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Family Law
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Post-nuptial agreements are growing in acceptance

Most everyone has heard of prenuptial agreements, where a couple decide before they get married what will happen if they get divorced or if one of them dies.

But did you know that there are also *post-nuptial* agreements? These are pretty much the same as prenuptial agreements, except that they're signed after the marriage, rather than before.

There are a number of reasons why a couple who don't have a prenup might want a postnup:

- A couple who are contemplating a divorce might want to negotiate the terms in advance, so if it happens, it will be less contentious.
- A couple who are trying to reconcile might want to settle their financial and legal arrangements to make it easier to concentrate on the emotional issues, or to work through marital problems such as overspending.
- Couples with substantial property might use a postnup as an estate planning tool.

- Spouses who have separate property, and are thinking of using it for the marriage (such as to buy a house), might want a postnup to make sure they retain their separate property rights.
 - A spouse who has children from a previous marriage and who receives a windfall (such as an inheritance) might want a postnup to make sure the children are able to share in the wealth.
 - Some companies, such as hedge funds and certain family businesses, require their executives to have postnups. The goal is that if the marriage dissolves, the non-employee spouse won't have access to sensitive company information and won't end up as a part-owner of the company.
- Prenups are widely accepted in the U.S.



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It's often wise to step back and decide whether the battle is really worth the cost in terms of time, money and energy.

Divorcing couples sometimes fight big battles over 'small' things

It's surprising how often divorcing couples are ready to go to war over seemingly small things, such as who gets a particular piece of personal property.

The item may have sentimental value, and it may become a proxy for other issues in the marriage. However, it's often wise to step back and decide whether the battle is really worth the cost in terms of time, money and energy.

Recently, a divorcing couple in New York agreed on every issue, from child custody and support payments to dividing their home and other property, with one exception – dozens of photo albums created over their 20 years of marriage.

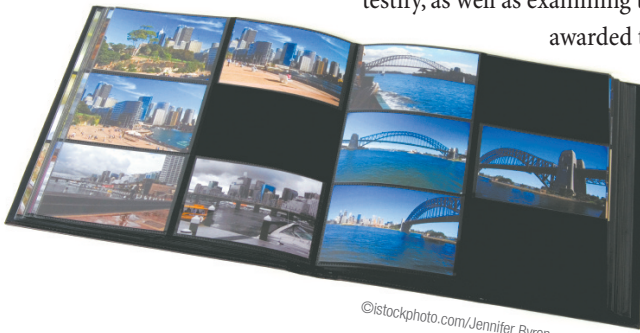
That's right – the couple went to court to settle who had the right to thousands of pictures documenting their family life together.

After listening to both the husband and wife testify, as well as examining the photos, a judge awarded the husband 75 percent of the pictures.

The court found he was intricately involved in taking, compiling and cataloging the photos, and that he loved photography. The

wife, who played a smaller role in creating the albums, got 25 percent.

The judge even set forth a selection process: Beginning on page one of the first album, the wife would receive every fourth picture until the couple had worked their way through all 7,000 photos.



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Shared parenting is okay even if parents don't get along

Family law courts have the power to order many things, but they can't order ex-spouses to get along with each other. Yet this doesn't necessarily mean that an unfriendly couple can't share parenting duties.

A father in Pennsylvania who was planning to retire from his job asked a judge for shared custody. The judge denied the request, ruling that the mother and father couldn't share custody because they didn't "work well together" and hadn't demonstrated the ability to be "civil and cordial."

But the father appealed, and the appeals court disagreed. The appeals court said that as long as the mother and father showed a "minimal degree of cooperation," they could share custody – it wasn't necessary that they have a good relationship.

Jehovah's Witness may get custody

The fact that a divorcing mother is a Jehovah's Witness shouldn't be held against her in deciding who gets custody, according to the Kansas Court of Appeals.

The father had argued that giving the mother custody could endanger the child, because of the religion's prohibition against blood transfusions.

But the court said that this was mere speculation, and there was no reason to think that the child had ever been denied a blood transfusion, needed a transfusion, or was likely to need one in the future.

If the issue ever actually came up, a judge could deal with it at that time, the court noted.

Post-nuptial agreements are growing in acceptance *continued from page 1*

Postnups are newer and their legal status is a little less clear, in part because people who sign postnups aren't negotiating over future arrangements but are bargaining away legal rights they already have as a result of being married. However, a growing number of states are accepting the agreements.

