

Premarital Agreements are Becoming Increasingly Important for Couples to Consider Before they Marry

The following are the most important things couples should be considering when they think about entering into a prenuptial agreement:

First, there is no formula premarital agreement! The terms should be as individual as the couple getting married. **Second**, This kind of an agreement is something of an insurance policy and can provide for what happens if your marriage lasts a lifetime as well as for the contingency of an early termination of the marriage. **Third**, in California, it is very important to complete and review thorough financial disclosures as part of a premarital agreement and consider all of the possible provisions that could be contained in such an agreement including spousal support waivers and limitations on what would be considered community property during marriage.

The Basics of California Family Law and Premarital Agreements

- California is a community property state in which spouses have equal ownership in all community property (property acquired during marriage). All money or property acquired by spouses during marriage is presumed to be community property unless the parties agree otherwise. Money or property owned prior to marriage, gifts, and inheritances, regardless of when received, and post-separation earnings, are separate property as are all earnings, rents, appreciation and accumulations on separate property. If and to the extent that a spouse devotes personal effort during marriage to the management or improvement of separate property, such as a business, a community property interest is then created in the separate property unless the parties agree that these efforts will not create a community property interest. On the death of a spouse, the surviving spouse owns one-half of all community property and is entitled to inherit a statutory portion of the deceased spouse's separate property and share of community property in the absence of a will, trust or premarital agreement that provides otherwise.
- On dissolution of marriage in California, community property is divided equally between the spouses (in the absence of a prenuptial agreement) and separate property is confirmed to its owner spouse. In a premarital agreement you can contract freely regarding the separate, community or mixed character of property and change the consequences of California Family Law if both parties agree. If you obtain a divorce in another state or country, that jurisdiction may or may not honor your premarital agreement and different rules could apply to the division of property. For example, in many U. S. states, marital property (including some property that California would consider separate property) is "equitably divided", not necessarily "equally divided". Many spouses create a premarital agreement in order to avoid the application of laws that do not apply in California, but do exist in other states or countries such as the "equitable division" laws.
- It is contrary to California public policy to provide, child custody, child support or parentage provisions in a premarital agreement.

- On dissolution of marriage in California, either spouse may owe spousal support (alimony) to the other spouse based on need, ability to pay, marital standard of living, the length of the marriage and a variety of other subjective factors. California statutes provide that spousal support generally lasts for one-half of the length of marriage if a marriage is short-term (less than ten years) and may last until death of either spouse, the remarriage of the supported spouse or further order of the court after a lengthy marriage (ten years or more). These rules build in considerable discretion for a judge to make spousal support orders. Within certain limits, you can provide for a waiver or modification of these spousal support rules in a premarital agreement. A premarital agreement with terms for spousal support that are found to be unconscionable, however, when drafted or at the time of enforcement (i.e., upon divorce) may be held to be unenforceable so it is important to carefully craft spousal support waiver provisions in a premarital agreement to meet the intent of the parties.

Organizing Questions

1. Do you plan to live in California?

If you do not plan to become a California resident, you should consider consulting an attorney in the jurisdiction where you plan to reside. If you are a California resident but think you may relocate to another state during marriage, you may want a premarital agreement that avoids “equitable division” laws or other unfavorable laws of another state or country

2. Do you want marital earnings from employment or business interests to be separate or community property during marriage?

This is perhaps the most important organizing question. Will you and your spouse want to accumulate community property together? Will all earnings be community property or will you want to protect certain kinds of earnings as separate property? If you have separate property now that may acquire a community component through work during marriage (such as stock options, restricted stock or premarital business interests), do you want to avoid the possibility of a community interest in this separate property?

3. Do you want to make special provisions for any particular kind of property?

Some couples want to make special provisions for the ownership of a personal residence or a business owned before marriage or other particular kinds of property. Does this apply to you?

4. Do you want to modify your obligations for spousal support if your marriage is dissolved?

Many couples want to eliminate or limit their potential obligations for or right to receive spousal support if their marriage ends in divorce. Whether you can or should depends on many factors, including whether you can foresee what you and your spouse’s circumstances will be in the future, your current income potential and the overall fairness of other terms of the agreement.

5. Do you want to make special provisions for your spouse if your marriage ends in your death or for you from your spouse if your marriage ends in your spouse's death?

Some couples want to create life insurance or other protections such as annuities, wills or trusts to provide for their own security or the security of their spouse in the event of death. For this reason, many prospective spouses create estate plans in conjunction with their premarital agreements.

These are the basic concepts all couples should think about before marriage and should discuss at length with an experienced and qualified Family Law Attorney.