

CLIENT INFORMATION LETTER # 48

PREMARITAL AGREEMENTS -- TEN TIPS FOR A BULLETPROOF "PRE-NUPT"

The purpose of this handout is to suggest some ideas on the preparation of a solid premarital agreement (often called a "pre-nupt"). Premarital agreements in this state are covered under Chapter 52B of the General Statutes, the Uniform Premarital Agreement Act. The tips below are adapted from an article in the October 14, 1996 issue of Forbes magazine. It is, of course, impossible to cover every issue that might come up in this area in a short brochure such as this. We want you to ask other questions of your lawyer at the appropriate time. Take this handout with you; if you have any comments or suggestions for improving it, please let us know.

TEN TIPS

1. No last-minute agreements!

Three days before the wedding? NO WAY! Avoid the appearance of making a deal at the last minute. You should sign as far in advance of the wedding as is possible. "*If it's not signed 30 days in advance, they're taking their chances,*" warns West Palm Beach lawyer Joel Weissman. If it's presented later than that, a fiancé, could claim he was made to sign under pressure. This could compromise the enforceability of the Agreement. The North Carolina Court of Appeals has ruled that just because a pre-marital agreement is signed the day before the wedding is not enough to constitute duress, coercion, or undue influence. Nonetheless, despite current case law, having your pre-marital agreement signed close in time to the wedding, subjects it to a possible lawsuit that questions the contract's validity. To avoid this possibility you and your future spouse should execute the agreement 30 days or more before the wedding.

2. No coercion.

Be sure there's not even a hint of duress, pressure or coercion. The single best way to ensure a voluntary agreement is to get a lawyer for your spouse-to-be. We can provide a referral if that's necessary.

3. Full disclosure? Or no disclosure??

Financial disclosure statements are often attached to premarital agreements, showing the income, debts and assets of both parties. Sometimes the wealthier party doesn't want to reveal how much he or she is worth. That's understandable; perhaps balance sheets and fiancés don't mix too well. Stanford Lotwin, a lawyer for Donald Trump, suggests limiting the disclosure of

financial assets by stating merely that you have certain assets exceeding a certain value. However, it is necessary that each asset be specifically identified in the contract so there is no question later as to whether the existence of the asset was disclosed. Make sure you don't lie. If your spouse can prove you were hiding assets, you will definitely be in big trouble!

4. **Surprises?**

Be prepared for a few surprises. Some may be pleasant, some not. Among the pleasant ones are . . . the fellow who insisted that his fiancé sign a pre-nupt discovered that, after all, she was rich. "*She was worth about four times what he was,*" chuckles New York divorce attorney Stuart Gartner.

5. **Priorities.**

Don't give your fiancé the idea that you think your assets are more valuable than him/her. "*The more stringent and self-protective the agreement, the more likely the marriage is going to blow up in their faces,*" warns Beverly Hills lawyer Alexander Leichtner.

6. **Don't be mean.**

Don't add anything vindictive or mean-spirited, like the provision Stan Lotwin recently saw imposing a \$1,000 penalty for every pound the wife-to-be gained. No court would enforce that kind of provision, and it could lead the judge to throw out the entire agreement.

7. **More time, more money.**

Consider increasing your fiancé's cut over time to make the agreement fairer. New York divorce lawyer Carl Tunick recalls a telephone call from a wife who wanted to get a divorce immediately. Tunick pointed out that she was entitled to an extra \$1 million for every year she stuck it out. "*Can't you wait until Jan. 1?*" asked Tunick. She did, and they're still married. Rumors have it that Catherine Zeta Jones signed a pre-nupt before her marriage to Michael Douglas that stipulated a higher figure for increasing years of marriage -- \$1 million for 1 year, \$2 million for 3 years, and \$3 million for over three years . . . etc.

8. **Where there's a will, there's a way.**

See that your fiancé stands to get something if you die first -- insurance proceeds, for example. Without such terms, taxes could consume everything -- including your retirement plan. "*The spouse is the only person who can roll it over,*" explains estate lawyer Judith Siege Baum. Be sure to take advantage of the unlimited marital deduction.

9. **The Bounty after the Mutiny.**

Don't count on escaping alimony payments. In New York and a few other states (including North Carolina), a spouse-to-be can waive the right to alimony. But Eleanor Alter (Patricia Duff's lawyer) points out that, if the judge thinks the deal's unfair, he or she can order you to pay anyway, no matter what the agreement might say. And in North Carolina there's a further

restriction: if the terms of a "pre-nupt" eliminate spousal support and this causes one party to the agreement to be eligible for public assistance, the judge can --notwithstanding the terms of the agreement -- require the wealthier party to provide support.

10. Don't mix assets.

Be careful about mixing premarital and post marital assets. "*Commingling is the kiss of death,*" counsels New York divorce attorney Harriett Cohen. Why? Because if you cannot absolutely prove what was yours before the marriage, you might just lose it!

11. Retirement plans are not always exempted.

Retirement plans are not always exempted by a pre-nuptial agreement. A soon to be spouse cannot waive his/her right to your retirement plan that falls under the Federal Statute of ERISA. Federal law requires that for a fiancé to waive this right to his/her future spouse's retirement, he/she must state in the pre-nuptial agreement that he/she will execute a waiver after the marriage. Then after the marriage, both parties must execute a post-nuptial agreement wherein the new spouse waives his/her right to the retirement plan.

12. Just a suggestion . . .

One technique that is being used to make pre-nuptial agreements less vulnerable to attack is to videotape the execution of the agreement. If the issue of validity is ever litigated, a videotape of the signing can go a long way to show there was no duress or coercion at the time of signing.

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What can I do if I have questions about premarital agreements? Our clients' questions deserve straightforward answers in plain English, not "lawyer-ese." Feel free to ask your lawyers for help and assistance. That is why we are here -- to serve you.