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Prenups may be a smart estate planning tool

Prenuptial agreements are not just for the rich and famous anymore. As more people enter into second marriages and have adult children from a prior marriage, prenuptial agreements have become a valuable estate planning tool. A recent Elder Law Answers article (www.elderlawanswers.com) highlights what to think about if you are considering a prenuptial agreement, or even if you have not even thought of going that route before.

Prenuptial agreements are designed to resolve issues of support and property division that may occur in the event that the marriage ends in divorce, or at the death of one spouse. Without such a document in a second or subsequent marriage, the new spouse might be able to invalidate an existing estate plan, such as property that you intended to pass to your children from a prior marriage, including real estate and family heirlooms, as well as cash. It can also protect your new spouse in the event that a new estate plan is not put into place before one spouse dies. Proper planning can protect both the children of prior marriages, and each other, at the death of one spouse. It is also a valuable tool in the event that the marriage ends in divorce.

The validity of the prenuptial agreement is very important to consider. The agreement must be in writing, and signed by both parties. Courts do not enforce verbal agreements. The agreement can be invalidated if one party is pressured into signing the agreement by the other party. The best way to be sure that both parties' interests are protected is for each to have independent counsel, that is, each person to have his or her own attorney. In order to accomplish this, sufficient time should be allotted to have an agreement prepared and reviewed before the wedding takes place. However, there is also an opportunity to have a postnuptial agreement, or sometimes an "antenuptial" agreement, if a prenuptial agreement is not feasible.

Some other factors that could result in an invalid agreement include the need for both parties to have read and understood the agreement. Again, sufficient time should be permitted for this step. Both spouses must be truthful in disclosing assets and liabilities. Lying or omitting information can invalidate an agreement. There can be no invalid provisions in the agreement. For instance, modifying child support obligations is illegal. While the parties can agree to most financial arrangements, a provision that is grossly unfair to one spouse may result in a court invalidating the entire agreement. Having an agreement prepared by an attorney familiar with such agreements, and then having the agreement reviewed by another attorney can help avoid such issues.

Be aware that in a Medicaid planning context, prenuptial agreements are often not acknowledged as valid by the Pennsylvania Department of Welfare. Nevertheless, this is not a good reason to consider this estate planning tool for its benefits other than in a Medicaid planning context.

Prenuptial agreements may not seem romantic, but for those who are marrying later in life, and have children and/or assets to protect, this may be the smartest estate planning tool that they have prepared. To see if such an agreement is right for you, consult your attorney.