



# The Wedding Planner

*What you need to know about prenuptial agreements before you tie the knot.*

BY JUDITH BRYANT

When you fall in love and decide to get married, asking your intended to sign a prenuptial agreement in anticipation of a divorce is, to say the least, a bit of a downer. Nevertheless, with divorce just as common as “till death do us part,” prenups may be worth contemplating. To decide whether you need one, consider the following:

- 1. What happens if you don't have a prenup?** If you get married without a prenup, everything you owned prior to marriage and everything you receive by gift or inheritance at any time during the marriage will be your separate property upon divorce. So, if all you want to do is make sure the ranch you owned prior to marriage or the beach house you inherited from your parents stays separate, you don't need a prenup.

Without a prenup, however, the *income* you receive from your

separate property during marriage will be community property, as will your earnings from employment during the marriage. Any property you acquire with your earnings or income from separate property during marriage will also be community property. If you want your separate property income to stay separate, or if you don't want even your salary to be community property, then you need a prenup.

- 2. What can a prenup do?** Texas Family Code Section 4.003(a) allows parties to a premarital agreement to agree on many things, including the characterization of property, management and control of property, how property will be divided upon divorce or the death of a spouse, and spousal support, to name a few. Parties can decide to keep certain things

separate (like income from separate property) and still share their earnings as community property, or they can agree to keep everything separate so that no community estate is created at all.

- 3. What can a prenup not do?** Texas Family Code Section 4.003(b) provides that premarital agreements cannot adversely affect the right of a child to support. While parties can and do enter into agreements relating to child issues, anything affecting the children will always be subject to a court's determination of what is in the best interests of the child.

A premarital agreement also cannot contain provisions that violate public policy or a statute imposing criminal penalties, and it cannot be used to intentionally defraud pre-existing creditors.

A premarital agreement also

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cannot waive a future spouse's benefits under the Employment Retirement Income Security Act, as ERISA rights are governed by federal law. Pursuant to ERISA, survivor rights can only be waived by a "spouse." For that reason, if retirement benefits are affected by the terms of a premarital agreement, the parties will have to execute a post-marital agreement affirming the terms of the premarital agreement, so that the waiver of benefits will have been executed by a spouse rather than an intended spouse.

#### 4. Do prenups hold up in court?

If drafted properly, a premarital agreement will usually be upheld. In fact, they are presumed by law to be enforceable if they meet certain prerequisites. The agreement must be in writing and signed by both parties, and the parties must provide disclosure of their assets and liabilities prior to signing the prenup and waive the right to any further disclosure. Unlike other contracts, however, there need not be any consideration for premarital agreements.

Since 1993, premarital agreements can only be challenged if a party can prove the following:

- (1) The party did not sign the agreement voluntarily; or
- (2) The agreement was unconscionable when it was signed and, before signing the agreement, that party: (a) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; (b) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and (c) did not have, or

reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.

Very few premarital agreements have been struck down as "involuntary" or "unconscionable." Neither of these terms is defined in the Texas Family Code, and there are minimal cases to guide us. A few courts have looked to older cases that allowed the common law defenses of duress, fraud, and undue influence to determine whether an agreement was entered into "voluntarily." A very pregnant bride "forced" to sign a prenup on the eve of the wedding might be said to have signed the agreement involuntarily, and the lack of legal counsel for one party might make a difference as well.

Recently, the Dallas Court of Appeals upheld the trial court's finding that a prenup had not been signed voluntarily, where the husband had misrepresented the reason for the prenup, removed all references to the value of his assets, hidden the document from the wife until hours before the wedding, and misrepresented to the wife that her lawyer had approved the agreement. In light of these rather egregious facts, the Dallas COA held there was sufficient evidence to uphold the trial court's conclusion that the wife did not sign the agreement voluntarily. [See *Moore v. Moore*, 383 S.W.3d 190 (tex. App.—Dallas 2012, pet. denied).]

Significantly, however, an "unconscionable" agreement is not established just by showing that it favors one party over the other. Texas courts have held that unfairness is not material to the enforceability of the agreement. The court will look to many factors, such as the maturity of

the individuals, their business backgrounds, their educational levels, whether they have been married before, their ages, and their desire to protect children from a prior marriage.

Whether an agreement is unconscionable will be determined on a case-by-case basis, but proving that it is unconscionable still will not invalidate the agreement unless the court also finds that there was no fair and reasonable disclosure and no waiver of disclosure beyond what was provided. While the issues of voluntary execution and unconscionable terms are highly subjective, whether there has been a fair and reasonable disclosure and a waiver thereof is less so. Therefore, an honest and complete disclosure of assets and liabilities is essential to the successful enforcement of a premarital agreement.

Of course, having a premarital agreement does not *guarantee* that a legal battle at the time of divorce or death will not take place. In some cases, a challenge will be raised to attempt to create leverage for a better settlement than is expected from the terms of the agreement. A premarital agreement may or may not be right for you or your marriage. It is important, however, to be prepared and know what will happen without one, and what one can and cannot do for your marital estate. **TBJ**



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