

## **BASIC FACTS REGARDING ANTENUPTIAL AGREEMENTS**

This outline will summarize information you will need to know regarding antenuptial agreements. This outline is intended to give the basics, and is not a substitute for specific questions regarding a particular case.

**Introduction:** An antenuptial agreement is a written agreement between a man and a woman executed prior to marriage. These agreements are also sometimes known as "pre-nuptial agreements." The terms of an antenuptial agreement can impact the rights of the parties during the marriage, upon divorce, and upon death of one of the parties. In some ways the rules for signing antenuptial agreements are even more complicated than for signing a will, so the first section deals with those formalities.

### ***FORMALITIES OF SIGNING***

**Disclosure of Assets:** It is required that each party disclose to the other party a full and complete description of their assets and income. The legally acceptable way to make sure that full disclosure is made, in order to make the contract valid, is to attach to the antenuptial agreement a summary of all assets owned by the wife, and a separate summary of all assets owned by the husband. A statement of approximate gross annual income is usually put at the bottom of each asset list. The underlying reason why full disclosure must be made is that signing an antenuptial agreement will normally involve waiving claims against assets of the other spouse. It is considered fundamental that a waiver of a claim must be made with full knowledge of the type of asset and value which is being waived.

**Use of Attorneys:** It is required that each party have the absolute right to consult with an attorney of their own choice. It is a conflict of interest for one attorney to act as counsel for both husband and wife. Many times people will ask if one spouse can **waive** their right to consult with an attorney. The answer is that a waiver of attorney is possible, but then the attorney drafting the document cannot guarantee that the court will later uphold the contract.

**Witnesses and Notary:** Generally, the antenuptial agreement must be executed in a very formal manner, normally at an attorney's office. The man and woman signing must be present, along with two witnesses and a notary public.

**Date of Signing:** An antenuptial agreement must be signed by **the day before** the wedding if it is to be valid under Minnesota law. There are occasions when a bride or groom has been asked to sign an antenuptial agreement the morning of the wedding, or even immediately prior to the ceremony. Even if he or she signs, that antenuptial agreement would not be valid if signed on the day of the marriage ceremony or later.

## ***CIRCUMSTANCES COVERED BY PROPERLY EXECUTED ANTENUPTIAL***

Assuming the document is properly executed as set forth above, the document normally covers three situations: rights during the marriage, rights upon divorce, and rights upon death. This section will explain each category briefly. "Rights Upon Divorce" is divided into separate sections covering first division of the property and second the issue of alimony. Where applicable, warnings are noted. For the most part, the intent of the antenuptial agreement is to segregate or make separate certain assets that one spouse had **prior** to the marriage, protecting said assets from claims from the other spouse at various stages.

**During the Marriage:** The antenuptial agreement clarifies that if a spouse brings property into the marriage, that property remains separate property for the spouse to transfer without requiring consent of the other spouse. Unfortunately, sometimes during the normal course of business a spouse is asked to join in transfer of assets, such as sign a deed on pre-marital real estate. Under the antenuptial agreement, the spouse is required to sign any deed necessary to transfer the pre-marital property. Also, each person retains the use of income from pre-marital property and solely maintains any benefits from said property, without sharing with the other spouse.

**Divorce:** Generally speaking, the purpose of the antenuptial agreement is to clarify that each spouse maintains property that they brought into the marriage, without the other spouse making a claim in the context of a divorce. In particular, if at the time of a divorce one spouse continues to own certain property listed on the asset sheets attached to the antenuptial agreement, then the law is very clear that the spouse will retain those assets even in the event of a divorce.

However, some married couples **commingle** their assets, especially cash savings or investments. This occurs both when pre-marital funds are placed into a joint account, and also when marital funds are added to a pre-marital account. If pre-marital funds or assets are to be protected for the event of divorce, then such assets must be segregated from marital assets. Otherwise, if the assets are commingled, the divorce court will normally presume that commingled assets are marital assets for division in the divorce.

**Warning on Property Settlements Upon Divorce:** Unfortunately, the specific statute authorizing an antenuptial agreement under Minnesota law allows protection only for **non-marital assets**. The statute does not specifically authorize protection of **marital assets**. Most people understand that if an asset is acquired during the marriage with marital funds, then that asset would not be protected by the antenuptial agreement and would be divided equally in the event of divorce. However, there are a few areas where the courts are likely to designate an asset as marital to the surprise of some people. First, income from a non-marital asset such as rent from an apartment building or dividends from stock are considered as marital funds, being paid during the marriage. Second, the increase in value of an asset during the marriage may be treated as a marital asset, especially when the increase is due to the efforts of both spouses. Third,

equity in an asset created by paying a mortgage or other debt down during marriage can also be considered a marital asset. So, depending upon the circumstances, the antenuptial agreement may not provide 100% protection against those types of claims.

**Spousal Maintenance or Alimony:** Another aspect of the divorce portion is that one or both of the parties may try to waive a claim for spousal maintenance or alimony from the other party. In other cases they will expressly limit the amount of alimony which may be paid at a later point. This is a tricky area because the court in a divorce will try to make sure that the monthly living needs of either spouse are met, in spite of the antenuptial agreement. Generally, anything which may serve to limit or waive spousal maintenance or alimony may not be favored by the court.

**Warning on Alimony:** It is my opinion that the spouse with greater income and/or assets will benefit greatly from obtaining a waiver of alimony from the other spouse. However, if the waiver of alimony provision is contested by the dependent spouse in a divorce, the spouse relying on the waiver will have the burden to establish that the antenuptial agreement was properly executed with full disclosure of assets and income, and that the provisions are fair to the other spouse, both at the time of signing and at the time of divorce. This is called the "substantive fairness test." Especially when there is a great disparity between the wealth of the parties, it is sometimes best to include a minimum level of alimony for the dependent spouse, often based upon the number of years of the marriage. This reduces the chance of the judge invalidating the alimony clause.

**Rights Upon Death:** One of the most important reasons for having an antenuptial agreement is to avoid unintended transfer of assets upon the death of one spouse. When no antenuptial agreement is signed, a surviving spouse (widow or widower) has a great number of immediate statutory rights to the estate of the other spouse. These rights may include a claim against the homestead property, an outright percentage of the estate of the deceased spouse, a claim for spousal or family maintenance to be paid from the estate during administration, and other rights. Most antenuptial agreements are written specifically so that the surviving spouse **waives** any and all of these rights, and the surviving spouse agrees instead to take only those assets and rights established under the Last Will and Testament of the deceased spouse. This way, either spouse can make a will knowing that the express provision of the will can be enforced, without the other spouse invoking certain statutory elections which may defeat the estate planning.

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In summary, there are a number of quite technical issues involving antenuptial agreements, and quite formal signing requirements. It is best that each side understands that certain strict formalities must be observed, or the document will be invalid defeating the intent of everyone involved. Given the current state of Minnesota law, no antenuptial agreement can provide protection against every possible scenario in the future. However, most attorneys agree that a properly written antenuptial

agreement can greatly limit certain claims, clarify the rights and responsibilities of the parties, and in general provide as much protection as possible. Please feel free to contact the Radunz law office with any follow-up questions.

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