

**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 this time? If so, how do you want to treat property acquired previously?
    - (1)          Is anything now considered joint property, or does each party have a separate property interest in any jointly-acquired property?
    - (2)          Will its label depend on how the property is currently titled?
    - (3)          What about untitled property?
  
2.           **Title Changes to Existing Property:**
  - a.           Is any property to be considered separate property going forward despite now being titled as jointly-owned property?
  - b.           Is any property to be considered jointly-owned property going forward 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?
    - (1)          If so, are contributions to be scheduled, or left completely voluntary?
  
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 accruing 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 to determine when the terms of the Agreement cease to apply. There are many choices.
    - (1) 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.
      - (2) Other potential "terminating events" could include death of either party (usually, this is separately addressed), the birth of a child of this relationship, disability of a party rendering that party unable to maintain gainful employment, or an agreed length of time.
  - b. If termination 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 – 10 days, 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 lump-sum or periodic payments?
      - (b) Set in a specific sum or according to some accrual formula?
      - (c) 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?
  - c. Should the terms effective upon divorce automatically apply at death as well?
12. **Amendment or Termination of Agreement:**
  - a. Will there be a date that the parties will be allowed or required to renegotiate or amend the Agreement? (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 at which the Agreement automatically expires, if any.
  - c. Will the 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 Other Party's 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 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 Agreement is challenged (for whatever reason), do you wish to include a provision making the challenging party entirely responsible for the other party's attorney's fees if that challenge is unsuccessful?
  - b. Do you want to try 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**

20. Lists from both parties detailing their property, debts, and income, as these will be attachments to the Agreement as Schedules. Unless you already have a profit & loss or similar updated document, the easiest way to organize the information may be 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>.
21. The approximate value of all such property (and any property already co-owned by the parties, should any exist), and the approximate sum of any separate or joint debt.

22. A proposed marriage date, or any other known future event that would alter the terms of the Agreement.