



DIVORCE A to Z-  
Antenuptial &  
Postnuptial  
Agreements and  
Their Impact on the  
Divorce Process

# What is an Antenuptial Agreement?

- An antenuptial agreement is a contract entered into between two individuals of legal age in contemplation of marriage that sets forth their respective rights with respect to the division of assets and income upon the dissolution of the marriage or the death of either party. Such agreements are also referred to as premarital and prenuptial agreements.

# Antenuptial Agreements

- An antenuptial agreement may:
  - determine the parties' rights with respect to both marital and nonmarital property;
  - provide for spousal maintenance;
  - determine the parties' rights in each other's estates, which may include barring each other of all rights in their respective estates not secured to them by their agreement; and
  - if an antenuptial agreement unambiguously permits severability, the court may sever any unenforceable provision and enforce the remaining provisions of the agreement

# Procedural Fairness Requirements for an Antenuptial Agreement from and after August 1, 2024

- the parties made a full and fair disclosure of their income and property to each other;
- each party had a meaningful opportunity to consult with an attorney;
- the agreement is in writing, notarized, and executed in the presence of two witnesses;
- the agreement is entered into voluntarily and free of duress; and
- the agreement is signed at least seven days prior to the marriage.

## Procedural Fairness Requirements for an Antenuptial Agreement from and after August 1, 2024

- Attorneys should work with clients to have antenuptial agreements signed one to two months before the date of marriage (which may or may not be the date of the wedding). Under the statute, an agreement signed at least seven days before the marriage is presumed enforceable, and the burden of proof lies with the party seeking to challenge the agreement. Minn. Stat. § 519.11, subd. 1b(c). However, when an agreement is signed less than seven days before the marriage, there is no such presumption. The burden of proof shifts to the proponent of the agreement.

## Procedural Fairness Requirements for an Antenuptial Agreement from and after August 1, 2024 – Full and Fair Disclosure

- According to the statute, “full and fair disclosure” means “that each party has provided a reasonably accurate description of all material facts of their income and good faith estimates of the value of their property and discloses the basis for these disclosures.” Minn. Stat. § 519.11, subd. 1b(a)

## Procedural Fairness Requirements for an Antenuptial Agreement from and after August 1, 2024 – Full and Fair Disclosure

- Attorneys should provide clients with a financial disclosure template and instructions on how to complete the same. The client should disclose their income, including all sources of income, and list all assets and debts, including the value or balance and date the information is being provided. In addition, the client should cite to the underlying documents used to complete their financial disclosure (e.g., tax returns, account statements, appraisals, loan statements, etc.) and provide the other party with the supporting documentation.

## Procedural Fairness Requirements for an Antenuptial Agreement from and after August 1, 2024 – Full and Fair Financial Disclosure

- The full and fair financial disclosure requirement is defined as: (1) each party has provided a reasonably accurate description of all material facts of their income; (2) each party has provided good faith estimates of the value of their property; and (3) each party has disclosed the basis for their disclosures. The full financial disclosure requirement cannot be waived.

## Procedural Fairness Requirements for an Antenuptial Agreement from and after August 1, 2024 – Full and Fair Financial Disclosure

- Under the amended statute, a “full and fair disclosure” requires the parties to an antenuptial agreement to provide “a reasonably accurate description of all material facts of their income and good faith estimates of the value of their property” and disclose the basis for their financial disclosures. In other words, parties to an antenuptial agreement must provide a detailed financial net worth statement that also identifies the source documents used to obtain the information provided (e.g., account statements, appraisals, etc.)
- The full and fair financial disclosure requirement cannot be waived.

## Procedural Fairness Requirements for an Antenuptial Agreement prior to August 1, 2024

- If the antenuptial agreement was executed prior to August 1, 2024, there are currently two different sets of procedural fairness requirements in Minnesota, one for Agreements covering nonmarital property, which are covered by Minn. Stat. § 519.11, and another for marital property, which is covered under common law (i.e., *Kremer v. Kremer*, 912 N.W.2d 617 (Minn. 2018)).

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# Procedural Fairness Requirements for an Antenuptial Agreement prior to August 1, 2024 - Statutory

- Full and fair disclosure of the earnings and property of each party
- Parties are of legal age
- Each party has had an opportunity to consult with legal counsel of their own choice
- The agreement must be in writing
- Signed in the presence of two witnesses and acknowledged by both parties before a notary public
- Signed at least one day prior to the solemnization of the marriage
- A Power of Attorney may not be used to meet any of these requirements

# Procedural Fairness Requirements for an Antenuptial Agreement prior to August 1, 2024 – Common Law

- Full and fair disclosure of the earnings and property of each party
- The agreement was supported by adequate consideration
- Both parties had knowledge of the material terms of the agreement and how those impact each party's rights
- The agreement was not procured by an abuse of fiduciary relations, undue influence or duress

Under the common law procedural fairness test, the opportunity to consult with independent legal counsel is a relevant factor but is not determinative of whether an agreement is procedurally fair.

