

## PERSONALIZING THE MARRIAGE CONTRACT

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Is someone you care about contemplating marriage? Then that someone should also consider a prenuptial agreement.

Marriage is a civil contract. Its terms are usually governed by the legislature and the courts. However, the couple may elect to exercise their rights to vary the terms of that contract. Depending on the couple's religious beliefs, marriage may also be viewed as a covenant or a sacrament. Regardless of religious views, it is the civil court system that enforces the rights and obligations of the parties on termination of the marriage relationship either by divorce or the death of one of the parties.

It is unlikely that anyone (even Jennifer Lopez) would marry someone expecting to divorce his or her spouse later. Nevertheless, while the precise statistics are subject to dispute, close to 50% of all marriages end in divorce. The rate of divorce is slightly higher for second marriages.

The divorce laws give the court broad discretion over dividing property and an equal division of marital property is presumptively valid. Divorce proceedings are often long and expensive. This is not because it is difficult to terminate the marriage. Rather it is because it is difficult to reconcile competing views on the appropriate division of property, the value of that property and the characterization of that property as marital property (subject to division) and non-marital property (not subject to division).

The court system struggles valiantly to come up with a fair and reasonable allocation of assets and responsibilities between the divorcing parties. A couple can enter into a private agreement that settles in advance the handling of financial matters in the event of death or divorce. This contract preempts and overrides the default rules set out by the legislature and the court system.

Such agreements can be entered into either before (prenuptial agreement) or after (postnuptial agreement) the marriage occurs. These agreements allow the couple to decide what is fair and reasonable while they love each other rather than viewing these questions in the middle of a divorce proceeding where the parties may well hate each other. A divorce can be a financial disaster, particularly where difficult to liquidate business assets are involved.

The agreement should cover how assets will be divided in the event of divorce. The agreement should cover assets owned at the time of marriage or as of the date of the agreement as well as earnings and value increases during the marriage.

The agreement should also cover each spouse's power to engage freely in estate planning. This is particularly important where one or both of the individuals have children by a prior marriage. Generally in such situations each individual wants to take

care of and support their spouse, but anything left over should go to the decedent's children rather than the children or heirs of the new spouse. Such agreements should also be considered where one spouse has significantly more money than the other or where a business interest is involved.

In Alaska (like most states) the ability of one spouse to disinherit the other spouse is extremely limited unless there is a prior agreement which alters the rules. Without an agreement, a surviving spouse is generally entitled to priority allowances, usually amounting to \$55,000, plus one-third of the augmented estate. The augmented estate includes life insurance, retirement plans, jointly held real estate, gifts to third parties made within two years of death, and basically everything that the predeceased spouse owned at the time of death. The formula also includes some consideration of the surviving spouse's separate assets.

Where spouses wish to provide for each other by way of trusts making assets available as needed but saving the remainder for their own chosen beneficiaries (such as children of a prior marriage), a prenuptial (or postnuptial) agreement is appropriate to restrict these elective share rights and allowances. In addition, federal law provides that a spouse must be named the beneficiary of certain qualified retirement plans (not IRAs) unless the spouse consents in writing to some other beneficiary designation.

Alaska courts recognize both prenuptial and postnuptial agreements as valid and enforceable. The Alaska Supreme Court has stated that prenuptial agreements provide a couple "with the opportunity to ensure predictability, plan their future with more security, and, most importantly, decide their own destiny. Moreover, allowing couples to think through the financial aspect of their marriage beforehand can only foster and strengthen the permanency of that relationship." *Brooks v. Brooks*, 733 P.2 1044, 1050 (Alaska 1987).

A pre- or postnuptial agreement that is in writing and signed by both parties is presumptively valid. However, in appropriate circumstances a court will consider whether the agreement was obtained through fraud, duress, mistake, or misrepresentation. Whether the agreement was unconscionable when signed and was entered into without full disclosure or voluntary waiver of complete disclosure is another factor for court consideration. The court might even consider whether facts and circumstances have changed since the agreement was signed such that enforcement is unfair and unreasonable.

Accordingly, it is important that such agreements be in writing, that they fully reflect the agreement of the couple and are signed willingly and voluntarily. Full disclosure of financial information should be provided. While waiver of disclosure may be enforceable, full disclosure makes it more likely that a court will enforce the agreement.

To reduce the possibility that the agreement will be set aside at some time in the future, it is better to have each individual represented by separate legal counsel. While

many couples are unwilling to go to this additional expense and inject potential disharmony brought on by separate advocates, it should not be viewed as substantially different from having your own lawyer look over an important contract before signing it.