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Prenuptial Agreements

“The legality of love”

Wine and roses...and prenuptials. While a premarital agreement is not appropriate in every case, one may be appropriate where one spouse has children by a prior marriage or where the spouses, for whatever reason, wish to provide in advance of marriage for the disposition of their property upon separation, divorce, or death.

Premarital agreements have not always been favored in Arizona. In fact, at one time, a contract before marriage providing that the husband would be relieved from the burden of supporting his wife in the event of divorce would have been contrary to public policy and, thus, unenforceable. The law has changed, however, and premarital agreements are no longer against public policy. Arizona, with a majority of other states, has adopted the Uniform Premarital Agreement Act, which, as the name implies, governs the scope and enforceability of premarital agreements.

Prospective spouses are now free to enter into an agreement in contemplation of marriage, which will be effective on marriage. A premarital agreement must be in writing and signed by both parties. The agreement is enforceable without consideration.

Scope of Premarital Agreements

The parties to a premarital agreement may contract with respect to a wide variety of issues, including:

1. The rights and obligations of each of the parties in any of the property of either or both of them, including income and earnings;
2. The right to buy, sell or use any property or assets during marriage;
3. The disposition of property on separation, divorce, death, or any other event;
4. The modification or elimination of spousal support (alimony);
5. The making of a will or trust to carry out the provisions of the agreement; and
6. The ownership of life insurance policies.

The parties may contract with respect to any other matter not listed above, so long as the provision is not in violation of a public policy or a statute imposing a criminal penalty. The right of a child to support may not be adversely affected by a premarital agreement.

Enforcement of Premarital Agreements

A premarital agreement is not enforceable if the person against whom enforcement is sought proves:

1. The person did not execute the agreement voluntarily; or
2. The agreement was unconscionable (grossly one-sided) when it was executed and before execution of the agreement that person:
 - 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.

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

The law contains an exception for modification or elimination of spousal maintenance. If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to be eligible for public assistance at the time of separation or divorce, the court, despite the terms of the agreement, may require payment of spousal support to alleviate the need for public support.

Legal Tips:

- Each party should fully disclose his or her assets prior to entering into a premarital agreement.
- Each party to a premarital agreement should be represented separately by legal counsel.
- Each party should retain a duplicate original of the agreement after it has been executed.