



**Materials to Accompany the
On-Demand CLE Seminar**

***“Prenuptial Agreements:
What Famous People
Can Teach Us”***

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PRENUPTIAL AGREEMENTS

The Basics as Illustrated by the Rich & Famous

I. Consideration. Prenups are merely a special type of contract, and thus the rules of contract law apply. The agreement must be supported by consideration in order to be enforceable. Therefore, it is vital that the agreement be negotiated and executed *before* the exchange of marital vows. The reason – the consideration supporting one fiancée’s promise to give up certain future rights in divorce is the other fiancé’s promise to marry her in return. Thus, if the two parties are already married when the contract is executed (a *postnuptial* agreement), then the necessary consideration is lacking.

II. Full Disclosure. One of the two most common grounds on which attempted prenups are invalidated nationwide is the fact that the fiancé in the supposedly superior position did not fully disclose to the other party all of the facts surrounding his finances. Thus, it is vital that the fiancé in the superior financial position attach to the prenup (and incorporate by reference) copies of detailed financial statements (balance sheet, etc.), in addition, perhaps, to several years of past income tax returns.

III. Adequate Notice. The second most common ground on which attempted prenups are invalidated is the failure of one party to give the other party adequate time to ponder and negotiate on the terms of the agreement. While there is no hard and fast rule on how much advance notice should be given, the bottom line is that a person should not wait until the eve of the wedding to even broach the subject. On review, any court that is asked to enforce a prenup will require a showing that the other party was given adequate time to consult legal counsel and to make a counteroffer.

IV. Pre-Marital Tactics for Clients Who Refuse to Use a PreNup

- A. Prenuptial Inventory
- B. Setting Up an Investment Trust
- C. Joint Ownership Agreements
- D. Children’s Trusts

V. What CAN you address in a PreNup (beyond the obvious property division issues)?

- A. Agreements to keep finances separate
- B. Segregation of debts

- C. Protecting children from prior marriages
- D. Agreements that family “heirloom” property is off-limits in a divorce
- E. Custody of pets
- F. Agreement on whether to file joint or separate income tax returns
- G. Agreement on how to divide up household bills during the marriage
- H. Agreement on a strategy for saving money
- I. Elder law issues, including agreements on obtaining long-term care insurance (to insulate one spouse from having to finance the other spouse’s nursing home care, etc.)
- J. Penalties aimed at discouraging bad behavior (e.g. Michael Douglas and Catherine Zeta-Jones)

VI. What a Prenup should NOT address:

- A. Agreements regarding child rearing (or even agreements on whether to have children)
- B. Child custody, visitation, or child support (the court cannot be deprived of its authority to oversee the best interests of children)
- C. Issues involving sexual relations
- D. Ground rules about step-kids

PRENUPTIAL AGREEMENT (Basic, Bare-Bones Form)

This Agreement made and entered into on this the ____ day of _____,
A.D. 2012 by and between _____ and _____.

- I. The parties are contemplating a marriage planned for an unspecified date.
- II. Both parties acknowledge that:
 - A. Both parties enter into this Agreement freely, voluntarily, and with full knowledge and free from any outside influence;
 - B. Neither party is under the influence of any alcohol, drugs, nor are they suffering any mental problem;
 - C. Both parties are fully acquainted with the business and resources of the other;
 - D. Both parties understand the assets, possessions, liabilities, income and expenses of the other;
 - E. Both parties have answered all questions the other has asked about income and assets;
 - F. Both parties have acquired knowledge of the other's estate from information received during the relationship from sources such as visiting the other party's home or business, conversation with other party's friends, family, and other party;
 - G. Both parties have had access to any and all financial information of the other party, including, but not limited to, the exchange of the financial statements attached to this Agreement as Exhibits thereto, all of which are hereby incorporated by reference; and

H. Both parties have had all the information they requested from the other party;

I. Both parties, with full awareness of possible risks and problems associated with lack of total knowledge, waive and decline any further knowledge and any claim of lack of sufficient knowledge;

J. Both parties understand that by entering into this Agreement they could receive substantially less than the amount than they would otherwise be entitled to receive, if there was a divorce, or the other died intestate, or if they elected to take against the Last Will and Testament pursuant to statute; and

K. Both parties have had plenty of time to consider and have carefully considered all of the facts and circumstances (having begun discussion of this agreement not later than _____, 2012), and each desires to marry the other regardless of any financial arrangements made for the other's benefit.

III. Each of the parties are of mature age, and acknowledge that they each have children from a prior marriage, and each party desires to enter into this Agreement to clarify their financial relationship.

