

INITIAL CHECKLIST FOR DRAFTING PRENUPTIAL/PREMARITAL AGREEMENT
(What to Consider and What Information We Need)

ISSUES TO CONSIDER IN DRAFTING PRENUPTIAL AGREEMENT

1. **Premarital Cohabitation:**
 - a. Was there any period of cohabitation before marriage? If so, how do you want to treat property acquired during premarital cohabitation?
 - (1) Will it be considered joint property, or is each party to have a separate property interest in it?
 - (2) Will its label depend on how the property is currently titled?

2. **Title to Existing Property:**
 - a. Is any property to be considered separate property despite now being titled as jointly-owned property?
 - b. Is any property to be considered jointly-owned property despite now being titled as separate property?

3. **Normal Living Expenses, i.e., utilities, mortgage, property taxes, homeowner's insurance, dry cleaning, housekeeping, landscaping, pool care, etc.**
 - a. Do you wish to specify who is going to be responsible for normal living expenses?
 - (1) Will the arrangement change if one spouse is working and the other is not in the future?
 - b. Will each spouse contribute a percentage to the normal living expenses or a joint account to be used for that purpose?

4. **Medical and Dental Insurance and Uncovered Expenses:**
 - a. If you wish to make specific arrangements on such expenses, which party will be responsible, or will each cover his or her own expenses?
 - b. Are specific arrangements intended regarding such expenses for any minor children?

5. **Taxes:**
 - a. Is it your intention to file jointly or separately while married?
 - b. Do you intend to allow tax return filings during marriage affect the characterization of any property, or be irrelevant to characterization?

6. **Wages and Salaries:**
 - a. Is the intended treatment of each party's wages or salary from employment after marriage to be as the earning party's separate property, or as both parties' community property?

- b. Is there income other than wages or salaries (for example, from existing dividends or investments) expected to be received, and will that income be treated any differently?
 - c. Is it anticipated that any other property might be accrued during marriage other than wages, salaries, and other income? If so, how is that property to be characterized?
- 7. **Retirement Benefits (Pension, 401(k), Individual Retirement Account):**
 - a. How will retirement benefits accrued after marriage be treated? This necessarily includes a discussion of any survivorship benefits and whether or not they will be available during the marriage and after.
 - b. Is there an intention to waive the spouse's automatic survivorship provisions of existing or future retirement benefits at the request of the plan participant?
- 8. **Gifts:**
 - a. If interspousal gifts are contemplated, is there to be a requirement of donative writing?
 - i. If so, it requires actually documenting each such gift (or gifts of more than a set amount).
 - ii. If not, no documentation is required, but the chances for disagreements as to what did, and did not, constitute a gift increase considerably upon a Terminating Event.
- 9. **Definition of "Terminating Event":**
 - a. A "*terminating event*" may be defined by the parties; one choice is to define it as occurring upon one of the following: (1) the filing of a complaint for divorce, annulment, or separate maintenance; (2) execution of a separation or property settlement agreement; or (3) either party's written notice to the other of an intention to remain apart, provided the parties actually separate.
 - b. If it is not defined by the parties, it will be defined by law at the place of any legal proceedings. In Nevada, the community terminates upon divorce, which is usually treated as meaning the time of the divorce trial.
- 10. **Distribution of Property and Support Upon Occurrence of Terminating Event:**
 - a. Will there be any distributions of property, cash, or other assets upon a Terminating Event?
 - (1) If so, when will this occur – 30 days, 60 days, 90 days, or some other later time?
 - b. Will there be spousal support?
 - (1) Will there be temporary spousal support pending completion of a dissolution action?
 - (2) Will there be post-dissolution spousal support? If so:
 - (a) Via a lump-sum or periodic?

(b) In what amount and for how long?

11. **Rights Upon Death:**

- a. In the event of either party's death, how should each party's estate be treated, either before or after a Terminating Event has occurred?
- b. Is there to be a requirement that either or both parties maintain life insurance in any given amount for one another or any minor children?

12. **Amendment or Termination of Agreement:**

- a. Will there be a date that the parties will be allowed to renegotiate/amend the agreement? (NOTE: our general policy is to allow parties the opportunity to amend the agreement at any time so long as the amendments are written and notarized by both parties).
- b. A date in which the agreement terminates, if any.
- c. Will the Prenuptial Agreement automatically be amended by the passage of time? For example, some people wish to include provisions allowing for the recharacterization of certain separate property to community property (thus, divisible) if the parties have been married for a certain amount of time.

13. **What Provisions Are Desired Regarding Future Transmutation of Property:**

- a. Separate property to community property.
- b. Community property to separate property.

14. **Who is the Opposing Attorney?**

15. **What Provisions, if Any, Are Desired Regarding Future Joint Debt?**

16. **Are Children Involved?**

- a. Is there a desire to provide in advance for how school or other anticipated expenses will be covered? If so:
 - (1) Will the parties split costs, or will one party be solely responsible?
- b. Do child care costs (daycare) or any other special expenses need to be addressed?

17. **Choice of Law:**

- a. What State's law will govern the execution and enforcement of the Prenuptial Agreement?

18. **Confidentiality:**

- a. Are any special arrangements required confidentiality, absent disclosures required by legal or administrative processes?

19. **Attorney's Fees:**
- a. In the event the Prenuptial Agreement is challenged (for whatever reason), do you wish to include a provision making the challenging party entirely responsible for the other's attorney's fees if their challenge is unsuccessful?
 - b. Do you want to avoid (at least theoretically) the possibility of paying for the other side's attorney's fees in the event a dissolution action is brought?
 - i. (See counsel regarding possible legal restrictions on such provisions, and special rules that apply whenever a party in the absence of support or fees might be forced to rely upon public assistance for support.)

INFORMATION WE NEED

1. LISTS from both parties detailing their separate property and debts as these will be attachments to the Prenuptial Agreement as Schedules. Unless you already have a profit & loss or similar updated document, the easiest way to organize the information is often to completely fill out the financial disclosure form used by the court in divorce cases, copies of which can be obtained at <http://www.willicklawgroup.com/divorce>.
2. The approximate value of each party's separate property (and any property already co-owned by the parties, should any exist).
3. The approximate value of each party's separate secured and unsecured debt, and any joint debt.
4. The proposed marriage date.