This past July, a postnuptial agreement was approved by the highest court in Massachusetts. In that case, the agreement stated that in the event of divorce, the wife would give up any interest in some \$5 million worth of Florida real

estate that the husband owned through his family's businesses.

The court said that judges should carefully scrutinize postnups, but this one was okay because it was negotiated by separate lawyers for each side, there was a full financial disclosure, and it was fair given that the husband was obligated to pay the wife \$5 million.

The court noted that postnups could actually save failing marriages in some cases, and could help protect the interests of children from prior relationships.

Divorced stepfather doesn't have right to visit child

While the rights of stepparents have expanded over the years, they're not entitled to the same rights as a parent.

The Washington Supreme Court reinforced this idea in a recent decision that said a divorced stepfather couldn't claim a legal right to visitation with his former stepdaughter.

In that case, the stepfather married the girl's mother when the girl was a baby. When they divorced, he asked a court to name him as a "de facto" parent, which would give him the ability to remain in the girl's life.

But the court refused.

"When [the stepfather] entered her life, [the child's] legal parents and their respective roles were already established," the court said. The stepfather didn't have a legal right to become, in effect, a third parent.

The case is part of a growing trend in which stepparents, grandparents, same-sex partners, and other "non-parents" seek visitation rights.

Father loses custody due to over-scheduling children

A New York judge recently awarded a mother primary custody of a couple's two children in part because the lifestyle the father had created for them was overly scheduled and exhausting.

The father centered the children's life around tennis. He woke them at 6 a.m. for a half-day of school, after which they spent six hours at a tennis program, returning home after 9:30 each night. On weekends, the children – aged five and ten – participated in tennis school and/or tournaments.

The court said that the father "has displayed poor decision-making regarding his minor children in continuing with this grueling daily schedule despite the fact that the children are constantly tired, regularly late to school, their school work is suffering, and their tennis appears to be negatively impacted."

The court added that the children's "daily schedule...is overly burdensome, exhausting and completely unacceptable."



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Paternity defendant avoids paying child support

Even if a defendant in a paternity case is actually the child's father, he may be able to avoid paying child support by arguing that there is already an existing father figure in the child's life, according to New York's highest court.

The mother in the case gave birth to a daughter when she was living with a boyfriend. The boyfriend was listed as the child's father on her birth certificate.

Twelve years later, the mother filed a paternity action against another man, claiming he was actually the father and demanding child support.

The defendant argued that the mother shouldn't be able to seek support from him because she continued to live with her boyfriend,

and the boyfriend was a genuine father figure in the child's life.

The court agreed with the defendant. It said that because the mother encouraged a close relationship between the child and the boyfriend as a father figure, it would be detrimental to the child's interests to disrupt that relationship by suddenly telling the child that she had a new father.

Interestingly, the court had previously ruled that a man who *wanted* to claim paternity could not do so because it would be against the child's interests to disrupt a settled familial relationship. In this case, it applied the same principle to the mother – so what was good for the gander was good for the goose.

It would be detrimental to the child's interests to suddenly tell her that she had a new father, the court said.

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Once you get divorced your financial picture will have changed, and you'll want to review all your estate planning decisions.

Divorce can affect your will and other documents

When you get divorced, the last thing on your mind is likely to be documents such as your will. But after a divorce, it's important to revise your will and other important documents, such as your power of attorney and health care proxy. These documents may contain provisions relating to a former spouse, former in-laws or stepchildren.

In some states, a divorce automatically revokes any bequest in a will to a former spouse. But this isn't always the case. And in any event, once you get divorced your financial picture will have changed, and you'll want to review all your estate planning decisions.

In a recent case, a Maryland man had a will with bequests to his wife and to members of the wife's family. He didn't bother to change the will after his divorce, and then he died. As a result of the law, his bequests to his wife were automatically revoked. But what about the bequests to members of her family?

The case went all the way to Maryland's highest



court. The court analyzed the will to determine if the husband was motivated by the marriage to create the bequests to his ex-wife's family members, or whether he had independent reasons.

In the end, it decided that there were no individual factors concerning the wife's relatives that would justify enforcing the bequests. But the family would have saved a lot of trouble and expense if he had simply updated his will.

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