

Estate Planning  
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### Prenuptial Agreements

#### \*347 A PRACTICAL GUIDE TO PREPARING AND USING PRENUPTIAL AGREEMENTS

Jeffrey A. Baskies, Attorney [FNa1]

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Over the last 20 years, the use of prenuptial or premarital agreements ('Prenuptials') has increased dramatically. But a number of very real questions still exist about them. For example: Will they be enforced? Assuming we believe they are enforced (but not always), then under what circumstances are they enforced (and when are they not)? Next, if we believe that Prenuptials can be enforced, and we believe we know under what circumstances, we still need to consider for which clients they are appropriate. Finally, who should be preparing Prenuptials?

These days, many potential clients believe they need Prenuptials. Some young clients with virtually no assets entering into a first marriage have asked if they need Prenuptials. More frequently, spouses entering into second or subsequent marriages (for ease, this article refers to all second or subsequent marriages as 'second marriages') ask about the use of Prenuptials (often to protect their assets for children from a prior marriage). And clients with circumstances anywhere in between these two scenarios have asked the same questions. Why? Apparently, there is a prevalent belief that entering into marriage without a Prenuptial is dangerous. However, this widespread belief has created a great deal of confusion and anxiety in the public concerning when to use Prenuptials and who should use them. We as advisors need to analyze those issues ourselves.

#### Why have Prenuptials proliferated?

Divorce has become so commonplace that its very frequency must be a fundamental cause for the increased use of Prenuptials. Who hasn't heard that 50% of all marriages today end in divorce? Many clients who have already experienced a divorce will seek a Prenuptial prior to remarriage. The bad memories of divorce proceedings are an obvious motivator. Children of a marriage ending in divorce may also be scarred by their experiences and may thus be more likely to consider Prenuptials when they marry. Even people not directly touched by a divorce proceeding in their immediate family are concerned by the frequent occurrence of divorce. It seems the high incidence of divorce has caused many engaged couples to consider their pending marriages more pragmatically and less romantically, leading to the increased use of Prenuptials.

Next, the uncertainty of outcomes in divorce proceedings may be another cause for the popularity of Prenuptials. Divorce proceedings--perhaps for good reason--are an inexact science. Particularly in the so-called equitable distribution states, it is almost impossible to predict what will happen in any given divorce case. There is a wide degree of flexibility generally afforded to divorce court judges to attempt to do what is right--to produce 'equity' between the parties.

\*348 When a court is charged with doing 'equity' in the broad sense (as divorce courts are), this ambiguity may be vital. It is probably best that there be a great degree of latitude. However, uncertainty in legal results can be more upsetting (to clients) than it is comforting.

Thus, not only the frequency of divorces, but the uncertainty of the results once in divorce court, combine to make potent motivators for the use of Prenuptials. Accordingly, clients with significant fears (relating to control of assets during and after a marriage--whether it terminates on death or divorce) should consider using Prenuptials.

Another trend causing the increased use of Prenuptials is clients entering into second marriages. These are the clients who are probably best served by Prenuptials. Often, these clients have been 'burned' in a prior divorce. Even if not, they frequently have children of a prior marriage to consider.

For such clients, using Prenuptials might be intended as much for protecting the clients' estates for their children and grandchildren as for protecting the clients in a divorce. These clients generally are the ones we might think of as needing Prenuptials the most. They have perhaps experienced divorce already, and they may well have children to worry about; therefore, defining property rights during and after the marriage may be vital for these clients.

In Florida, it is not uncommon to see second marriages that are more like mergers (we can call them 'merger/marriages'). Merger/marriages are characterized by two independently wealthy (or at least economically comfortable) persons joining in a marriage for reasons totally unrelated to the production of family wealth or child rearing. They clearly fit the profile of clients who need Prenuptials. Prenuptials for these clients are typically different from negotiated Prenuptials involving spouses of disparate wealth. Often, in merger/marriages the parties simply waive all divorce and probate rights.

In my mind, clients entering into merger/marriages should always consider Prenuptials; they are ideal candidates for Prenuptials--there should be relatively little to negotiate and a relatively low likelihood of contest. Clients entering into other second marriages, particularly where there are very disparate amounts of assets between the parties (or wide age gaps--e.g., where the new spouse is close in age to the children of the prior marriage), may still need Prenuptials, but these agreements can be much more difficult to manage.

