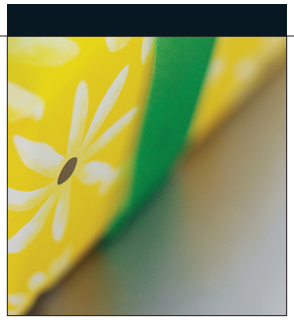

Before Saying "I Do," Specify "I Will" In a Prenuptial Agreement

The disclosure and discussion aspects of formulating prenuptial agreements can improve communication, set expectations, and avoids future disappointments.

MITCHELL K. KARPF

Estate planners often have a unique close and trusting relationship with their clients and are intimately aware of every detail of the client's financial position. They may be the first person contacted regarding financial and legal planning for life-changing events.

One such life event with huge consequences in this area is marriage. After congratulating the client, an advisor should use the opportunity to review the client's finances and will, discuss planning options, and, importantly, broach the subject of the "prenuptial agreement."

A prenuptial agreement, also known as an antenuptial or premarital agreement, called "prenup" for short, is a binding contract executed by prospective spouses to define each of the rights, duties, and obligations of the parties during the marriage and in the event of separation, annulment, divorce, or death. Despite what many people think, prenuptial agreements are not just for the "rich and famous." In fact, more clients than ever can benefit from a prenuptial agreement. Those advantages can arise for many different reasons.

Who should get a prenuptial agreement?

Millennials are increasingly getting married. They, typically, have waited until their careers are well established. Thus, each party may be bringing businesses and other substantial assets into the marriage. Unfortunately, they are also bringing with them more student loans, credit card debt, and mortgage loans. A prenuptial agreement can specify how premarital debt is paid and from what source.

MITCHELL K. KARPF is the managing shareholder of Young Berman Karpf & Gonzalez, P.A. in Fort Lauderdale, Florida. He is a Board Certified Marital and Family Law Lawyer and a Board Certified Family Trial Advocate, and focuses his practice on complex, high-net-worth marital and family law cases. He may be reached at mkarpf@ybkglaw.com.

On the opposite end of the age spectrum, older generations continue to live longer, providing the opportunity for widows and widowers to enter into their second, third, or even fourth marriages. (No one wants to be alone!) Also, one in every two marriages ends up in divorce, and people enter into subsequent marriages bringing with them assets, children, and a myriad of issues and concerns. Most often, the primary goal in this context is to make sure that the client's children—and not those the client's new spouse may have from an earlier marriage—get their rightful share of the client's estate. A prenuptial agreement can allow an older couple to protect assets that they want to keep in their respective families, determine what assets they will use for their support, or indicate who can remain in a house if one party dies.

Besides the young and old, same-sex couples are a prime candidate for prenuptial agreements. The

Supreme Court's decision this past summer in *Obergefell v. Hodges*,[1] clarified that marriage, and the possibility of divorce along with it, is a right bestowed to all couples across the country. This ruling theoretically should cause an increase in marriages at a rate unseen since the end of World War II. These marriages are quite different because many same-sex couples have lived together for years while acquiring property, establishing careers, and essentially living as a married couple. A prenuptial agreement gives the couple control to delineate what assets they intend to be considered marital and which assets they intend to remain separate as well as how to deal with alimony and support issues, particularly if they have already been in a long-term relationship.

Sometimes, the clients want prenuptial agreements for their children who often have very little on their own but are involved in family businesses or stand to inherit substantial assets. They too are prime candidates.

Overcoming the stigma

While the perception is less common than in the past, many people are initially hesitant to discuss a prenuptial agreement with their soon-to-be spouse because of the connotation that one is expecting the marriage to fail before it has begun. The discussion, however, need not begin from this perspective.

Clients can use their financial advisor or their attorney as a scapegoat for bringing up the touchy subject. Clients should also be referred to qualified attorneys who not only are experts in their field but who practice with compassion. After all, this is not a divorce but instead a precursor to what is hopefully a long and loving marriage. The prenuptial agreement should be looked at as "insurance" and to avoid a costly and contentious divorce.

Sometimes, the clients want prenuptial agreements for their children who often have very little on their own but are involved in family businesses or stand to inherit substantial assets.

