

Antenuptial (prenuptial) Agreements

Unmarried persons in Minnesota who are planning to marry may choose to enter into an antenuptial (prenuptial) agreement with their prospective spouses before the date of the wedding in order to allow the parties to determine or limit the rights that each party will have in the other parties' property, and/or income, in the event of:

- ◆ the **death of one or both of the parties**,
- or
- ◆ the **dissolution of the marriage**.

In the absence of a validly executed antenuptial agreement - or other legally effective waiver - spouses may have certain rights to income, and/or property rights in the assets owned by the other spouse:

- ◆ upon **the death** of one of the parties,
- or
- ◆ **upon the dissolution of the marriage**.

Authority for Antenuptial Agreements

Antenuptial agreements are enforceable in Minnesota if they satisfy one, and possibly two, sources of law:

1. **Minnesota Statutes**, Section 519.11 which:
 - ◆ addresses matters relating to separate property owned by each of the spouses upon commencement of the marriage, or acquired by gift or inheritance ("***non-marital property***") upon the dissolution of a marriage,
 - and
 - ◆ allows the waiver of one spouse's rights in the other spouse's estate in the event of the death of the spouse,and
2. **Nonstatutory Minnesota "common law"** - which addresses matters relating to:
 - ◆ each spouse's rights in the assets acquired during the course of the marriage ("***marital property***"),
 - ◆ each spouse's rights in ***non-marital property***,
 - ◆ a spouse's rights to periodic ongoing spousal support payments in the event of divorce ("***maintenance***", ***or alimony***),

and

- ◆ a surviving spouse's rights to periodic, ongoing spousal support payments in the event of the death of the other spouse.

Minnesota “common law” - a body of law created by the courts - requires not only:

- ◆ **procedural fairness** in the execution of an antenuptial agreement,
but also
- ◆ a certain degree of **substantive fairness** in the division of property and/or income between the spouses upon the termination of the marriage due to divorce.

Minnesota Statutes, Section 519.11, adopted in 1979:

- ◆ codified the common law requirements of **procedural fairness in the execution of an antenuptial agreement** - addressing *non-marital property* issues,
and
- ◆ **shifted the burden of proof** with respect to nonmarital property from the proponent of the agreement, to the spouse opposed to its enforcement,
- ◆ but did not eliminate the common law requirement of **substantive fairness**.

Procedural Fairness

The statutory and common law burden of **procedural fairness** is met when:

- (a) there is a **full and fair disclosure** of the earnings and property of each party,
and
- (b) the parties have had **an opportunity to consult with legal counsel** of their own choice.

However, the opportunity to consult with personal legal counsel - while a statutory requirement - is only a factor to be considered under the common law when determining whether **procedural fairness** has been attained in the execution of an antenuptial agreement.

Substantive Fairness

The common law requirement of **substantive fairness** - relating to the effect an antenuptial agreement may have on the relative rights of the parties - guards against misrepresentation by a spouse, and the overall unfairness of the agreement, and must be met both:

- ◆ at the time that the antenuptial agreement is entered into,
and

- ♦ at the time that enforcement of the agreement is sought.

Complete Enforceability of Antenuptial Agreements is Never Certain

Due to the subjective nature of both:

- ♦ **procedural fairness** - which requires the **full and fair disclosure** of the earnings and property of each party,
and
- ♦ **substantive fairness** - which must be met both:
 - ♦ at the time that the antenuptial agreement is entered into,
and
 - ♦ at the time that enforcement of the antenuptial agreement is sought,

ensuring the complete enforceability of all provisions of an antenuptial agreement at the time of its execution is not possible.

While it is generally true that having an antenuptial agreement provides better protection against claims made by a spouse upon death or divorce than not having one, the enforceability of such agreements remains unpredictable, and subject to some uncertainty.

Separate Legal Counsel is Advisable, but Technically Not Required.

While there is no formal requirement that both spouses be **actually represented** by separate legal counsel with respect to their interests in an antenuptial agreement,

- ♦ separate representation is generally advisable,
and
- ♦ may help to overcome any claim that the execution of the agreement was procedurally unfair.

Property Rights of Married Persons

In general, assets titled in the names of both spouses are presumed to be owned by both spouses equally.

I. Property Rights Upon Dissolution of the Marriage

However, regardless of which spouse “owns” an asset in the sense that his or her name is exclusively listed on the title, all assets owned and/or acquired by each of the spouses during the marriage are generally divided into two classes:

- ♦ *marital property*,
- and
- ♦ *nonmarital property*.

