Marriage Proposals to Engagements to Wedding Season with an Overview of what Premarital Agreements Entail

As Valentine's Day comes and goes each year, many couples excitedly take their relationships from dating to being engaged. As the planning of the wedding commences, it is essential to know what a Premarital Agreement (also, "Agreement") entails, which many commonly refer to them as a "Prenuptial Agreement" or a "Prenup". It used to be these Agreements were mainly used by wealthy families. Most people have heard all sorts of stories from their friends and family relative to these Agreements or lack thereof and having wished they entered into this Agreement, a binding, legal document, also known as a contract. As such, all Premarital Agreements must be in writing and signed by each party. Similarly, newly engaged couples often have their families insist on there being a Premarital Agreement if there is family money that either an individual will receive or are already receiving from a family business, real estate, and/or from the family. Alternately, one of the parties may have property, including but not limited to real estate, retirement accounts/funds, investments, and other personal property. Likewise, Premarital Agreements are commonly prepared for people entering into a second or third marriage. Additionally, more younger people insist on such an Agreement because either they have been a child of a divorce and do not want the same experience that their parents might have had and/or because younger people may have money they wish to protect. Most of all, Premarital Agreements limit possible litigation between spouses, which is crucial to mitigate such litigation especially when there is/are minor child (ren) of the parties.

As most couples begin to plan their weddings, they ought to consider if a Premarital Agreement if right for them. Each fiancé has an option to retain counsel to represent him/her in the preparation and execution of such an Agreement for many reasons. Both individuals and their respective attorneys work together on the drafting of this Agreement, which usually reduces any conflicts that may later arise if they divorce because the Premarital Agreement dictates how marital property (real and personal, including debts and obligations) is to be divided. These Agreements also may set forth how to divide property upon one's passing, which is not the focus herein but important to note those who enter into a Premarital Agreement ought to have a separate estate plan that controls the division of property. Finally, Premarital Agreements usually state that non-marital property (real and personal) will be the property of the party who it prior to the date of marriage. This article breaks down what specifically are Premarital Agreements and what they entail.

Attorneys are often asked, "what is a Premarital Agreement" and "how do Premarital Agreements work". Generally, these Agreements set forth how property (real and personal, marital and non-marital) are to be divided between parties and which party pays for what debt (marital and non-marital). Before these questions may be answered, it is essential to understand and define what marital property and non-marital property mean under Illinois law. Marital property is "all property, including debts and other obligations acquired by either spouse during the marriage" See Section 503(a) of the Illinois Marriage

and Dissolution of Marriage Act ("IMDMA" or "Act"). Non-marital property is "(1) all property acquired by gift, legacy, descent; (2) property acquired in exchange for property acquired before the marriage; (3) property acquired by a spouse after a judgment of legal separation; (4) property excluded by valid agreement of the parties, including a premarital agreement or a postnuptial agreement; (5) any judgment or property obtained by judgment awarded to a spouse from the other spouse except, however, when a spouse is required to sue the other spouse in order to obtain insurance coverage or otherwise recover from a third party and the recovery is directly related to amounts advanced by the marital estate, the judgment shall be considered marital property; (6) property acquired before the marriage, except as it related to retirement plans that may have both marital and non-marital characteristics; (7) the increase in value of non-marital property, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provide in subsection (c) of this Section; and (8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse." See 750 ILCS 5/503(a)(1) – (8).

When couples plan their wedding, they often register for certain personal property, which are referred to as "gifts." Likewise, they often buy personal property to furnish their residence, either a new residence or move into an already existing residence of one spouse. As such and if they divorce, Premarital Agreements state which spouse receives wedding gifts as well as marital and non-marital property. Section 503 of the IMDMA sets forth disposition of property and debts. (a) For purposes of the Act, "marital property means all property, including debts and other obligations, acquired by either spouse subsequent to the marriage … Property acquired prior to a marriage that would otherwise be non-marital property shall not be deemed to be marital property solely because the property was acquired in contemplation of the marriage." See 750 ILCS 5/503.

