

**PREMARITAL AGREEMENTS:  
PREPARE AT THE BEGINNING TO SAVE AT THE END**

By

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Often we receive inquiries from clients regarding premarital agreements and their validity and effect in Virginia. Previously divorced persons and persons marrying for the first time may wish to protect their property in the event of divorce, and a premarital agreement is a contract that allows them to do so. However, poorly crafted premarital agreements and those that do not meet the requirements of the Virginia Code may be deemed voidable. Therefore, it is important to carefully plan and prepare the premarital agreement in order for it to be effective in the event of divorce.

Premarital agreements in Virginia are governed by the Premarital Agreement Act (“Act”), codified at VA Code §20-147, *et seq*, which is Virginia’s version of the Uniform Premarital Agreement Act adopted by several other states. Uniform acts provide increased uniformity and certainty in the law and similar interpretation and enforcement of premarital agreements in those states that adopted the uniform act. The Act applies to all premarital agreements executed on or after July 1, 1986, and has no effect on agreements entered into prior to that date. The parties to a premarital agreement, the prospective spouses, may tailor their agreement to cover only specific rights, obligations and property interests or have their agreement cast a wide net over them in the event of divorce. Premarital agreements must be in writing and signed by both parties.

There are two grounds for voiding premarital agreements: 1) If the agreement was not executed voluntarily; and 2) if it is unconscionable and (i) a party was not provided a “fair and reasonable disclosure of the property or financial obligations” of the other party and (ii) the party did not voluntarily and expressly waive, in writing, any right to disclosure.

The agreement must be entered into voluntarily. Counsel may argue that a prospective spouse signed the agreement due to duress or undue influence. These arguments often arise as a result of a last minute signing of the agreement, such as on the night before the wedding or on the wedding day itself. Also, agreements are sometimes signed after a meal or other occasion where alcohol has been consumed. To avoid contests over voluntariness, or at least overcome them, it is best to enter into the agreement at least several days in advance of the wedding in a professional environment, such as an attorney's office. Both parties ought to be represented by their own, independent counsel, have the premarital agreement explained to them, and not have consumed any alcohol.

The second grounds for voidance, unconscionability and lack of disclosure, may also be prevented by planning. The rationale here is, the parties must know what one another has in order to waive their rights to that property. Therefore, it is important to provide a full and frank disclosure of one another's property. Property is defined in the Act to include real and personal property, earnings and income. It is best to err on the side of disclosure. To be unconscionable, the agreement has been defined as "one that no man in his senses and not under a delusion would make, on the one hand, and as no fair man would accept, on the other." It has also been defined as "shocking to the conscience of the court." While it is difficult to prove unconscionability, it is advisable that the parties treat one another fairly in the premarital agreement. If one party is treated harshly, then the possibility that the agreement is unconscionable exists.

Premarital agreements can be effective tools to provide certainty regarding the disposition of property in the event of divorce. Both parties should be represented by their own counsel, carefully craft and discuss the terms of the agreement, and enter into the agreement at least several days before the wedding in a professional forum. These simple measures taken before the marriage should provide the parties with security and certainty in the event of divorce.



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