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Family Law: To Prenup Or Not To Prenup



By DORI B. HIGHTOWER

Unfortunately, in today's world with regard to financial matters in marriages and relationships we all too frequently see deception, information withholding and lies. I can only hope the information in this article will be helpful to you and your clients so that they too can get to the heart of the matter.

One tool for combating this unscrupulous aspect of human nature can be a prenuptial (prenup) agreement, since a prenup arguably calls for "full" disclosure of financial information. "Full" is in quotations marks because the courts have waffled on what constitutes full disclosure. It can be fuzzy. The bottom line is that going through the exercise of negotiating a prenup may give a client more information than they would otherwise obtain in the blush of love and romance.

In Connecticut, *McHugh V. McHugh*, is the seminal case on prenuptial agreements. It is important to have an experienced family lawyer advise a client about the criteria considered for whether a prenup will be enforceable upon the dissolution of a marriage based upon the relevant case law and facts.

Since every union is unique, one must consider if a prenup is advantageous to their marital relationship. A prenuptial agreement is a contract created to represent the interests of two individuals who plan to marry. The prenup should be tailored to reflect the interests and concerns of both parties. It may include the rights and responsibilities of each individual during the marital relationship or if it ends in divorce or death.

Whether you are contemplating a prenup or postnuptial agreement, the following steps should be well thought out:

- As a couple, contact an experienced family law attorney jointly to review and discuss general and specific terms that reflect your personal circumstances and needs.
- Once you have a draft prenup, one should review it with their own independent and separate experienced family lawyer, in order to get suggestions and propose revisions before signing.
- If you decline the opportunity to review the prenup with independent counsel, do so knowingly.

More Mainstream

During the 1980's, when the U.S. divorce rate peaked, prenups were considered the exotic purview of the ultra-rich. While the divorce rate has fallen for first marriages, prenups have become more mainstream.

The divorce rate for second and third marriages may be a contributing factor for an increase in the use of prenups with the Baby Boomer generation slated to live far longer than any in history. Prenups are a useful tool for providing the parties and their family members with greater comfort about how issues such as "assets and liabilities" can be addressed. Also, senior citizens may want to ensure that children from prior unions are protected if they remarry after the death of a spouse.

The increasing prevalence of same-sex marriage has also highlighted the importance of prenups, as people who were previously denied legal marital standing can now envisage a legal union with a partner who may have accumulated substantial assets or debt prior to their marriage. Also, parental right issues can be addressed in prenups and post-nuptial agreements.

Even without divorce, couples are often in need of a post-nuptial agreement if they encounter changing circumstances such as volatile finances, medical emergencies or job loss. A shifting balance of power in a relationship can also prompt a fresh look at how finances should be addressed moving forward in the marriage.

Despite the rapid evolution of cultural mores and economic circumstances, many people have emotional resistance to signing a prenup, even when it is clearly in their best interest. A client may think it will kill the romance in their marriage, and turn it into a business relationship. But in truth, it may address many problems that can be avoided down the road. Entering into a prenup or postnup has the potential to strengthen the marriage and possibly level the playing field.

The 1995 Connecticut Uniform Premarital Agreement Act stipulates that in order to be enforceable both parties signing the contract must have provided full and fair financial information. By ensuring full disclosure, couples enter matrimony in an atmosphere of confidence and mutual trust.

The following types of couples may find it prudent to consider entering into a prenuptial agreement:

- **Couples With Significant Assets On Both Sides:** In this case, the significance of the assets may be in the eye of the beholder. It could be a condo worth \$200,000, a beloved

sports car, or the silver tea set that has been in the family for generations. Whatever you bring into the marriage, you should specify whether or not you want it to be considered as part of the marital assets upon death or divorce.

For example, “Mom’s house is mom’s house, it stays in my family”; or, “You cannot sell my childhood stamp collection.” The devil is in the details here. More than one divorcing couple has engaged in an ugly fight over custody of the family dog.

- **Same-Sex Marriages:** Jake and Harvey had been life partners for 16 years when the Connecticut Supreme Court held on October 10, 2008 that the Connecticut Constitution protects the right to same-sex marriage. While other couples rushed to City Hall to wed, Jake and Harvey signed a prenuptial agreement before taking out a marriage license. “Harvey is a producer who juggles a lot of debt and other people’s money,” says Jake. “I wanted to make sure I didn’t become responsible for any of that if he dropped dead or got hit by a truck.” In the prenup, Jake and Harvey agreed that Harvey would be responsible for all of his own debt and Harvey agreed to maintain a life insurance policy sufficient to cover his debts.
- **Couples With Unequal Assets: Barbie and Sebastian are madly in love.** Barbie is in the process of receiving an estate in excess of \$3 million from the death of her 95-year-old grandmother. Sebastian has several outstanding loans and owes the Internal Revenue Service two years of back taxes. His debt is estimated at \$375,000. The advantage of doing a prenup is that Sebastian must disclose all of his debt to Barbie. Additionally, Barbie must fully disclose her assets. This gives them the opportunity to discuss financial issues prior to saying “I do” and ending up with a big surprise. Barbie may decide that her inheritance will be used during the marriage or not. She may also decide not to sign a joint tax return with Sebastian given his poor track record.
- **A Mature Couple Entering Into A Second Or Third Marriage:** A prenup may be in order when one or both spouses have children from prior marriages, in order to protect their children’s inheritance. If someone comes into your life after age 60, you may not want them to have the benefit of those years of your hard work. That could be addressed in the prenup. Provisions can also be added for specific bequests, or to compensate a spouse’s years as caretaker in the event an illness or disability. For example, if you have a house in Florida where your daughter lives, you may not want that called into question to pay for caring for an ailing spouse in your later years. Put it in the prenup.

Post-Nuptial Agreements

An agreement entered into after a marriage may be referred to as a post-nuptial (postnup) agreement. True, not everyone should have a prenup. Young couples with no assets to speak of may be better off saving their money. However, they may at some time down the road want to create a post-nuptial agreement. This type of contract can be utilized to cover financial and a variety of other lifestyle issues such as where they live, how they are employed, the future distribution of what they own, etc.

For example, Rita and Frank have been married happily for 30 years. He is a partner in a veterinary clinic. Both Rita and his partner’s wife’s names were on the original business agreement as co-owners. Jim felt his partner’s wife, Rita was intrusive, and wanted the agreement modified to take the wives out of the partnership. Rita agreed, but wanted a post-nup specifying that if they ever divorced, Frank’s share of the business would pass on to their daughter, not a second wife or girlfriend, or even the ASPCA.

“It doesn’t even have to be divorce. You don’t know what happens in life,” Rita says. “If I drop dead and my daughter ended up with the wicked stepmother, there is no way that I would want my daughter’s inheritance going to the wicked stepmother.”

My experiences over the years has led me to gain insight into relationships gone right and relationships gone wrong. I do understand the need for pre- and post-nuptial agreements but sometimes wonder how someone can sign a legal contract that states how many times a week one will have sex; how much weight one can gain; how often one can visit their parents or not; how one can work or not; how much one is entitled to for each year they are married; the exclusion of assets brought into the marriage in the case of divorce and so much more. Guiding our clients on such matters can make all the difference in the blush of love, romance and possible deception.

Names, characters and incidents in this article are the product of the author’s imagination or are used fictitiously. Any resemblance to actual persons, living or dead is entirely coincidental.

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