Prenuptial Agreements

Adapted from an article by Fort Sill Assistance Office

1. What is a prenuptial agreement?

A prenuptial agreement (prenup) is a contract between two people that plan on getting married that comes into effect in the event of divorce. Some people may have special circumstances where a prenup might be a good idea.

2. Should I get a prenup?

Ultimately, the decision to get a prenup is up to the individual. However, certain life factors may make obtaining a prenup more appropriate. You make want to consider a prenup:

- If you are getting married for the second time (especially if you have children from a previous marriage);
- If you are extremely wealthy, and your net worth greatly exceeds that of your soon-to-be spouse;
- If you have special family heirlooms that you want to keep in the family;
- If you own your own business; OR
- If you or your soon-to-be spouse have significant debt.

3. What are some of the advantages and disadvantages of a prenuptial agreement?

Advantages

- **Property:** If you personally own significant amounts of property (cars, furniture, bank accounts, etc.) you can protect those pre-marital assets by clearly listing what you are bringing into the marriage, and that it is *your* property. This can prevent the court from entitling your spouse to a portion of your pre-marriage property during or after the marriage.
- **Debt:** You can protect yourself from becoming responsible for debt (credit cards, student loans, car payments, etc.) that your spouse brings into the marriage or incurs him/herself during the marriage. Absent a prenup, creditors might be able to come after you for your spouse's debts.

Disadvantages

- **Emotional Harm**: Presenting your soon-to-be spouse with a Prenup may seriously damage your relationship since you are, in effect, planning your divorce before your wedding. Think carefully about this option, and have a mature conversation.
- **Planned Exit**: You might be substantially more willing to get a divorce, rather than work through your problems and grow together in your marriage, if you know the terms of your divorce are already planned out in your favor.

4. What can I put in my prenuptial agreement?

Generally, a prenup can deal with the following:

a) division of property on divorce;
b) whether particular items are considered community property or separate property;
c) ownership of the marital residence;
d) responsibility for premarital debts;
e) distribution of property on death (although you also need to update your estate planning documents (Last Will and Testament, SGLI, etc.) to reflect this);
f) alimony obligations (in most states);
g) financial responsibilities during the marriage;
h) which state's laws you desire to govern the prenup;
i) how disputes about the prenup are to be resolved (for instance through mediation or arbitration); and
j) sunset clause – a couple might wish to include that their prenup expire if they are married for a long time.

Prenups can include responsibilities that don't deal with money, but you should avoid making demands that might seem frivolous, such as requiring that your spouse not gain weight, or that he or she quit smoking and take out the garbage three times a week.

However, prenups CANNOT deal with the following:

a) custody of the children (this includes things such as in what religion to raise the children, their schooling, etc.);
b) visitation to the children;
c) child support;
d) anything "illegal" (as with most contracts);
e) anything "unconscionable" (unfair); and
f) anything that is thought to encourage divorce.

Although most states permit prenuptial agreements to provide for alimony (spousal support), a court is allowed to invalidate the alimony provisions if the judge believes them to be unjust. This will normally occur in long term marriages if there is a great disparity between spouses' incomes and little or no alimony being paid.

5. When is the best time to bring up a prenuptial agreement with my soon-to-be spouse?

Have the conversation with him/her as early on in the relationship as possible. Waiting until the last minute is not fair to your soon-to-be spouse. In fact, a judge may be more likely to invalidate a "last minute" prenup if it appears to have been signed under coercion or duress.

6. How can I help ensure my prenuptial agreement will be valid?

Perhaps the most important ingredient of a solid prenuptial agreement is honesty. Both parties must FULLY disclose their assets. If it turns out either person has been dishonest, or coerced/threatened the other into signing, a judge can toss out the prenup. A valid prenup also is "fair" and will not leave one of the parties destitute. The court will look for fairness to make sure one spouse is not being taken advantage of. Again, ensure that the prenup is signed well in advance of the wedding. You can't present your honey with a prenup two days before the big day and say, "Uh, by the way, I need your signature on this."

Both parties should have separate legal representation. The prenup should be prepared, reviewed, witnessed and signed by an attorney. Each attorney should ensure the prenup is written well, and meets the needs of the client. Bottom line, if you're thinking about getting a prenup, hire an attorney! **The Torii Station Soldier Family Legal Service Office does not prepare or advise on prenuptial agreements.**