A. Marital Property

Minnesota statutes define "*marital property*" to be:

- ♦ real or personal property, including vested public or private pension plan benefits or rights,
- ♦ **acquired by either spouse** to a marriage dissolution:
 - at any time during the existence of the marriage relation between them,
 - prior to the date of **the initially scheduled pre hearing settlement conference** incident to the dissolution (the "**Valuation Date**").

Minnesota statutes further provides that **all property acquired by either spouse:**

- ♦ **subsequent to the marriage,**
- but
- ♦ **before the Valuation Date,**

is presumed to be *marital property* regardless of whether title is held:

- ♦ individually
- or
- ♦ by the spouses in a form of coownership, such as joint tenancy or tenancy in common.

The **increase in the value of either *marital* or *nonmarital property*** attributable to **the efforts** of one or both spouses during the marriage is also classified as *marital property*.

Such "**active appreciation**" includes whatever appreciation is derived from the **active management of a business, or the supervision of investments**.

Cash dividends on stocks, and rental income - even from *nonmarital property*, are two forms of income which are generally considered to be *marital property*.

B. Non-Marital Property

Minnesota statutes define "*nonmarital property*" to be real or personal property **acquired by either spouse** before, during, or after the existence of the marriage, which:

1. is acquired as a gift, bequest, devise or inheritance **from a third party to only one of the spouses**;
2. is **acquired before the marriage**;
3. is excluded by a valid antenuptial contract,
or
4. is acquired in exchange for, or is the increase in value of, property which is described in one of the above clauses.

The **increase in the value of *nonmarital property*** which is attributable to inflation or to market forces or conditions retains its nonmarital character. Such “**passive appreciation**” would include the **increase in value of stock** over a period of time.

C. Division of Marital Property and Non-Marital Property upon Divorce ("Dissolution")

1. Marital Property

A court has broad discretion to divide *marital property* between the spouses in the event of a marriage dissolution (divorce) proceeding.

Minnesota statutes provide that upon dissolution, the court **shall make** a just and equitable division of the *marital property* of the parties without regard to marital misconduct, after giving consideration to all relevant factors, including:

- ◆ the length of the marriage,
- ◆ any prior marriage of a spouse,
- ◆ the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, opportunity for future acquisition of capital assets, and income of each spouse,
- ◆ the contribution of each spouse in the acquisition, preservation, depreciation or appreciation in the amount or value of the *marital property*,
- and
- ◆ the contribution of a spouse as a homemaker.

Minnesota statutes also provide for a conclusive presumption that each spouse made a substantial contribution to the acquisition of income and property while they were living together as husband and wife.

Minnesota statutes also provide that the court may award the **household goods and furniture** of the parties - whether or not acquired during the marriage - to either spouse.

2. Non-Marital Property

In contrast to its broad powers over *marital property*, a Minnesota court has less discretion to divide Non-marital Property between spouses in the event of a dissolution.

Minnesota Statutes provide that if a court finds that:

- ♦ either spouse's **resources or property** - including the spouse's portion of the *marital property*,
- ♦ **are so inadequate as to work an unfair hardship** - considering all relevant circumstances,

the court **may**, in addition to the marital property, **apportion up to one-half of the nonmarital property** in order to prevent the unfair hardship.

If the court apportions *nonmarital property* between the spouses, it shall consider all relevant factors including:

- ♦ the **length of the marriage**,
- ♦ any **prior marriage** of a spouse,
- ♦ the age, health, station, occupation, amount and sources of income, vocational skills, employability, assets owned by each spouse,
and the
- ♦ liabilities, needs, and opportunity for future acquisition of capital assets and income of each spouse.

3. Effect of an Antenuptial Agreement on Property Rights in the event of Dissolution of the Marriage

Minnesota Statutes provides that an antenuptial contract or settlement made in conformity with the **statutory requirements** may determine the rights each spouse has in the *nonmarital property* of the other spouse upon dissolution or legal separation.

An antenuptial agreement may also determine or limit the rights that each of the spouses has in the property of the other upon the death of the other spouse.

4. Requirements for a Valid Antenuptial Agreement

According to **the statute**, in order for an antenuptial agreement to be valid and enforceable, the agreement:

- ♦ must be in writing;

- ◆ must be witnessed by two persons who are not parties to the agreement;
- ◆ must be acknowledged by the parties before a notary public;
- ◆ must be entered into prior to the marriage,
- and
- ◆ must be **Procedurally Fair**:
 - (a) there have been a **full and fair disclosure** of the earnings and property of each party,
 - and
 - (b) the parties have had an **opportunity to consult with legal counsel** of their own choice.

