



LAW OFFICE OF  
**BRYAN FAGAN**  
— PLLC —



# PRENUPTIAL AGREEMENTS IN HOUSTON, TX

WORK WITH A HOUSTON ATTORNEY

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## INTRODUCTION

Thank you for downloading our special report: about Prenuptial Agreements in a Divorce, with information that will help you protect your assets and secure your future. For more insider divorce tips, please download our other special reports about Dirty Divorce Tricks, How to Plan and Prepare for Divorce, and Divorce after 50. We understand that you have a lot of questions and concerns about your divorce and we want to help you feel as comfortable with the process as we can. If you would like to speak to one of our highly skilled Law Office of Bryan Fagan, PLLC attorneys, we encourage you to contact us to schedule a free confidential consultation. We're here for you, always. Sincerely, Bryan Fagan, Law Office of Bryan Fagan

## PRENUPTIAL AGREEMENTS IN HOUSTON

Prior to getting married, there is often a misconception that prenuptial agreements are a sign of mistrust in one's spouse, yet this is often not the case. Having a prenuptial agreement in place simply allows you and your partner to have a clear understanding of the division of your assets in the event your marriage prematurely ends.

Another benefit of prenuptial agreements is that you can have a safe and open conversation with your potential spouse about your finances, expectations, and future, and start your marriage off with a solid foundation built on trust and honesty. At The Law Office of Bryan Fagan, PLLC, our Houston family law attorneys have the patience and understanding to help simplify this process for you and are always happy to address any questions or concerns you have.

- ☑ Terms and Conditions in Premarital Agreements
- ☑ Prenuptial agreements can be voided in Texas
- ☑ Common Questions about Texas Prenuptial and Marital Agreements

In the event that you or your spouse feels as though you want to end your marriage and you had not previously established a prenuptial or post nuptial agreement, you may experience a great deal of tension or hostility when trying to divide your assets. To avoid this, we often recommend that you have at least one of these vital documents drafted and put into place.

### A prenuptial agreement often includes:

- ☑ A clear division of your assets
- ☑ The allocation of any potential debt
- ☑ Your financial rights and responsibilities
- ☑ An outline of the division of your property or estates

## BEGIN YOUR MARRIAGE WITH TRUST & HONESTY

At The Law Office of Bryan Fagan, PLLC, we want you and your significant other to have a long-successful marriage. The best way to achieve this is to make sure that you both have a clear understanding of each other's expectations about your future in the event that your marriage prematurely ends, which is why our Houston family law attorneys often recommend that you have a prenuptial agreement drafted in our office under the supervision of our caring staff.

## TERMS AND CONDITIONS IN PREMARITAL AGREEMENTS

A premarital agreement (prenuptial agreement) can be beneficial in the way of planning for a compatible and companionable married life. But some things are strictly off-limits. Couples cannot agree to an act that violates public policy. Nor can they contract to do something criminal or illegal. For example, an "agreement" to commit tax evasion by hiding earnings from the IRS could never be enforced in court by one spouse against the other.

Texas Statutes list the scope of what is permissible with a premarital agreement and what is expressly prohibited. The language of Texas Family Code Section 4.003 (a) is broad and allows the parties to negotiate reasonable terms with substantial flexibility:



- ☑ the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
- ☑ the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
- ☑ the disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
- ☑ the modification or elimination of spousal support;
- ☑ the making of a will, trust, or other arrangements to carry out the provisions of the agreement;
- ☑ the ownership rights in and disposition of the death benefit from a life insurance policy;
- ☑ the choice of law governing the construction of the agreement; and
- ☑ any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

## PROPERTY

Premarital agreement terms and conditions regarding the property, both separate and community. Treatment of assets and debts during a marriage makes up a large portion of Texas Premarital Agreements, including income, earnings, and any "interest, present or future, legal or equitable, vested or contingent," real property, and

## PERSONAL PROPERTY

Not only are couples free to determine how property will be purchased, sold, used, transferred, mortgaged, and managed during the marriage, but they may also decide how property will be divided in the event of separation or divorce. Before they marry, couples are free to negotiate the division of community property, valuation of assets, allocation of debts.

