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Premarital Agreement Contracts in Montana: Financial and Legal Aspects

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A premarital agreement contract can help couples resolve concerns over money, work, children, the home, and other mutual issues. This publication lists items to consider and highlights some of the financial and legal aspects of this contract.

DECADES AGO MARRIAGE CONTRACTS WERE MAINLY FOR

the rich or royal families who wanted to preserve the fortunes of a dynasty. Today, however, couples may bring assets and income to the marriage that they want to protect. Some may also want to safeguard inheritances for their children from a previous marriage. Others may use premarital agreements to determine how assets acquired during marriage will be distributed if they divorce or pass away. Making decisions about these issues in advance can greatly reduce legal fees and provide peace of mind for individuals entering into marriage.

The legal method used by couples to resolve the challenging issues of money, property, and prior and future financial commitments is a **premarital agreement contract**. The Montana Uniform Premarital Agreement Act defines a premarital agreement as “an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.”¹ Premarital agreement contracts typically focus on three major areas: (1) property rights at the death of either spouse; (2) property rights at divorce; and (3) support rights for either spouse at divorce. After marriage, a premarital agreement contract may be amended or revoked only by a written agreement signed by both parties. This is often referred to as a **post marital agreement**.

Who needs a premarital agreement contract?

Because Montana law provides for property rights for a surviving spouse, every legally married couple has an “implied premarital agreement” upon marriage.² However, married

couples who want an agreement that reflects their own values and objectives, rather than those provided by the state, should consider a premarital agreement contract.

Premarital agreements allow couples entering into a marriage control over the division of their property and assets should they divorce rather than leaving the decision up to state law and the courts. Premarital agreement contracts could be considered if either one of the future partners:

- owns real estate, financial investments (stocks, bonds, or mutual funds), jewelry, furniture, collectibles, or other personal property that they want to keep as separate property;
- wants to clarify financial obligations to parents, a former spouse, or a child from a previous marriage;
- wants to clarify rights and role of the new spouse in a personal or family business;
- wants an inheritance received before or during the upcoming marriage to remain as separate property, instead of marital property;
- has a vested interest in a pension plan at work;
- wants to designate how death benefits from a life insurance policy will be distributed;
- wants to designate how much an employed spouse contributes to the future earnings of the other spouse who is studying for a profession such as medicine or law;
- wants to eliminate or determine the amount and duration of spousal support should the couple divorce;
- wants to make a will, trust or other arrangement to carry out the provisions of the premarital agreement contract; or
- wants to determine which state jurisdiction would control the validity of the premarital agreement contract.

¹ Uniform Premarital Agreement Act, Montana Code Annotated 2011 §40-2-601 through §40-2-610.

² Ravdin, Linda J. 2011. *Premarital Agreements: Drafting and Negotiation*. American Bar Association.

What items should be considered in a premarital agreement contract?

Following is a list of items to consider when planning for a premarital agreement contract. Both husband- and wife-to-be can prepare the information separately. After discussions, they may decide that some property should be held as joint tenants with right of survivorship or as tenants-in-common instead of titled in separate names. Major concerns should be discussed between the future spouses before discussing the formal document with their respective attorneys. They should formally agree when, or under what circumstances, they agree to review the premarital agreement contract and if modifications are necessary, to seek legal counsel.

Assets. List all financial investments (stocks, bonds, money market funds, mutual funds, or annuities), savings accounts, and money owed to each party. What portion, if any, will be merged upon marriage and what assets will remain as sole ownership in each spouse's name? If you divorce, how will the assets be divided? What do you want to happen to the assets upon your death? For more information, request the MSU Extension MontGuide, *Dying Without a Will in Montana: Who Receives Your Property* (MT198908HR), or view the *Dying Without a Will in Montana* interactive website at www.montana.edu/dyingwithoutawill.

Beneficiary Designations. Do payable-on-death (POD) designations on your checking, savings accounts, or certificates of deposit or transfer-on-death (TOD) registrations on stocks, bonds, or mutual funds need to be changed? Do your grantee beneficiaries named in a transfer on death deed for your real property need to be changed? For more information, request the MontGuide *Transfer on Death Deed in Montana* (MT200707HR).

Charitable contributions. Who decides what organizations are worthy to receive contributions? Will contributions come from the husband, wife or both?

Checking/savings accounts/safe deposit box. Will accounts be kept in sole ownership or placed in joint tenancy with right of survivorship? Will you need a household account? Who pays into it and how much? Will deposits into the household account be equal or prorated based on the income of each prospective spouse? Will a safe-deposit box be leased in joint tenancy or will each spouse have separate box? Who will keep the keys and where?

Children. What are each party's financial and/or parental responsibilities? If a child has special needs, what are they and who will handle them? Are children "planned" in the forthcoming marriage? Keep in mind that premarital agreements cannot deny court authority for minor children upon a separation or divorce. Although parents may include their intent regarding legal or physical custody in a premarital agreement, a court is not bound to follow the terms of the custody provisions that are included in premarital agreements contracts.