Thus, Prenuptials have proliferated in recent years. The forgoing are probably prime causes, although there undoubtedly are many more. Advisors should understand why clients might be interested in Prenuptials to best serve their clients' needs.

### **Why some Prenuptials are not enforced**

The issue of enforcement of Prenuptials is probably unique from state to state and from judge to judge. Consequently, any comments here are general and may or may not be applicable in your practice. Nevertheless, the following discussion addresses some fundamental issues that may be relevant in any jurisdiction.

To start, it is clear that not all Prenuptials are enforced. Without citing case law in all 50 states, we will assume that in every jurisdiction, there are multiple examples of Prenuptials that were not enforced. Certainly some of the time, the reasons for non-enforcement are state-law specific and thus beyond the scope of this article; however, there may be a few common issues relating to divorce court proceedings in general which help explain why some Prenuptials are invalidated or ignored.

First, most divorce judges genuinely strive to perform equity. Second, in their daily work, they often are confronted with the very worst in people-- nasty legal battles precipitated by untruthfulness, unfaithfulness, abuse, and/or neglect. Third, these judges are probably keenly aware of how often the parties (particularly the custodial parent in a divorce involving minors) drastically alter their standard of living--and not equally. There have been studies indicating that many divorces leave the custodial parent (typically the mother) at a significantly lower economic level, while the non-custodial parent frequently thrives financially.

As a result, family law practitioners have found that divorce judges often do not hesitate to ignore strict legal issues when presented in a forum that offends their sense of 'equity' or 'justice.' In those cases, many divorce judges will try to do what they feel is right, even if that means actively seeking a way to set aside a Prenuptial. With a conclusion in hand, it is not difficult to search for corroborating evidence.

Again, this issue is not intended to criticize the flexibility that exists in the divorce process. However, practitioners need to recognize that this judicial perspective might exist in order to understand why Prenuptials may not be respected. I am told that many judges have a natural inclination to attempt to do 'equity' even in \*349 the face of legal issues they may not like; perhaps this explains why they might choose not to enforce Prenuptials they deem unfair. Faced with the possibility of upholding Prenuptials and entering divorce decrees that the judges deem 'unfair,' they might try to avoid such results. Accordingly, judges might be inclined to look for any excuse to set aside a Prenuptial, so that they can then proceed to reach their own equitable solutions.

In such cases, where are the judges most likely to find escape hatches? The escapes are likely to be in the drafting and execution of the Prenuptials. After all, most state laws don't permit judges to ignore Prenuptials simply because they don't like the results. So judges searching for ways not to enforce unfair Prenuptials, and seeking to avoid applying them, are likely to claim that such Prenuptials were improperly executed.

As a result, if clients expect Prenuptials to be enforced (when challenged), the agreements must be either 'fair' or 'airtight'--and preferably both! Therefore, clients should be advised that if challenged, unfair Prenuptials are less likely to be enforced.

### **Fair Prenuptials: An oxymoron?**

Are fair Prenuptials possible? Of course, there is no 'one-size-fits-all' definition of what makes Prenuptials fair, but such agreements must exist. In general, fair Prenuptials do not leave one spouse destitute at the end of the marriage (by death or divorce), unless the other spouse is also left impoverished.

Fair Prenuptials consider the length of the marriage and the involvement of both spouses in the production of wealth. Fairness might look distinctly different for (1) a marriage with two young persons just starting out, compared with (2) a marriage between two retired persons. Prenuptials may be fair even if both parties waive all claims upon death or divorce, where both spouses are already wealthy and self-sustaining. A fair Prenuptial need not create two co-equal partners in terms of wealth, but should not leave a divorcing or surviving spouse economically uncomfortable if the other spouse has more than sufficient means.

If the parties negotiate fair deals, then courts should be much more likely to enforce their terms. Fairness should solve many problems. Thus, advisors should advocate fair agreements. Counsel your clients to be reasonable with their future spouses. Perhaps advise clients in first marriages (particularly if they are young), to keep the terms close to what a divorce court and a probate court would craft.

