

**THE PRENUPTIAL AGREEMENT —FOR LOVE OR MONEY**

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As recently as fifteen or twenty years ago, the experienced matrimonial practitioner had occasion to write one or two prenuptial agreements per year, and sometimes even fewer than those. Now, with the advent of equitable distribution of marital property, multiple marriages and an increase in the aging population, it has been a common-place occurrence for clients to request prenuptial agreements in order to preserve the separate character of presently held property, to protect rights relating to future acquired assets (in addition to the preservation or waiver of estate rights) and sometimes to provide effective Medicaid planning.

A. The Proliferation of Prenuptial Agreements.

In the past, prenuptial agreements were designed primarily to protect estate rights. In recent years, the purpose has expanded to cover broad estate planning which may encompass many obligations and rights arising out of a marital relationship. Provisions now include, among others, predetermination of rights with regard to marital and separate property during the lifetime of the spouses, maintenance, pension rights, life insurance provisions, distribution of acquired property and other marital benefits. The prenuptial agreement, which once rarely was more than three or four pages in length is now commonly eight, ten or more pages and sometimes as long and as involved as an entire post-marriage settlement agreement.

Historically, prenuptial agreements were useful tools in protecting decedents' estate rights. Commonly, either one or both parties to a contemplated marriage waived his or her

rights to the other party's estate in the event of death of that party. Prior to 1980, equitable distribution of marital property was not a consideration under New York Law. Consequently, the prenuptial agreements commonly focused on the waiver of estate rights and, possibly, the waiver of alimony or a provision for alimony in a specific amount and for a specific time.

However, with the advent of equitable distribution of marital property, the prenuptial agreement expanded in scope to encompass not only the protection of decedents' estates but also waivers or provisions relating to the acquisition and distribution of marital property.

As second and third marriages began to abound, prospective spouses often desired to protect property rights for children of prior marriages. They also wanted, in appropriate cases, to limit liability for maintenance in the event of a divorce. Among the older population, serious considerations have arisen with regard to protection of Medicaid benefits. Younger people marrying for the first time, whose parents were wealthy, were influenced by their parents to protect the parents' property which would evolve to the children by way of estate planning and estate distributions.

In short, the proliferation of prenuptial agreements in recent years is a byproduct of sociological and economic changes affecting a large portion of our population.

#### B. Requisites for a Valid Prenuptial Agreement.

One of the most obvious ways of minimizing possible foreseeable problems after a marriage is a prenuptial agreement. Agreements of this type have become fairly common among persons of all ages who marry or remarry. Many precautions should be taken because the agreements are usually strictly construed, being in derogation of common law and of statute law. There are five indispensable requirements to a valid prenuptial agreement.

First, there must be complete financial disclosure by each of the parties to the other in writing. Although it was formerly held that prior to the marriage, parties entering into a prenuptial agreement are not in a confidential relationship with each other, the Court of Appeals in *Matter of Greiff*, 92 N.Y.2d 341, 680 N.Y.S.2d 894, 703 N.E.2d 752 (1998), indicated otherwise. It is not uncommon during a challenge to the prenuptial agreement for one party to claim ignorance of the extent of the financial resources of the other party. In the absence of that knowledge, the claim is frequently made that had such financial information been revealed, the prenuptial agreement might not have been entered into or, if it were, the terms would have been significantly different. If there is a concealment of assets and income, then there exists a basis to presume that there has been overreaching, concealment of facts, misrepresentation or other forms of deception. (See, *In re Phillips's Estate* (1944) 293 NY 483, 58 N.E.2d 504, which held that parties to a prenuptial agreement, although not in a confidential relationship with each other, nevertheless stand in a relation of mutual confidence which calls for "good faith of a high standard in disclosing those circumstances which are relevant to the contemplated arrangement".)

Consequently, it is suggested that a net worth statement be prepared by each of the parties, using the form which is prescribed by 22 NYCRR §202.16 (b) and Appendix A of that Rule. If the parties desire not to provide financial information in the detail required by the form, then at a very minimum, a general statement should be included in the agreement regarding the assets, income and net worth of each of the parties.

