

CHAPTER TWO

Premarital Agreements

A PREMARITAL AGREEMENT--also referred to as an **antenuptial agreement**--is a contract entered into by a man and woman before they marry. The agreement usually describes what each party's rights will be if they divorce or if one of them dies. Premarital agreements most commonly deal with issues of property and support, describing the property and support, if any, to which each party will be entitled in the event of divorce or death.

Reasons for Premarital Agreements

People intending to marry use premarital agreements for several reasons, some of which may be interrelated. Premarital agreements help clarify the parties' expectations and rights for the future. The agreements may avoid uncertainties and fears about how a divorce court might divide property and decide spousal support if the marriage fails.

A man or woman who wants a future spouse to sign a premarital agreement often has something he or she wants to protect, usually money. One or both partners may want to avoid the risk of a major loss of assets, income, or a family business in the event of a divorce.

People marrying for a second or third time also might desire to make sure that certain assets or personal belongings are passed on to the children or grandchildren of prior marriages rather than to a current spouse.

The less wealthy spouse generally is giving something up by signing a premarital agreement. That spouse (as well as the other spouse) is agreeing to have his or her property rights determined by the agreement rather than by the usual rules of law that a court would apply on divorce or death. As will be discussed later (see chapter 9), courts have rules for dividing property when a couple divorces. In some states (such as California), courts automatically divide equally the property acquired by the husband and wife during the marriage. In most states, courts divide property as the court considers fair, and the result is less predictable. The split could be fifty-fifty or something else.

If one spouse dies, courts normally follow the instructions of that person's will, but the surviving spouse usually is entitled to one-third to one-half of the estate regardless of what the deceased spouse's will says. If the husband and wife have signed a valid premarital agreement, however, that agreement will supersede the usual laws for dividing property and income upon death. In many cases, the less wealthy spouse will receive less under the premarital agreement than he or she would receive under the usual laws of divorce or wills.

If the less wealthy spouse will receive less under the agreement than under the general laws of divorce and death, why does he or she choose to sign the agreement? The answer to that question depends on the individual.

Some people prefer to control their fiscal relationship rather than to leave it to state regulation. They may want to avoid uncertainty about what a court might decide if the marriage ends in divorce. For some, the answer may be “love conquers all”--the less wealthy person may just want to marry the other person and not care much about the financial details. For others, the agreement may provide ample security, even if it is not as generous as a judge might be. Still others may not like the agreement, but they are willing to take their chances and hope the relationship and the financial arrangements work out for the best.

Criteria for a Valid Agreement

The laws governing the validity of premarital agreements vary from state to state. In general, the agreements must be in writing and signed by the parties.

In most states, the parties (particularly the wealthier party) must disclose their income and assets to the other party. This way, the parties will know more about what they might be giving up. In some states, it may be possible to waive a full disclosure of income and assets, but the person waiving that right should do so knowingly, and it is best if each party has at least a general idea of the other's net worth.

Sometimes it is difficult to make a precise statement of a party's net worth. If for example, the husband or wife owns a business that is **closely held** (meaning shares of the company's stock are not traded on a public stock market), it may be difficult to ascertain the value of the business. In that

circumstance, it usually is best to acknowledge the difficulty of precise valuation in the agreement and then state the minimum net worth or the range of possible net worth of the party.

In order to be valid, an agreement must not be the result of **fraud** or **duress**. An agreement is likely to be invalid on the basis of fraud if one person (particularly the wealthier one) deliberately misstates his or her financial condition. For example, if a man hides assets from his future wife so that she will agree to a low level of support in case of divorce, a court probably would declare the agreement invalid. Similarly, if one person exerts excessive emotional pressure on the other to sign the agreement, a court also might declare the agreement to be invalid because of duress.

In order to avoid an appearance of duress and to give the parties ample time to consider the agreement, the agreement should be reviewed and signed well before the wedding. Most states do not set a specific time at which premarital agreements must be signed, but the greater amount of time the parties have to consider the agreement, the greater the likelihood a court would find the agreement to be voluntary.

If the wealthier person presents the agreement to the prospective spouse for the first time one day before the wedding, a court may later find that the agreement was invalid because of duress. A last-minute premarital agreement is not automatically invalid, but timing may be a significant factor in determining whether the agreement is valid.

An agreement might be valid even if both parties were not represented by lawyers, but using lawyers is a good idea in order to help make sure the agreement is drafted properly and that both parties are making informed decisions.

The lawyer for the wealthier party usually prepares the initial draft of the agreement. The less wealthy party and that party's attorney, if there is one, should review the agreement carefully and ask questions about any matters that are uncertain. The likelihood of having a valid, enforceable agreement increases if the less wealthy party's interests are well represented and some back-and-forth negotiations take place.

In order to demonstrate that the parties truly know what they are agreeing to, some attorneys favor taking additional steps to illustrate the knowledge of each party about the agreement. In addition to signing the agreement, the parties also may place their initials on pages with key provisions, such as the provisions of the agreement pertaining to disclosures of assets, distribution of property, and support.

The parties, particularly the less wealthy party, might be asked to prepare a handwritten statement, in the parties' own words, reflecting understanding and consent to the agreement. Alternatively, the signing of the agreement might be videotaped (or audiotaped) with the parties providing oral statements of their understanding and consent to the agreement (in addition to their written consent).

Sidebar:

WHEN AN AGREEMENT IS ENFORCEABLE

Mary and John are in their late forties. They plan to marry in five months. Each has been married before. Before getting married, however, they wish to clarify their financial relationship. Mary has assets of about \$400,000; John has assets of about \$200,000. They both work and are capable of self-support. They each wish to protect the assets that they will bring into the marriage.

