

THE BENEFITS OF A PRENUPTIAL AGREEMENT

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Most seniors understand the importance of having proper legal documents in place. Generally, this includes a Last Will and Testament, Durable Power of Attorney and Living Will. However, an often overlooked legal document for seniors is a Prenuptial Agreement. More couples are entering into second marriages. Often these marriages vary in terms of length and financial commitment. Couples fail to realize that marriage brings about many changes from both a personal and legal perspective.

Typically couples associate a Prenuptial Agreement with divorce protection. It is true that a Prenuptial Agreement can specify how assets and debts will be divided in the event of a divorce. This is especially important when a husband and wife maintain separate accounts or if the value of their assets at the date of entering into the marriage is disproportionate. However, a Prenuptial Agreement can also outline how an estate should be divided in the event of the death of either spouse.

New Jersey law outlines various entitlements that a surviving spouse is automatically entitled to receive. This includes the right to receive a portion of a spouse's estate even if they are omitted from their Will. This right is referred to as an "elective share". The elective share statute states that a surviving spouse is entitled to receive one-third of a couple's augmented estate. The term "augmented estate" typically includes assets acquired during the marriage and appreciation in any separately owned property that occurs during the marriage. A spouse can waive their right to receive an elective share amount in a Prenuptial Agreement. Therefore, one spouse can omit the other spouse from receiving any portion of their estate.

Prenuptial Agreements can also be beneficial in situations involving a premarital Will. Often couples prepare Wills while both spouses' are alive. After one spouse dies, the surviving spouse sometimes does not change his or her Will because the document states that if his or her spouse is not living, the estate passes to their children. If, subsequent to the first spouse's death, the surviving spouse remarries and does not change his or her Will, then an undesirable result could occur. New Jersey law specifies that the new spouse may be entitled to receive an intestate share of the estate. The

intestacy law typically applies when a person dies without a Will. This rule applies regardless of how long the parties were married.

Recently I was involved in a case where the husband remarried after his first wife's death. Prior to his first wife's death he had executed a Will leaving his estate to his wife if she survived him, and in default to his children. The husband later remarried and never changed his initial Will. His second marriage lasted 6 months and then he suddenly died. During his second marriage he maintained separate accounts from his spouse and they did not share assets. Upon the husband's death his second wife was entitled to receive an intestate share of his estate even though she was omitted from his Will. The intestacy law provides the surviving spouse with the right to receive the first twenty-five percent (25%) of the estate (but not less than \$50,000 or more than \$200,000) and fifty percent (50%) of the remaining estate. Therefore, the second wife received a larger portion of the estate than the husband's children from the first marriage. This result could have been avoided if the parties had entered into a Prenuptial Agreement or prepared new Wills after their marriage.

In summary, Prenuptial Agreements should always be considered prior to marriage. A Prenuptial Agreement can limit a spouse's right to assets in the event of a divorce or death. If you are already married then a Prenuptial Agreement cannot be prepared. However, you can enter into a Postnuptial or Ante-nuptial Agreement. This is an agreement which addresses the above-mentioned issues but it is executed after the marriage takes place. If you have your own assets and wish for them to pass to your intended beneficiaries, then you should consult with a competent estate planning attorney prior to getting married.