

Mediation and Prenuptial Agreements

[\(By Anju D. Jessani, MBA, APM – Accredited Professional Mediator\)](#)

With more people getting married later for the first time - often with substantial assets, and people getting married for the second+ time(s) with children from previous marriages and dealing with even lower odds of these marriage surviving, it is no wonder that I am getting more and more requests for mediation for prenuptial agreements.

A prenuptial agreement is a contract between prospective spouses. Most prenuptial agreements contain provisions limiting the distribution of marital property and alimony in the event of divorce and limiting the distribution of property to a spouse in the event of death.

Prenuptial agreements represent an almost perfect application for mediation. Whereas the family law (i.e. divorce) lawyer is trained to protect his or her client at the expense of the adversary, the mediator is trained to act as a neutral third-party, helping the parties to explore all options and their potential consequences.

During the mediation process, the mediator summarizes the agreements reached in the mediation process in a non-legal document called the Memorandum of Understanding. The couple then has separate lawyers review the Memorandum turn it into a legal agreement.

Often, the couple may use the mediation process to discuss financial issues that are emotionally difficult to bring up on their own, but may choose not to have a formal document drawn up. In some cases, this decision is based on the understanding that in most states, premarital assets, if kept separate from marital property, remain separate property and are not subject to distribution at the time of divorce. In other cases, a trust or a will may serve the same function as the intent of a prenuptial agreement.

While the standards for enforcing prenuptial agreements vary from state to state, in almost all states, five conditions are imposed:

1. Each party must make complete disclosure to the other of his or her assets, liabilities, sources of income, and any other facts likely to affect his or her financial position.
2. Each party must be represented by separate and independent legal counsel (or must make a voluntary and well considered decision to waive such independent legal counsel).

3. The terms of the agreement must be "fair" at the time the agreement is entered into, a standard with respect to which even reasonable people may differ.
4. Provisions regarding child support are prohibited.
5. Finally, the agreement may be set aside by the courts if enforcement of the agreement would impoverish either party and thereby create a risk that either party (or any minor children of either party) would require public assistance.

Because of past uncertainty whether courts could enforce prenuptial agreements, a uniform treatment of prenuptial agreements was sought through the Uniform Premarital Agreement Act (UPAA). The UPAA was approved by the National Conference on Uniform State Laws in 1983 and has been adopted in whole or in part by approximately half the states including New Jersey (in 1988), but not neighboring New York and Pennsylvania. The statutory citation for New Jersey is N.J.S.A. 37:2-31 to 37:2-41. The full text is included as an addition to this article.

Some couples feel that discussing financial matters including what happens if the marriage fails hinders the romance and shows a lack of commitment towards the marriage. Let's face it... at the end of the marriage, few couples agree on how to split their assets and I hear a lot of "I assumed" statements. Whether you choose to have a prenuptial agreement, communicating about financial issues, strengthens the trust and starts the marriage off on the right foot. The signing of a prenuptial agreement, or not, finally comes down to a decision that the couple will have to make together. However, you don't need to have the prenuptial agreement to have the discussion and information sharing that is part of the prenuptial agreement process.

**Copyrighted by [Anju D. Jessani, MBA, APM – Accredited Professional Mediator](#)
For more information, please contact ajessani@dwdmediation.org**

New Jersey Statutory Citation on Prenuptial Agreements

Uniform Premarital Agreement Act (UPAA)

Adopted by New Jersey on August 5, 1998.

Effective 90 days After That.

N.J.S.A. 37:2-31 to 37:2-41 is the Statutory Citation.

The Law is 1988, c 99, s. 1.

37:2-31. Short title: This article shall be known and may be cited as the "Uniform Premarital Agreement Act."

37:2-32. Definitions as used in this article:

a. "Premarital agreement" means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage;

b. "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings;

c. "Unconscionable premarital agreement" means an agreement, either due to a lack of property or unemployability:

(1) Which would render a spouse without a means of reasonable support;

(2) Which would make a spouse a public charge; or

(3) Which would provide a standard of living far below that which was enjoyed before the marriage.

37:2-33. Formalities; consideration A premarital agreement shall be in writing, with a statement of assets annexed thereto, signed by both parties, and it is enforceable without consideration.

37:2-34. Contents of premarital agreement Parties to a premarital agreement may contract with respect to:

a. 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;

b. 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;

c. The disposition of property upon separation, marital dissolution, death, or the

occurrence or nonoccurrence of any other event;

d. The modification or elimination of spousal support;

e. The making of a will, trust, or other arrangement to carry out the provisions of the agreement;

f. The ownership rights in and disposition of the death benefit from a life insurance policy;

g. The choice of law governing the construction of the agreement; and

h. Any other matter, including their personal rights and obligations, not in violation of public policy.

37:2-35. Premarital agreement not to adversely affect right of child support A premarital agreement shall not adversely affect the right of a child to support.

37:2-36. When premarital agreement becomes effective A premarital agreement becomes effective upon marriage of the parties.

37:2-37. Amendment or revocation of premarital agreement After marriage of the parties, a premarital agreement may be amended or revoked only by a written agreement signed by the parties, and the amended agreement or revocation is enforceable without consideration.

37:2-38. Enforcement of premarital agreement; generally The burden of proof to set aside a premarital agreement shall be upon the party alleging the agreement to be unenforceable. A premarital agreement shall not be enforceable if the party seeking to set aside the agreement proves, by clear and convincing evidence, that:

a. The party executed the agreement involuntarily; or

b. The agreement was unconscionable at the time enforcement was sought; or

c. That party, before execution of the agreement:

(1) Was not provided full and fair disclosure of the earnings, property and financial obligations of the other party;

(2) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure

provided;

(3) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party; or

(4) Did not consult with independent legal counsel and did not voluntarily and expressly waive, in writing, the opportunity to consult with independent legal counsel.

d. The issue of unconscionability of a premarital agreement shall be determined by the court as a matter of law

37:2-39. Enforcement of premarital agreement; marriage determined void If a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result.

37:2-40. Construction of article: This article shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of the article among states enacting the "Uniform Premarital Agreement Act."

37:2-41. Application of article: This article shall apply to premarital agreements executed on and after its effective date.