Many important decisions need to be considered before the wedding. Who will keep the house? How will the mortgage be paid? Who gets which investment fund? Who shall have a controlling interest in the family business? Both spouses work from the same game plan on marriage, separation, divorce, and untimely death of a spouse. Similar to a separation agreement settling property division in divorce, they may characterize future assets and debts as either separate or community property.

## REAL ESTATE

You purchased your house before you met your fiancé. After the wedding, you probably will both reside in the home. In the event of a divorce, is this property a marital or separate property asset? To avoid the gray area that family homes can fall into, putting in place a premarital agreement is an easy way to legally outline homeownership and what will happen to the home in the event of a divorce. For this reason, decisions concerning a home that one spouse owned before marriage are typically one of the most common items listed in most premarital agreements.

## RETIREMENT ACCOUNTS

Be aware that most retirement and pension accounts in Texas are subject to the state's community property rule. With this in mind, it's common to see language in premarital agreements exempting retirement accounts from consideration as community property or fixing a certain percentage/split if the couple does divorce.

Under Texas Family Code Section 7.001 "GENERAL RULE OF PROPERTY DIVISION:

"In a decree of divorce or annulment, the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage."

Case law has mostly found that "just and right" means that the starting point for dividing community property is 50/50. However, with a premarital agreement, either individual may waive their future marital interest in the other's IRA, pension, or 401k funded with matrimonial earnings. If the premarital agreement waiving the right to a community share of the other spouse's retirement asset, then upon death or divorce, the retirement asset is, by contract, not marital property.



## PROVIDING FOR SPOUSAL MAINTENANCE

In the event of a divorce, how much will you pay or receive in alimony? What if one of you becomes ill and can no longer work throughout your marriage? What if your spouse cheats? What about spousal income loss when one spouse stays home to raise the children? Instead of monthly payments, would a lump sum or equivalent (assigning over homeownership, for example) be an acceptable alternative? Many couples choose to make decisions about alimony now rather than fight about it later.

Most challenges to premarital agreements involve spousal support, usually because the couple accumulated more during the marriage, and the premarital agreement does not account for those assets.

Texas law allows for agreements to modify or eliminate spousal maintenance (alimony) of a spouse. These are standard clauses in a premarital agreement. An individual may waive the right to financial support from their spouse in the event of separation or divorce in the future.

## SEPARATION OF BUSINESS INTERESTS

You own a business. In the event of a divorce, can your spouse claim a part or percent, even if he or she did not participate in it? To keep business owners and business shares out of the divorce, a premarital agreement can clearly define these types of investments and income as separate or can outline the specific percentage a spouse would be entitled to claim.

## ASSETS EARMARKED FOR CHILDREN

If you have children from a previous relationship and know you would like certain assets you currently own to be inherited by these children (i.e., money, stocks, furniture, or other real property), a premarital agreement can include language listing which specific property is to be kept separate for their interest.

## BANK ACCOUNTS & CREDIT CARDS

Have a hefty savings account, or likewise, have a wonderful spouse-to-be who made the mistake of over-spending on his or her credit cards a few years back? A prenuptial agreement can specify these types of separate items — individual bank accounts and personal debt — remain separate in the event of a divorce, rather than being open to division.

## ATTORNEY FEES AND COSTS

The parties to a premarital agreement can also negotiate who pays the cost of preparing the premarital agreement. This is incredibly helpful when a wealthy individual wants a premarital agreement to get married. Still, the other party needs financial assistance to hire his or her own attorney. As discussed later, having one's own attorney to negotiate and draft the premarital agreement is paramount. If the financially dominant party wholly controls the negotiation and the other party cannot afford to obtain review by independent counsel, enforcement may become problematic.

What is the point of an invalid or unenforceable premarital agreement? It is essential to get things right from the beginning.

The agreement may also provide for:

- The payment of legal fees
- Court costs
- Forensic calculations
- Child custody evaluations and
- Related expenses in a divorce

Additionally, the couple can agree on how probate costs and expenses related to the administration of the decedent's estate will be paid. Will the costs be paid from community resources, for instance, or from the deceased spouse's separate bank or investment account?



## TAXATION MATTERS

A premarital agreement may include provisions addressing tax matters. The parties could designate responsibility for preparing a joint tax return, especially one that is more sophisticated or has specialized expertise or training in that area. They may agree upon the portion each will contribute to the payment of taxes if, for example, one's income is substantially higher than the other's. Couples might agree that each will be responsible for the taxes owed on separate property income and pay the tax owed from a different bank account. At the same time, they agree to keep income earned on separate property segregated for tax purposes.

