



Prenuptial Agreements

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Background

A prenuptial agreement is a contract between two persons who are planning to marry. Prenuptial agreements are often called premarital agreements, and, if entered into subsequent to the marriage, postmarital or antenuptial agreements. These types of contracts typically set forth the rights that each party has to the other's property. Couples can enter into prenuptial agreements prior to a first marriage or prior to a subsequent marriage after death or [DIVORCE](#) of a prior spouse. Premarital agreements become operative in the event of divorce or the death of one spouse.

Prenuptial agreements can avoid uncertainty about how a judge would divide property and decide spousal support if the marriage ends in divorce. Either party may be seeking to avoid a major loss of assets, income, investments, or a business in the event of a divorce. People marrying for a second or third time often want to make their children the beneficiaries of all of their assets, rather than have the property pass to a second spouse and that spouse's offspring from a prior marriage. A valid prenuptial agreement will generally supersede whatever state law exists regarding [PROBATE](#) or divorce issues.

Requirements for Prenuptial Agreements

In general, as with any contract, in order to be valid, a prenuptial agreement must be in writing and signed by the parties. In most states, the parties must fully disclose all income and assets to the other party. In a few states, it may be possible to waive a full disclosure of income and assets, but the spouse waiving that right must do so knowingly. If it is difficult to determine the exact validity of all of the assets, for example in a small family-owned business, the agreement should acknowledge some type of approximate value.

Additionally, the terms of the agreement must be reasonable. An agreement cannot be unusually harsh and unfair or the court will likely decline to uphold it. Blatantly unfair agreements are termed unconscionable agreements. Usually this means no reasonable person would enter into agreement with such terms. If a court finds an agreement to be unconscionable, the agreement will not be enforced.

Finally, both parties must have a fair opportunity to review the proposed agreement and to have independent legal [COUNSEL](#). While an agreement where both parties did not hire counsel is not necessarily invalid, hiring attorneys is another step that can demonstrate to the court that the agreement is fairly drafted and that both parties are making informed decisions. This is particularly true if two attorneys negotiate the agreement drafting and redrafting various provisions to the satisfaction of the parties.

Provisions of a Prenuptial Agreement

Although each couple will have different circumstances, prenuptial agreements generally address a number of different aspects of the couple's agreement. These usually include the following:

Inventory

The agreement should have an inventory, often attached as an exhibit to the agreement of each party's property, assets and debts which will be brought into the marriage.

Character of Property

The agreement should specify the character of certain types of property, whether they will be owned as marital or separate property, or a combination thereof. This would include investment earnings from property previously owned, the earnings of each spouse, and any subsequent [INHERITANCE](#). The agreement should also set forth how property will be distributed in the event of death of either spouse or in the event of divorce.

Spousal Support

The agreement should also specify the level (if any) of spousal support in the event of divorce. State laws do not set a specific amount of support that must be provided for premarital agreements. Many courts will apply broader notions of fairness and require support at a level higher than subsistence, so the level of support must be reasonable given the party's circumstances.

Escalator Clause

An escalator clause increases the amount of assets or support given to one spouse based on the length of the marriage or sometimes on a significant increase in one spouse's assets or income. If one spouse is concerned that assets or income could devalue in the future, that spouse could include a provision that the amount of property given to the other spouse would never exceed a certain percentage of the entire value of all the assets.

Contested Agreements

A prenuptial agreement can be contested, not simply during a divorce of the parties, but by the children or parents of a deceased spouse. The party contesting the agreement is usually seeking to have it declared void so that the existing probate or divorce laws will apply. Claims may be made that a spouse did not fully understand the agreement or that one spouse forced the other, physically or mentally do sign the agreement. A challenge of this type is often termed [DURESS](#). To avoid this sort of challenge, the couple should enter into the agreement well before the wedding. While most jurisdictions do not specify a particular time frame, the more time the couple has to review and consider the provisions of the agreement, the more chance a court would find it voluntary. While an agreement proposed and signed a day or two before the wedding is not [PER SE](#) invalid, it may be a factor, which the court considers in deciding whether to uphold the agreement at a later

date.

Other grounds for contesting an agreement may be that some misrepresentations took place which induced one spouse to sign the agreement. One spouse may have made misrepresentations about the agreement itself, perhaps that it was nonbinding, only for tax purposes, or temporary. The agreement may also face a serious challenge if all assets were not fully disclosed. Although this is another form of misrepresentation, a challenge of this sort is typically termed [FRAUD](#). An agreement may well be invalid on this basis if one spouse intentionally misrepresents certain aspects of income or assets.

