



# Alternatives to a Prenuptial Agreement

In this day and age when the divorce rate is trending up, one can never be too prepared. In the absence of certainty, planning for the unknown and learning your options are the next best thing.

In the state of New York, the division of assets in the event of a divorce is based on equitable distribution, which does not necessarily mean equal distribution, because state courts consider many factors when determining the division of property. A prenuptial agreement (“prenup”) is the recommended tool to ensure that each spouse retains his/her share of assets with which they entered the marriage. Some couples, however, may not wish to pursue this sensitive subject, or it is simply not for them. In the event that one party is more interested in a prenup than their counterpart, all is not lost without this legal agreement. There are several measures that may be taken in place of executing a prenuptial agreement that will help preserve one’s separate assets should the relationship result in separation and divorce. These practices, outlined below, will help facilitate establishing your separate property.

First, marital property is considered all property that either spouse acquires from the date of the marriage to the date an action for divorce is filed by one spouse. Marital property includes gifts given from one spouse to another but does not include inherited property or assets gifted to just one spouse by another person, although gifts made during the marriage are often contested. Separate property, on the other hand, is each spouse’s individual property that was owned prior to marriage. Separate property will remain the individual’s separate property after divorce as long as it was not comingled during the marriage, and that records can show this.

## **5 TIPS FOR PROTECTING YOUR ASSETS AT THE START OF A MARRIAGE**

**Open new financial accounts after getting married.** This practice clearly separates marital assets from your separate assets and facilitates the payment of marital expenses and marital acquisitions. Any contributions to or purchases made from these accounts will be considered marital property.

**Keep separate property distinctly separate and in your individual name only.** Avoid adding any marital funds to your separate property accounts. Adding property or funds acquired during the marriage, such as earnings, to these separate property accounts results in comingling, which will taint all the property in such an account. Whether you file your tax returns jointly or separately, keep track of your portion of your tax liability separately.

**Consider setting up a revocable trust to keep separate property separate.** As a separate legal entity, this structure would add another layer of protection. Keeping your separate funds in a separate entity may help reduce the administrative tasks of tracing acquisitions and provide another hurdle to comingling assets.

**Keep diligent records.** This will be crucial for those who wish to preserve their separate property without a prenuptial agreement, since the burden of proof will be on the spouse wishing to establish separate property. Good records will show that any acquisitions made from separate property funds are actually separate property. During the marriage, clear records should also be kept of any inherited property or gifted money from a third party. These properties and funds should be added to separate property accounts.

**Keep in mind that post-marital appreciation of pre-marital separate property can be considered marital property.** The deciding factor will be whether the asset appreciates actively or passively. For example, appreciation on rental real estate actively managed by you, even if owned in your individual name only, may be subject to a claim by your spouse due to your efforts on this property during your marriage. Consider hiring a property manager.

While the methods outlined above should help in the preservation of your separate property, they are not iron-clad. Aside from the preservation of separate property, a prenuptial agreement may accomplish other objectives, such as an estate waiver, removing your spouse from your residence, waiving alimony, and ensuring that the appreciation of each spouse's separate property will remain separate property. These additional benefits, unfortunately, are not available in the absence of a prenuptial agreement. For further information and assistance with determining which path is best for you, contact Lydia Vercelli, a director in Anchin Private Client, or your Anchin relationship partner at 212.840.3456 or [info@anchin.com](mailto:info@anchin.com).



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