For example, I was involved in a case where a young woman wished to protect her inherited assets from the claims of her future husband. Other than keeping those assets free of claims from her prospective spouse in case of death or divorce, she wanted to enter this marriage with all the same hopes and possibilities of financial risk and reward as any other young/first marriage newlywed. So, in the Prenuptial she did not require her husband to waive all alimony, support etc.; only the inherited assets were exempted from the traditional equitable dissolution model and spousal probate rights. So long as the wife keeps the inherited assets separate, they should not be at risk for a claim by the husband. (Note: That is what a divorce court should do anyway, but having the Prenuptial offers an added level of comfort.)

Another example of fairness involved a client who was older and much wealthier than his intended wife. He was already retired and she was still working--although she would retire after the wedding to travel and live with him. In that case, she gave up her career to join him in retirement. This client wanted a Prenuptial to fix the new spouse's rights and avoid any future legal battles. Accordingly, he asked her to sign a Prenuptial under which she would be paid a lump-sum amount in case of divorce; this money was intended to support her and help get her back on her feet. The lump sum was adjusted based on the term of the marriage (obviously, the longer the marriage, the more she got).

In the end, the couple did get divorced, but it was a very simple process, as the Prenuptial was not challenged. Both parties agreed that the deal they had previously worked out was fair, and there was nothing to fight about. Things might not have proceeded as smoothly and cordially had the husband insisted on a less reasonable provision

for his wife when the Prenuptial was negotiated. While I believe he could have taken a much harsher line with her, and she still would have signed the Prenuptial and married him, I also believe she'd have tried to challenge the agreement had it provided that she was to receive nothing at all.

Those are just a few examples, and there are many more. In general, though, the point is relatively simple: Counselors should tell clients that reasonableness and fairness in substance are as important (or perhaps more important) in the process of creating Prenuptials as are the formalities (proper execution, full asset disclosure, \*350 separate representation, etc). Candor at the outset and fairness in the terms are likely the best defenses for Prenuptials; such agreements probably won't be challenged, and if they are, they are easier to defend.

### **Ethical issues relating to Prenuptials**

The overly eager spouse. Interestingly, some clients actually go overboard. Some clients provide so much for their intended spouse in case of death or divorce that they would have been economically better off had they not entered into the Prenuptial. Such cases present confusing ethical situations.

For example, I represented a client who was contemplating marriage. In this case, it was a second marriage for both parties; each had children from a prior marriage and each had some wealth, albeit the husband was clearly the wealthier of the two. We began a negotiation with the spouse and her attorney, and drafted a proposed agreement. Then, after some back-and-forth between the attorneys, we decided to meet in a conference room one day (the attorneys and the clients) all together to hammer out the final details and hopefully sign the Prenuptial. Not long into the discussions of the draft Prenuptial's terms, the soon-to-be wife began to cry hysterically. We had to stop not once, but several times, in our discussions due to crying. Each time she cried, our client conceded another issue.

By the time she was done crying (and our client was done retreating), the proposed Prenuptial was, in my opinion, overly generous. Her rights under the Prenuptial now exceeded her best chances in a divorce proceeding or under the probate rules. So I had to counsel my client that now I felt he'd be better off economically not signing the Prenuptial. As I am sure you guessed, he still signed that Prenuptial, but I have a letter in my file advising him that I thought he probably should not sign. Was it unethical to proceed? I don't believe so, but it certainly puts an attorney in an uncomfortable situation.

The rubber stamp. When considering ethical issues, we should also try to put ourselves in the 'other attorney's' shoes. What are our ethical responsibilities to advise a client about the implications of signing a Prenuptial that someone else has already drafted and our client has already essentially agreed to? What if she is being treated quite unfairly? What if the marriage is imminent? Our duty is to review with the client what rights she is abandoning, and ensure she comprehends the extent of the unfairness of the agreement. Nevertheless, in the end, it should be the client's choice if she desires to go ahead and sign the Prenuptial.

In such a case, where it is transparent you are being retained only to 'rubber stamp' a deal, what should you do? Are you effectively serving your client (this wife-to-be) if you help? Or would your client be better served if you refused? Would she be better served if you did not facilitate her execution of that Prenuptial? These are difficult legal ethical questions to answer.