D. Summary - Property Rights Upon Dissolution of the Marriage

Assuming the presence of **Procedural Fairness** in the development and execution of an antenuptial agreement, an antenuptial agreement can be effective:

- ◆ pursuant to **statutory authority**:
 - to determine or limit the rights each spouse has in the *nonmarital property* of the other party upon dissolution of the marriage;
 - and
 - to bar each spouse of all rights in the **estate** or the other spouse not so secured to them by their agreement,
- and
- ◆ pursuant to non statutory **common-law authority**, to determine or limit the rights each spouse has upon dissolution of the marriage in the *marital property* of the other spouse.

However, any predetermined dissolution plan with respect to the division of *nonmarital property* must be required to be **Substantively Fair** - both:

- ◆ at the time of execution of the antenuptial agreement,
- and
- ◆ at the time that the antenuptial agreement is sought to be enforced.

Furthermore, any agreed upon limitations on the division of **nonmarital property** will only be enforceable to the extent that there has been a **full and fair disclosure** of the earnings and property of each party.

While an antenuptial agreement can also be effective under common law authority to determine or limit the rights each party has in both the **nonmarital** and **marital property** of the other party upon dissolution of the marriage, any such limitation of property rights must be **Substantively Fair** at the time of enforcement.

II. “Maintenance” (Alimony) upon Dissolution

A. Maintenance Defined

In addition to any **division of property**, spouses involved in a marriage dissolution typically address the issue of “*maintenance*” - formerly known as “*alimony*” - which is an award made in a dissolution or legal separation proceeding of:

- ◆ payments from the future income or earnings of one spouse,
- ◆ for the support and maintenance of the other.

Minnesota Statutes provides that in a proceeding for the dissolution of a marriage or a legal separation, the court may grant a **Maintenance Order** in favor of **either spouse** if it finds that the spouse seeking *maintenance*:

(a) lacks **sufficient property**, including *marital property* apportioned to the spouse, to provide for the reasonable needs of the spouse, considering the **standard of living** established during the marriage - especially, but not limited to, **a period of training or education**,

or

(b) is **unable to provide adequate self-support**, after considering the **standard of living** established during the marriage and all relevant circumstances, through appropriate employment,

or

(c) is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

Two of the three conditions for the payment of *maintenance* specifically take into consideration the **standard of living** which the parties established during marriage - a necessarily subjective matter - and the third condition does so implicitly.

B. Effect of an Antenuptial Agreement on Maintenance Rights

The Minnesota **statutory provisions** regarding antenuptial agreements do not address rights to *maintenance*. Therefore, the effect of an antenuptial agreement on *maintenance* rights must be determined by the application of **common law principles**.

Under the common law, an antenuptial agreement must be **substantively fair**, both at the time that the agreement was entered into, and at the time of enforcement. Substantive unfairness can occur when:

- ◆ one spouse winds up with significantly greater net worth and/or earning potential,
or
- ◆ if one spouse has custody of children and thus higher living expenses, without a proportionate increase in resources.

Substantive unfairness can also occur:

- ◆ when the premises or assumptions upon which the original agreement were based,
- ◆ have so changed that enforcement of its terms would not be consistent with the reasonable expectations of the parties at the time the agreement was entered into,
- ◆ to such an extent that to validate the terms of the agreement at the time of enforcement would be patently unfair.

Maintenance may be either temporary or permanent in nature, with permanent *maintenance* more likely to be awarded in long-term marriages.

III. Property Rights Upon Death

A. Defined

In the absence of an antenuptial agreement or other legally effective waiver, a Minnesota surviving spouse will have certain statutory rights to make claims against the estate of a deceased spouse, including the following:

- (i) **Elective Share** - Depending on the length of the marriage, a surviving spouse has the right to elect to receive from:
 - ◆ **the estate of a deceased spouse,**
or
 - ◆ **other assets of the spouse,**

a certain percentage of a calculated asset value known as the “Augmented Estate”, if the decedent’s will does not provide a greater amount to the surviving spouse.

Initially, this percentage is very small, not exceeding six percent during the first three years of marriage. However, it can rise to 50% if persons stay married for 15 years. The calculation of this “*elective share*” amount is very complex, and takes into consideration numerous factors.

However, the wealthier spouse can never obtain an award of an elective share because the formula takes into consideration the assets of both spouses.

(ii) Rights in the homestead - In general, a surviving spouse will have certain ownership rights in their homestead in the absence of an antenuptial agreement or other legally effective waiver.

