

Domestic Relations

PRENUPTIAL AGREEMENTS

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Persons who are contemplating marriage may consider whether or not to enter into a prenuptial agreement. A prenuptial agreement (sometimes referred to as an antenuptial agreement) is an agreement whereby the parties to the anticipated marriage may agree to modify or give up certain property rights in the property of their prospective spouse that they may otherwise receive simply by virtue of their marriage. These rights include rights to their prospective spouse's real estate or inheritance, rights to inherit property from their spouse in the event of death and certain other rights given to a husband or wife as a result of the marriage alone.

Until recently, prenuptial agreements which were made only in contemplation of divorce or separation were contrary to the public policy and not enforceable. It had been thought that if parties to an agreement (ordinarily the prospective husband and wife) knew the outcome of a divorce if one were to occur, they would be less likely to remain in the marriage and divorce would even be encouraged.

Most commonly prenuptial agreements are considered as an option for people who have been previously married or who either (a) have children from a previous marriage which they wish to protect financially from the claims of their new spouse; or, (b) who may have acquired sizeable assets before the contemplated marriage which they wish to segregate from their new marital estate. In addition, a properly drafted and executed prenuptial

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agreement can serve to reduce the controversy in the event that a divorce should occur.

A 1991 decision of the Michigan Court of Appeals has established that a properly drafted and executed prenuptial agreement is enforceable in the event of a divorce. In order that the agreement be enforceable at the time of a divorce, the agreement must be examined by the Court and it must appear that all of the following are true.

1. The agreement was not obtained by fraud, duress, mistake, or misrepresentation or by non-disclosure of material facts.
2. The agreement was not unconscionable (grossly unfair) at the time that it was executed.
3. The facts and circumstances since the signing of the agreement have not changed so substantially or dramatically so as to render the enforcement of the agreement at the time of the divorce unfair, even if it was fair at the time of the signing of the agreement.

In order to maximize the likelihood of the prenuptial agreement being enforceable in the event of a divorce, the following measures should be observed.

1. Each party to the agreement should be represented by their own independent attorney. While it is not essential that each party be represented by a separate attorney (in separate

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law firms), claims of duress, fraud, or undue pressure or influence from one spouse upon the other will be more readily avoided.

2. The agreement should be made and executed as far in advance of the wedding as time will allow. Agreements executed on the wedding day or the week preceding the wedding are subject to being voided. This problem is avoided to a substantial measure if the agreement is executed well in advance of the wedding.
3. There should be complete disclosure of all assets of the parties. The assets should be listed in the agreement or in exhibits that are attached to the agreement. This allows each of the parties to make an informed choice as to what they are giving up and avoids claims of misrepresentation or omission of assets.
4. The technical contract aspects of the agreement such as the method of execution, whether adequate consideration is given, witnesses and the like must be observed. Accordingly, the agreement should be prepared by legal counsel and its signing formalities carefully observed.

As a practical proposition, prenuptial agreement is a difficult issue to address by the parties and requires a mature and adult consideration. Many times the prospective husband or wife believes that the consideration of a prenuptial agreement represents something less than a

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full commitment on the part of the prospective spouse. “If you really love me, then your assets will be mine and mine will be yours” is a common response to the subject of a prenuptial agreement. The parties should approach the issue from a mature viewpoint and recognize that other factors such as the interests of children from a previous relationship or a prior unsatisfactory experience from an earlier marriage and divorce, make the consideration of a prenuptial agreement a way of addressing financial matters in advance so that the new husband and wife can focus on the all important non-financial aspects of their marriage.

Postnuptial agreements, those executed by the husband and wife after the marriage, are also enforceable in Michigan. Accordingly, even if a prenuptial agreement has not been executed prior to the marriage, if a validly drawn and executed agreement is made after the marriage, it will be enforceable. Many of the same considerations that effect the validity and enforceability of prenuptial agreements apply to postnuptial agreements.

Finally, even if a Court determines that a prenuptial agreement or postnuptial agreement is not enforceable, upon a divorce, the Court may consider the pre or postnuptial agreement as an expression of the intentions of the parties upon its execution.

In summary, a prenuptial agreement is a viable option for those parties contemplating marriage, particularly a subsequent marriage or a marriage later in life. A prenuptial agreement should be prepared and executed pursuant to important legal parameters and may serve well toward resolving otherwise thorny financial questions between spouses.

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