Another theory used to contest prenuptial agreements is that one spouse lacked capacity. If a party was ill, taking medication, which affected mental capacity, or was intoxicated by alcohol or influenced by other drugs, the agreement may not be valid under the rules of basic contract law.

Child Custody and Child Support

A prenuptial agreement may contain provisions regarding [CHILD CUSTODY](#), visitation, and [CHILD SUPPORT](#); however, a divorce court would not be bound by such provisions. Courts have the power to decide on child [CUSTODY](#), visitation rights, and child support. The court would look with particular disfavor on these provisions for children of both parties who were not even born at the time of the prenuptial agreement.

Postmarital Agreements

Postmarital or antenuptial agreements are drafted after the marriage has taken place but before either party separates, divorces, leaves, or dies. These contracts contain provisions similar to those in premarital contracts. Courts look carefully at these types of agreements since once the marriage has taken place it is sometimes the case that one of the parties is unwilling to enter into the agreement. A postmarital agreement may alter the rules for the division of property between the spouses in the event of divorce or death. A married couple may seek to enter into a postmarital agreement after a significant financial change or after a reunification subsequent to a separation. A Marital [SETTLEMENT](#) Agreement is a particular form of postmarital agreement that specifies the distribution of property and responsibility for debt between the respective spouses as part of a divorce.

Living Together Agreements

The same concerns and considerations by couples who do plan to marry and who draw up a premarital contract apply to couples who plan never to marry. There is nothing illegal about an unmarried couple living together. Any governmental interference with a couple's right to live together would be considered a violation of the couple's right to free association under the First Amendment to the United States Constitution. An unmarried couple living together can enter into an agreement to share expenses or acquire property, including real estate. An unmarried couple can also enter into a trust, which would allow for a more specific distribution of certain assets and would protect the couple in the event of [DISABILITY](#) or incapacity of one of the partners.

Engagement Rings

There are two legal theories with respect to engagement rings. One theory is that an engagement ring is a gift and belongs to the person receiving it. The other theory is that an engagement ring is a conditional gift, a gift given in anticipation of marriage. Under this theory, if the marriage will not take place, the condition upon which the gift was given has been removed, and the ring belongs to the giver. A number of court cases have actually addressed this issue. In some states, if the person who gave the ring broke off the engagement, the person who received the ring is entitled to keep it. Since property which is a gift is generally considered separate property, once the marriage takes place, the ring then belongs to the wearer even if the marriage ends in divorce.

Probate Concerns

When a couple enters into a prenuptial agreement, the parties may also sign other documents relating to probate concerns and plans. The couple may contract to make a will or a trust with particular terms once they are married. (Signing new wills at the same time as a prenuptial agreement is an option; however, once the marriage takes place, the wills would need to be redrafted to reflect the marriage in order for the terms to remain valid.) The couple may choose to create a trust to manage certain aspects of estate planning. A trust created in connection with a [PREMARITAL AGREEMENT](#) might be used as a tool to manage and protect the assets of each spouse, as well as to establish a fund for the benefit of the less wealthy spouse. The prenuptial agreement might provide that in the event of divorce or death, the less wealthy spouse's entitlement to assets might be limited to the money or property in the trust.

In many estate plans, the Trust is the central tool that is used to control and manage property. A Trust continues despite the incapacity or death of the grantor. It determines how a TRUSTEE is to act with respect to the Trust estate. It determines how property is to be distributed after the death of the grantor. A properly drawn Trust is a separate entity that does not die when the creator dies. The successor Trustee can take over management of the Trust estate and pay bills and taxes and promptly distribute the Trust assets to the beneficiaries, without court supervision, if the Trust agreement gives the Trustee that power. Trusts, unlike Wills, are generally private documents. The public would be able to see how much the decedent owned and who the beneficiaries were under a Will, but typically not with a Trust. Like a Will, however, a Trust can be used to provide for minor children, children from a prior marriage and a second spouse in the same trust, transfer a family-operated or closely-held business, provide for pets, provide for charities and can remove life insurance benefits from a taxable estate, while still controlling the designation of insurance beneficiaries.

Additional Resources

Complete Premarital Contracting: Loving Communication for Today's Couples. Rickard, Jacqueline, Evans, 1993.

Cupid, Couples, & Contracts: A Guide to Living Together, Prenuptial Agreements, and Divorce. Wallman, Lester, Master Media, 1994.

Organizations

American Bar Association
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Encyclopedia of Everyday Law: Prenuptial Agreements

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