both partners should hire separate, trusted attorneys when creating a prenuptial agreement. An experienced attorney can guide you through all the relevant questions and ensure the final legal document is fair and thorough. They can also make sure appropriate language is used so your prenup will be enforceable if it ever ends up in court.

5 Estate Planning Moves Every Engaged Couple Should Consider



Estate planning becomes even more important when a couple gets engaged. Since California does not recognize “common law marriages,” being engaged or even living with a partner for many years does not grant you rights to their property if you pass away, or vice versa. Your future spouse also lacks the power to make medical or financial decisions on your behalf if you become incapacitated. Here are five estate planning moves that every engaged couple should consider.

Prenuptial Essentials

#1 Create a prenuptial agreement.

Creating a prenup is an excellent estate planning move to take when you're engaged because it outlines what property you had prior to your marriage and what your intent was for that property after the marriage.

#2 Create or update a revocable living trust and/or will.

If you've already created a will or trust, you'll want to update those documents to reflect your prenuptial agreement. If you don't have an estate plan in place already, you'll want to create a simple will at the bare minimum to select an executor and ensure that your property will be distributed as you desire after you pass.

If you plan to keep some or all of your assets as separate property after marriage, you may wish to create a single settlor trust and transfer those assets into it. A single settlor trust is also a popular option for those who have children from a previous relationship and want to ensure their kids receive an inheritance.

Creating a prenup and an estate plan often go hand in hand. That's why our law firm offers a convenient [prenuptial package](#) which includes a prenuptial agreement PLUS a new single settlor trust or restatement of trust. Planning a wedding is stressful enough, so we love helping newly individuals partners kill two birds with one stone.

#3 Create a Durable Power of Attorney and Advance Healthcare Directive.

If you were to become incapacitated due to illness or injury, who would you want to make medical decisions on your behalf? An Advance Healthcare Directive allows you to designate your future spouse or another trusted person to fill this role. Your Advance Directive also allows you to express your wishes for end-of-life care and grants your agent access to your medical records so they can make data-based decisions on your behalf.

If you became incapacitated, who would you want to pay your bills and handle your finances? A Durable Power of Attorney allows you to designate an agent to do these tasks.

Without these critical documents, an expensive and time-consuming conservatorship may be necessary in order to grant these powers.

#4 Update beneficiary designations.

Not all assets can be transferred into a trust or distributed by a will. For example, retirement accounts, pensions, and life insurance policies must be held by an individual - not a trust. Upon your death, these assets will be distributed to the person you name as the beneficiary of that account or policy.

Once you become engaged, be sure to review the beneficiary designations on any life insurance, pensions, or retirement accounts you may own. If you wish to name your future spouse as the beneficiary or make any other changes, contact the company and request a Change of Beneficiary Form.

#5 Consider re-titling real estate or other accounts.

If you already own real estate when you get engaged, consider whether you'd like to add your partner to the title. Joint tenancy with the right of survivorship offers both spouses rights to the property. That means that if you were to pass away, your spouse would have the "right of survivorship", meaning they would automatically inherit the home. The same is true for jointly owned bank accounts if you choose to add a spouse to the title.

Note that if you create a trust, you may wish for the real estate and bank accounts to be titled in your trust instead. Consult an experienced estate planning attorney for help executing your wishes.

Conclusion

We hope this information has been helpful in deciding if a prenuptial agreement is right for you, understanding the issues involved, and learning how to create a legally binding document in California.

If you have any questions about this process, feel free to contact the Law Offices of Daniel A. Hunt. We're happy to offer new clients a no-cost initial consultation with one of our attorneys.

Ready to get started? Contact our office.

If you're ready to start creating your prenuptial agreement, our attorneys stand ready to guide you through the whole process.

We strive to be helpful, efficient, knowledgeable, accountable, and honest with every client we serve. Please feel free to contact the Law Offices of Daniel A. Hunt and claim your no-cost initial consultation!

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