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## Swipe Right for a Prenup

By Rebecca A. Provder, Esq.\*

Tinder. Bumble. Match.com. JDate. Eharmony. OkCupid. Hinge. Facebook messages rekindling romances between high school sweethearts.

The dating landscape has transformed dramatically in the past decade. Initially, online dating was stigmatized and largely kept private. Over time, it shed its taboo and has become a staple for singles, especially with the rise and popularity of dating apps.

Dating websites and apps fuse together a wide group of people and create a platform for them to easily connect. Online dating also provides a forum for people to meet who otherwise would not have crossed paths.

Current dating trends are a far cry from how couples formed in the past, such as through school, set-ups by friends or family members, work, bars, parties, or chance encounters. While, obviously, traditional forms of meet-ups remain, the birth and growth of online dating introduced many other relationship opportunities.

Significant changes in the institution of marriage have also impacted the modern dating scene. The new dating arena not only provides singles with a broader spectrum of potential matches, but more options for divorcees seeking a fresh start.

When baby boomers first walked down the aisle, couples believed it was 'til death do us part and divorce was not on the radar. Presently, couples marry with the backdrop of widespread divorce in our society.

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Nevertheless, marriage rates remain high. According to the U.S. Census Bureau, approximately 82% of all Americans over the age of 25 will marry at least once in their lifetime. However, divorce statistics loom large. The census statistics reveal that about 40% of first marriages, 60% of second marriages, and 73% of third marriages end in divorce.

Given the high divorce rates, most individuals have a connection to divorce either directly or indirectly. If an individual has not experienced divorce firsthand, he or she may be a child of divorce or witnessed friends or family members going through a marriage break-up.

Consequently, with the prevalence of divorce, prenuptial agreements have become an attractive option and proliferated in recent years. Another factor contributing to the rise of prenuptial agreements is that on average individuals are marrying at an older age. The average age of women marrying for the first time was 20.6 in 1970 and 26.5 in 2009. Similarly, the average age of men marrying for the first time was 22.5 in 1970 and 28.4 in 2009. With couples marrying later in life, it regularly follows that they are entering into the marriage with more assets. If they do not have assets, they may have future career or business prospects that they seek to protect.

Prenuptial agreements continue to be popular among high net worth individuals, whether self-made or derived from family wealth. In instances of family wealth, individuals may strive to keep the money in the family and away from the in-laws. Safeguarding gifts, inheritances, and family businesses are significant benefits that may be derived from prenuptial agreements.

Upon remarriage, prenuptial agreements also have a strong appeal. A prenuptial agreement can function to limit issues and acrimony in the event of a future divorce. Likewise, through a prenuptial agreement, a person embarking on remarriage can balance the interests of a soon-to-be spouse with the interests of children from a prior marriage.

### WHY GET A PRENUP?

A prenuptial agreement is advantageous to prescribe rights in the event of divorce and death. Rather

than rely on default statutes, a prenuptial agreement provides couples with an opportunity to tailor the law to meet their unique needs and objectives.

Public policy favors individuals reaching their own agreements through contracts, and so duly executed prenuptial agreements are presumed valid and generally upheld. It is very difficult to set aside a validly executed prenuptial agreement. There are limited grounds to set aside a prenuptial agreement, including fraud, overreaching, duress, and unconscionability. Notably, a prenuptial agreement will not be set aside based on unconscionability simply because the agreement is improvident in retrospect.

There is not a one size fits all prenuptial agreement. Although sometimes just hearing the word “prenup” sparks a cringe worthy reaction, it is important to keep in mind that prenuptial agreements are not inherently unfair or one-sided.

The topics addressed in a prenuptial agreement can be narrow or broad depending upon the couple’s preferences. Prenuptial agreements may address various issues, such as property division upon divorce, spousal support, and estate rights upon death.

A more unspoken benefit of the process is that it provides couples with a platform to candidly discuss finances prior to marriage. It may be the impetus for couples to have their first major conversation about finances. They can share the details of their assets, debts, and income. By discussing financial issues upfront, it helps start the marriage with full financial disclosure and an understanding of the other party’s views on money.

## **PRENUP PROFILE: WHAT’S IN A PRENUP?**

### **Property Division**

A primary issue addressed in a prenuptial agreement is the division of property upon divorce. In order to reach a consensus on terms governing property division, it is important to understand the applicable law absent a prenuptial agreement.

