

Prenuptial Agreements

Most people enter marriage with the best intentions. However, with the rate of divorce on the rise, it is becoming more and more advisable to consider a prenuptial agreement as an integral piece to any marital plans.

Division of Property upon Divorce

Oregon Revised Statute (“ORS”) 107.105 dictates the division of property in Oregon upon dissolution of a marriage. The Court has the authority to divide all property owned by the parties, regardless of how held, including but not limited to jointly held marital property, separately acquired property, inherited property, property acquired prior to the marriage, and property maintained in a spouses sole and separate name. The Court must make a property division that is just and proper under all of the circumstances. However, a large portion of the time the Court divides all of the assets of the parties 50/50. Clearly, it is better to enter a prenuptial agreement to create certainty rather than rolling the dice and allowing the Court to divide your assets as it deems appropriate.

Prenuptial Agreements Generally

Pursuant to ORS 108.700 through 108.740, a prenuptial agreement is an agreement made between prospective spouses in contemplation of marriage. The agreement becomes binding and effective upon marriage. The prenuptial agreement must be in writing and signed by both parties. No consideration, other than marriage, is required for the agreement to become enforceable.

Subjects of a Prenuptial Agreement

A prenuptial agreement may deal with the following: (1) the rights and obligations of either party in any of the property held by either or both of them regardless when or where acquired; (2) the rights and obligations of either party to manage or control property; (3) the disposition or division of property upon separation, divorce, death, or any other occurrence or event; (4) the modification or elimination of spousal support; (5) the making of a will or trust to carry out the provisions of the prenuptial agreement; (6) the ownership rights in and disposition of death benefits from life insurance; (7) the choice of law governing the prenuptial agreement; and, (8) any other matter, including personal rights and obligations, not in violation of public policy or statute imposing a criminal penalty. The right to child support may not be adversely affected by the terms of a prenuptial agreement.

Changes to a Prenuptial Agreement

A prenuptial agreement may endure the full length of the marriage or it may be changed after the parties are convinced of the success and endurance of the marriage. There are many ways to alter a prenuptial agreement. First, the prenuptial agreement may be amended or revoked by written agreement of the parties. Second, separate assets subject to separate ownership under the terms of the prenuptial agreement can be commingled with marital assets. With commingling, the separate assets come out from under the terms of the prenuptial agreement. Finally, the terms of a prenuptial agreement can be changed through estate planning documents, such as through a will or trust. For example, separate assets subject to separate ownership under the terms of the prenuptial agreement can be given by a decedent to the surviving spouse upon death through the terms of a will.

Unenforceable Prenuptial Agreements

It is imperative that a prenuptial agreement be drafted correctly and executed carefully. Otherwise, a Court may determine the agreement to be unenforceable.

Must be entered Voluntarily. A prenuptial is not enforceable if it is not executed voluntarily. This might seem obvious, but there are several circumstances under which a Court will determine that the prenuptial was not entered voluntarily. First, the prenuptial might be unenforceable if it was executed close in time to the wedding. After all the wedding deposits are made and invitations mailed, the Court may determine that the prenuptial was executed under duress as the spouse challenging the prenuptial felt trapped and embarrassed over the prospect that the wedding would be canceled unless the prenuptial was signed. Second, both parties to the marriage should have the opportunity to seek independent legal counsel. A Court may determine that the prenuptial is unenforceable if both parties were represented by a single lawyer, or if one party did not receive any independent legal advice before signing.

The Prenuptial must be conscionable. A prenuptial may be deemed unenforceable if it was unconscionable when executed. A prenuptial is unconscionable if there is not a reasonable and full disclosure of all of the assets and financial obligations of the parties prior to execution. A prenuptial may also be unconscionable if it eliminates or modifies a party's right to spousal support where, due to lack of resources, that spouse would qualify public assistance (such as welfare).

Postnuptial Agreements

The Oregon Revised Statutes apply only to agreements between prospective spouses, but do not address agreements entered post-marriage. The Oregon courts have never expressly approved such postnuptial agreements. There is some division among lawyers on the enforceability of postnuptial agreements. The prevailing view is that they are valid, but a client should understand that there exists some uncertainty.

Conclusion

Consulting with an attorney before getting married is a good idea. An attorney can elaborate on the above points as well as assist with protecting your pre-marital and post-marital wealth.



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