Now that the marital and non-marital definitions are identified above, another common question people often ask of an attorney is, "how do Premarital Agreements work". A basic definition of a Premarital Agreement is that it is a contract between the soon to be spouses that dictate which spouse will receive what property, otherwise known as "property distribution" in a divorce (and unless specifically excluded, if a spouse passes without an estate plan or legal document). If applicable, Premarital Agreements also define and provide calculation(s) of maintenance payments from one spouse to the other. Since a Premarital Agreement is a contract, it must be in writing and signed by both parties, who are adults. Oral "premarital agreements" are not enforceable.

To illustrate how a Premarital Agreements works, certain laws define "marital property;" however, it is critical to note that spouses may agree to a different definition of marital property as set forth above. For example, a couple may identify certain real estate ("real property") as marital or non-marital properties. They may agree in their Premarital Agreement that one spouse's pre-marital residence is defined as marital property or that any business (es) created during the marriage are considered a spouse's non-marital

property. Another example is that the spouses may agree in a Premarital Agreement to a specific division of property (i.e., 60/40) or to the allocation of a particular belonging, (i.e., "Wife shall receive a certain vehicle and investment accounts). Similarly, they may agree to certain maintenance payments, both in amount and duration, (i.e., "if we divorce within five years of the date of marriage, Husband shall pay to Wife five hundred thousand dollars; if we divorce after five but within ten years of marriage, Husband shall pay to wife ten hundred thousand dollars"). This way, the Premarital Agreement controls the property distribution and, if applicable, provides for a formula for the amount and duration of a maintenance obligation. Such an Agreement allows for creative methods of distributing property and setting forth maintenance while reducing the costs of litigation and the stress, too. Another benefit to entering into a Premarital Agreement is that people's credit scores may be affected negatively by litigation when a marriage is dissolving. Thus, Premarital Agreements may prevent adverse effects of your credit score.

Further, many people ask attorneys, "how can I be sure my Agreement is enforceable?" Generally, so long as the Agreements are "fair" when both parties enter into them and also fair when the Courts look to enforce them. Aside from the equitable aspect, attorneys look to and rely upon Illinois law as an answer. Illinois adopted The Uniform Premarital Agreement Act, effective January 1, 1990. Under The Uniform Premarital Agreement Act, said Agreement was unenforceable if the party challenging it proved the following:

> "(1) he or she did not execute the agreement voluntarily; or (2) the agreement was unconscionable when it was executed and, before execution of the agreement, the party was not provided a fair and reasonable disclosure of the other's property, did not waive the right to such disclosure in writing, and did not have (and could not reasonably have had) an adequate knowledge of the other's property." See *In re Marriage of Kranzler*), 2018 IL App (1st) 171169 (Ill. App., 2018), *citing Heinrich*, 2014 IL App (2d) 121333, ¶ 49 (*citing* 750 ILCS 10/7(a) (West 2012)).

In addition to the execution of a Premarital Agreement that provides for a fair and reasonable disclosure of both parties' property prior to signing said Agreement, the law in Illinois is clear the a signature obtained by coercion or duress from one party renders the Premarital Agreement invalid so it has no legal effect. In other words, for a valid Premarital Agreement, it shall be signed voluntarily by both parties. Not only does this mean signing the Agreement on your wedding day or shortly prior to may result in the Court finding the Premarital Agreement was entered into involuntarily if a divorce commences. For there to be valid Premarital Agreement, it must be signed voluntarily by both parties within a reasonable time period prior to the parties' wedding day. A signature obtained by duress or coercion will invalidate a Premarital Agreement. The Illinois Supreme Court defined duress as "a condition where one is induced by a wrongful act or threat of another to make a contract under circumstances which deprive [the individual] of the exercise of free will." See *Kaplan v. Kaplan*, 25 Ill.2d 181, 185, 182 N.E.2d 706, 708 (1962). Note in Illinois, the bar is not set low. In *Kaplan*, the bride-to-be threatened to expose the groom's affair, which was insufficient to prove his "duress." See *Kaplan v. Kaplan*, 25 Ill.2d 181, 185, 182 N.E.2d 706, 708 (1962). In another case,