After disclosing their assets to each other and consulting with their individual attorneys, they sign an agreement that provides:

- Their future earnings will remain their respective separate property as long as the earnings are kept in accounts bearing only the name of the person who earned the money;
- The savings, investments, and retirement accounts that they bring into the marriage, along with any growth in those assets, will remain separate property after the marriage as long as the assets are held in the name of only one of the parties;
- Each party waives any right to future alimony or inheritance, although either party is free to include the other in his or her will;
- The parties, if they wish, may make joint investments, such as in a house, condominium, or car, in which case, title will be held jointly with a **right of**

survivorship (which means if one of them dies, the other will receive the property that was jointly held); and

- they will share payment of common expenses, including housing, utilities, and food, in proportion to their incomes.

Since the agreement appears to be fair and not made under duress, it is likely to be valid and enforceable.

[End of sidebar]

Amount of Support

State laws do not set a specific amount of support that must be provided in premarital agreements.

If, after a divorce, the parties are capable of self-support, based on their assets, income, and job skills, a court could uphold an agreement that provided no property or support to the less wealthy spouse.

If, on the other hand, the less wealthy spouse cannot be self-sufficient and the agreement provides little or no property or support, courts in most states are likely to step in and order some distribution of property or support in favor of the less wealthy spouse. That amount will vary from state to state. In some states, the amount needs to reach only a subsistence level--enough to keep the less wealthy spouse off the welfare rolls. Many courts will apply broader notions of fairness and require support at a level higher than subsistence.

A standard used by some courts is “**unconscionability.**” That refers to agreements that are unusually harsh and unfair. Some courts define an unconscionable agreement as one that no sensible person would offer and no sensible person, not under duress or delusion, would accept. Since the standard of unconscionability is subjective, courts have interpreted the term in different ways, but if a court finds an agreement to be unconscionable, the agreement will not be enforced. For discussion of the general standards for dividing property and alimony/maintenance in the absence of a valid premarital agreement, see [chapters 9 and 10](#).

To promote fairness and avoid unconscionability, many lawyers drafting premarital agreements favor including an **escalator clause** or a **phase-in provision** that will increase the amount of assets or support given to the less wealthy spouse based on the length of the marriage or an increase in the wealthier party's assets or income after the agreement is made.

If the wealthier party is concerned that his or her assets could drop sharply at a later time, the wealthier spouse may wish to include a provision to provide protection in such a circumstance. If the agreement provides for a fixed dollar amount to the less wealthy spouse, the wealthier party might add a provision that says in no event shall the amount of property given to the other spouse exceed half (or some other percent) of the wealthier party's assets. Alternatively, the payment of assets at time of divorce (or death) could be set as a percent of the wealthier party's assets at the time of divorce (or death).

Nonbinding Issues

Although premarital agreements can be binding on issues of division of property and alimony, they are not binding on issues of child custody. Parties cannot agree in advance of the birth of a child how custody of the child will be decided in the event of divorce. Courts remain the ultimate guardian of a child's best interest, and courts do not want to encourage a husband and wife to bargain away what is best for the child. A court may consider what the parties declared to be best for the child in a premarital agreement, but the court will not be bound by an agreement entered into before marriage.

A premarital agreement on child support also is not binding on the court for similar reasons. If the agreement on child support meets the child's reasonable needs, the court may choose to follow it, but it is not required to do so. For description of the standards for child custody and child support, see [chapters 11 and 12](#).

Related Documents

At the time the parties sign a premarital agreement, they also may sign related documents to help carry out their wishes. For example, the man and woman may enter into a **contract to make a will** by which they agree in advance about what the terms of their wills will be. The parties may wish to agree that children from

prior marriages (or the current marriage) will receive a specified amount of their estates.

Contracts to make a will have the advantage clarifying the parties' rights and responsibilities, but such contracts carry the disadvantage of loss of flexibility. If circumstances change, a party who signed the contract to make a will may not be able to change his or her will unless both parties consent. If, for instance, one party wishes to include a new person or charity in the will, that party may no longer be able to do so, depending on how the contract was written.

Another document that may be signed at the time of a premarital agreement is a document to create a **trust**. A trust is a legal device by which the title to property is held by one party for the benefit of another party. For example, money in a bank account, shares of stock in a company, or deeds to land may be placed in a trust. A **trustee** will have the power to manage the property in the trust for benefit of the person for whom the trust was created (the **beneficiary**).

A trust created in connection with a premarital agreement might be used to manage and protect the assets of the wealthier party. A trust also might be used to establish a fund for the benefit of the less wealthy party. In some premarital agreements, the wealthier party may agree to place a certain amount of money each year into a trust for the benefit of the less wealthy party. The deposits would continue to be made for as long as the marriage lasts (perhaps up

to a maximum number of years or a maximum dollar amount). In the event of divorce or death, the less wealthy party's entitlement to assets might be limited to whatever was in the trust.

Postmarital Agreements

Postmarital agreements or **postnuptial agreements** are agreements entered into after a marriage has taken place, but before the parties seek to end their marriage. As with premarital agreements, one or both of the parties usually is seeking to protect assets or income in the event of divorce or death.

A married couple may seek to enter into a postmarital agreement after a significant financial change or a period of marital conflict.

The law regarding the validity and enforcement of postmarital agreements is not well developed.

The standard for enforcement of postmarital agreements most likely is similar to the standards discussed earlier for enforcement of premarital agreements. Key criteria for validity of the agreements include: full disclosure of assets, absence of duress, and fairness.

When a man and woman are married (instead of just contemplating marriage), they may be held to a very high standard of fairness when dealing with each other on financial issues--perhaps a higher standard than would be the case if they were entering into a premarital agreement.

When entering into a postmarital agreement, it would be a good idea for the parties to articulate in writing why they are entering into the agreement and to be sure the agreement is fair for both parties.

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