Credit cards. List them all. Will they remain in separate names, or will each party reapply for credit in both names? Will a limit be set on the amount that can be charged without consulting the other? Who pays the bills and keeps the records?

Debts. List all credit payments (other than those already covered above) that will remain at the time of your marriage. Who is to pay these debts, you or your spouse? Both of you?

Employment. Will earnings be kept in separate accounts or pooled? Will the marriage affect either party's ability to move for employment? Will either spouse discontinue working after the marriage? What effect will the transfer of one party to a different town or state have on the other party? What effect would an early retirement of one spouse have on the relationship and financial situation?

Family Obligations. What financial promises, both oral and written, have been made to children about education, weddings, business ventures, car insurance, support, and so on? Which, if any, of these issues should be discussed with your children as well as your prospective spouse?

Former spouse. If your previous marriage ended in divorce, disclose all obligations, financial and otherwise, that were made to the former spouse, including property settlement payments, spouse and/or child support payments, life insurance, and health insurance. If a former spouse died, detail any changes remarriage may cause in your financial situation. Are you receiving pension benefits or other payments that will cease? If you are receiving Social Security, what impact will marriage have on the benefits?

Furniture and furnishings. What items will be jointly owned? What items will be separately owned? What items will be sold or given away before or after the marriage?

Health insurance. Will parties keep separate health insurance coverage, or will one be added to the other's policy? What about health insurance for the children? Who pays the premiums?

Inheritances. Will inheritances or gifts to either party before or after the marriage remain as separate property?

Life insurance. Decide if your present beneficiary designation needs to be changed. Is the present amount of insurance adequate for your new family? Is there a cash value on the policy? Who is owner of the life insurance policy? Who makes the premium payments?

Parents. Does either party have aging parents who are dependent now or may need assistance in the future? Will they live with you? Who will care for them? What financial assistance will be provided?

Pension funds. Determine if anyone else (for example, a former spouse) has a claim on your pensions. Will that change with the new marriage? Will you need to change the beneficiary designation?

Real estate. List all separate real estate properties with their values, indebtedness (first and second mortgages), and payments. To whom would you want the property to pass upon your death? What if you divorce? Will you sell your home(s)? Invest in a different home? If a home is sold, will the proceeds remain in the name of the owner or will they be placed in joint tenancy with right of survivorship? For more information, request the MontGuide *Property Ownership* ([MT198907HR](#)).

Religious financial commitments. Same church? Separate churches? Will contributions come from husband, wife or both?

Spousal Support. If a legal separation or divorce occurs, will one spouse provide support to the other? The Montana Uniform Premarital Agreement Act allows parties to modify or eliminate spousal support in a premarital agreement. However, if a spousal support modification provision causes a party to become eligible for public assistance, the court may require the other party to provide support to the extent necessary to avoid eligibility.

Vehicles. Will the title(s) be kept in separate names or reissued in joint tenancy? Who will pay for the insurance and vehicle registration? Should insurance coverage be changed?

Wills. Specify that separate wills are to be written. Itemize provisions each should make for the other in a will. Incorporate reference to a separate listing of tangible personal property in each will. For more information, request the MontGuides *Wills* ([MT198906HR](#)) and *Who Gets Grandma's Yellow Pie Plate: Transferring Non-titled Property* ([MT199701HR](#)).

Must a premarital agreement be in writing?

Yes! The Montana Uniform Premarital Agreement Act requires that a premarital agreement be in writing and signed by both parties. Because a premarital agreement is a legal contract that becomes effective upon marriage, the logical person to draft it is an attorney who practices family law. However, you and your spouse-to-be should first work out the details. The attorney drafting the financial premarital agreement should eliminate any ambiguities before the final draft is complete. Keep all notes of all drafts of the agreement to show that both had significant input in the drafting of the agreement to avoid an allegation by one party of "ambiguity."

Because one provision in the agreement could be ruled by a court as illegal or unenforceable and could possibly invalidate an entire contract, your attorney will include a severability clause. This clause provides that even if one portion of the agreement proves illegal or unenforceable, the rest will still be valid.

How can I ensure that my premarital agreement is valid?

Capacity to enter into a valid premarital agreement contract requires "an ability to comprehend the nature and quality of the transaction, together with an understanding of its significance and consequences." A premarital agreement contract should minimally provide the following information: (1) each member entered into the agreement voluntarily, and (2) a fair and adequate financial disclosure of the parties has been made. The parties entering into the agreement must do so on their own. They must have a meaningful choice of whether or not to enter into the agreement. The parties cannot be under duress or undue influence.

Example A: Upon a proposal for marriage that resulted from a long-distance romance, a Russian woman left her home country and immigrated to Montana with her young son. The woman possessed limited English-speaking skills and entered into a premarital agreement with her American husband. The woman had no knowledge that she would be asked to sign a premarital agreement until after she moved

her family to Montana from Russia. Although an attorney was provided for her, the advice she received was without the benefit of a translator. Because she wanted to stay in the United States, she signed the premarital agreement without understanding the content. The Montana Supreme Court found that the circumstances in this case “displayed coercive pressure, impacting the wife’s ability to enter into the premarital agreement voluntarily.” The Court invalidated the premarital agreement.