the Court refused to find coercion where the groom adamantly demanded a Prenup and made a Premarital Agreement a precondition to marriage. *In re Marriage of Barnes*, 324 Ill.App.3d 514, 258 Ill.Dec. 139, 755 N.E.2d 522 (4th Dist., 2001).

In addition to coercion and duress, the Premarital Agreement must not be unconscionable. As such, gross unfairness ("unconscionability") of Premarital Agreement is not enough to invalidate it. Other factors must be present *in addition to* the alleged unconscionability in order to set aside a Premarital Agreement. Unconscionability is defined as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party … A contract is unconscionable when it is improvident, totally one-sided or oppressive." See *In re Marriage of Gurin*, 212 Ill.App.3d 806, 815, 156 Ill.Dec. 877, 84, 571 N.E.2d 857, 864 (1st Dist., 1991). When asked to consider the "conscionability" of a prenuptial agreement the Court considers the circumstances that existed when the Agreement was signed, not circumstances that may have arisen since the Agreement was executed. For the Court, the question is "regardless of how the agreement looks or works at the time of divorce, was it unconscionable when executed?" *Id.* at 84. In order to invalidate a Premarital Agreement on grounds of unconscionability, a one-sided Premarital Agreement is not enough to be invalid. Instead, a party must also prove, summarily, that she or he:

1. did not receive a fair and reasonable disclosure of the property or financial obligations of the fiancé,
2. did not voluntarily waive the right to disclosure, and
3. lacked an adequate knowledge of the fiancé's assets or obligations.

If the Court concludes the Premarital Agreement was conscionable at the time it was executed, then it does not consider the requirements about disclosure. If the Court concludes that the Premarital Agreement was unconscionable when it was signed, then it will still be enforceable if either financial disclosure was made, financial disclosure was waived, or the challenging spouse knew the finances even without financial disclosure.

An otherwise valid Premarital Agreement may be rendered void if one of the parties conceals assets during the negotiation of the Agreement. One of the purposes of the Agreement is to fully disclose the respective financial circumstances of the spouses-to-be. Where one spouse conceals assets, the lack of disclosure prevents the disadvantaged spouse from making an informed decision when deciding whether to enter into the Agreement. The Illinois Supreme Court provides, in relevant part, "specific knowledge is required before a prospective [spouse] can intelligently choose to take a small sum in payment for a release of her[/his] rights and interests in her[/his] prospective husband's property." See *Watson v. Watson*, 5 Ill.2d 526, 126 N.E.2d 220 (1955).

Concealment of assets and failure to disclose applies also to the Court's calculation of maintenance. If the Premarital Agreement provides for the payment of maintenance that is largely disproportionate to the value of the payor's estate, then the Court will presume that assets were concealed and the paying spouse will have to prove that full disclosure was made during the negotiations. *In Re Marriage of Drag*, 326 Ill.App.3d 1051, 762 N.E.2d 1111 (3d Dist., 2002). Failure to meet that burden will invalidate the Premarital

Agreement. *Id*. However, parties may waive the required disclosure of assets so long as they do so in writing, pursuant to Section 10 of the IMDMA. 750 ILCS 10/7(a)(2)(ii).

All in all, fully executed Premarital Agreement reduce a lot of stress and attorneys' fees of the soon to be married spouses. This way, a couple has an agreement, reduced to writing in a Premarital Agreement about how property acquired prior to the marriage is marital or non-marital property and how said property (including debts) ought to be divided in case of a divorce and in the case of a death, then the estate plan controls. This makes Premarital Agreements important for just about anyone who recently said "yes" to a marriage proposal and have begun planning for their wedding.