

Should Same Sex Couples Obtain Prenuptial Agreements Before Marriage?

January 2, 2014 | by Matthew Coleman

Dear Ask the Attorney:

My partner and I have been in a committed same-sex relationship for about five years. Now that marriage is available to same-sex couples in New Jersey, we plan to get married in the near future. Before we do, should we consider a prenuptial agreement?

Thank you,

SJ

Our guest blogger today is Matthew S. Coleman, Esq., an associate with our family and matrimonial law department. Mr. Coleman concentrates his practice in all areas of family law including divorce, child custody, LGBT issues including same sex prenuptial agreements, the dissolution of civil unions, and appellate work.

Dear SJ:

Thank you for your question and congratulations on your pending marriage. 2013 has proven to be an exciting year for same-sex couples in New Jersey and other states around the country. In June, the United States Supreme Court issued a ruling striking down a major portion of the so-called Defense of Marriage Act and stating that the same-sex marriages that are legally recognized by individual states must be recognized by the federal government.

That landmark case was then used by the New Jersey trial court in October 2013 as a major factor for its ruling declaring that New Jersey must recognize same-sex marriages. Prior to that decision, same-

sex couples were only allowed to form civil unions. Now that gay couples can marry, it is important to understand the rights and responsibilities that marriage affords couples. For some couples, that may include entering into a prenuptial agreement.

A prenuptial agreement is a contract, entered into by parties prior to their marriage that addresses issues concerning equitable distribution of assets (for example real estate or personal property), spousal support, and other issues that may arise should the couple divorce at a later time. A prenuptial agreement may not be right for every couple, but it is something to consider should either or both of the parties have substantial assets, a business, or family wealth, to name just a few factors. Under such circumstances, a prenuptial agreement can provide important protections for a couple, gay or straight.

The standard for enforcing a prenuptial agreement is the same for both same-sex couples and opposite couples. Prior to a change in law in 2013, the agreement would have to also be conscionable at the time of enforcement. Now, the agreement must only be conscionable at the time the parties sign. This is a recent development that now applies to both same-sex and opposite sex couples.

There are important issues that same-sex couples may wish to address in their prenuptial agreement that are particular to same-sex couples. For instance, same-sex couples may wish to consider what to do should they relocate during the marriage to a state that does not allow for same-sex marriage. It may be difficult for such a couple to obtain a dissolution of their marriage in that state. Whether you can foresee such a circumstance or not, couples may wish to provide for a clear procedure for dissolution in their prenuptial agreement should such relocation occur.

If the parties had already entered into a civil union, with or without a pre-civil union agreement, there may be additional issues with any new agreement that may be entered into prior to marriage. For example, if a couple entered into a civil union, and now wishes to sign a prenuptial agreement prior to entering into a marriage, the prenuptial agreement may be considered a post-nuptial or mid-marriage agreement. Mid-marriage agreements can be considered coercive and difficult to enforce. This is a complex and evolving area that the courts have yet to address.

Prenuptial agreements may not seem romantic, but it can save a party significant time and money in the unfortunate event that their marriage fails by providing for a clear path to resolution. Every family's

circumstances are different, and the ways in which New Jersey is dealing with recent developments affecting same-sex couples are continuing to evolve. It is important to discuss your questions with experienced professionals who have knowledge about how these issues impact same-sex couples and who can advise you on your particular circumstances.