THE *Prenup* CHECKUP

Coming together as a couple doesn't mean your financial assets have to come together as well. Find out what's the best course for you, so that what's yours stays yours.

Deina tells her friends she wishes she could go back in time and change things; she wishes she never met her ex-husband, she really wishes she never married him, but, most of all, she wishes she had listened to someone who suggested she get a prenuptial agreement.*

You see, Deina was an independent graphic designer who had worked hard to buy her own home before she met her ex. Part home, part rental property, she thought it was a smart move since she didn't have a pension; the home would be her retirement savings.

But, (Deina rolls her eyes) she fell in love. Deina and her new husband used the home she bought to get a mortgage on another house they would use as a residence. But they grew tired of being landlords of the first home, sold it, and used the proceeds to pay off the second home plus top up their RSPs.

Then came the divorce. Deina was horrified to learn that, far from each spouse taking away what they contributed to the marriage, her ex was walking away with half a home he didn't pay equally for and retirement savings he never contributed to.

Moreover, he is making a claim on half the value of Deina's small business.

She says that having her marriage end was bad enough, being unaware of how a prenup could have helped her really makes her wish for that time machine.

Like some second marriages, some feel the term prenuptial agreement comes with a certain amount of baggage, most of it untrue. For instance, prenups have the undeserved reputation of being used by rich individuals to protect their wealth from the ambitions of their new spouses.

But Nicole Ewing, Vice President, Business Succession Advisor and Tax and Estate Planner, TD Wealth, says prenuptial agreements are becoming more accepted for second marriages or for people with homes, savings, financial obligations and independent goals.

Increasingly, they are important for first marriages too, she says. In fact, she would recommend that even if you have been married for many years, you might want to think about how your financial state has changed and whether a *post-nup* could be useful.

Ewing says that far from bringing friction to a relationship, a prenuptial agreement can actually help both partners by laying out plans for managing or sharing finances during the marriage or in case of a breakdown of the marriage or if one spouse dies.

"Prenups are becoming a normal part of moving in together, a normal part of getting married. People are having these discussions and are working through them. Spouses are much more independent financially and are having conversations over who's going to pay for what and what money's going to be joined and what isn't," she says.

"It's now much more intentional than in years before where the couples' money just blended without any plans," Ewing says.

What is a Prenuptial Agreement?

Once people are married or are living common-law, they are governed by federal, provincial laws and common law around their money and property, which spell out each person's rights and obligations in various circumstances.

So, for instance, take a fictional couple, Bob and Mary, who are both on their second marriage and have lived in Bob's home for the 25 years of their marriage. Everything else being equal, if Bob dies or if the couple separates, Mary may have a legitimate claim on the ownership of the house as it is regarded as a matrimonial home under family law in Ontario. However, many issues (but not child support) can be negotiable with a prenuptial agreement. What if Bob wants his old home to go to his children of his first marriage if he dies? What if he wants to keep this home in case his marriage to Mary doesn't work out? If she is willing, Mary could give up her claim to the value of matrimonial home in a prenup agreement, perhaps, for instance, in exchange for a cash settlement. Note that laws around the matrimonial home differ from province to province.

The prenup would say that, for the purpose of the net family property equalization calculation, both parties agree that the person who owned the home prior to marriage will get a credit for the value of the home at the date of marriage. This would mean that the matrimonial home will be treated like every other asset and will not be exempted from the calculation as would happen under family law, says Ewing. This clause would be binding.

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But there are differences between the *value* of the home and the *possession* of the home.

A couple may negotiate and state in a prenup that the spouse who was the owner of the home before the marriage expects the other spouse to move out of the home within a month, once the marriage breaks down. Couples may agree on this in a prenup but it is not binding, Ewing says.

Ewing says, the other spouse is free to change their mind and not leave the property. The spouse cannot waive his/her right to possession of the home. Expressing the intention in writing is merely one factor considered by the courts in determining which spouse will be granted exclusive possession, Ewing says.

Ewing says the prenup — available for both married and common-law couples — is simply a contract that states how a couple determines their own personal rights, obligations and intentions to each other. If the spouses want to keep their money distinct, the contract should say that, and if they want to mingle their money and assets, or if they want something in between, the contract should say that too.

"Where these contract fall apart is when people undermine their own agreements. They have the agreements in place and then they do something that essentially voids them, makes them useless."

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Just like a marriage will reveal each person's personality, habits, and hopes to the partner, so too a prenuptial agreement reveals each other's full financial state. Both spouses are required to give a full account to each other; including current and anticipated income and debt, properties and accurate values of the properties, credit scores, trusts, interests in companies and investments and financial obligations, like paying child support.

Not required for the prenup (but certainly helpful) is a discussion couples should have on other issues around money; are they spenders or savers? Luxurious or penny-pinchers? Must splurge on loved ones or sends cards only? Have strict and defined goals for their money and retirement or haven't given it a thought?

What's the purpose of revealing all this information, Ewing asks. First, it allows each partner to go into the marriage with their eyes open to any and all financial issues that may crop up in the marriage. This way, a couple can make informed decisions if they give up certain rights granted to them by law.