In many such cases, clients listen to what you say, but the words pass right out the other side of their heads. They have been told, 'This is just a formality, so don't let your lawyer run up the fees for nothing.' Sometimes, they believe they will 'win over' the new spouse, and soon the spouse will destroy the Prenuptial.

Some clients just assume their spouses will never enforce the Prenuptials. Alternatively, and perhaps more sinisterly, they may believe if there ever is a divorce, they'll just challenge the Prenuptial and argue they didn't know what they were doing--implicating you as the advisor as incompetent. Or they may plan to assert that the Prenuptial is so patently unfair no judge should enforce it, again leading to issues about the adequacy of representation. In any case, the attorney/advisor is in a classic 'no-win' situation. It is not clear if you are better off declining that representation or giving the proper advice and 'papering' your file.

The case of the unfair Prenuptial. In some respects, the hardest problem we face occurs when a client comes to an

advisor and asks the advisor to create an obviously unfair Prenuptial. 'The Case of the Obviously Unfair Prenuptial' sounds like a good title for a new Sherlock Holmes novel. However, sometimes our clients wish to create Prenuptials that are clearly unfair.

For example, a case I handled involved a second marriage in which the husband was quite well off, but his intended wife was economically comfortable, at best (living in a trailer home in Florida). She had made do, but was not wealthy by any means. Because she had been able to make do, he assumed that if they divorced or he died, she'd figure out a way to make do again. And thus he did not want to provide anything for her in case of divorce or death. In that case, the Prenuptial would definitely appear unfair if it were challenged.

\*352 These cases of obviously unfair Prenuptials are situations where we should probably try to counsel our clients to be reasonable and to provide more adequately for their spouses. But what if the client still refuses, and what if the wife-to-be agrees (if she does not negotiate a better deal)? Advisors should tell clients that such Prenuptials are the most likely to be challenged and the most susceptible to being overturned. These are the least predictable Prenuptials, and the most problematic. In those cases, we can assume the spouse is signing only because she doesn't think the husband (or a judge) will enforce the Prenuptial. Why else agree?

As advisors, we must caution our clients; we must alert them to the risks that the Prenuptial will be ignored in a divorce; and assuredly we must stress the formalities (discussed more below). If any of the formalities are neglected, you can assume you have handed a future judge all the ammunition the judge will need or want to disregard that Prenuptial.

Unfair Prenuptials create terrible problems for the advisor. Inherent in such cases is the probability of future litigation. As advisors, we can assume that patently unfair Prenuptials are going to be challenged (the challenging spouse really has nothing to lose). We can also assume that we advisors will be dragged into such challenges--as fact witnesses in the litigation.

It is not fun serving as a witness in someone's divorce. Moreover, how can we get paid for this time? I understand that some planners include in their retainer agreements a provision requiring their client to pay their standard hourly fees if they are subsequently called as witnesses in any proceeding to enforce or interpret the Prenuptial's terms. I have not heard how well these clauses have worked in practice in terms of actually collecting.

How else can we protect ourselves? I think some planners charge exorbitant fees for preparing such Prenuptials. This discourages clients from creating them in the first place and provides enough economic incentive to offset the risk of future litigation. But there are no easy answers.

Further, we can assume that an attack against an unfair Prenuptial by the other spouse's divorce attorney (or perhaps even by the judge) will seek to throw out the unfair Prenuptial based on legal technicalities--alleged mistakes. Judges are not likely to look the clients in the eye and say they are ignoring such Prenuptials because the agreements are not fair (because unfairness may not be a valid legal basis to overturn Prenuptials in the state where you practice). Instead, in order to do justice, the judges might latch onto legal technicalities and try to turn molehills into mountains. Thus, if unfair Prenuptials are subsequently not enforced, a very likely reason will be some legal technicality that the judges find the advisors failed to satisfy. Can a malpractice suit be far behind? So, not only are unfair Prenuptials potentially more problematic for our clients, they also pose greater dangers to us as planners.

That creates an additional ethical quandary. If we believe judges are inclined to set aside unfair Prenuptials, and we also believe judges are inclined to do so based on arguments of improper execution (lack of full disclosure, duress, etc.), then aren't we drafting documents which we expect will be pointed back at us (like swords) at some future date? If so, how smart is that to do? It may meet our clients' demands, but are we required to sacrifice ourselves for our clients? Assuming not, we need to act as proper advisors and counselors to our clients. We need to discourage our clients from demanding that their future spouses execute patently unfair Prenuptials.

