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PRENUPTIAL AGREEMENTS

A PRIMER

By

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WHY HAVE A PRENUPTIAL AGREEMENT?

The divorce rate for first marriages is 50% and for second marriages it is 60%. However, only 1% of married couples have a premarital agreement, known as a prenuptial agreement. Studies show this low number is for two reasons. First, it is due to the “it won’t happen to me” philosophy. Second, it is thought to demonstrate a lack of trust in the relationship. Actually, a prenuptial agreement fosters open communication. By looking at current and future plans for assets, the couple can determine if their philosophies are compatible, and work to resolve any conflicts before they become a source of friction in the marriage. Also, should the marriage not last, the agreement provides for the division of property without the expense and acrimony that might otherwise occur.

Due to changes in our society, premarital agreements are more important now. These agreements provide for those marrying to determine how to handle property acquired by each of them before marriage, as well as property acquired by them after marriage. The need to do this is prompted by people marrying later in life and multiple marriages. When people marry young, they have no assets to protect. When they marry multiple times, they may need to protect children from prior marriages.

Just as the name implies, prenuptial agreements must be completed prior to marriage. Ohio does not recognize post-nuptial agreements, except separation agreements made when parties physically separate in contemplation of divorce.

When contemplating a prenuptial agreement, the first thing to consider is how the law would affect you if you do not have one. In Ohio, all property owned by a person before marriage remains their separate property. The only things that changes that are if the property is eliminated during the marriage, rather than transferred to another asset or if the person gifts the property to the marriage. Therefore, upon divorce, a party will receive his premarital property, plus any non-marital growth thereon.

Besides divorce, people who have children from prior marriages may be concerned about inheritance for those children. Under Ohio law, if a married person who only has children with their current spouse dies without a will, all property goes to the spouse. If the deceased has one child and the surviving spouse is not the parent of that child, then the spouse receives the first \$20,000 and then one-half of the remainder of the estate, and the child receives the other one-half. If the deceased has a child with the surviving spouse, but also other children, the spouse receives the first \$60,000 and then one-third of the remainder of the estate, and the children receive two-thirds.

If a person makes a will, can they leave out their spouse and keep them from inheriting? No. A surviving spouse has a right to elect under a will. This means that he or she can choose to retain the marital residence, an allowance of support for up to \$40,000, and from one-third to one-half of the remainder of the estate.

A prenuptial agreement can be used to alter the spouse's statutory rights to inherit. Under it, a spouse can agree to be prohibited from receiving some or all of the deceased spouse's estate.

WHAT IS REQUIRED FOR A PRENUP?

When entering into a prenuptial agreement, there are certain things that must be done to make it valid. The first requirement is full financial disclosure. This means that each party must provide a complete list of all assets, including their current value.

The second requirement is that each party has the opportunity to fully review the agreement, with an attorney if they wish. If one spouse takes the other to his attorney's office and presents the agreement, asking that she sign without time to take the agreement and review it, the prenuptial may very well not hold up in court.

The third requirement is that there is no fraud or duress. No fraud means that no assets were not disclosed and that they were not undervalued. No duress means that neither party was forced into signing the agreement. This force could be the actual threat of no marriage without it or the more subtle force of presenting the agreement shortly before the wedding when there is little time to review, and doing so would result in delay and embarrassment. The prenuptial agreement should be completed before the invitations for the wedding are sent.

The fourth requirement is that the agreement be conscionable. That is, it must not overreach, and must be made in good faith and with fair dealing.

Finally, the agreement must not promote divorce. That is, it cannot reward someone for ending the marriage.

All of the above requirements are judged at the time the agreement was made, not at the time a party seeks to enforce the agreement. Thus, if a divorce is filed, and one party challenges the validity of the agreement, the Court must determine if it was properly entered into, not if it is fair now.

CAN SPOUSAL SUPPORT (ALIMONY) BE ADDRESSED IN THE PRENUP?

Yes, the agreement can provide for the amount and duration of spousal support or for no support at all. However, unlike the property division, this provision is judged at the time of the divorce. This is because the State has a public policy interest in not allowing a spouse to become destitute upon divorce.

CAN CHILD CUSTODY AND CHILD SUPPORT BE ADDRESSED IN THE PRENUP?

No, the State has a public policy interest in the welfare of children. Custody of children is determined based upon what is in their best interest. See our Child Custody report for more information on this. The State also has an interest in the support of children. See our Child Support report for more information on this.

The Court will determine the custody of the children and the support paid for them, if the parties cannot agree. The prenuptial agreement may influence the support amount if one party will receive less than half the assets, as Ohio law would give them.

WHAT IF WE MOVE AWAY FROM OHIO?

Prenuptial agreements are generally governed by the law in the State where they were created. If you contemplate moving to another, particular state, you may wish to look into the laws regarding prenuptial agreements in that State.

HOW CAN I RECEIVE MORE INFORMATION?

We hope you have found this report useful. As you can see, there are a number of issues to examine when deciding if a prenuptial agreement is right for you. We strive to obtain full information from you to examine all factors that may affect what you receive, so we can fully advise you. If you would like to discuss your situation, please call the office at **513-241-4029** or email us at **cathy.cook@cathycooklaw.com**. We offer a free phone consultation. For a more in-depth analysis of your situation, we offer an in office case audit.

LEGAL NOTICE

The above is an overview of prenuptial agreements in the state of Ohio. It is not legal advice, and does not create an attorney-client relationship with Cathy R. Cook, Attorneys at Law. Your own situation should be reviewed and analyzed by an attorney.