Providing an itemized list of all assets and liabilities, initialing every page, and attaching the list of assets to the agreement is an example of providing a full financial disclosure for a premarital agreement. Each party should be given a copy of the agreement prior to the marriage and each should seek independent legal counsel. An express waiver of any further financial disclosure in the agreement essentially states that each party has provided sufficient financial disclosures, that the parties are satisfied with the disclosure, and that all future financial disclosures are unnecessary.

Can a premarital agreement contract substitute for a will?

No, each partner should still have a written will. A will can be signed and changed only by the person who wrote it. A premarital agreement contract can be changed only by both parties.

Knowing that a premarital agreement contract exists may help minimize tension between adult children and the new stepparent. Adult children may fear that stepparent will receive all their parent’s assets upon death.

If a premarital agreement allows a surviving spouse to control property or assets that will pass to a third party at the surviving spouse’s death, the inclusion of restrictions on gifts made during the surviving spouse’s lifetime should be included in the premarital agreement. Otherwise, the surviving spouse may be able to give away the property or assets that were meant to pass to a third party in a written will.²

Isn’t a premarital agreement contract a pessimistic and potentially destructive way to begin a marriage?

While some couples have broken up or indefinitely postponed the wedding after beginning premarital contract negotiations, one could wonder if they can’t struggle through the process of writing a premarital agreement contract, how will they compromise during a marriage.

In the open discussion and preparation of materials for the premarital contract, you and your prospective spouse will learn important facts about one another’s values, attitudes toward family and property, and lifestyles. Premarital agreements give couples entering into a marriage more control over the division of property and assets should they divorce rather than leaving the decisions up to Montana law and the courts.

Should each party have legal counsel review the premarital contract agreement?

Yes! To protect their interests, each husband- and wife-to-be should have individual legal counsel before signing the contract. Advice of independent counsel is the single most important factor in establishing that the contract was voluntarily signed. Without a separate attorney for the about-to-be husband and wife, the potential exists for a judge to set aside the premarital agreement contract and declare it invalid.

Ensuring that both parties to the premarital agreement obtain independent counsel is an indicator that the parties were actively involved in the creation of the premarital agreement. This would be another indicator that will assist in refuting any future claims by either party of fraud, duress, undue influence, or taking advantage of the other party by deceitful means. If one party decides not to obtain independent counsel, the premarital agreement should indicate that the party was clearly advised to seek independent counsel and declined to do so.

Example B: In one situation, a wealthy man had his fiancé sign away all rights to his personal assets in a premarital agreement should they divorce. He informed her that an attorney wasn’t necessary. When they did divorce, the judge set aside the premarital agreement contract, ruling in this case that the woman’s lack of legal counsel before signing invalidated the contract.

While consulting with two attorneys, one for the prospective husband-to-be and another for the wife-to-be, may seem like an unnecessary added expense, it is not. The goal is to develop a premarital agreement contract that is fair, equitable and advantageous to both the husband- and wife-to-be, their children and their families.

What if we change our minds after the agreement is signed and we are married?

Your attorney should include a clause in the premarital agreement contract that allows for modification of the contract upon the joint written consent of both parties. Such a provision allows for flexibility in coping with changed circumstances.

A couple may wish to renegotiate a contract provision after a certain period of time, after birth of a child, or after one of them receives an inheritance. Also, premarital agreements can only be legally amended or revoked by a written agreement signed by both parties.

What if we title property differently than we agreed to in the premarital agreement?

Commingling of non-marital property after marriage has the potential of invalidating a premarital agreement. The Montana Supreme Court has ruled that when premarital separate property is commingled with marital property it becomes a “marital asset.” For example, property placed in joint tenancy with right of survivorship between the spouses after marriage when the agreement stated property was to remain in separate names, could be ruled by the court as marital property.

Example C: A husband inherited a piece of real property and claimed that it was not a marital asset. The property was used as the marital residence throughout the marriage. His wife was active in remodeling and redesigning the property. Marital funds were used in improving the property. As a result, the Montana Supreme Court ruled that the property was a marital asset and was no longer the separate property of the husband.

Summary

A premarital agreement contract can create an atmosphere of open discussions in your new relationship that carries over into the marriage so that future concerns about money, work, children, the home, and other mutual issues can be openly discussed. Montana courts will uphold premarital agreement contracts when both parties understand the legal consequences of the contract at the time they sign it and property financial disclosure has been made. Both parties need to be aware of all important facts at the time the agreement is written and signed.

Other Resources

Montana State University Extension publishes other fact sheets written to assist families with estate planning and marriage and family topics:

- www.montana.edu/estateplanning
- www.montana.edu/extensionecon/publications.html

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(MARRIAGE AND FAMILY FINANCES)**

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