#### Following the required formalities

If a client wants to be assured a Prenuptial will be enforced, then the Prenuptial should be reasonably fair. And

whether fair or not, the procedural formalities are not optional (although they are particularly crucial in an 'unfair' agreement). These formalities vary from state to state, but in general they can be summarized as follows: separate representation, full and adequate disclosure, and lack of coercion or duress.

Separate representation. Run (don't walk) away from any client who insists that only one attorney represent both parties to a Prenuptial. Prenuptials are unlike other contracts. They do not follow the same logic, and they have their own rules. The parties are not two professional business persons arguing over widgets; they are two human beings negotiating in the face of romance. They generally are not 'repeat players' in the marketplace of marriage, and their trade is not susceptible to simple monetary damages. Prenuptials are fundamentally different agreements, and as such they need to be treated specially. Because the parties are negotiating away potent and valuable legal rights, they must each be separately represented in order for the Prenuptial to be enforced.

Next, if possible, try not to get involved in the selection of the \*354 attorney for the other spouse. It is often tempting to refer matters to our friends, and sometimes your client will demand that you find an attorney to represent the spouse-to-be, but in most cases, it will be better in the long run if the spouse chooses his/her own counsel. If you must refer another attorney, suggest a few names so that the prospective spouse can choose. In addition, don't recommend the worst lawyers in the county. That will only open the Prenuptial to future attack.

Full and frank financial disclosure. No client is thrilled to prepare and then turn over a full asset disclosure. Some clients fight it more than others do. In many states, full financial disclosure is a formal prerequisite to enforcing a Prenuptial. How else can parties make informed and intelligent choices in negotiating Prenuptials? Clearly, a waiver cannot be valid if the waiving party is unaware of the rights she is being asked to waive. Therefore, complete and full financial disclosure is required.

Assume the client will fight you on this. I recently represented a client who spent several thousands of dollars working with me to develop a draft Prenuptial, only to halt the process altogether when I pressed him too hard on the asset disclosure. Some clients will battle, but you must advise them it is for their own good and you must fight back. Be totally frank; tell the client that not only must he fully disclose his financial condition but that any material discrepancies could doom the Prenuptial.

When coordinating a financial disclosure, a standard financial statement is always a good starting point. To that, add copies of at least the last two years' personal income tax returns. Along with the asset and income disclosures, the client should also very carefully outline any liabilities he may have. Valuation issues may arise, and clients with closely held businesses may present particular difficulties. These clients are so used to manipulating the value of their businesses, depending on whom they are talking to (a lender or a creditor), that sometimes it is virtually impossible to discern what actually is fair value.

In that case, I suggest hiring an appraiser or at the least an accountant to provide a valuation. In addition, offer to make all of the business' financial information available to the intended spouse. That way, not only will a relatively accurate valuation be put forth, but the intended spouse will have adequate opportunity to independently hire experts to consider the valuation based on the financial data. I have also learned that some attorneys offer their client's CPAs for direct consultation by the other party. I am not sure this is necessary, but precautions such as these will help defend the formalities of the Prenuptial.

Lack of coercion or duress. Duress can be created in many ways--for example, when the client makes overt threats designed to scare or force the other party into signing the Prenuptial. Obviously, any such threats will jeopardize the Prenuptial. Usually, however, the coercion is more subtle and complex. Be on the look out for this, and try to advise your client to avoid any activity that might later be construed as creating duress.

For example, side promises must be avoided. A client can devastate a Prenuptial by going home and saying: 'You know this is all the lawyer's doing (or my father's doing) and as soon as we are married, I intend to tear up this agreement.' The client may as well already have. But you'd be surprised how common this can be. Frequently, our own clients are not too happy about finalizing the Prenuptials. A Prenuptial often creates major headaches for the client at home; the spouse-to-be was probably reluctant to enter into a Prenuptial at the outset, and is likely only more upset and bitter about it as the process drags on. It is convenient and somewhat natural for the client to blame

someone else for all the hardship and to make unintended promises to the prospective spouse just to smooth the waters.

