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## Prenuptial Agreement – A practical approach to protect your future

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### ABSTRACT:

In modern times, as divorce rates are constantly rising, one of the major factors contributing to the trend is individuals' resistance to make adjustments within the institutions of marriage. Marriage is a sacred and lifelong union between two individuals and their families. Although in today's modern era, the mindset of people is evolving and changing which can sometimes turn up this wonderful union into the worst nightmare. The concept of premarital agreements originated in western countries but is now gaining popularity in India, tackling societal needs and potential disputes. A prenuptial agreement provides a legal framework for the rights and responsibilities of each partner covering financial disclosure, alimony, and child custody.

**KEYWORDS:** Prenuptial agreements, Marriage. Divorce

### INTRODUCTION

A prenuptial agreement is derived from the Latin word 'nuptiae' (meaning marriage or wedding) and the prefix 'pre' (meaning before), is a premarital agreement outlining property division and conditions regarding ownership, "assets, and debts in the event of divorce, separation, or death. Prenups are ratified globally", including in countries like France, Italy, Germany, and Canada. According to the Cambridge Dictionary, a prenuptial agreement is an official document outlining property and child arrangements in case of dissolution. A prenuptial agreement defines the terms and conditions, preventing costly courtroom battles during divorces, thereby maintaining financial resources and emotional wellbeing of both the parties.

### HISTORICAL BACKGROUND

Prenuptial agreements have a longstanding tradition originating from ancient civilizations. In ancient Egypt, over 2,000 years ago, written and oral contracts specified assets allocation, dowries, and bride wealth. For example, women like Sukanya included conditions in their marriages. Additionally, ancient Hebrew marriages incorporated the Ketuba contract which protected women in cases of widowhood or divorce. In the 9th century, France's customary prenups emerged from dowry systems. King Edward IV prenuptial agreements allegedly made between 1461 and 1464, is one of the historic precedents in the 15th century. In Europe, prenuptial agreements developed in the 19th Century where the husbands provided one-third of their property to their wives as dowry. In common law, wives had marital rights to a portion of their husbands' financial assets. "The Married Women's Property Act (1848) in New York" empowered married women to own property and the Uniform Premarital Agreement Act (1953) protected women's rights. Prenups have transformed to deliver financial stability and protection for both parties in the event of divorce or death.

### JURISPRUDENTIAL PERSPECTIVE

Totalitarian principle, as defined by Jeremy Bentham<sup>3</sup>, highlighted the greatest happiness for the greatest number. This principle ratified that actions promote happiness and disapproves those causing unhappiness. Bentham's utilitarianism intended to create a fair and logical framework for society by eliminating useless and corrupt laws. The constitution of India also guarantees equality before law (Article 14), prohibits gender-based discrimination (Article 15), and aims for a unified civil code (Article 44). The Indian Constitution authorizes the central government authority to make laws on marriage and divorce, which are part of the concurrent list. In case of conflicts between central and state laws, the central law prevails.

### PREREQUISITES OF PRENUPS

A prenuptial agreement typically includes:

- Management of financial records
- Household expenses
- "Retirement benefits"
- "Insurance policies"

- “Property division”
- “Child custody”
- Spousal support

#### *Major clauses typically cover*

- Asset disclosure
- Financial obligations
- Property division
- Child custody and support
- Spousal support
- Insurance benefits
- Bank account management
- The essentials terms and conditions are as follows
- Fairness and validation: The agreement must be reasonable and approved by both parties.
- Attorney Certification: Each party should have their own independent legal representative to obtain certification.
- Severability Clause: The agreement should include a clause outlining that if one provision is invalidated, the rest remains in effect.
- Asset and Liability Disclosure: A comprehensive list covering each spouse's assets and liabilities should be attached.
- Comprehensive Terms: The agreement should include all clauses and terms agreed upon by the prospective spouses.
- Independent Review: The agreement must be examined and ratified independently by a separate legal practitioner.
- Clear Property Rights: The agreement should specify each party's assets, debts, and property rights before marriage.
- “Division of Property and Spousal Support: The agreement should settle issues of property division and spousal support in case of marriage breakdown”.

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## LEGAL FRAMEWORK

In India, there is no specific law governing prenuptial agreements due to absence of specific legislation, leading to ambiguity and vagueness. While personal laws govern different communities Hindu Marriage Act, 1955, According to Hindu law, marriage is a sacred union between two individuals unlike a contract, as a result it led to disagreement with the prenuptial agreement. Muslim Personal Law, Prenuptial agreement is more acceptable in Muslim law provided that it must not contravene with the principles of “Muslim personal law”. “Indian Divorce Act, 1869”, It is only applicable among Christians, including prenuptial agreements in divorce proceedings. The Indian Contract Act, 1872, mandates that agreements must not oppose public policy. Despite this, there is a lack of judicial guidelines and clear interpretation of law in the context of prenuptial agreement. To ensure its validity prenuptial agreements require, there must be specific law governing prenuptial agreements in India. The prenuptial agreement must meet the essential conditions of a valid contract and not violate public policy.

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## CASE LAWS

The dynamic nature of society, as demonstrated through various case precedents, raises challenges what constitutes the opposition to public policy, notably in the context of prenuptial agreement. The ambiguity in judicial precedents pertaining to public policy opposition creates uncertainties. The honourable Supreme court<sup>4</sup> in its various landmark judgments has clarified its stand on public policy and prenuptial agreements such as in *Ratan Chand Hirachand 5vs. Askar Nawaz Jung*, The Supreme Court highlighted the dynamic nature of public policy, emphasizing that judges need to stabilize legal principles with societal realities, *Richardson vs. Mellish*<sup>6</sup>This case illustrated public policy as an “unruly horse,” emphasizing the need for careful consideration and judicial discretion., *Commissioner of Income Tax vs. Mansukh Rai More*<sup>7</sup>, The court recognized the legitimacy of a prenuptial agreement demanding property transfer to a trust for the benefit of children ,*Mohammad khan vs. Shah Malli*<sup>8</sup> The Jammu and Kashmir High Court sustained the legality of a prenuptial agreement in relation to a customary practice (Khana Damad) in the Kashmir valley. These judgments provided a legal structure for resolving issues related to prenuptial agreements, specifying the responsibilities of couples entering into them, and granting legitimacy to these agreements. This structure likely helps to ensure that couples understand their duties and rights, advocating accountability and stability in marital relationships.

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## ADVANTAGES OF PRENUPTIAL AGREEMENTS

There should be transparency in relationships which<sup>9</sup> can advocate open communication about the finances and property. Prenups is also cost efficient, avoiding costly legal battles<sup>10</sup>. It also clarifies the reasonable allocation of assets at the time of divorce. It also protects one of the spouses from the debt sharing, as it will decide previously. It also establishes clear guidelines <sup>11</sup>about the alimony at the time of divorce to avoid future conflicts. It also encourages open discussions about the financial assets before marriage.

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## DISADVANTAGES OF PRENUPTIAL AGREEMENTS

The prenuptial agreement might not be binding as court it often usually financial division the parties..It is not flexible according to the12 changing the circumstances of the partners,for example one partner might lose a job, questioning its validity. It might also lead to mistrust among the parties.Prenups may not cover all the aspects of a relationship.Prenups might even lead to financial secrecy in a marriage.

## CONCLUSION

Through this article, we highlighted the need for specific legislation governing prenuptial agreement to ensure enforceability, as society is dynamic in nature therefore by adopting beneficial legislation can promote healthier marriages. It also maintains transparency and accountability in marriages as well steps need to taken to create awareness among the public and judicial system .

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