

Pre-Marital and Marital Agreements

Marriage establishes a legal relationship between husband and wife that creates certain property rights, including interests in the other spouse's assets and income. In cases of persons with existing wealth or the expectation of inherited wealth, or in cases of couples entering second marriages, those marital rights can be limited through pre-nuptial planning. Anytime after the marriage ceremony, marital agreements may be negotiated and implemented in order to limit spousal rights and claims, but the "incentive" is not as strong on the part of at least one spouse to do so. Although these agreements often address issues such as alimony and retirement benefits, the most common goal in the estate planning context is the preservation of the ability to provide for one's own heirs without concern for a spousal claim after death. (See, [Planning for Blended Families](#)).

In the classic pre-nuptial agreement, each spouse agrees to give up some or all rights in the other spouse's assets during life or in their estate at death. Each spouse is then able to arrange his or her estate plan so that it will be distributed in accordance with their wishes, free of claims which might otherwise be made by the surviving spouse. In Virginia, the spouse must waive his or her rights to claim an elective share of the "augmented estate" of the other in the written agreement. Essentially, the augmented estate consists of all property owned by the decedent at death, including certain assets given away during the marriage without the spouse's written consent. The elective share is calculated as one-third of that amount, reduced by assets already received by the survivor from the decedent (by beneficiary designation, for example). Clearly, then, the waiver of such rights in a prenuptial agreement is critical, if the spouses and their families are to be ensured of their post-mortem rights and circumstances.

In order to be effective, the agreement must include a schedule of assets containing a full disclosure of each spouse's resources. Generally, each must be represented by separate counsel before endorsing the agreement. Once executed, the agreement can only be modified by a separate agreement of the spouses, represented by separate counsel.

It is important to note that the pre-nuptial agreement does not prevent a spouse from making provisions in his or her estate plan for the survivor on a voluntary basis, or from changing those provisions at a later time. Likewise, it does not require that the surviving spouse refuse to accept such a gift, either.

There are other considerations and options in the context of spousal estate planning, but the most effective legal instrument for achieving certainty is the premarital/marital agreement.

Notice - This information is not legal advice or counsel absent an extant attorney-client relationship with the recipient; this information does not create an attorney-client relationship. Seek legal counsel before taking any action on the matters referenced above.