

## When Prenups Fail

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**NOTHING CAN BREAK** the romance like having the prenup conversation. But for many soon-to-be newlyweds, signing a prenuptial agreement<sup>1</sup> is like buying fire insurance: You hate to think your house could burn down, but if it did, you'd be spared a lot of time, money and aggravation.

Prenups are touted as a particularly useful tool for high-net-worth individuals, small-business owners or folks entering a second marriage, particularly if they have children from the first one. And they can be. But prenups aren't always as rock solid as one may assume. In some cases, a spouse can challenge the prenup during a divorce and get the court to overthrow it.

The number of prenup challenges is on the rise, according to a recent survey by the American Academy of Matrimonial Lawyers (AAML): 44% of the respondents said they've seen an increase over the last five years, compared with 18% who said they've seen a decrease. (The rest reported no change.)

Although the grounds that a spouse may use to challenge a prenup vary by state  and if you're planning on signing a prenup you're best off working with a qualified attorney who's fully versed in your state's laws  some rules apply across the board. Here are six.

### 1. When Dealing With Custody and Child Support

A prenuptial agreement may be an excellent tool to protect the financial future of children from a prior marriage. But that's not the case with children of the current marriage, says Sharyn Sooho, co-founder of the online community DivorceNet.com<sup>2</sup> and a divorce lawyer in Newton, Mass.

"If your prenup attempts to determine ahead of time who gets custody and how much support is going to be paid to the children, forget it," she says. "It probably won't even be looked at." Even if your kids were born before you got married, if there is a battle over custody or the amount of child support, the courts will decide what's best for the children.

### 2. When a Partner Signs Under Duress

A prenup could end up being useless if one of the spouses signs it against his or her will. Why? If that spouse contests the prenup, the court could void it.

"In order for the prenup to be valid, both parties need to enter into it freely and voluntarily," says Nihara Choudhri, author of "What to Do Before the I Do: The Modern Couple's Guide to Marriage, Money and Pre-nups."

That's one reason why the partners should start talking about a prenup well before their wedding day. "It's much better to have it done two months or a month before the wedding than two weeks or a week before," says Frederic Siegel, a divorce attorney with Fitzmaurice & Siegel in Stamford, Conn. "Then you eliminate the argument that one of the spouses was under duress or they didn't have time to consider it."

In fact, he adds, these days some couples actually videotape the signing of the document, so if the prenup is challenged, there's evidence that both sides knew what they were doing.

### 3. When You Keep Financial Secrets

If you keep financial secrets from your future spouse, you'd better be willing to share them. "One of the cornerstones of a valid prenuptial agreement is full financial disclosure," says Choudhri. That means the spouses are fully aware of the other's income, assets and debts. Otherwise, Choudhri explains, your spouse-to-be can't make an educated decision on how much money he or she is entitled to at the time of divorce or death.

### 4. When It's Unfair

You could say pretty much anything in a prenup but it won't be worth the paper it's written on if the court decides it's unfair to one of the parties. To make matters more complicated, some states like California, for example look at fairness only at the time of the signing. Others like New York require that the contract is deemed fair both at the time it was signed and at the time of the divorce.

How do the courts determine fairness? To start with, they would likely question prenups that appear lopsided, says Arlene Dubin, a divorce lawyer in New York and author of the book "Prenups for Lovers<sup>3</sup>." If one spouse earns or owns a lot less than the other, and in the prenup waives the lesser-earner's rights to spousal support, for example, the document may be considered unfair.

And assessing fairness at the time of divorce can be even more confusing, says Katherine Stoner, author of "Prenuptial Agreements: How to Write a Fair and Lasting Contract." Say, for example, that both spouses worked before they got married and had a prenup that gave each their share of earnings during the marriage. At some point, the wife was disabled and stopped working, so the husband became the main breadwinner. In that case, the court could overturn the prenup and grant the wife a larger alimony, Stoner says.

In all, fairness is a gray area, says DivorceNet.com's Sooho. She cites two cases in Maryland that were very similar in nature the wives appealed the prenups that waived their right to alimony but had very different outcomes. One judge decided alimony waivers were fine and upheld the prenup, the other voided it. When it comes to prenup appeals, "there's a lot of discretion on the part of the judges," Sooho says.

### 5. When You Don't Have a Lawyer

Signing a prenup without legal representation can be grounds enough for a judge to declare it invalid. That goes back to the issue of fairness, full disclosure and duress: If one spouse wasn't represented by a lawyer, he or she may one day claim they didn't know what they were doing.

Steven Spielberg learned this the hard way back in 1989, when his former wife Amy Irving contested their prenup. The agreement had been signed on a napkin, without the presence of Irving's attorney. Ultimately, she walked away with \$100 million, or half of her ex-husband's earnings.

## 6. When You Ignore Your Own Rules

"When you have a prenup and then you don't follow the rules you laid out in it, it may not be worth anything," Stoner says. She gives the following example: Say Henry and Wendy are about to get married. Henry has a house, which he wants to keep for himself in the event of a divorce. The two spouses-to-be decide that he will continue making all mortgage payments from his own accounts and keep the house. But as the years of marital bliss roll on, the spouses commingle all their money and Henry ends up making mortgage payments from a joint account. The result? "If they get separated or he dies, there could very well be a marital property claim on the house," Stoner says. "They had a perfectly good prenup, but they didn't follow it."

### The Modern Prenup

Think the standards for prenuptial agreements are tough? You can thank Barry Bonds. When the San Francisco Giants player divorced his first wife in 1994, she contested the prenuptial agreement that basically waived her claim on his multimillion fortune.

Bonds's wife, Susann Margareth Branco, who is Swedish, claimed she was forced to sign the prenup on the couple's way to the airport for their Las Vegas wedding, without a chance to consult with her lawyer. In addition to that, the document was in English, a language she didn't speak fluently.

The California Supreme Court upheld the prenup, but the consequent public outrage resulted in a new prenup law to make sure 11th-hour agreements aren't enforceable. Now, most states uphold the standards of that law, including requiring that both sides have lawyers, make full financial disclosure, and draft the document at least a week before the wedding.