Moreover, taking the time to review each other's financial picture can easily make a marriage stronger by putting everything out in the open. Money is one of the top reasons why marriages fail. People have vastly different values and expectations with respect to personal finance. A prenuptial agreement can solve many issues. But, it must be balanced with the facts and circumstances that the parties are in when entering into the marriage. For example, while it may be beneficial for a young, first-marriage couple to have an agreement to protect their nonmarital assets, it is equally important to ensure that the parties work together building their future as opposed to living financially independent lives. Each and every relationship is different.

Without an agreement

Without a prenuptial agreement, the fate of a client's assets in divorce is determined by the state they live in and the judge assigned to the case. Where one lives matters because states have very significant and sometimes subtle differences in their dissolution-of-marriage statutes.

For dividing property, states use two distinct methods. The majority use an "equitable distribution" scheme. In these jurisdictions, the court uses statutory factors to divide the parties' assets and debts fairly in light of the couple's circumstances. In Florida, for instance, these factors include, among others:

- The contribution of one spouse to the career of the other.
- The desirability of maintaining the home for the benefit of the children.
- The economic circumstances of the parties.
- The intentional dissipation of assets.

The minority of states apply "community property" rules when dividing the marital estate. Under this method, the court simply divides the couple's joint assets in half without considering any fairness factors. This makes for a quick, clean division of property. Some community property states have extremely generous alimony laws. Nine states, including California and Texas, follow community property rules.

Besides the state law that is applied, judges often have wide discretion that affects the division of marital assets and alimony.

Content of the agreement

Prenuptial agreements are extremely flexible tools. The content can vary widely as an agreement should always be tailored to the individual client's needs. A prenuptial agreement can simply protect one specific asset, such as a business or family interest, or can be completely comprehensive to include any and all financial issues.

A comprehensive agreement will identify what assets and debts each party is bringing into the marriage. Assets may include just about anything such as houses, furniture,

[1] 135 S. Ct. 2584, 115 AFTR2d 2015-2309 (2015).
[2] 19-A M.R.S.A. § 606.
[3] Fla. Stat. § 61.071.

businesses, land, easements, drilling rights, timeshares, bank accounts, retirement accounts, stocks, insurance policies, options, patents, copyrights, trademarks, cars, boats, planes, horses, receivables, royalties, licensing rights, domain names, frequent flyer miles, baseball card collections, artwork, jewelry, and more. The agreement also will outline which assets will become marital property, which will continue to be owned separately, and how appreciation in value during the marriage will be handled.

The concern for many couples is alimony. In some states, where one spouse is the primary wage-earner and the other sacrifices a career to raise children, alimony awards are purely up to the judge's discretion within certain parameters such as the ability to pay along with the lifestyle enjoyed during the marriage. In other states, alimony is calculated with a formula like child support. Alimony is also very state-specific, and thus an attorney practicing in the appropriate jurisdiction should be involved.

A prenuptial agreement can waive alimony entirely, specify a lump sum to be awarded, or create a schedule of payments depending on the length of marriage. Other important clauses include waivers of homestead, elective share, and inheritance rights.

Choice of law provisions are critical. Our society is more mobile than ever. Many families maintain multiple residences in several states. Parties must designate which state's laws they desire to govern their agreement. In the absence of a choice-of-law provision, the state in which the parties' divorce occurs will govern.

Courts may distinguish between a party's active and passive work efforts. Often a premarital asset, like real estate or a stock, will increase in value from a party's small effort that occurred during the marriage, such as managing the property or trading the stock. Courts have found the asset will remain nonmarital but that the appreciation in value is a marital asset. Once again, the parties can dispense with the uncertainties and address this in their prenuptial agreement.

A "sunset clause" may be included in a prenuptial agreement, dictating that after a certain number of years, the agreement expires.

Countless interesting clauses can be included in prenuptial agreements for circumstances specific to the parties. If cheating has been an issue in the past, an infidelity or "bad boy/girl clause" can prescribe certain penalties, including liquidated damages, if a party is caught straying. These clauses must be carefully drafted to prevent being considered vague, and thus unenforceable.

Perhaps a client is concerned that his or her future spouse will spread rumors about the client and his or her family on Facebook in the event of nasty divorce. In that situation, a "social media disclosure clause" should be added to the prenuptial agreement, wherein the parties are forbidden from posting comments online about their ex-spouse and in-laws. These provisions can also specify liquidated damages and must be drafted carefully.

