

## **Premarital Agreements: What they are and why you Should Care.**

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Probably the last thing a new bride or groom wants to consider prior to their wedding is a premarital agreement. After all, with all the moving parts involved in planning a wedding and a honeymoon, who has the time or desire to worry about obtaining a premarital agreement? Nonetheless, you may find yourself needing a premarital agreement for any number of reasons: one fiancé may have significant wealth coming in to the marriage or the potential for a significant inheritance. Or, you or your fiancé may be getting married for a second time. Or, you may want to have different rules related to death and divorce than the ones that the state provides.

The experience of a marriage ending – by death or divorce – can be emotionally traumatizing. People getting married may choose to have a premarital agreement to provide predictability at a time when they are experiencing this trauma.

### ***What is a Prenuptial Agreement?***

A premarital agreement (a.k.a. “Antenuptial agreement,” “Prenuptial Agreement,” or “Prenup” for slang) is: “[a]n agreement made before marriage usually to resolve issues of [spousal] support and property division if the marriage ends in divorce or death of a spouse.” *Black’s Law Dictionary* (9th ed. 2009). Essentially, premarital

agreements are written contracts between future spouses, which provide for what is to occur in the event of either divorce or death.

Premarital agreements in Colorado are defined and governed by Colorado's "Uniform Premarital and Marital Agreements Act" codified in C.R.S. § 14-2-301 *et seq.* According to statute, a premarital agreement in Colorado is defined as: "an agreement between individuals who intend to marry which affirms, modifies, or waives a marital right or obligation during the marriage or at legal separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event."

Under current Colorado law, premarital agreements differ from "marital agreements," in that the former are contracted and executed *prior* to the marriage ceremony, while the later are formed sometime during the marriage itself. *See*, C.R.S. § 14-2-307 (2016) ("A premarital agreement is effective on marriage. A marital agreement is effective on signing by both parties"). A premarital agreement also differs from a "cohabitation agreement," which is a written agreement implemented to safeguard individual's assets after a couple has chosen to live together while remaining unmarried. Cohabitation agreements can be equally as important for those individuals residing in states such as Colorado that still recognize the legal doctrine of common-law marriage, but that is a different subject.

Many times after a dissolution of marriage (divorce) starts, a spouse will assert that they had a verbal agreement regarding deciding what would happen with a specific piece of real property, personal property, or spousal maintenance. Unfortunately, there is an old maxim that applies to such situations: "If it's not in writing, it didn't happen." By Colorado statute, premarital agreements must be in writing and signed

by both parties. C.R.S. § 14-2-306 (2016). Often times clients hold a misconception that since their premarital agreement was not notarized that it is not valid or enforceable. This is a myth as there is no legal requirement in Colorado to have a premarital agreement notarized. Having a premarital agreement notarized is, however, a good formality to guard against later claims of duress, fraud, and even forgery.

### ***What is Typically Included in a PreMarial Agreement?***

Premarital agreements can include provisions for what is to occur in the event either party initiates a dissolution of marriage proceeding. For example, this can include: payment (or non-payment) of spousal support, payment of attorney's fees and costs, division of marital property, and even defining what will be included in a marital estate.

However, Colorado law prohibits inclusion of any term or provision that is against "public policy." C.R.S. § 14-2-310(2)(e) (2016). Colorado cases have held this to apply to certain spousal support agreements. Similarly, provisions with respect to payment of attorney's fees may also ultimately be unenforceable. A trial court may review a waiver of attorney fees in a marital agreement for unconscionability at the time of dissolution, because an unconscionable waiver violates the public policy interest behind protecting spouses. *In re Marriage of Ikeler*, 167 P.3d 663 (Colo. 2007).

Additionally, any clauses in the premarital agreement purporting to limit child support, or which defines the rights or duties of the parties regarding custodial

responsibility (known as decision-making and parenting time), is not binding on the court. C.R.S. §§ 14-2-310(2)(a)-(3) (2016).

### ***Advantages of a Premarital Agreement.***

For starters, premarital agreements (if properly drafted) can reduce litigation costs and time or eliminate the need for litigation altogether. Additionally, because adequate financial disclosure is required of each spouse, a person enters a marriage with more knowledge of the economic circumstances of their fiancé before entering the marriage. Also, a premarital agreement provides peace of mind that specific goals as to assets owned at the time of marriage, inherited or received by gift during marriage, and earned during a marriage, will be addressed in the manner that two people have agreed.

### ***Disadvantages of a Premarital Agreement.***

Premarital agreements do require careful drafting and varying amounts of negotiation. Be careful when thinking there's a stock form that can be obtained for a bargain price: the agreement may not be worth the piece of paper it is written on. People have different issues as to their assets and income, and no one marriage is the same as anyone else's. Using a "template" or a premarital agreement purchased off the internet may have very unintended consequences.

While this means a premarital agreement may sound costly up front, the agreement can very much be the "ounce of prevention that prevents a pound of the cure."

Additionally, many people find this to be a hard conversation to have with their future spouse. It's a lot easier to discuss wedding dresses, liquor selection, the first dance song, and the guest list. Ok, maybe not the guest list. But having this tough

conversation can be good practice for people about to embark on a lifetime of tough decisions that need to be made together.

Another disadvantage is that one day you may have to litigate a poorly drafted premarital agreement. Or, even have to litigate a very well drafted premarital agreement, because even the best written premarital agreements can sometimes be read differently by different parties and attorneys.

### ***Who needs a Premarital Agreement?***

For years, premarital agreements were thought to be reserved for the rich and famous. However, prenuptial agreements are not just for professional athletes and celebrities anymore.

Anyone that owns his or her own business, has substantial income or expects substantial income, owns real property, expects an inheritance, or has substantial other assets should consider the need for a premarital agreement. Even without these assets, you should consider whether your future spouse will be attending college during your marriage if you want the student loan debt to belong only to the person who incurred it. The sobering reality is that every marriage will end one day, by either death or divorce. A thoughtful premarital agreement can anticipate and prepare for either event.

### ***Do you have to be a Lawyer to Draft a Premarital Agreement?***

No, you do not have to be a lawyer to draft a premarital agreement. However, there are many pitfalls non-law drafters can (and often do) encounter. For example, many times parties attempting to execute a premarital agreement do not even realize there are statutory requisites, which must be included in each agreement that are often

overlooked. *See*, C.R.S. § 14-2-309(3). And it's far too easy to draft provisions that are too vague to enforce, ambiguous, or void as opposed to public policy.

### ***Final Thoughts.***

In addition to numerous statutory requirements involved with executing a proper premarital agreement there is an abundance of practical considerations that should be met to create a legally binding and enforceable agreement.

For example, if one spouse is represented by an attorney and the other spouse fails to have his or her own separately retained counsel review the premarital agreement prior to signing, there is a chance the agreement may be invalidated later on. Colorado statutes state a premarital agreement is “unenforceable” if a party against whom enforcement is sought proves the party did not have access to independent legal representation. C.R.S. § 14-2-309(1)(b) (2016). Under Colorado law, “[a] party has access to independent legal representation if...[b]efore signing a premarital or marital agreement, the party has a reasonable time to (i) [d]ecide whether to retain a lawyer to provide independent legal representation; and (ii) [l]ocate a lawyer to provide independent legal representation, obtain the lawyer's advice, and consider the advice provided; and [t]he other party is represented by a lawyer and the party has the financial ability to retain a lawyer or the other party agrees to pay the reasonable fees and expenses of independent legal representation.” C.R.S. §§ 14-2-309(2)(a)-(b) (2016).