# Procedural Fairness Requirements

- It is strongly recommended both parties consult with an attorney as part of an antenuptial agreement.
- An antenuptial agreement must be in writing and executed prior to the parties' marriage. The courts cannot enforce an oral agreement. The written agreement must be executed in the presence of two witnesses and must be acknowledged under oath. It is not recommended that one of the witnesses also be the notary.
- It is also strongly recommended that the consideration for the agreement be spelled out in the agreement. While the marriage itself is consideration for the agreement, it is best to list out additional consideration that is provided to address any claims that the agreement is one-sided and unconscionable.

# What is a Postnuptial Agreement?

- Spouses who are legally married may enter into a postnuptial agreement, which is a legal contract setting forth their respective rights with respect to the division of assets and income upon the dissolution of the marriage or the death of either party.

# Procedural Fairness Requirements for a Postnuptial Agreement

- In addition to the requirements for an antenuptial agreement, a postnuptial agreement is enforceable if it meets the requirements of a prenuptial agreement, with certain additional requirements: 1) both parties must be represented by attorneys; and 2) the agreement is presumed unenforceable if either party commences a dissolution proceeding within two years of the execution of the agreement, unless the party seeking enforcement can prove the agreement is fair and equitable.

## Substantive Fairness Requirements for Antenuptial and Postnuptial Agreements – August 1, 2024 and going forward

- Substantive fairness review for Antenuptial Agreements executed from and after August 1, 2024, requires that the Court determine whether all or part of the agreement is substantively unfair as to be unconscionable to either party by the agreement's terms or as the result of drastically changed circumstances originally not foreseen when the agreement was created, such that enforcement would no longer comport with the reasonable expectations of the parties at the time that the parties executed the agreement.
- The new statutory law for antenuptial and postnuptial agreements expressly allows for parties to agree to provisions regarding spousal maintenance.

# Substantive Fairness

- An antenuptial agreement must be substantively fair to be enforceable. A court's substantive fairness analysis was previously guided exclusively by case law.
- The amended statute now delineates the required "substantive fairness" analysis. An agreement is substantively unfair if it is unconscionable to a party based on its terms or drastically changed circumstances that were not foreseen when the agreement was executed so that enforcement of the agreement would not match the parties' reasonable expectations at the time of the agreement.

# Substantive Fairness

- The question of substantive fairness for antenuptial agreements is: Have the parties' intentions become so frustrated from the time of execution to the time of enforcement that it would be unconscionable to enforce the agreement? This standard is very high.
- Just because an antenuptial agreement deviates from Minnesota law on property division or spousal maintenance does not make it unconscionable.

## Substantive Fairness Requirements for Antenuptial and Postnuptial Agreements – prior to August 1, 2024

- For antenuptial agreements executed prior to August 1, 2024, substantive fairness analysis occurs both at the time of execution of the contract and at its enforcement. At enforcement, the question is whether the circumstances have changed in a way not foreseeable to the parties when they entered into the contract, rendering the contract so one-sided as to be unconscionable at enforcement. At the time of execution, the court will look at whether there was adequate consideration and whether it was unconscionable at that time.

# Substantive Fairness – Practice Tips

- Do not make these agreements so one-sided that they become unconscionable.
- Try to list the foreseeable future circumstances of the parties.
- When it comes to spousal maintenance, tread very carefully

## *Kremer v. Kremer*, 912 N.W.2d 617 (Minn. 2018)

- The Agreement was found to be invalid.
- The Minnesota Supreme Court held that the common law test for procedural fairness applies to provisions in antenuptial agreements addressing marital property. Prior to *Kremer*, it was generally understood that the statutory test under Minn. Stat. § 519.11, subd. 1 applied to all antenuptial agreements (executed on or after August 1, 1979), regardless of whether the agreement addressed the distribution of non-marital property, marital property, or both.

# Kremer v. Kremer

- Under the common law test, "*In re Estate of Kinney*, 733 N.W.2d 118 (Minn. 2007), an antenuptial agreement is procedurally fair if: (1) there was a full and fair disclosure of the parties' assets; (2) the agreement was supported by adequate consideration; (3) both parties had knowledge of how the terms of the antenuptial agreement impacted their rights; and (4) the agreement was not procured by undue influence or duress.

## *Kremer v. Kremer*

- The Supreme Court concluded that the Agreement was not “equitably and fairly made.”
- Found that two of the *Kinney* factors—1) whether the Agreement was supported by adequate consideration and 2) whether the Agreement was procured by duress - rendered the Agreement procedurally unfair.

## Amendments or Revocation of an Antenuptial or Postnuptial Agreement

- The only way to modify or revoke an antenuptial agreement or postnuptial agreement is to enter into a valid postnuptial agreement. A verbal or even written agreement that does not comply with the requirements for a postnuptial agreement will not be enforceable.
- Additionally, the parties cannot tear up a copy of the agreement and intend for that to revoke the agreement. As long as there is one copy of the agreement in existence, which will typically be found at one of the attorneys' offices, then it can be enforced, even if both parties indicated verbally at one time an intention to revoke it.

# Thank You!

- Any Questions?
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