

Prenuptial Agreement Checklist

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A Prenuptial Agreement, also known as an Antenuptial Agreement, is a legally binding contract and “should be construed and interpreted in the same manner unless the context of the contract demonstrates the parties intention that a different meaning be given.¹” The Checklist below may offer some assistance in the drafting of, or negotiating, a Prenuptial Agreement:

Whereas Clause:

Intent:

- Entered in contemplation of marriage
- Further the marital relationship
- Not in contemplation of divorce
- Intent to be binding on all heirs, legal representatives, and assigns
- Cognizant of disparity in incomes and/or assets
- Entered into freely and voluntarily
- Neither party under duress, coercion, or undue influence²
- Parties agree to be bound by the provisions and recitals of the Agreement

Now, Therefore:

Consideration:

- Contemplated marriage
- Forgoing recitals
- Mutual covenants
- Conditions (if any)
- Parties agree to be mutually bound by the Agreement

Introductory Provisions:

- Whereas Clause incorporated into Agreement
- Agreement not intended to encourage divorce (Public Policy)
- Waiver of rights which party may otherwise be entitled
- Rights at death

Financial Disclosure:

- Full, fair and open disclosure³
- Knowledge of each party regarding the finances of the other

Children:

- Support for children from prior marriage⁴

Equitable Distribution:

- Assets considered non-marital
- Assets subject to equitable distribution
- Date of valuation of marital assets

- Enhancement of value:
- Present value of assets
- Appreciation (passive/active)

Special consideration for unique property:

- Vested or non-vested stock options, etc.
- Liabilities:
- Marital and non-marital liabilities
- Responsibility of each party for the marital liabilities

Alimony:

- Waiver of all rights to support, maintenance and/or alimony of all forms⁵

Forms of Alimony:

- Type of alimony based upon number of years of marriage
- Amount set forth in schedule
- Alimony dependent upon incomes and/or net worth:
- Definition of income and/or net worth
- Date of identification of income
- Sources of identification of income (i.e. CPA, etc.)

Legal Fees:

- Definition of “legal fees” (paralegal, attorney, CPA, experts, costs, etc.)
- Waiver of fees – post dissolution⁶
- Post dissolution schedule as to agreed upon amount of fees
- Prevailing party provision⁷

Entitlement:

- Need/ability

Period of Reflection:

- Negotiation time period
- Amount of time for reflection prior to marriage⁸
- Opportunity to discuss contents with advisors, counsel, etc.

Counsel for Both Parties:

- Both parties had counsel or opportunity to obtain independent counsel⁹

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**Checklist***from preceding page*

- Names of each party's counsel
- Waiver by party to seek counsel

Modification:

In writing, executed with same formality as Agreement

- Terms for modification

Misc. Provisions:

- Jurisdiction/Choice of Law¹⁰
 - Application of Agreement
 - Death or divorce¹¹
 - Agreement supersedes a prior or subsequent will¹²
 - Tax advice – included or excluded
 - Effectuation of Agreement – documents needed, expediting documents, etc.
 - No waiver of gifts
 - No presumptions
- Entire understanding set forth in Agreement

- Confidentiality of Agreement
- Severability
- Counterparts – intent to be one Agreement
- No marriage – Agreement null and void

Endnotes:

- 1 *Ledeo-Genaro v. Genaro*, 963 So. 2d 749 (Fla. 4th DCA, 2007).
- 2 *Hjortaaas v. McCabe*, 656 So. 2d 168 (Fla. 2d DCA, 1995).
- 3 *O'Connor v. O'Connor*, 435 So. 2d 344 (Fla. 1st DCA, 1983); *Francavilla v. Francavilla*, 969 So.2d 522 (Fla. 4th DCA, 2007); *Castro v. Castro*, 508 So. 2d 330 (Fla. 1987) (note: full and frank disclosure is required for Postnuptial Agreements).
- 4 *Weeks v. Weeks*, 143 Fla. 686 (Fla. 1940).
- 5 *Fernandez v. Fernandez*, 710 So. 2d 223 (Fla. 2d DCA, 1998); *Lashkajani v. Lashkajani*, 911 So. 2d 1154 (Fla. 2005).
- 6 *Lashkajani*, 911 So. 2d 1154.
- 7 *Lashkajani*, 911 So. 2d 1154.
- 8 *Hjortaaas v. McCabe*, 656 So. 2d 168 (Fla. 2d DCA, 1995).
- 9 *McNamara v. McNamara*, 40 So. 3d 78 (Fla. 5th DCA, 2010).
- 10 *McNamara v. McNamara*, 40 So. 3d 78 (Fla. 5th DCA, 2010); *citing, Massoni Farms, Inc. EI Dupont DeNemours & Comp.* 761 So. 2d 306, 311 (Fla. 2000).
- 11 *Florida Statute* §61.079 (4)(a)(3).
- 12 *Gridley v. Galego*, 698 So. 2d 273, 275 (Fla. 2d DCA, 1997); *Donner v. Donner*, 302 So. 2d 452 (Fla. 3d DCA, 1974); 1-20 Fla. Fam. L. § 20.01, Brenda M. Abrams.