



## Prenuptial Agreements

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In the course of our careers we have had numerous conversations with clients and their children about the advisability of a prenuptial (also known as premarital or ante nuptial) agreement. Often these conversations were after an engagement was announced and a wedding date set, and the client or child of the client was unaware of the concept of such an agreement and found the conversation uncomfortable.

The goal of this paper is to build awareness of these agreements and allow our clients and their family members a chance to reflect on their advisability. People are living longer, and individuals are marrying more than once. No fault divorce laws enacted in every state have increased the number of multiple marriages. At the same time, our entrepreneurial society has resulted in many individuals accumulating wealth at a younger age than in the past, making these property division issues of even greater importance. The increase in multiple marriages and the accumulation of wealth makes the consideration of prenuptial agreements more important than in the past.

Every state has its own laws governing divorce and the rights of a surviving spouse, so this paper speaks in general terms. If you are contemplating getting married and think a premarital agreement might be appropriate, we recommend you speak with your attorney to get all the information you need to make the right decision.

### What are they?

As soon as two people marry, the laws of their state redefine their relationship in numerous ways. States have their own divorce laws that apply when parties decide to undo their marriage. They also have laws that address how property is distributed when a spouse dies, rules that provide a minimum of assets (and income) to a surviving spouse despite the provisions of the will of the deceased spouse. These are known as the *elective share* rules and have been in place for many years, originally to ensure the deceased spouse adequately provided for the surviving spouse and to ensure the survivor does not become a ward of the state.

At the moment you are married, these state rules become the contract between you and your new spouse. Instead of accepting the rules written for all married couples, you and your prospective spouse can decide how the two of you want to handle these matters considering your own unique circumstances. A prenuptial agreement is a contract between parties made in anticipation of marriage that determines their respective rights upon death or divorce. In the United States these agreements, if done properly, are enforceable.

### Why would I want one?

The classic case for consideration of a prenuptial agreement is a second marriage between mature adults, each with their own children. For example, the parties can decide before they marry that the property of each will remain separate and go to their respective children when they die. Of course they can make adjustments more favorable to their spouse during the course of the marriage, perhaps to add to joint property that will be shared. Without the agreement, a will that leaves all of the deceased spouse's property to his or her own children could be elected against by the surviving spouse, so some of the property would go to the surviving spouse and not to the deceased's children.

Other common cases for prenuptials include where a family has significant worth in a family enterprise. Divorce or death could result in a non-family member having an ownership interest in the business. Significant family money of one of the parties might be a reason to consider a prenuptial agreement, even for a first

marriage. Another example might be where the prospective spouses have gone through a divorce and have strong feelings regarding divorce provisions, such as alimony. Again, the agreement can specify how these provisions may apply. Having an agreement in place may also mean that you are not subject to changing state laws when you move to a different state.

### **Make sure it is done right and is enforceable**

While states have their own rules, generally speaking:

- The agreement should be in writing.
- Each party should be represented by counsel.
- Each party should fully disclose all of their assets.
- Each of the parties must sign the agreement of their own free will without coercion or duress. Signing the agreement minutes before the ceremony will not help you pass this test.
- The agreement must be reasonable and fair. Trying to dictate behavior rarely works.
- Marital rights should be waived.
- It should become effective upon marriage.

### **Matters of the Heart**

People who have lost a spouse or gone through a divorce frequently have little interest in bringing up the topic of a prenuptial agreement: “Now that I am with someone who wants to share their life with me, why risk messing it up with all of these financial discussions? It isn’t easy to find that right person!” This is the toughest challenge for a family advisor. What do you say?

**These issues are there already.** The state imposes these rules regarding how property is divided at death and upon divorce. Why not take a close look to learn the laws and then decide what is best for the two of you. Admittedly, these are not easy conversations, but marriage is a slow process of getting to know each other and growing together. Isn’t talking about finances a part of that process?

**Your adult children may find it reassuring.** Your family may be more willing to embrace you as a couple if they know your assets will be left to them when you die. Having your family on board and supportive can be critical to the success of your new relationship.

**Having this discussion may help ensure you each have the same expectations.** Introducing the topic early in your relationship may help you both become more comfortable with the conversation. Try to give yourselves time to reflect on these issues. Sometimes these pre-marital conversations precipitate a break off of an engagement. One of the parties may conclude that financial issues are too important to their prospective partner. These are personal issues that only you, hopefully with the support of family and friends, can decide.

### **A Long Successful Marriage**

Marriage is one of the most important decisions we make in our lives. Addressing these issues, with sensitivity, can help you achieve everyone’s goal: a long successful marriage.

\* While the topic is prenuptial agreements, post marital agreements may also serve many of the same purposes. Depending on the state, post marital agreements may be less flexible and include constraints that do not apply to prenuptial agreements. These issues are beyond the scope of this short piece. In the practical world however, regardless of the law, the parties may have less incentive to come to an agreement after the marriage than before. Leaving your assets to your descendants in appropriately structured irrevocable trusts is another strategy many clients employ.

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