Divorce laws vary from state-to-state and the differences can be substantial. In most states, the method of dividing property upon divorce is equitable distribution. Under an equitable distribution system, there is a distinction between marital and separate property. In general, marital property is property earned during the marriage from employment or self-employment. The classification of what constitutes separate property is state specific, but generally includes pre-marital assets and may also constitute inheritances (such as in New York, but not in other nearby states such as Connecticut or Massachusetts).

In equitable distribution states, property is divided equitably upon divorce. However, equitable does not necessarily mean equal distribution.

Other states, such as California, Texas, and Nevada, have a community property system. In community property states, each spouse owns a one-half interest in property acquired during the marriage.

In a prenuptial agreement, the parties can make provisions regarding property division that deviate from the applicable law. For example, couples can adopt a narrower definition of marital property and broader definition of separate property. In other cases, a couple may elect not to have any assets classified as marital property, such as if they are on similar financial footing or in lieu of marital property there is a specified payout based on the length of the marriage.

### **Marital Residence**

One of the most sensitive issues that arise in a divorce case is what happens to the marital residence. In a prenuptial agreement, couples may address who gets the marital residence in the event of a divorce, as well as incorporate provisions governing continued occupancy and move out from the premises. The agreement can also set forth terms regarding the sale or buyout of the property.

### **Spousal Support**

Each state has statutory and case law pertaining to spousal support, otherwise commonly known as alimony or spousal maintenance. The rules vary by state and are largely fact specific.

Generally, there is a statutory formula to calculate the presumptive amount of spousal support during and after a divorce proceeding. In addition, legislation typically specifies factors to consider in determining whether to deviate from the presumptive amount of spousal support. Usually, there are also suggested guidelines for the duration of the spousal support payments.

Spousal support is another issue commonly tackled in a prenuptial agreement. Couples seeking more finality and predictability may elect to set forth a specific amount and duration of spousal support in their prenuptial agreements. In many states, including New York, couples may elect to fully waive spousal support in the event of divorce. Alternatively, couples can set forth certain parameters regarding spousal support payments, such as imposing caps on the amount and duration.

During negotiations, it is important to take into account the tax consequences of spousal support payments. Historically, alimony was taxable to the recipient and tax-deductible by the payor spouse on his or

her respective income tax returns. However, the new tax act signed into law on December 22, 2017 overhauls this traditional tax treatment and eliminates the deductibility of alimony commencing with divorce agreements entered into after December 31, 2018.

## Rights Upon Death

Absent a prenuptial agreement, a surviving spouse cannot be disinherited upon death. Rather, a surviving spouse has certain automatic inheritance rights. For example, under New York law, in the event that a spouse dies without a will, the surviving spouse is entitled to receive the entire intestate estate if the couple does not have children, and the first \$50,000 plus half of the balance of the intestate estate if they have children. If a spouse dies with a will (even if the will does not make any provisions for his or her surviving spouse), then the surviving spouse is entitled to receive an outright inheritance equal to one-third of the deceased spouse's net estate (commonly referred to as the elective share).

A prenuptial agreement provides a couple with the flexibility to either modify or fully waive their inheritance rights that would otherwise exist under intestacy laws or the elective share prescribed by statute. Consequently, a prenuptial agreement offers a couple the opportunity to agree upon an estate plan that takes into account their particular family dynamics. This can be especially advantageous where one or both of the parties have children from a prior relationship because the prenuptial agreement can provide a mechanism for allocating assets between the children and new spouse.

Significantly, most prenuptial agreements contain provisions expressly permitting voluntarily dispositions, which allow for the parties to leave each other more upon death than the minimum requirements. While a prenuptial agreement is often difficult to modify, a will can be easily modified a myriad of times. An individual may initially choose to have his or her will mirror the minimum inheritance provisions set forth in his or her prenuptial agreement, yet with the passage of time elect to leave his or her spouse more upon death than they are contractually obligated to do so.

Notably, while provisions in favor of a former spouse under a will, revocable trust, or intestacy laws are revoked upon divorce, revocation does not automatically occur upon commencement of a divorce proceeding. In a prenuptial agreement, this issue can be ameliorated by overriding the otherwise applicable law and providing that the default inheritance rights are eliminated at the start of a divorce case.