Deciding how tax matters will be handled in marriage is why you consult a CPA or tax attorney. Before accepting any arrangement, understand current law and how the proposed premarital agreement alters the outcome.

For example, previously, if a higher-earning spouse was to pay alimony, it represented a tax break for the payor. The recipient included the alimony as income and was assessed the tax, but at a lower rate, perhaps much lower. During negotiations, the deduction incentivized the paying more to support a dependent spouse who enjoyed a lower tax rate.

However, things changed on January 1, 2019. There is no longer an alimony deduction. It is important to be mindful that the laws on these and other family law issues could change at any time.

## ON THE CHILD'S UPBRINGING

Some couples include terms and conditions in a premarital agreement attempting to control custody upon a parent's death or divorce. Child custody is a general term meant to include legal decision-making authority and parenting time access to the child. Custody issues are not something that can be constrained by using a premarital agreement.

Why is that? A premarital agreement cannot limit a party's constitutionally protected parental rights. The right to parent one's child is within the Fifth and Fourteenth Amendments' due process clause to the United States Constitution. The premarital agreement is also prohibited from providing a parenting plan that is not in the child's best interest.

## TEXAS CUSTODY LAW PREVALENCE

Texas custody law takes precedence over the premarital agreement with child custody terms. Couples cannot use the premarital agreement to dictate parenting time or who shall have the legal decision-making authority over a child if they separate or divorce. That is for the court to determine based upon statutory factors weighted according to the child's best interest.

Furthermore, the premarital agreement cannot divest the court of custody jurisdiction over a minor child. Parents should negotiate a parenting plan in good faith with their attorneys' assistance and submit their parenting plan to the court.

A couple might want to provide personal guidance for married life by reciting custody intentions, for example, by stating their mutual desire for joint custody and equal parenting time if they divorce. They might agree to one parent being the primary caregiver who works from home until they reach a certain age. What if the parent chooses a different career path? That is his or her right. Could the other spouse sue to enforce a premarital agreement that requires the other parent to work from home or not at all? No.

Understand how some wishes affect personal rights and obligations and, as such, are not enforceable and will not bind the judge in divorce proceedings. In any case, such a provision should be made severable from the premarital agreement without affecting the overall validity and enforceability of the agreement's remaining terms and conditions.



## EDUCATION

Provisions directing the child's upbringing and education may be included in a premarital agreement, although court enforcement might not always be available. Compare a requirement over education with a provision over religious upbringing.

A contract that a child attends a private school and receive private lessons in music and arts may be enforceable in divorce proceedings

## ADDITIONAL CHILD SUPPORT

Can a couple provide for child support obligations and amounts in their premarital agreement? Under Texas law, a premarital agreement cannot adversely impact child support. For instance, the contract cannot determine which parent will wholly be responsible for paying child support. Parties can agree on extra help for private lessons, extracurricular activities, travel, and so on.

With every custody proceeding, the court will order child support based upon calculations using the Texas Child Support Guidelines. No child should be made to suffer for lack of support simply because their parents entered into a premarital agreement with terms contrary to guidelines.

Future parents can agree to child support more than what Guidelines are required but cannot reduce or eliminate child support in violation of Guidelines. For example, they could decide the wealthier parent should provide additional monthly support, paying child-related expenses for extracurricular activities, and funding a college trust. But couples cannot agree to eliminate or diminish a parent's legal obligation to support their child.

Generally, a premarital agreement cannot negatively impact third parties' rights to the agreement, such as the creditor of one or both spouses. That child may enforce a provision in the understanding that creates a beneficial right in the child as a third party beneficiary. Say the premarital agreement included a provision to fund a college trust, as an example. Still, the parents either failed to pay into the trust or remove funds from the educational trust for some reason.





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## **WE'RE HERE FOR YOU**

When it comes to your financial future, your peace of mind matters. No matter where you are in the divorce process, we are always available to help you protect your assets and safeguard your future. As a Texas law firm exclusively devoted to divorce and family law, our experienced divorce attorneys will explain your options and support you throughout the process. Please contact us at (281) 810-9760 if you would like to schedule a free confidential consultation

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