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Prenuptial Agreements: Are they really enforceable? Why should I get one?

One major aspect of family law is prenuptial agreements. I have handled divorces where a premarital agreement was involved but for one reason or another it was deemed invalid according to the courts. I have also helped clients prepare their own prenuptial agreement. Clients usually have several questions about premarital agreements, so I've decided to list the most asked of these questions with the answers I usually give my clients.

My fiancée wants me to sign a premarital agreement, does that mean he doesn't love me?

There are many reasons why a person wants a premarital or prenuptial agreement. A prenuptial agreement protects the interest of both parties and makes the distribution of property easier during a divorce or upon the death of one of the parties. There are cases where a spouse may own a business or may have accumulated property which they wish to remain their property in case something happens to them or the parties decides to part ways.

Does the agreement need to last forever?

There are many couples that enter into agreements which remain valid for a maximum number of years. There are other agreements which provide for various distributions after various lengths of marriage. A couple may also wish to dissolve the agreement after they have been married for a certain amount of time. They would sign a separate agreement which would modify or revoke the previous agreement.

What can be in the agreement?

Parties can agree on issues such as the characterization of property, how community property should be handled, ownerships of businesses and all other issues pertaining to either the separate property or community property of the spouses. Parties may also agree to spousal support payments, minimum or maximum payments, waivers of spousal support and duration of spousal support. Agreements which contain provisions for child support or child custody are unenforceable.

Is a prenuptial agreement really enforceable.



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In California, premarital agreements must conform to California Family Code § 1615. In order for an agreement to be valid ALL of the following factors must be met:

The parties must execute/sign the agreement voluntarily. If a party is coerced into signing the agreement, then it would not be voluntary. The agreement must not be unreasonably unfair to either party.

Both parties must be provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party. If it is found that a party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party, the party may seek to invalidate the agreement based on the non-disclosure of the other spouse.

Both parties must voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.

Both parties must be represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel. This means that each person should have their own attorney review the agreement prior to the time that they sign the agreement. If they choose not to have an attorney review the agreement, they must state in writing that they do not wish to have their own attorney.

Both parties must have at least seven calendar days between the time they are shown the agreement and advised to seek independent legal counsel and the date that they sign the agreement. If you attempt to present your future spouse with the agreement the night before your wedding, then it will likely be deemed to be invalid.

The parties must be fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. If one spouse does not read or write English, the agreement must be provided in their native language.

The explanation of the rights and obligations MUST be in writing and the writing must be delivered to the party prior to the time that they sign the agreement. The party shall, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and that document must clearly state who provided that information.

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The agreement and the writings executed pursuant must not be signed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement (meaning they were of the proper age and mental capacity to sign the agreement).

In my practice, I have seen many prenuptial agreements be deemed invalid because one or more requirement was not satisfied. There was a case which I handled where the wife could not read or write English and no Spanish translation was provided to her. Since she could not fully understand what she was signing the court deemed that the document was not valid. In another case the wife was given the agreement to sign shortly before her wedding. There were numerous guests invited and the agreement was presented as a “take it or leave it” document. She reluctantly agreed to sign the document just moments before the wedding. Ultimately the couple divorced and the premarital agreement was deemed to be invalid.

Where one spouse wishes to have a premarital agreement, it is best to start the conversation before the wedding plans start. When a premarital agreement has been properly prepared and signed, it can save parties a lot of time an expense in the event of a death or divorce. It can also set forth each party’s expectations prior to the time of the marriage. The agreement may also open discussions which the couple should have before deciding to marry.

Many people think that prenuptial agreements are unromantic and falsely believe that if their fiancé wants to sign one they aren't really committed to them, but if done correctly a prenuptial agreement can protect the interests of both parties involved.