

# FAMILY LAWYER

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# MAGAZINE

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A wedding cake topper featuring a bride in a white gown and a groom in a dark suit, embracing. The topper is set on a white cake with pink roses.

# Ensuring the Enforceability of Prenuptial Agreements

Unless it is enforceable, a prenuptial agreement isn't worth the paper it's written on. Here are four ways to help ensure the agreement's enforceability.

By Ann Moder, Family Lawyer

Certain provisions of law allow a family lawyer to argue the enforceability – or unenforceability – of a prenuptial or premarital agreement. It is necessary to comply with all requirements of those provisions in the jurisdiction where the agreement will be enforced in order to ensure that the other party will not be able to argue any such provisions to set aside the agreement in the future, should the parties decide to divorce.

## Full Financial Disclosure

The requirements of a fair financial disclosure between the parties and that the agreement be executed voluntarily and without duress or coercion are of primary importance. Also, the agreement cannot be unconscionable: in some states, the agreement can neither be unconscionable at the time when entered into by the parties nor at the time of enforcement. Whether or not expressly required by statute, the parties to a prenuptial agreement should exchange financial disclosures providing their assets and liabilities. A full knowledge of each other's assets and liabilities helps to determine the issue of

unconscionability: for example, learning the actual extent of the other's wealth could change the expectations and negotiating position of the other party. Full financial disclosure also furthers both parties' complete understanding of the agreement.

Some states allow voluntary waivers of financial disclosures, or permit arguments that the party seeking to set aside the agreement reasonably had adequate knowledge of the other party's financial circumstances when such disclosures were not made. Since a lack of disclosure opens the door to a potential argument to set aside the agreement, full and accurate mutual financial disclosures are imperative.

## Allow Sufficient Time

There are various items to consider to ensure that the agreement cannot be set aside due to coercion or duress, including but not limited to:

- the time frame in which the party seeking to set aside the agreement had to review, revise, and understand the agreement;
- the education and ability of that party to understand the agreement;

- the time frame in which the agreement was signed and/or negotiated prior to the marriage ceremony;
- and whether or not that party is represented by counsel.

When being retained to prepare a prenuptial agreement, the attorney must determine whether or not there is sufficient time – considering the aforementioned factors – to prepare and execute the agreement prior to the marriage ceremony. You must factor in ample time to educate both parties on all aspects of the agreement to ensure consent is knowing and voluntary, as well as to make revisions requested by one or both parties.

## Recording the Execution of the Agreement

Many experienced attorneys recommend video-recording and transcribing the execution of the agreement. You should discuss the pros and cons about the decision to employ a videographer or court reporter with your client – especially since the bar is split as to the positives and negatives of creating this type of record. Generally, both attorneys of record explain the provisions

of the agreement to their respective clients while being recorded and transcribed. In some jurisdictions, it is advisable to have a retired judicial officer officiate the explanation and execution of the agreement; in many situations, the retired judicial officer questions both parties in connection with the agreement. Ultimately, the purpose of the video and transcription is to provide assurance that both parties understand the terms of the agreement, and enter into those terms freely, voluntarily, and without coercion or duress.

### Independent Legal Counsel

If he/she has not already done so, request that the other party obtain his/her own legal counsel. This gives the other party the opportunity to obtain a full understanding of the agreement, and to state on the record that the agreement was fully explained to him/her by counsel. The requirement of access to independent counsel is crucial when one or both parties are

waiving important legal rights. Many family law attorneys take the position that they will not represent a party to a prenuptial agreement when the other party does not have legal representation. If one party does not have an attorney, it could leave the door open for that party to later state that he or she did not fully understand what they signed. Again, some states have waivers allowing a party to execute a prenuptial agreement without counsel, and it may still be valid and enforceable; however, this is also not recommended, as it can create potential problems resulting in future litigation in connection with the enforcement of the agreement.

Because prenuptial agreements vary from jurisdiction to jurisdiction, and last for the duration of the marriage, if you are not well-versed in this area of law, consider consulting or associating with a family law practitioner who is not only experienced in this area of law, but also experienced in the appropriate jurisdiction. ■



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#### Using Prenuptial Agreements to Protect a Business

Prominent attorney Sanford Ain and business valuator Stuart Rosenberg discuss the role of prenuptial agreements in cases involving business owners and professional practices – ranging from law firms to start-up companies.

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