- ◆ **If a deceased spouse has surviving descendants**, a surviving spouse has the right to petition the probate court to receive a life estate in the homestead.

The “*remainder interest*” in the homestead - which can only be enjoyed by the “*remainder persons*” by surviving the owner of the life estate - would be held by the deceased spouse’s descendants.

- ◆ **If a deceased spouse has no surviving descendants**, a surviving spouse would have the right to petition the probate court for ownership of the entire homestead.

(iii) Rights in exempt property. In addition to rights to an elective share and rights in the homestead, in the absence of an antenuptial agreement or other legally effective waiver, a surviving spouse would have the right to elect to receive from the estate of a deceased spouse the following items:

- A. Furniture, household goods, personal effects, or other personal property, not exceeding \$10,000 in value.

and

- B. One automobile, without regard to value.

(iv) Rights to “probate” maintenance. In addition to a right to an elective share, rights in the homestead, and rights to select items of exempt property, in the absence of an antenuptial agreement or other legally effective waiver, a surviving spouse has the right to receive from the estate of a deceased spouse reasonable **support maintenance** for a minimum period of 18 months, and possibly longer, at the discretion of the court.

Since a determination of **reasonable support maintenance** takes into consideration the standard of living to which the spouse has been accustomed to living, such payments can be significant, especially when they continue indefinitely.

- (v) **Rights to Intestate Share.** If a spouse dies without a will, in the absence of an antenuptial agreement or other legally effective waiver, the surviving spouse may have a right to receive a certain amount of the decedent's property pursuant to Minnesota's laws of intestacy which govern property disposition where there is no will.

The surviving spouse would be entitled to the entire intestate estate:

- ♦ if the decedent had no descendants,
or
- ♦ if all such descendants were also descendants of the surviving spouse.

However, in a situation where there is a surviving spouse and one or more children of the decedent who are not children of the surviving spouse, the surviving spouse would be entitled to:

- ♦ the first \$150,000 of the decedent's probate estate,
and
- ♦ one half of the balance of such probate estate.

- (vi) **Rights of an "Omitted Spouse" to an Intestate Share.** If a will was drafted prior to the marriage, a spouse may be entitled to an intestate share **of the decedent's estate unless:**

- (1) it appears from **the will or other evidence** that the will was made **in contemplation of** the testator's marriage to the surviving spouse;
 - (2) **the will expressed the intention** that it is to be effective notwithstanding any subsequent marriage;
- or
- (3) the testator **provided for the spouse by transfer outside the will**, and the intent that the transfer be in lieu of a testamentary provision:
 - ♦ **is shown by the testator's statements**
or
 - ♦ **is reasonably inferred from** the amount of the transfer or other evidence.

B. Effect of an Antenuptial Agreement on "Probate Rights"

The Minnesota antenuptial agreement statute provides that an antenuptial contract or settlement made in conformity with the statutory requirements may bar each other of all rights in the **other spouse's estates** not granted to them by their agreement.

Minnesota's common law, as well as Minnesota's probate statutes, may also permit an antenuptial agreement to determine or limit the rights of a surviving spouse in such property. Therefore, all of the above identified rights of a surviving spouse should be waivable by a party to an antenuptial agreement in the Agreement itself.

Postnuptial Agreements

Antenuptial agreements must be signed by the parties prior to a marriage. However, any desired amendments to, or revocation of, an **antenuptial** agreement - other than a waiver of probate rights - can only be made pursuant to a validly executed **postnuptial** agreement.

Postnuptial Agreement Requirements

The same Minnesota statute governs both **antenuptial** agreements and **postnuptial** agreements. The provisions thereof relating to postnuptial agreements have the following additional requirement:

1. both spouses must be **actually represented by** separate legal counsel at the time of its execution.

The above requirement is the primary difference between antenuptial agreements and postnuptial agreements:

- ◆ Parties to an antenuptial agreement **need not be represented by** separate legal counsel.
- ◆ Parties to postnuptial agreements **must be represented by** separate legal counsel.

In addition, a **postnuptial** agreement is not enforceable if either party commences an action for legal separation or dissolution within 2 years of the date of its creation.

Waivers of Federal Pension/ERISA Rights

In general, an antenuptial agreement **will not be effective** to waive a spouse's rights to receive benefits under a federal pension or retirement plan arising under federal laws known as ERISA and REA, but a **postnuptial agreement** or other qualifying waiver can be effective to waive such rights.

Since the parties to an antenuptial agreement are not yet married, they cannot waive federal pension rights which are reserved to a spouse.

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