## Custody and Child Support

Unlike with other contracts, provisions set forth in a prenuptial agreement regarding child custody and

child support are not binding. Rather, these provisions may be used as an indication of the parties' intent. The rationale for this distinction is that the best interests of the children shall remain the paramount consideration at all times. It is also often difficult to forecast a child's needs and the parties' future financial circumstances prior to conception. Therefore, while these terms may be set forth in a prenuptial agreement, more regularly they are not incorporated in the document.

## Taxes

In a prenuptial agreement, couples can decide how they wish to pay their taxes during the marriage. They may choose to file jointly, separately, or maintain flexibility in making a filing election in any given year.

A prenuptial agreement can also specify the source of funds to pay tax liabilities during the marriage. For example, a couple may elect to provide that taxes incurred in connection with separate property are to be paid from separate property and that taxes incurred in connection with marital property are to be paid from marital property. A prenuptial agreement can also set forth the allocation of any tax refunds.

## Debts

In addition, the payment of any debts incurred before or during the marriage can be addressed in a prenuptial agreement. A prenuptial agreement can be an invaluable tool to bring to the forefront the existence of any debts, such as credit card debts, tax arrears, or student loans. It can also detail that each party is responsible to pay his or her own premarital debts.

Likewise, a prenuptial agreement can include terms regarding debts incurred during the marriage. Couples may elect to jointly share any marital debts, or may opt to distinguish between debts incurred individually and jointly during the marriage.

## Nondisclosure Clauses

Confidentiality or nondisclosure clauses are no longer reserved for celebrities or public figures. Rather, confidentiality clauses have become appealing to a much broader clientele.

A prenuptial agreement can specify which information will remain confidential. It can also include a penalty in the case of a violation of a nondisclosure clause.

In some cases, couples desire to have a nondisclosure clause simply pertain to the provisions of the prenuptial agreement and related financial information. In this event, they may seek to keep sensitive business and financial information confidential from non-

parties in order to protect their privacy and reputations.

In other cases, couples prefer to have a broader confidentiality clause that extends to non-monetary aspects of the relationship. For example, they may include a provision that photographs or videos cannot be posted on social media without the consent of the other party. The demand for these more expansive nondisclosure clauses has increased with the widespread use of social media outlets, such as Facebook, Twitter, Instagram, and LinkedIn.

## Counsel Fees

Case and statutory law typically provides that the wealthier spouse is responsible to contribute to the less wealthy spouse's counsel fees in the event of a divorce. For example, in New York, Domestic Relations Law Section 237, which governs the award of counsel fees in a matrimonial case, imposes a rebuttable presumption that counsel fees should be awarded to the less monied spouse.

In a prenuptial agreement, couples can choose to deviate from the applicable law that would otherwise pertain to counsel fees. For example, subject to certain exceptions, each party can waive counsel fees from the other party in the event of a divorce. As another example, couples can impose caps on the amount of counsel fees that may be awarded.

## VALIDITY: KEY POINTS

### Separate and Independent Counsel

A common inquiry is whether both parties can retain the same attorney in connection with a prenuptial agreement. However, it is crucial for each party to retain separate and independent counsel of his or her own choosing. Separate counsel is of the foremost importance because prenuptial agreements have far reaching implications, and each party should enter into the agreement knowingly and voluntarily.

### Financial Disclosure

While this right may be waived, it is strongly advisable that both parties provide full financial disclosure before entry into a prenuptial agreement. Financial disclosure should accurately set forth each person's assets, liabilities, and income. An expectation of gifts or inheritances also may be disclosed, as well as the terms of any trusts of which a party is a beneficiary.

The financial disclosure is typically set forth on a schedule that is referenced in the prenuptial agree-

ment and attached as an exhibit. Accountants and other financial advisors can participate in the disclosure process to help ensure that full and accurate information is provided.

## Proper Formalities

For validity purposes, it is important for prenuptial agreements to be executed in accordance with the formal requirements. Generally, the agreement must be signed by both parties and acknowledged in the form a deed is required to be recorded. As a precaution, it is good practice for a prenuptial agreement to be signed before a witness and for each page to be initialed.

## Timing

It is advisable to begin negotiating the prenuptial agreement as far in advance of the wedding date as possible, or even before the wedding date is set, in order to provide ample time for negotiation. A good rule of thumb is to aim to execute a prenuptial agreement at least 30 to 60 days before the wedding date.

