

Pre-Nuptial Agreements

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Any business person who has significant assets and who is getting married for the first time or remarried should seriously consider signing a pre-nuptial agreement. A pre-nuptial agreement may take some of the spontaneity out of the emotional relationship, but from a dollars and sense standpoint, it can help insulate your separate property in the event of a divorce.

In Washington, there is no specific statute governing pre-nuptial agreements. The validity of a pre-nuptial agreement or contract depends on a number of factors:

1. The contract must not contravene public policy;
2. The parties must be fully informed of the extent of each party's separate property;
3. The contract formalities should be observed, including full disclosure, consideration and signatures;
4. The parties should seek independent legal advice; and
5. The contract must be entered into voluntarily.

Your lawyer cannot tell you with any degree of certainty whether a pre-nuptial agreement will be ultimately upheld by the court in a future divorce proceeding. However, a well-crafted pre-nuptial agreement has a good chance of passing judicial muster.

Purpose of the Agreement

The agreement should discuss the nature and value of the separate assets each of the parties brings with them to the marriage. It should also describe each party's assets in separate property schedules attached to the agreement, including the estimated dollar values of the assets listed.

Separate Property

The agreement should state that the listed separate property of the parties is to remain separate property, and that any proceed from the sale of any separate property will continue to remain separate property. In the event of an appreciation in value of an asset the appreciated value also remains the separate property of the party owning the asset.

Co-Mingling

Co-Mingling separate property with community property generally makes it community property. The parties need to take extra care that the separate property not be co-mingled. In the event that separate property is co-mingled, the parties can still try and "redivide" the separate property based on the values set out in the separate property schedules.

On-Going Identification of Separate Property

The agreement basically revolves around the "separate property" listed in the separate property schedules. As time goes on, certain property may have been inadvertently or mistakenly omitted from the separate property schedules. For example, future inheritances or *inter vivos* gifts can be designated by the parties as separate property and later included in the separate property schedules.

Debts

Each party is responsible for any separate debts they incur prior to the date of the agreement. Further, it should be specifically stated that neither party shall be liable for any debts incurred by the other in connection with their ownership of separate property after the marriage. This provision, of course, gets a little tricky. For example, if one of the parties has a separate card and runs up debts, the credit card company will still try and collect against both spouses. This is a whole separate can of worms. (One of these days I'll have to write an article on credit card rights.)

Marital Home

In a normal marriage, the parties will live together in a home in which one or both of them contributes cash, purchases a mortgage moves in, and purchases furnishings. The easiest thing to do is to treat the home as community property. However, the parties can agree to assign particular percentages of the fair market value of the home as their separate property interests. For example, at the time the home is sold, the sales proceeds would be allocated to each party by their agreed upon percentages, minus the payment of any outstanding mortgage and other debts against the home. The parties can also write into the agreement who will retain possession of the home in event of a divorce, and who will make the mortgage payments. The parties can also designate in the agreement that in the event of the death of one of the parties, the home shall pass outright to the surviving spouse, and the parties can execute a limited community property agreement to that effect after they are married.

Jointly Owned Property and Expenses (Other Than Home)

The parties can also agree that certain community property expenses are to be taken care of by setting up a joint checking and joint savings account. Any payments made into the joint accounts are treated as community property. The parties should state that they intend to use the depositing of separate funds into joint accounts as a method of converting separate property into community property. The parties can also indicate that all property purchased from funds from a joint account will be held by the parties as community property.

Termination of the Agreement

The agreement can be terminated by (1) death of either party, (2) termination of the contemplated marriage, (3) court order, or (4) mutual agreement. If a party believes they have been treated unfairly, they can appeal to a court to throw out the agreement. To try and prevent this, the agreement should include that the parties have sought the advice of independent counsel,

that they have had time to think about it sufficiently before the marriage takes place, and that it is a voluntary and uncoerced agreement.

Recitation of Property Rights

A good attorney will recite the community and separate property rights of the parties. Community property rights can be voluntarily waived by signing a prenuptial agreement. The monied party will often want to retain as much separate property as possible on the grounds that they earned it before entering into the marriage and want to retain it if the marriage is dissolved.

Some items can be built into the agreement so that the non-monied party can still be treated “fairly.” For example, a certain sum of cash can be paid to the non-monied person as their separate property for every year that the marriage lasts, free of any control of the monied person. Also, in the event of a dissolution, a fixed sum can be agreed upon beforehand by the parties prior to the marriage.

Other Provisions

Other helpful clauses include the right to independent counsel, the voluntary execution of the agreement, the full disclosure of each party's separate property assets, and the payment of attorneys fees. The parties should execute the agreement in front of a notary public who will witness their signatures. Separate attorney certifications should also be included in the agreement showing that each party has consulted with and been given advice by their independent counsel before signing the agreement.

Summary

In general, the Washington courts will apply the same standards to the enforcement of prenuptial contracts as they would apply to other contractual relationships in connection with separation or divorce proceedings. The attorney should put together an agreement that the parties will agree to and that the parties believe is a fair agreement. Love may make the world go around, but you keep a close eye on your assets!

Good luck!

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