

# EMPYRION™

WEALTH MANAGEMENT

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## ◆ **Post Nuptial Agreements: Life Changes, so Can Your Marriage**

Many of us will attend a wedding this month. The history of June weddings dates all the way back to early Roman times. The Romans celebrated a festival in honor of the deity Juno, the wife of Jupiter and goddess of marriage and childbirth, on the first of June. Even the term "honeymoon" has an historical origin; it refers to the first moon after the summer solstice, June 21, which was called the "honey moon."<sup>1</sup>

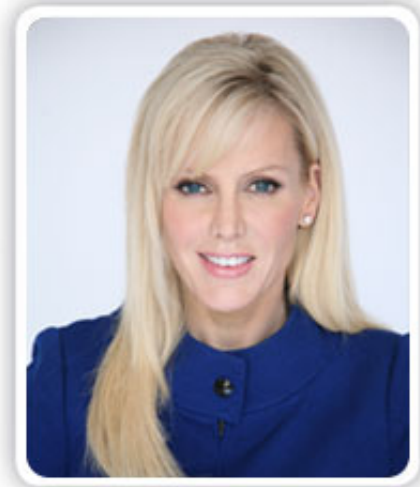
In those days, of course, there was nothing romantic about weddings, which were business contracts between the bride's father and the groom's family. Of course that's difficult to imagine as we sit through well-orchestrated modern day weddings!

While I advise the vast majority of couples to resist the "it's so unromantic" complaint and execute a prenuptial agreement, more and more I'm seeing older couples execute postnuptial agreements, or update their prenup. That's likely because, as anyone who has been married for a bit can tell you, things change during a marriage. Financial fortunes can improve or decline. Children sometimes prompt a re-thinking of priorities. Spouses might develop new or competing interests. Career paths can change radically. A business may be started or lost. And the spouses or family immediate family members can suffer serious illnesses.

Of course, in addition to the emotional toll these changes might create for a marriage, many can impact a couple's financial state as well. Sometimes the shifts are significant enough to warrant a postnup. Like a prenup, this is a legal agreement between spouses that spells out the distribution of property should the marriage end in divorce. A postnup can also seek to encourage a stress free marriage and minimize future financial conflicts.

Interestingly, a recent survey of members of the American Academy of Matrimonial Lawyers (AAML) revealed that often both spouses agree on drafting a postnup, whereas there can be resistance to a prenup by one spouse. That tells me that perhaps couples are reacting to having weathered a financial storm. Or, looked at in a more positive light, perhaps both parties have agreed it's a priority to provide for each other, no matter what the future holds.

Often, the trigger for a postnup is that the financial status of one or both of the spouses changes significantly.



Kimberly Foss, CFP®, CPWA®

Yet, like the prenup, a postnup can address lifestyle issues. (Facebook founder Mark Zuckerberg and Priscilla Chan have a prenup that protects his immense fortune. However, their agreement also includes the stipulation that they go on one date a week!)



Your postnup might address who is responsible for child care, household chores, or investment decisions. Obviously, life can change just as soon as the postnup is signed, so I advise not to get too mired in the lifestyle details. The basic goal is to agree on overarching philosophies and ensure that the lines of communication will remain open.

Remember, don't set your postnup in stone because your life together will continue to evolve. For example, the stay-at-home spouse could become the primary breadwinner. So, your document should be able to adapt. In fact you might include a clause calling for the review and renegotiation of the agreement at certain set points in time. Ten years is a popular mark, but sometimes in more complex situations where two parents are blending together their families, it could make sense to review the agreement earlier.

If I have a caution for anyone executing a postnup – or a prenup for that matter! – it's that one spouse cannot waive the right to the other's 401(k) retirement plan assets in these agreements. Generally, a plan participant's spouse is the beneficiary of retirement assets. These

assets pass outside a will, according to beneficiary forms. Yes, it is possible to waive those rights, but, importantly, such a waiver must conform to several requirements. Under ERISA, the spouse's consent to waive his or her rights must be recorded in a plan document.

The concern is that a spouse waiving rights to retirement assets in a prenup or postnup may not realize that these are assets that under law he or she would generally be entitled to. If your intent is, in fact, to waive your rights to retirement assets – perhaps your spouse wants them to go to his or her children from a previous marriage – it's best to go to directly to the plan administrator and request waiver documents.

There was a 2013 court decision on this very issue, *Mid-American Pension v. Michael Cox*. As IRA guru Ed Slott reports, a husband and wife came to an agreement and signed a post-nuptial agreement promising to disclaim any right to the other's assets in the event of divorce. Mr. Cox filed for divorce (this was the third time, and they had been married to and divorced from each other twice before), but died before the proceedings could be concluded. Mrs. Cox was supposed to disclaim everything because Mr. Cox has intended his parents to inherit his IRA. However, when the not-yet-ex-wife and her in-laws went to court, Mrs. Cox prevailed because the proper protocol, filling out a form from the plan provider, was not followed.

In closing, while you are signing a postnup which will guide the disposal of your assets should your marriage dissolve, you'll also want to update your wills to ensure your assets are divided as you wish after your death. This is especially important for blended families. To avoid a situation where children feel like their step-parent inherits all of "their" money, many remarried couples invest in life insurance or establish a QTIP trust. With life insurance, you name your children as beneficiaries, so they are guaranteed money your new spouse has no access to. Alternately, a [QTIP Trust](#), can hold assets you intend for your children but allow your surviving spouse to collect income from the trust during the rest of his or her lifetime. In either case, of course, it's imperative to involve your estate planning attorney. And, as always, I'm available to answer any questions.

**Stay Diversified, Stay the Course!**

A handwritten signature in cursive script, appearing to read "Kimberly Foss".

Kimberly Foss, CFP®, CPWA®  
Empyrium Wealth Management, Inc.  
[www.empyriumwealth.com](http://www.empyriumwealth.com)

(916) 786-7626  
(800) 787-7634

1. <http://droherphd.com/blog/the-history-of-june-weddings/#sthash.taYfj6vk.dpuf>

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Empyrium Wealth Management, Inc., 3741 Douglas Blvd., Suite 130 Roseville, CA 95661

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