

Pondering a Prenup

A premarital or prenuptial agreement is a written declaration of two people contemplating marriage. It is effective upon marriage and provides, among other things, for the rights and responsibilities with respect to support and the disposition of property at divorce, separation, or death of the parties.

- Do all states enforce prenuptial agreements in the same way?

No. State laws vary in some respects; however, 26 states have adopted the Uniform Premarital Agreement Act (UPAA), which provides uniformity among those states.

- Do I need a prenuptial agreement?

Generally, prenups are signed by persons previously married who intend to pursue a career and have substantial family wealth.

- If my fiancé and I have little property and modest income at the time we marry, do we need a prenuptial agreement?

You probably do not need a prenuptial agreement unless you want to settle issues of support and property distribution in advance of divorce, separation, or death. However, thinking through a prenuptial agreement promotes financial planning and encourages you to consider a wide spectrum of issues before your marriage.

- What form must a premarital agreement take?

The agreement must be in writing and must be freely and voluntarily signed by both parties. In some states, witnesses are necessary and the agreement must be acknowledged before a notary public.

- What kind of attorney drafts prenups?

Many people seek advice from a general practitioner or estate planning or trust lawyer. However, the attorney with the most knowledge and experience is the marital and family lawyer who, at a minimum, should be a part of the team. After all, it is the marital and family lawyer who "makes them, and breaks them."

- Must I hire an attorney for my Prenup?

Not necessarily, but it is a good idea. An attorney will call your attention to the various issues that may be considered and how best to deal with them. Also, agreements drafted without an attorney may be more likely to be subject to questions about whether the agreement was entered into free of duress and voluntarily.

- Should one attorney prepare the premarital agreement for both of us?

No. Each of you should hire your own attorney, and your attorneys should be independent and should represent your interests alone. An agreement drafted by one attorney representing both of you may later be subject to a claim of alleged erroneous advice by that single attorney.

- What will a Prenup cost?

It is difficult to say. There is no one form for such agreements. Each family has unique issues. The cost will depend on the terms, the necessary conferences, the complexity of the issues, and the time required to negotiate the agreement. Fees generally include a retainer plus the usual hourly rate of the attorney.

- Should I pay the lawyer for my fiancé?

It is not a good idea to pay your spouse's attorney fees because the lawyer for your fiancé should be completely independent. Better to give the money to your fiancé to pay the lawyer directly.

- If we later move to another state, will the agreement still be effective?

Yes, as long as the terms of the agreement are not against the public policy of the new state of residence. Most premarital agreements contain a "choice of law" clause indicating which state's law will apply.

- If I am forced or pressured into signing the agreement, what rights do I have?

For an agreement to be enforceable, it must be entered into voluntarily. There must be no duress, fraud, deceit, coercion, misrepresentation, or overreaching.

How soon before the marriage must the agreement be signed?

A good rule of thumb is that the agreement should be signed before the wedding invitations are mailed. The less time there is between the signing of the agreement and the marriage, the more likely

is a successful claim that the agreement was not entered into voluntarily.

- What does a premarital agreement cover?

Such agreement can provide for any matter, including personal rights and obligations, as long as it is not in violation of public policy. Generally, matters are addressed in the event of separation, divorce or death, the disposition of property, and modification or elimination of spousal support; although not every state permits agreements to control support.

- Can we provide for custody, visitation, and support for children?

No. A court will not enforce such provisions.

- Can a prenuptial agreement eliminate an obligation for any future spousal support?

Yes, in some states. However, in other states, if the provisions result in one party becoming eligible for public assistance at the time of separation or dissolution, a court may require the financially able party to provide support.

- How can I be sure the agreement will be enforced?

Premarital agreements are frequently subject to attack. However, if the agreement was entered into voluntarily; was not unconscionable when made; was drafted with full disclosure of assets, liabilities, and income by the party against whom the enforcement action is sought, the chances of it being upheld are great.

- When does the agreement become effective?

It becomes effective when you marry.

- Can rights in qualified retirement plans be waived in a premarital agreement?

Usually not, because the waiver should be signed by a spouse. Certainly this is true as far as survivor benefits are concerned. In some states, the property rights in a retirement plan can be waived. Frequently an agreement will set forth that if rights are to be waived, the waiver will be executed after the marriage.

- Are the terms of the premarital agreement effective even in a long-term marriage?

Yes. Sometimes, however, agreements provide a "sunset clause," which makes some or all of the provisions ineffective after a number of years of marriage.

- Can rights to spousal support and attorney's fees during a proceeding for separation or divorce be waived?

In some states, yes. In others, spouses are entitled to such rights until a final judgment is

entered. The spouse is entitled to support and attorney's fees if, under the circumstances of the case, fees are awardable.