Duress can also be argued later if the challenging spouse alleges she did not have adequate opportunity to review the Prenuptial or the financial disclosures. Bad facts might help her argument. For example, do not delay supplying the financial disclosures until the morning of the Prenuptial's execution. Provide those written materials ahead of time. Be sure her attorney confirms receipt of the information, and has adequate time to review and analyze the materials. Moreover, try to avoid 'document execution parties' in your office. The non-client spouse might allege she did not have a chance to review the agreement with her lawyer that one last time, and she had a lot of questions you refused to answer for her.

Finally, try to avoid the classic case of duress--popping the Prenuptial out just before walking down the aisle (or something similar). If the client comes to see you and you feel it is too close in time to the wedding to make the agreement binding, say so. Either the wedding date can be changed or \*356 perhaps a post-nuptial agreement can be reached. But trying to rush a Prenuptial, and expecting it to hold up, is generally foolhardy.

I remember being involved once in a frantic rush to finalize a Prenuptial. The prospective husband is one of my favorite clients, albeit he is somewhat eccentric. Naturally, I wanted to help him. This client is quite wealthy and had recently met a younger impecunious spouse-to-be. We discussed a Prenuptial and I am certain he also discussed it directly with his wife-to-be, but I was still in the drafting stage when I got the 'call.' To the best of my recollection, the 'call' went something like this:

'Jeff, I know it is Friday and this is a holiday weekend (Memorial day was that Monday), but Tuesday I am flying out to Los Angeles and then next weekend I am going to stop in Las Vegas on my way home and get married. You have to finish the agreement, get my girlfriend a lawyer, meet over here this weekend and get it reviewed and executed. Thanks.'

This is probably one of those times when you are supposed to act nobly and tell your long-term client how much you would love to help but his request is so blatantly ridiculous that you couldn't possibly facilitate it. But that wouldn't make a good story. Instead, I finished the draft, called a lawyer friend I knew, told him the details of the Prenuptial, and scheduled a meeting at the client's apartment the next morning.

We did execute that document the next day, the client did fly off to Las Vegas and he did get married within a week. He also got divorced within a few months (big surprise, right?). The moral of the story, though, is that the client was extremely generous in the Prenuptial. In fact, this is another case where I felt the client was perhaps being overly generous. I sent him a letter saying it was my opinion he might be better served (economically) by not signing the Prenuptial. For less than a month of marriage, the wife received well over \$100,000. But the client did not mind at all. He wanted her to have something, no matter how brief the marriage. Moreover, for him, having the Prenuptial gave him peace of mind to be able to write a check and be out of the marriage quickly and without litigation. It was worth every penny, he said.

### **Some issues to address in the Prenuptial**

Prenuptials can address any of your clients' concerns. Their imagination and public policy are the only constraints.

During marriage. Typically, Prenuptials provide for management of assets during the marriage. Often, Prenuptials provide that the assets held in a spouse's individual name will be treated as the separate property of that spouse and he/she is free to deal with it independently. Sometimes, Prenuptials call for the establishment of joint accounts to pay living expenses. Such Prenuptials might require one or both spouses to contribute to that account.

Gift giving is another issue to address. For estate planning purposes, clients frequently are advised to start giving away assets and/or changing their form--such as creating and funding irrevocable trusts, family limited partnerships, or private annuities. These techniques may be terrific for estate planning, but they may also directly affect the other spouse's rights upon death or divorce (particularly if such rights are tied to the value of a spouse's estate). Consequently, Prenuptials should specifically address the client's ability to enter into estate planning strategies

and/or define any limitations thereon.

There are an unlimited number of other issues you may need to consider and incorporate into Prenuptials, including issues like house work, child rearing, and others. Additionally, Prenuptials can address the selection of health care decision-makers and/or guardians in case of incapacity. In most states, the spouse will be entitled to fulfill those roles unless otherwise directed, so you need to discuss this point with clients. Particularly in second marriages with grown children from a prior marriage, someone other than the new spouse might well be the preferred fiduciary.

You may need to address qualified pension plans and spousal waivers (which require technical expertise and should be reviewed carefully). Importantly, be aware that a premarital waiver of a spouse's qualified plan benefits will not be effective. Qualified plan waivers must be executed after marriage.

