

Premarital Agreement Checklist

- Make sure that you discuss, negotiate, and enter into an Agreement well in advance of the wedding. Last minute Agreements are more difficult to enforce.
- The key elements to creating a valid, enforceable Agreement are full disclosure and the opportunity for both parties to consult with independent counsel. It's important to disclose all assets and income; Nevada courts impose a fiduciary duty on parties who are engaged. If it's relevant, ask about the difficulties involved in valuing a closely held company.
- The Agreement should include a clear statement of respective rights on divorce or death of one of the parties; consider increasing the level of compensation to the less wealthy party over time, based on the length of the marriage and the parties' potential increase in wealth; this will help prevent claims of unconscionability or overreaching.
- Financial issues that could be addressed, and should at least be considered, include:
 - What already-existing property will be retained as separate or premarital property (e.g., business interests, investment accounts, real estate)?
 - Will spousal inheritance rights be waived (i.e., will existing or future children, or others inherit the property, instead of the spouse)?
 - Will appreciation of existing property be considered separate property or community property?
 - Will earnings during the marriage be considered separate property or community property?
 - Will there be alimony/maintenance in the event of divorce? Do you wish to specify, limit, or restrict what amount or duration of alimony might be awarded by a divorce court?
 - Who will own separate property commingled with community property, or community property commingled with separate property?
 - Who inherits what if one party dies during the marriage?
 - Do you wish to make advance arrangements for child support? Agreements that address child support are not binding on the court, but can be upheld if they meet the reasonable needs of the child, and you can agree to items (such as college expenses) that could not be ordered unless you agreed to them.
- Both parties cannot be represented by one attorney. Separate counsel should be

suggested, preferably in writing, and the Agreement should document that it was suggested. Cases have shown that courts are more likely to enforce an Agreement when both parties actually saw independent counsel, as opposed to those cases where one party or the other decided not to see a lawyer before signing.

- Each party should meet separately with his or her attorney, away from the other party and attorney, to discuss the terms and meaning of the Agreement. This helps prevent later allegations of coercion.
- It is best if each party chooses his or her own attorney; problems may result if the wealthier party chooses or even suggests an attorney for the other party, although we can easily suggest a *list* of attorneys who practice in this field if desired. It also is best (although not required) if each party is responsible for his or her own attorney's fees.
- Both your file and your attorney's file should document the negotiation process, retaining copies of correspondence and drafts of the Agreement to show — in particular — changes made at the request of the other party. A record of active negotiation enhances the likelihood that the Agreement will be upheld. Such documentation might include the parties' handwritten responses to questions, recorded dialogue between the attorneys and parties at the time of the signing by a court reporter, and/or a videotape of the signing and of an attorney-client discussion about disclosure and the voluntary nature of the drafting process.
- The Agreement should document the parties' levels of education, experience in business and legal matters, and prior marriages.
- Consider alternatives to an Agreement, such as the establishment of an *inter vivos* trust before marriage or the keeping of separate accounts during marriage. For Jewish clients, consider a clause stating that the parties agree to cooperate in obtaining a *Get* (a religious divorce), in the event that the marriage is dissolved.
- If the attorney for either party thinks the Agreement may be unenforceable, the attorney may write a letter to the client describing the possible problems, or even signing the document "approved as to form only." This could endanger the Agreement's validity if challenged in later proceedings.
- Each party should be provided with a copy of the Agreement.

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