

# The Legal Intelligencer

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## The ABC's of Prenuptial Agreements Under Pennsylvania Law

Prenuptial agreements are no longer just for the wealthy. Traditionally, prenuptial agreements (often referred to as "prenups" for short) have been used to protect the assets of a particularly well-off spouse-to-be in a marriage; however, today, with the high divorce rate, individuals of more modest means have been turning to prenups as well.

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Prenuptial agreements are no longer just for the wealthy. Traditionally, prenuptial agreements (often referred to as "prenups" for short) have been used to protect the assets of a particularly well-off spouse-to-be in a marriage; however, today, with the high divorce rate, individuals of more modest means have been turning to prenups as well. As we hear all too often, statistics show that 50 percent of all marriages end in divorce. This percentage is based on the fact that in one year there are twice as many marriages as there are divorces. With that backdrop, the demand for prenuptial agreements is growing, particularly in cases involving second and third marriages with children from a prior marriage/relationship.

A prenuptial agreement is a contract between two individuals before they are married that addresses their property rights upon divorce and/or death. The most typical situations where couples sign prenups include:

- One of the parties is significantly wealthier than the other and seeks to protect some or all of that wealth.
- One or both of the parties owns a business or is involved in a family business and wants to protect the business (and the other family members involved in that business) from spousal claims.
- One or both of the parties has children from a prior marriage or relationship and wishes to pass certain property to such children upon such party's death.

Without a prenup, state laws will govern the disposition of property acquired during marriage at divorce or death. To understand the true impact of a prenuptial agreement, it is important to have a general overview of state law. For the purpose of this article, we will focus on Pennsylvania law.

### Assets Passing at Death

When a person dies, he or she either dies with or without a will in place. If a person dies without a will, he or she dies "intestate," and the surviving spouse will inherit assets in accordance with the Pennsylvania laws of intestate succession. Generally, the spouse would receive the first \$30,000 plus one-half of the estate and the remaining half would go to the surviving children or, if none, to the decedent's surviving parents (if there are no children or parents, the surviving spouse would inherit the entire estate). If a person dies with a will, he or she dies "testate," and the decedent's probate estate passes in accordance with the terms of the will. It is important to understand that certain assets passing by beneficiary designations (i.e., life insurance policies, annuities and retirement plan benefits) would pass in accordance with those beneficiary designations, rather than under the will or in accordance with the intestacy laws.

What if the will purports to disinherit the surviving spouse? In that case, the surviving spouse is entitled to an "elective share." Pursuant to Pennsylvania's elective share statute, a surviving spouse may elect to take one-third of certain of the deceased spouse's property included in the "augmented estate." By taking the elective share (or electing against

the will), the spouse is deemed to be disclaiming all rights to certain types of assets that the spouse might otherwise have been entitled to, such as life insurance proceeds, retirement benefits and jointly owned property, as well as other interests deemed to have passed from the deceased spouse.

The foregoing illustrates the significant role that state law can play on what a surviving spouse is entitled to receive from the asset base of the first spouse to die in a marriage (without any corresponding encumbrance on the asset base of the surviving spouse). A prenuptial agreement gives a spouse the ability to control how much (if anything) he or she will leave to the surviving spouse, and thus, avoid being constrained by state law in such regard.

### **Asset Division Upon Divorce**

When it comes to divorce, Pennsylvania is an equitable distribution state, meaning that the courts divide the marital property based upon principles of equity or fairness. This does not necessarily mean that property will be divided equally. In Pennsylvania, property is characterized as separate property or marital property.

Separate property includes:

- Property acquired prior to the marriage (or in exchange for such property).
- Property excluded from the marital estate by a prenuptial or postnuptial agreement.
- Gifts and inheritances received during the marriage.
- Property acquired after separation.

Marital property generally includes assets acquired during the marriage and appreciation or income derived from those assets and from separate property. The way an asset is titled does not necessarily determine whether it is marital property or separate property for divorce purposes (note that the rule is different for death purposes). Thus, even if a residence is purchased in the name of one spouse, if it was purchased during the marriage, it will be considered marital property to the extent that it was purchased with funds arising from marital property.

Although only marital property is subject to equitable distribution and separate property is not, as noted above, any increase in value of the separate property during the marriage is considered a marital asset. Also, to the extent that separate property is commingled with marital property or used to purchase a joint asset, it may inadvertently be converted into marital property. By entering into a prenuptial agreement, spouses can clearly set forth what property they agree will remain separate from spousal claims.

### **Enforceability of Prenups in Pennsylvania**

In Pennsylvania, prenuptial agreements are binding and enforceable if certain requirements are met. The parties must make a full and fair disclosure of their financial worth and the agreement must be free of fraud and duress (notably, for this purpose, threatening to call off the wedding is not considered duress). Other than that, in Pennsylvania (although this is not necessarily the case in other jurisdictions), there is no requirement that the agreement be "fair" to either or both of the parties. This leaves the parties free to enter into any type of agreement that they wish as long as they have the proper disclosures and there is no fraud or duress. As a precaution, it is generally advisable to have each party seek advice from separate legal counsel prior to the execution of the agreement.

### **Scope of the agreement**

The scope of a prenuptial agreement can be as broad or as limited as the parties desire, whether that means protecting one particular asset or segregating all assets from a spouse's claims. Prenups can specify the division of assets only in the event of a divorce or death, or can cover both events. In addition to property rights, in a prenuptial agreement a couple can dictate the extent (if any) and the timing of spousal support to be paid if there is a divorce (child support, however, cannot be agreed upon under the terms of a prenuptial agreement). Some couples choose to spell out how their finances and expenses (including payment of debts) will be handled during or following the marriage. Many times there are clauses in the prenuptial agreements related to the years of marriage, often involving the payment of an escalating property settlement amount as the years of marriage increase or, in some cases, making a prenuptial agreement null and void after the couple has been married for a certain number of years. In Hollywood, some celebrities have been creative with adultery or even weight-maintenance clauses. Regardless of what may be covered, the overarching principle is the same — a prenuptial agreement establishes the game plan for property division based on what the happy couple wants to be in effect after their exchange of wedding vows (or at least what they are willing to sign), but not to be applied until the marriage ends — whether by natural causes or not.

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