## IS A TRUST ENOUGH?

Although clients are regularly advised that placing funds in a trust for a beneficiary will provide ironclad protection in the event of the beneficiary's divorce, in practice it may not be so clear cut. While putting funds in trust, such as for children, is more protective than leaving it to them outright, it should not be assumed that the assets will be completely protected in the event of a divorce.

For example, most states adopt a broad definition of income for purposes of calculating child support and spousal support. Thus, depending on state law and specific case facts, trust income may be included in calculating child support and spousal support under certain circumstances, such as where it constitutes a regular or main source of income for the beneficiary. Furthermore, if funds are actually distributed from a trust and commingled with marital assets during the marriage, they may be up for grabs in a divorce case.

Therefore, even if there is a trust in existence, a prenuptial agreement can provide significant additional protection. A prenuptial agreement can help shield trusts that were established at the time of the prenuptial agreement, as well as those that may be created in the future. The extra protection derived from a prenuptial agreement can extend to trust income, assets, and distributions.

## PROPOSING A PRENUP

Proposing a prenuptial agreement is not an easy topic to broach. However, it is better to discuss the

topic than to miss out on significant benefits that could have been derived from a prenuptial agreement. Therefore, clients and their advisors should not shy away from the subject, but rather address it head on.

Location and timing are key for discussing a prenuptial agreement. It is helpful to address the subject in a comfortable environment and when both individuals are in a good mindset. Do not wait until the last minute. It is highly undesirable to be negotiating a prenuptial agreement while taking care of last-minute wedding details and closely approaching the walk down the aisle.

## **MEDIATED PRENUPS**

Although sometimes overlooked, mediation is a viable option for a prenuptial agreement. A mediated prenuptial agreement can be an open and amiable way to navigate through the process. Couples can discuss their goals and mutually agree upon provisions with the mediator's assistance before the agreement is drafted.

It is strongly advisable for each party to retain his or her own "review attorney" at some point during the mediation. The review attorneys will provide legal advice to their clients, and thus contribute an extra layer of informed decision making. They will also have the opportunity to review the agreement and make sure it accurately addresses all of the pertinent issues.

## **COLLABORATIVE PRENUPS**

Collaborative law is also a possibility for prenuptial agreements. Each party retains a collaboratively trained lawyer to represent him or her in the negotiation and preparation of the prenuptial agreement.

As part of the collaborative process, the parties and their attorneys develop the terms of the prenuptial agreement during the course of four-way meetings. The collaborative process provides a non-adversarial and transparent approach to negotiation, which naturally resonates with many engaged couples.

## **POSTNUPTIAL AGREEMENTS**

A prenuptial agreement is entered into prior to marriage, whereas a postnuptial agreement is entered into

after marriage. There are various reasons why prenuptial agreements are usually preferable over postnuptial agreements. It is more difficult for a person to waive rights after they have vested. Further, postnuptial agreements tend to languish as there is no deadline, whereas the wedding date creates momentum for prenuptial agreements. Moreover, as married couples are fiduciaries, postnuptial agreements may be held to a higher standard than prenuptial agreements. Despite these drawbacks, postnuptial agreements can serve an important function, and clients and their advisors should keep them in mind as a possibility in appropriate cases.

## **LET'S CHAT**

It is important for the full spectrum of a client's advisors, such as accountants, other financial advisors, and attorneys, to work closely together in order to achieve optimum results. Illustratively, in drafting and negotiating a prenuptial agreement, it is important to be aware of obligations that a client may have to a former spouse, current spouse, or children from a prior relationship. Likewise, the terms of the prenuptial agreement should be shared with the client's trusts and estates attorney in order to ensure conformity.

## **DON'T LET A PRENUP GROW DUSTY**

When a prenuptial agreement is signed, it is commonly remarked that hopefully the agreement will be put in a drawer and grow dusty. However, a crucial takeaway for clients and their advisors is to become well acquainted with the document and review it periodically in order to achieve maximum benefits that may be derived from the agreement.

## **CONCLUSION**

Swipe right for a prenup; don't ghost this option. It is important when wedding bells are on the horizon for individuals to fully explore their options and contact a professional to learn more about the benefits of a prenuptial agreement.