

Breaking Up Is Hard To Do (But It Might Be Easier with a Prenup)

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1. Introduction

- All marriages will end one day, either by death or divorce
- Purpose of a prenap
- Estate planner's perspective
- Rules vary by state
- Psychological and emotional impact on couple and family

1. Introduction (cont.)

- Terminology
 - Premarital agreement = prenap or antenuptial
 - Postmarital
 - Equitable Distribution

2. History

- **Modern Prenup v. Marriage Settlement**
- **Early “True” Prenups – absolute releases**
- **Modern Prenups – “divorce financial planning”**
- **Public policy – refused to enforce provisions that might encourage divorce**
- **Development of Uniform Prenup Act**

3. Economic Aspects of Divorce

- **Separation agreement**
- **Property Division**
 - **Separate property**
 - **Marital property**
- **Alimony**
- **Child Support**

3. Inheritance Rights after Death of a Spouse

- **Elective Share Rights**
 - **In NC, like most states, a surviving spouse is entitled to a minimum share of the estate (absent a prenup)**
 - **Under the version adopted in 2014, the minimum share is a percentage based solely on the duration of the marriage (from 15% to 50%)**

4. NC Uniform Premarital Agreement Act (N.C.G.S. Ch. 52B)

- **Contents**
- **Formalities**
 - **Signed writing**
 - **No consideration required**
- **Amendment/revocation**
- **Enforceability**

4. NC Uniform Premarital Agreement Act (N.C.G.S. Ch. 52B)

- **Unenforceable if party can prove that:**
 - **The party did not execute the agreement voluntarily; OR**
 - **Unconscionable at the time of execution AND the party was not provided a fair and reasonable financial disclosure (nor did the party have knowledge of the other's finances; nor had the party voluntarily waived disclosure)**

5. Relevant Factors to Enforceability

- **Disclosure**
- **Timing**
- **Separate Representation**
- **Public policy/criminal statutes**
- **Fraud/undue influence**

6. Common Provisions

- **Recitals**
- **Financial Disclosure/Waiver**
- **Inheritance Rights**
- **Property Division**
- **Spousal Support/Waiver**
- **Tax filing choices**

6. Common Provisions (cont.)

- **Responsibility for debts**
- **Independent counsel**
- **Administrative provisions**
- **Severability**
- **Signatures and notary acknowledgments**

6. Common Provisions (cont.)

- **Property Division Issues**
 - **Separate Property**
 - **Joint Property**
 - **Business Interests**
 - **Retirement Accounts**
 - **Free Trader**
 - **Appreciation (active v. passive)**
 - **Proceeds and replacements**

6. Common Provisions (cont.)

- **Specific Issues**
 - **Business Interests**
 - Review treatment w/o prenup
 - Active v. passive appreciation
 - Business income
 - Source of capital contributions
 - Impact of business debts/guarantees
 - Exchanged property/sales proceeds

6. Common Provisions (cont.)

- **Specific Issues**
 - Retirement Accounts
 - Household operations
 - Conduct of marriage
 - Property distribution in lieu of alimony or spousal support

7. Candidates for a Prenup

- **Family Business Owner (G1, G2 or G3)**
- **High net worth family**
- **Second marriage (particularly if there are children from a prior marriage)**
- **Celebrity/athlete**
- **Widows/widowers marrying late in life**

8. Miscellaneous

- Prenups ineffective for Medicaid
- Doctrine of Medical Necessaries
- Commingling and potential conversion from separate to marital
- Prenups do not replace sound estate planning
- Postnup can rectify lack of prenup
- CPA's role

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