

## **Safeguarding Wealth: Strategies for High-net-worth Attorneys (and other clients) Facing or Following Divorce**

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Divorce is never easy, even for attorneys going through their own divorce. One would think that attorneys would understand the art of confrontation and thus handle the divorce process better than most. However, one's own divorce can be contentious, intellectually tricky, and very emotional. Lawyers are human, and we feel deeply, just like anyone else. For high-earning attorneys and other high-net-worth individuals, the dissolution of a marriage comes with unique financial and legal challenges. Proactive planning through prenups, business structuring, and estate planning is key to safeguarding wealth and ensuring long-term financial stability.

Protecting assets, if appropriate, should start before the marriage is formalized, but some steps can be taken once the marriage is headed for divorce. Let's examine these two scenarios more closely.

### **Planning Begins Well Before Tying the Knot**

Long before the wedding bells peal, high-net-worth individuals can take steps to protect their assets. For a seasoned attorney who has developed a thriving practice, someone working for a company who earns a significant salary and generous stock options, a business owner, or an individual with a sizable family inheritance or passed on family wealth, a prenuptial agreement is an opportunity to ensure you are not giving away what you or your family have spent a lifetime or lifetimes putting together.

A Prenuptial agreement in California must conform with the California Uniform Prenuptial Agreement Act rules. Generally speaking, the prenup is binding as long as there is full disclosure, no fraud or duress, and the last draft of the document is finalized and shared at least seven (7) days before the document is signed. Failure to fully disclose or hide assets can result in the agreement eventually being set aside. In a California Prenuptial Agreement, and similarly in some other states, the signatories to the prenup each must attach a schedule of assets and liabilities and disclose their income. We generally exchange three to five years of tax returns. So, it is inadvisable to try to hide anything.

I am a big believer in Prenuptial Agreements, particularly if you are from a family of generational wealth, inherit money, have a prior family to support, or have developed an estate prior to your marriage (as is often the case in a second or third marriage and sometimes even the first!).

### **Prenuptial Limitations and the Importance of Not Commingling Funds**

When it comes to setting future financial limitations, the Uniform Prenuptial Agreement Act allows for a spousal support waiver. Still, those limitations must not be unconscionable at the time of enforcement – *unconscionable*, meaning it cannot be perceived as shocking to the senses. There was a case a few years ago where the California appellate court confirmed the trial court's set aside of the spousal support waiver as unconscionable at the time of enforcement. The appellate court focused on the many years that had elapsed since the execution of the Prenuptial Agreement, the fact that the wife had not worked outside the home instead raising the parties' six children and that she had waived her community property interest in her husband's income.

This appellate court ruling set off shockwaves in the family law legal community in California because we had always thought that *unconscionable* would be if someone were on life support, severely disabled, or in a similarly extreme condition, making it impossible to support oneself. The decision has led many divorce attorneys in the state to draft Prenuptial Agreements that include placing a cap on spousal support (in amount and duration) instead of a full-support waiver. However, interestingly, the Prenuptial Agreement in the case I mentioned above also had a provision for a \$6,000 per-month threshold for spousal support (but only if the parties' marriage lasted 11 years). However, given the husband's high income and the parties' affluent lifestyle, the \$6,000 was viewed by the court as *unconscionable*.

When managing premarital funds, it is advisable to keep things segregated and not commingle marital and premarital finances. Even with a Prenuptial Agreement, it is far more difficult to untangle these assets once they are commingled.

Separate bank accounts, individual investment accounts, real estate holdings, and an LLC or corporation should all be kept separate/segregated and only in your name. Also, be sure that whatever monies are used to pay for things like real estate holdings come from your separate property assets. If you have a Prenuptial Agreement and your earnings from your services are your separate property (not community property), then your earnings from your services can be used for such payments. The separate property would also mean funds from before your marriage or funds you inherited, were gifted, or were bequeathed. The bottom line is that keeping premarital accounts separate from shared and community assets is usually much cleaner. Any business manager worth their salt will maintain separate accounts and payments.

### **Additional Prenup Recommendations**

This discussion is not exhaustive. There are several other factors to consider when protecting assets. First and foremost, it's important to have a good lawyer. Make sure to bring up the topic of a prenup with your attorney well before your planned wedding so you can explore the various financial options regarding how you want to enter your marriage and what you wish to share or keep separate. You should also ensure that your future spouse has a competent lawyer.

Another step to consider is putting a non-disclosure clause in your prenup. This clause would restrict your spouse from sharing with the public (or even

family/friends) private matters such as your assets, liabilities, income, investments, and details of your life together. However, an NDA does not entirely shield sensitive information from the public; any divorce settlement will likely be filed with the court, making it a public record.

### **After the Storm: How Postnuptial Agreements Work**

Once the marriage is consummated, a postnuptial agreement can accomplish objectives similar to those of a prenup. Such an agreement can define how assets acquired during the marriage will be handled. A postnup or amendments to a Prenuptial Agreement can update financial arrangements as circumstances change (e.g., inheritance, career growth, heirs, etc.) and clarify spousal support expectations.

It is important to note that no California statute specifically governs postnups, but attorneys typically try to follow the Uniform Prenuptial Agreement Act guidelines. Disclosure requirements are more stringent in a postnup, as each party has a fiduciary duty to the other.

If you own your law firm or are a partner or might become a partner in a law firm, you can provide in a prenup or a postnup agreement that there is no community interest in your law firm. Although a buy-sell agreement can be put in place to restrict spousal claims, in California, without a prenup or postnup agreement, the buy-sell agreement and spousal waiver will not likely preclude the spouse from claiming an interest in the practice. Similarly, if you are an attorney in a company earning various forms of deferred compensation, you might want to consider having a prenup or postnup agreement to protect those assets.

For high-net-worth individuals, a Prenuptial Agreement with a consistent/complementary estate plan is essential for protecting premarital assets. An irrevocable trust is one option, but I caution my clients to remember that irrevocable means precisely that.

A last piece of advice I would offer any fellow attorneys facing divorce is this: As tempting as it might be to have a colleague in your office represent you, it is better to look outside your firm. As a firm's former founding and managing partner, I can speak from experience. Your firm would prefer not to be involved in your affairs, and there is less chance that conflicts with your attorney will become a messier inter-office problem.

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