Divorce. Naturally, Prenuptials should provide for the disposition of assets upon divorce. To afford fairness in Prenuptials, some reasonable provisions should be provided for the less wealthy spouse or the spouse who stays at home or the spouse who takes care of the children, as the case may be. This should be either a lump-sum \*357 amount or a periodic payment--neither is necessarily better than the other. The amount should probably vary depending on the term of the marriage--a sliding scale over time is typical. Once an amount is agreed upon, all other rights upon divorce are typically waived.

There might also be many specific issues to deal with in the Prenuptial. Often, there will be items (particularly those that have no formal title, such as jewelry and/or furniture and collectibles) which the clients want to be sure they retain. I have prepared Prenuptials with clauses to specifically retain season tickets to local sports teams, sentimental jewelry, valuable artworks, etc. Some clients have required provisions regarding pets. The potential range of property rights to retain is virtually limitless.

Death. Prenuptials should also consider the disposition of assets upon death. Presumptively, elective share rights (or dower rights) will be waived. Nevertheless, many clients will provide some post-death provisions for their spouses. To accomplish fairness in Prenuptials, some post-death provisions might be appropriate. Analyze whether the surviving spouse should receive assets outright or in trust. Consider, too, whether the post-death benefits should be based on a sliding scale.

In many cases, the post-death provisions will be much more generous than the divorce provisions. The reasons for this are obvious: In a marriage terminating upon divorce, the spouses are unlikely to be on good terms, but most clients believe that if their new spouse is still married to them at the time of death, then the two of them were probably still on good terms. Accordingly, it is easier to plan to be more generous on death.

### **The role of estate planning advisors**

What role can estate planning advisors play in the creation of Prenuptials? First, estate planning attorneys can be much more active in the business of preparing these documents. For many, there is a belief that you need to see a divorce attorney to have a Prenuptial prepared. But estate planning attorneys are very accustomed to dealing with the issues presented in Prenuptials--except for the divorce aspects. In fact, estate planning lawyers can probably add more to the post-death provisions than the average Prenuptial now covers. Thus, I believe divorce lawyers and estate planning attorneys should work together more closely to develop better Prenuptials for clients.

Next, other estate planning advisors can help their clients by their familiarity with Prenuptials. Many clients will not bother to call an attorney, or do not have one. But most have accountants. And most tell their accountants a great deal of personal information--including marital plans. If the accountants are familiar with the reasons clients might need or want Prenuptials, they might greatly help their clients. Plus, accountants can probably help screen out a lot of clients who think they might need Prenuptials, but really probably do not. Moreover, there might be a reasonable amount of work for accountants if their clients do prepare Prenuptials. Financial disclosures and asset valuations may need to be prepared by the accountants.

Similarly, financial planners and bankers often have closer relationships with their individual clients than

attorneys have. If these planners know the relevant issues, they may be able to help their clients obtain appropriate advice in a timely fashion. This might help preserve their clients' wealth and provide an invaluable value-added service. But the planners must know when to suggest a Prenuptial, and they must know that this must be done well in advance of the wedding.

The combined input of divorce attorneys, estate planning attorneys, and other estate planning professionals (e.g., accountants, financial planners) can lead to much greater public awareness of the benefits of Prenuptials. The combined efforts of these specialists might also help to identify a much broader group of clients who could benefit from the use of Prenuptials. If all these professionals work together, the quality of their services will be improved. It is hoped that more clients who really need Prenuptials will be alerted to the benefits of Prenuptials with enough advanced time to create valid agreements.

#### **PRACTICE NOTES**

You may need to address qualified pension plans and spousal waivers (which require technical expertise and should be reviewed carefully). Importantly, be aware that a premarital waiver of a spouse's qualified plan benefits will not be effective. Qualified plan waivers must be executed after marriage.

[FN1]. JEFFREY A. BASKIES, ATTORNEYJEFFREY A. BASKIES is a member of the Fort Lauderdale, Florida, office of the law firm of Ruden McClosky Smith Schuster & Russell, P.A. He has previously written and lectured on estate planning. Mr. Baskies can be contacted at [JAB@RUDEN.COM](mailto:JAB@RUDEN.COM).

27 Est. Plan. 347, 2000 WL 1346349 (W.G.&.L.)

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