



PRENUPTIAL AGREEMENTS

What is a Prenuptial Agreement?

A prenuptial agreement (“prenup”) is a premarital contract between two people that comes into effect in the event of divorce or death. It cannot be altered once married. In fact, all married couples have an automatic prenuptial agreement: the state’s divorce law. However, some couples will have special circumstances where a customized prenuptial agreement is appropriate.

Who should get a Prenuptial Agreement?

Ultimately, the decision to prepare a prenuptial agreement is up to the individual. However, the existence of certain circumstances makes a prenuptial agreement more appropriate. You may want to consider a prenuptial agreement in the following situations:

- if you are getting married for the second time (especially if you have children from a previous marriage),
- if your net worth greatly exceeds that of your soon-to-be spouse,
- if you have family heirlooms that you want to keep in the family,
- if you own a business, **or**
- if you, or your soon-to-be spouse, have significant debt.

What are some of the Advantages and Disadvantages of a Prenuptial Agreement?

There are certain advantages to a prenuptial agreement, specifically related to property and debt. If you own valuable personal and/or real property (home, cars, furniture, etc.) or have a significant amount of money in a bank account, you can protect those pre-marital assets in a prenuptial agreement. The agreement will specifically list and describe the property you wish to protect, and the agreement will state how the property should be distributed or protected if the marriage was to end. This will prevent the court from distributing certain assets to your spouse upon divorce. Additionally, if your spouse has a significant amount of debt, you can protect yourself from becoming responsible for that debt (credit cards, student loans, car payments, etc.). The prenuptial agreement would require that certain debts remain the responsibility of the spouse who accrued them. Without such an agreement, the court could require you to assume an amount of the debt.

However, there are also certain disadvantages to a prenuptial agreement. First, presenting your soon-to-be spouse with a prenuptial agreement may cause distrust and damage your relationship. It is important to approach a conversation about a prenuptial agreement with openness and maturity. Second, someone who feels like the terms of their prenup is strongly in their favor might be more willing to divorce rather than repair the marriage. All this is to say to be cautious if/when forming this agreement.

What can a Prenuptial Agreement include?

Generally, a prenuptial agreement includes the following provisions:

- property distribution upon divorce,
- property classification (communal or separate property),
- ownership of the marital residence,
- premarital debt responsibility,
- property distribution upon death [although you also need to update your estate planning documents (Last Will and Testament, SGLV, etc.) to reflect this],
- alimony obligations (in most states),
- financial responsibilities during the marriage,
- which state's laws will govern the agreement (otherwise, the laws of the state in which you divorce will govern rather than those of the state in which you married),
- how disputes about the prenuptial agreement are to be resolved (for instance, through mediation), **and**
- "Sunset Clause" (allows a couple to include that their prenuptial agreement expires if they are married for a specific length of time).

Prenuptial agreements can include responsibilities that do not involve pre-marital assets, but you should avoid making demands that might seem frivolous, such as requiring that your spouse not gain weight or that they quit smoking. Additionally, any requirement involving sexual intercourse is unenforceable.

Prenuptial agreements **cannot** include the following provisions:

- child custody (including requiring what religion to raise the children, their schooling, etc.),
- visitation,
- child support,
- anything illegal (as with any contract),
- anything unconscionable (unfair), **and**
- anything thought to encourage divorce.

Although most states permit prenuptial agreements to provide for alimony (spousal support), a court is allowed to invalidate the alimony provision if the judge believes it to be unjust. This will normally occur in long term marriages if there is a great disparity between the spouses' incomes with little or no alimony required to be paid.

When is the best time to bring up a Prenuptial Agreement with my fiancé?

Have the conversation with your future spouse as early as possible. Waiting until right before the wedding to discuss a prenuptial agreement with your soon-to-be spouse may result in several issues. A judge may be more likely to invalidate a "last minute" agreement if it appears to have been signed under coercion or duress. Thus, it is important to have this discussion early on to avoid distrust within the relationship and possible invalidation of the agreement.

How can I ensure my Prenuptial Agreement will be Valid?

Both parties must fully disclose their property, assets, and liabilities (debts). If it turns out either person has been dishonest or coerced/threatened the other into signing, a judge can invalidate the prenuptial agreement. A valid prenuptial agreement must be "fair" and does not leave one of the parties destitute. The court will look for fairness to make sure one spouse has not taken advantage of the other. Additionally, couples should ensure that the agreement is signed well in advance of the wedding to avoid any impression of coercion or duress.

A prenuptial agreement does not have to be signed by an attorney, but to ensure that your assets are protected, it is highly recommended that your prenuptial agreement is reviewed and signed by an attorney. The attorney will ensure the agreement includes all protections available to you as well as ensure it is legally valid. Nevertheless, a couple should not use the same attorney because each person's interests are inherently not the same.

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This Information Paper provides only basic information and is not intended to serve as a substitute for personal consultation with a Legal Assistance Attorney. To schedule an appointment with a Legal Assistance Attorney, please contact the Legal Assistance Office at (580) 442-5058. The Fort Sill Legal Assistance Office is located on the 4th Floor of Building 4700 (Welcome Center) at 4700 Mow-Way Road, Fort Sill, Oklahoma 73503.