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Prenuptial Agreement Considerations for Same-Sex Couples

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Nearly everyone who is engaged to be married contemplates a prenuptial agreement at some point, even if only to acknowledge the possibility briefly and conclude that they are not a good candidate.

Most young couples entering a first marriage with few assets and no children probably decide that the benefit of a prenuptial agreement doesn't outweigh the cost - both the financial cost and the cost of a tense conversation with their future spouse where they discuss the possibility of divorce before they've even tied the knot.

On the other hand, couples entering a second marriage later in life might conclude that a prenuptial agreement is worth the financial and personal investment if either of them has children from a previous relationship or has accumulated significant assets.

A same-sex couple that gets divorced after being together for decades but married for only a few years might only be "credited" with the few years of legal marriage. This can skew the reality of the relationship and generate an unfair result in divorce.

Now that marriage is available to same-sex couples in Michigan, those couples must also decide whether or not a prenuptial agreement is right for them. The same factors that opposite-sex couples consider are important, of course, but there are other considerations that are unique to same-sex couples.

For instance, the length of the marriage and contribution during the marriage are two important factors that courts consider for purposes of dividing property and determining spousal support in the event of divorce. In past cases concerning opposite-sex marriages, Michigan courts have strictly held that the duration of the marriage is determined by the date of legal marriage, even though the parties may have been in a committed cohabitation relationship for decades before getting married. *See, e.g., Korth v. Korth*, 256 Mich. App. 286, 662 N.W.2d 111 (2003); *Reeves v. Reeves*, 226 Mich. App. 490, 575 N.W.2d 1 (1997).

There are many same-sex couples in Michigan that have been in a committed relationship for decades but were legally unable to marry until recently. If courts apply this principle to same-sex couples who have delayed marriage only because of legal constraints, a same-sex couple that gets divorced after being together for decades but married for only a few years might only be "credited" with the few years of legal marriage. This can skew the reality of the relationship and generate an unfair result in divorce.

For example, suppose a same-sex couple would have married decades ago but for Michigan's ban on same-sex marriage. Early on, they decided that one partner would stop working in order to care for the home or the children while the other worked and developed a prosperous career. During the relationship, the working partner developed higher earning power and accumulated more property in his or her own name, perhaps because the parties maintained separate bank accounts or the couple decided it made sense for the wage-earner alone to apply for the loan on the house. Then, after the Supreme Court held that same-sex marriage bans are unconstitutional, the couple decided to get married. A few years later, they got divorced. A trial court - in its broad discretion - could decide that since the legal marriage only lasted a few years, the nonworking spouse is not credited with his or her contributions prior to the marriage and is not entitled to spousal support or a fair share of the property accumulated over the entire relationship.

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ATTORNEYS AT LAW

Article By [Varnum LLP Varnum, etc.](#)
[Jeffrey D. Koelzer](#)

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Granted, there are several other equitable factors a court must consider in addition to the duration of the marriage when deciding on property division and spousal support which may cut in the other direction. Some courts may decide that the general principles of equity require "counting" periods of cohabitation before same-sex couples were allowed to marry. But trial courts have very broad discretion. Without any clear precedent, any given judge could decide the same case differently.

For that reason, same-sex couples who are planning to exercise their right to marry after many years of living together, accumulating property together, and developing disparate earning capacities should consider putting a prenuptial agreement in place to spare themselves from a court's broad discretion.

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