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PERCENTAGE OF FIRST MARRIAGES THAT END IN DIVORCE BEFORE THE 30TH ANNIVERSARY[1]

Consider, if before the marriage, Bob is in debt and he buys a home with his new spouse, Mary; that house may draw the interest of Bob's creditors. A prenuptial agreement where Bob's financial past is revealed before the marriage will allow Mary to make an informed decision about whether she should buy a house with Bob and how best to protect herself.

Another scenario could be if Bob exaggerates his financial status at the beginning of his relationship with Mary, by implying he owns a condo in Florida, whereas it's just a time-share owned by Bob's mom. A prenuptial agreement will clear up vague or unrevealed details about the financial status of either partner because every aspect of someone's financial life has to come to light. If something is not listed in the prenup or is inaccurate, the prenuptial agreement can be declared invalid in court.

Secondly, the prenup records that, once the financial states of the partners are revealed and up for discussion, the couples may agree to waive certain rights they're entitled to under the law. For instance, Mary may own a business which she has built up over several decades; husband Bob may agree in the prenup to give up any claims on the business in return for a lump sum of money, if Mary dies or the relationship ends in divorce. Another scenario could be if Mary is the sole owner of a home and wants to pass it on to her kids of her first marriage, even though Bob has lived in the home for 20 years. Mary and Bob could agree in the prenup that Bob could take a cash settlement instead and give up the claim to the house if Mary dies.

WHEN TO CONSIDER A PRENUPTIAL AGREEMENT

- You or your spouse are a business owner.
- You have substantial assets you wish to keep independent of your spouse's.
- You have estate plans for your children to inherit your assets.
- Your money habits and style are significantly different from your spouse's.
- Your spouse has financial or creditor problems.

Living the Prenup

Ewing says that if the time and effort is put into making a through prenuptial agreement, then the spouses have to really 'live' the agreement. That means, if you want to keep your money separate, you must actively keep your assets separate and distinct in every way — not doing so could make the agreement ineffective.

For instance, Bob and Mary have a prenup that says their assets will remain separate. Mary buys a home but the monthly insurance payments and occasional household expenses come out of a joint account that Bob and Mary have set up for convenience sake. If their marriage ends, Bob may be able to claim the home as a joint asset since house expenses are coming out of an account in his name.

"Where these (prenup) contracts fall apart is when people undermine their own agreements. They have the agreements in place and then they do something that essentially voids them, it makes them useless," Ewing says. Ewing offers a real-life scenario that she encountered; a small businessman and his wife had a prenup that said she was not entitled to a claim on his business if the marriage ended. However, when he sold his business, he put the proceeds into a joint account with his spouse as a financial strategy. That move negated any protection he tried to have in the prenup since he essentially made his wife a co-owner of his business.

PRENUP QUESTIONS TO THINK ABOUT

Ewing says that when people have revealed their financial states to each other, each partner should think carefully about these questions and concerns:

How distinct do you want your finances to be within the marriage and how independent do you want to be during the marriage?

Concern: A prenup stating 'yours is yours and mine is mine' may be clear-cut and assets may be easier to administer if the marriage ends. However, during the marriage, it may become awkward tracking equal contributions to shared purchases and/or contributions of labour. For example, how do you balance, and document in the prenup, who pays for the house insurance versus who cuts the grass or shovels the driveway? Or how difficult is it to contribute separately to a child's RESP over 20 years?

Do you want your finances and your partner's finances to blend together, immediately, gradually over time or over a documented schedule?

Concern: It is natural and convenient that couples will want to pool resources to buy assets together, like a home. However, if one partner is wealthier than another, or contributes more to the purchase of the home than another, that home may be divided equally if the marriage dissolves. That would leave one partner with a net gain and one with a net loss.

How flexible do you want the blending of your finances to be?

Concern: People have to consider all eventualities both immediately and in the future. Should both spouses have unlimited or limited access to each other's finances? What if Mary has twice the assets and salary Bob has but, once they are married, Bob uses her money to upgrade his used car to a foreign coupe?

Do you have common retirement goals and an age when you want to retire?

Concern: Especially if retirement is on the horizon, couples must be on the same page in regards to retirement. No retirement plan will work well if the couple has different ideas on retirement, especially if their finances are blended. And if finances are separated, much more planning is retirement is probably needed.

Do You Need A Post-Nup?

Getting a postnuptial agreement after you are married is rare but not unheard of. Naturally, the financial circumstances of a couple can change greatly during the course of a marriage. One reason for a post-nup would be because of a business interest of one of the spouses. Ewing says, for example, if a spouse is in a partnership with others, the shareholders agreement may declare that any claim on assets (in case of a marriage breakdown or death of a spouse) has to come from personal and not business funds.

Ewing admits that a prenuptial agreement isn't the most romantic part of planning a marriage. But, she says, the agreement is ultimately there to protect personal interests and to offer remedies to couples before problems put them into harmful situations.

Anyone about to sign a marriage certificate should make a detour to their lawyer. There, they can think about signing a prenup to ensure their best interests are protected before they say ‘I do.’

— Don Sutton, MoneyTalk Life

**Deina is a pseudonym*

[1]Zosia Bielski, “When it comes to marriage, the third time’s not often the charm, ” *The Globe and Mail*, September 29, 2016, accessed Feb. 1, 2018, www.theglobeandmail.com/life/relationships/when-it-comes-to-marriage-the-third-times-not-often-the-charm/article32125001/.