Although many owners consider their pets just as important as children, the law still classifies them as property in many states. Prenuptial agreements can include provisions that determine who gets the cat and who gets the dog, visitation schedules, and the assignment of pet expenses in the future.

A "sunset clause" may be included in a prenuptial agreement, dictating that after a certain number of years, the agreement expires. In a few states, such as Maine,[2] the agreement will automatically lapse after the parties have a child, unless the parties renew the agreement.

If one partner has a history of substance abuse, a spouse may include a clause requiring random drug screening. Couples can trade shopping allowances for a number of homemade meals per week. The possibilities, while endless, are subject to judicial scrutiny.

What cannot be included

While the rules are flexible, certain restrictions do apply. Parties cannot include anything in their agreement that violates public policy. Furthermore, 27 jurisdictions (i.e., Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, Virginia, and Wisconsin) have adopted the Uniform Premarital Agreement Act (UPAA), or have modified versions on their books. The UPAA provides insight into when prenuptial agreement should not be enforced.

Prenuptial agreements must be in writing to be enforceable. Oral agreements will not be enforced.

Agreements must be entered into freely, voluntarily, and not under duress. An agreement may not be valid if one spouse was pressured by the other, by his or her lawyer, or by family members to sign it. A court will invalidate an agreement that it determines was made under the threat of force, emotional

stress, financial pressure, or physical/mental disability. It is good practice to have the signing of the agreement videotaped to show that both sides entered into the agreement on their own free will, and were not under the influence of any substance while signing.

An agreement cannot be patently unfair. If an agreement leaves one spouse needing public assistance, a court will not enforce it because of public policy. Clients must be reasonable when negotiating terms. If one spouse has no source of individual income, the other spouse must provide assets or income so the nonmoneyed spouse can survive.

In some states, including Florida,[3] temporary spousal support and attorney's fees issued during the pendency of the case cannot be waived. If an agreement is challenged for any of the reasons above, a party could be on the hook for temporary alimony and attorney's fees while litigating the validity of the agreement.

Full financial disclosure

The parties should make full financial disclosure prior to signing. If one spouse hides foreign accounts, misstates his or her net worth, or flat out lies in any way, the entire agreement can be overturned. Financial disclosure is a critical part in which financial advisors will be heavily involved.

Provisions related to children

Couples anticipating to start a family often include provisions regarding children. For example, parties can indicate that, in the event of a divorce, they intend to exercise an equal 50-50 timesharing schedule, or they may formalize their agreement that the children should attend private school and who will pay for it, or the nature of the child's religious upbringing. For issues affecting children, the court will always make the final determination based on the "best interest of the child" standard.

Practice tips

Financial advisors and other nonattorney advisors can be of great assistance in the prenuptial agreement process but *must refrain from giving legal advice.* They should refer the client to an attorney with experience drafting and defending contested prenuptial agreements. While there is no requirement that a party be represented by an attorney, having independent counsel provides less ability for a spouse to challenge the agreement. Often the wealthier individual will hire an attorney to draft the agreement and the other party's attorney will review and revise it.

The drafts can go back and forth several times. Thus, it is crucial to advise clients to start early. Suggest a prenuptial agreement to clients as soon as they reveal that they are getting married. Drafting it at least six months in advance ensures enough time for both parties to review and make changes. An agreement executed right before the wedding creates more of a presumption of duress and can be harder to enforce. There must be ample time for reflection between the time that the agreement is signed and the wedding occurs, preferably 90 days.

If a financial advisor is involved in the process, he or she should prepare the client for meeting with the attorney. The financial advisor should assist the client in creating a detailed list of all assets, liabilities, income, and expenses.

Even those estate planners who do not draft the agreements themselves should have an understanding of the nuances of a prenuptial agreement. This will allow them to help clients financially plan one of the biggest events of their lives. Litigating a divorce is not only time-consuming and emotionally intense but it can be very expensive. While a quality drafted prenuptial agreement may not be a cheap endeavor, it surely beats the alternative.

It is far better to plan for the worst and hope for the best. Clients should take control of their own destiny and make provisions for divorce rather than let the state laws and decisions of a judge make these decisions for them and at a great expense to them. ■