IV. Each parties have been informed, and they understand that, if they marry and one party survives the other, the survivor would, by the currently existing statutes of the State of _____, be entitled to share in the deceased's estate even if the deceased spouse did not include the survivor in his or her Last Will and Testament. By signing this Agreement, each spouse acknowledges that he or she is giving up all of the right that a surviving spouse would have according to _____ statutes, including a share of or an allowance from the deceased spouse's estate.

V. The parties have been informed; and they understand that in the event of a divorce the courts of the State of _____ would distribute marital property of the parties and make decisions with respect to support and alimony. Furthermore, if a spouse substantially contributes to the preservation and appreciation of the other spouse's separate property, a court could possibly declare the income and/or appreciation in value to be marital property subject to division. The parties, in signing this Agreement, understand that they are waiving any right that they might have for a court of appropriate jurisdiction to make decisions with respect to issues surrounding a divorce.

VI. Each of the parties now owns and is possessed of an estate in his or her own name and right, which he or she mutually desires to retain, manage and dispose of separately by gift, Will or otherwise, and to the same extent as if they each remain single. Husband desires to marry Wife and release all rights which he could or might have, by reason of the marriage, in the property or income which Wife now owns, may hereafter acquire, or in her estate upon her death. Wife desires to marry Husband and release all rights which she could or might have, by reason of the marriage, in the property or income which Husband now owns, may hereafter acquire, or in his estate upon his death.

VII. The Agreement of the parties is therefore as follows:

1. Both parties shall retain the possession and title, and all rights to manage and control the estate and income which they now own or which they may acquire by any means including, but not limited to, gift, inheritance, or purchase, just as if such party had remained single and unmarried. Each party has the right to sell, encumber, dispose of, or give away, by Will or otherwise, any or all of their estate free from any claim by the other spouse.

2. If this marriage is terminated by" annulment, divorce, or upon the death of either of the parties, each party waives all claims against the other party or the estate, increase in the estate or income, inheritance or gifts of the other, including, but not limited to, a claim for property distribution, alimony, support, acting as the other's executor or administrator, or any right by inheritance, descent, homestead election to take against the will, elective portion, widow's or widower's support, marital property portion, equitable distribution, or otherwise.

3. Any new assets that are acquired during the marriage and that are titled to both parties' names will be divided equally (50/50) between the parties in the event of a divorce.

4. Both parties expressly waive and renounce any legal or statutory right or claim that she or he has or may have under the laws which presently exist or which hereinafter come into existence with respect to any property, property interests, property division, alimony, support rights, premarital promise of support, oral agreement, constructive trust, or equitable lien.

5. Nothing herein contained shall be deemed to constitute a waiver by either party of any bequest or transfer that the other party may choose to make to him or her by deed, title, Will, or codicil. However, both parties acknowledge that no promises of any kind have been made by either of them to the other with respect to any bequest or conveyance except as set out in this Agreement.

6. The parties state that they have each discussed their estate and assets with the other, and each party is satisfied with the information that he or she has been given.

Both parties expressly waive their right to independently confirm any information with respect to the other party's estate, assets, and income, and both parties agree that financial statements shall not be required, and both parties agree to be bound by the terms of this Agreement without the necessity of either party executing a financial statement.

7. This Agreement contains the entire understanding and agreement of the parties. There are no representations or promises other than those expressly set forth herein, and each party enters into this contract voluntarily and with full knowledge of the financial condition, nature, character, and value of the other's estate, and waives any further discovery or confirmation of the other's estate.

8. If a court holds that any portion of this Agreement is invalid, the remainder shall be in full force and effect, and the invalid portion shall be struck from the Agreement or modified as the court shall order, and the remainder of the Agreement shall remain in full force and effect.

9. Each of the parties before the execution of this Agreement has been advised to seek the advice and counsel of an independent attorney. If either party decides not to obtain the requested advice and counsel of an independent attorney, he or she does so with full knowledge of the risks and problems that fail to get independent counsel could entail and stipulate that this Agreement will be treated as if he or she had obtained independent counsel. Each party acknowledges that this Agreement has been entered into of his or her own choice with full knowledge and information including tax consequences.

10. A modification or waiver of this Agreement shall be effective only if made in writing and executed with the same formality as this Agreement. The parties may

modify or revoke this Agreement without the consent of any third person.

11. The terms and conditions are accepted by the parties as reasonable and fair under the circumstances. No coercion or undue influence has been used by or against either party in making this Agreement.

12. This Agreement is conditioned upon the actual marriage of the parties.

IN WITNESS WHEREOF, the parties have set their hands and seals on this the
day of _____, A.D. 2012.