A second indispensable requisite to the preservation of the integrity of the agreement is that each party must be separately represented by counsel of that person's own choosing and without any suggestions by the other party as to that choice. It has been held that the failure of one party

to be separately represented was not *per se* fatal to a matrimonial agreement. The leading case is *Levine v. Levine* (1982) 56 N.Y.2d 42, 451 N.Y.S.2d 26, 436 N.E.2d 476. However, it will be noted that in order for the parties to determine whether or not the agreement was valid, it was necessary to litigate the case from the trial court, through the intermediate appellate court and to the Court of Appeals -- with enormous expense involved -- to learn whether or not the agreement would be upheld. It would have been far less expensive, expedient and reassuring for each of the parties to have been separately represented. The cost of a second attorney, who is consulted regarding an agreement prepared by the first attorney, will certainly be far less costly than even the initial stages of any process of litigation. The client should be cautioned not to suggest the name of an attorney to be used by the other party in order to avoid the appearance of impropriety. Rather, the other party should have a free and independent choice of attorney, thereby eliminating any claim that the attorney might have been biased.

If the other party is reluctant to retain an attorney, then it is suggested that an agreement be prepared based upon information supplied by the client. Under no circumstances should the attorney for the client discuss the matter, see or have any contact with the other party (again, to avoid any possible claim of influence by the attorney on the other party). A copy of the agreement may then be given to the client for delivery to the other party with instructions that the other party take the agreement to an independently chosen attorney for a consultation. The copy provided to the other party should be clearly stamped "DRAFT" on each page in order to avoid the impulse on the part of the parties to sign a draft without a second attorney having been consulted. After the consultation, the name and address of the other attorney should then be inserted in the agreement, which is then placed in final form for its execution.

The third prerequisite is a proper acknowledgment of each signature. In order to be valid, the agreement must be signed by each of the parties and acknowledged before a notary public in a form as is required for a deed to be recorded. That requirement is essential in order for the agreement to constitute an "opting out" agreement under Domestic Relations Law §236 Part B (3), whereby the parties by agreement may alter the plan of equitable distribution of marital property that would otherwise be applicable.

In *Matisoff v. Dobi*, 90 N.Y.2d 127, 659 N.Y.S. 2d 209, 681 N.E.2d 376 (1997), the parties had entered into a prenuptial agreement in 1981, which both of them had signed. However, their signatures were not acknowledged. During the trial, both parties testified that the agreement was duly signed and that the signatures were, indeed, authentic. However, what was lacking was the acknowledgment before a notary public or other person authorized to take the acknowledgment.

The Court of Appeals held that despite the fact that the signatures were genuine and that the parties admitted that they had in fact signed the agreement, nevertheless the requirements of the statute (Domestic Relations Law §236 Part B, subdivision 3) requires a certificate of acknowledgement in the same form as required for a deed to be recorded. Because that certificate of acknowledgement was lacking, the agreement was invalid.

It should be noted, however, that in the recent case of *Bloomfield v. Bloomfield*, decided on November 27, 2001, the Court of Appeals found that a 1969 premarital agreement (which predated the 1980 Equitable Distribution Law) was not required to have such an acknowledgement. The case is also significant in holding that in a pre-Equitable Distribution Law

agreement (in this case 1969) a party could waive rights to the equitable distribution of marital property even before those rights were created or even contemplated.

A fourth indispensable ingredient in protecting the integrity of the prenuptial agreement is -- time. To expect a party to sign an agreement which affects substantial rights and obligations minutes, hours or even a few days prior to a marriage, can very easily give rise to a claim that the prenuptial agreement should be set aside for the reason, among others, that it was signed without sufficient time to contemplate its full import; it may also be claimed that it was signed under the duress, that is, the pressure of time and the emotional anxiety of a party immediately or shortly prior to a marriage to the extent that full consideration was not given to the agreement. Here again, this fourth ingredient for a valid agreement is essential to minimize an attack upon the instrument and to protect its validity. It has been said that the agreement should be signed well in advance of the anticipated nuptials and before any commitments are entered into, which may influence or induce a party to sign the agreement, such as an obligation for a wedding reception made to a catering hall. Weeks or months are appropriate as the advance time for signing the agreement prior to the occurrence of the wedding ceremony.

The fifth requisite to a valid prenuptial agreement is that it have an essential fairness. If there was any doubt as to whether or not the parties to a prenuptial agreement were in a confidential, or special, relationship prior to their marriage, that issue was resolved by *Greiff v. Greiff, supra*, wherein the Court of Appeals held that the parties were in “ a relationship of trust and confidence” at the time of entering into an agreement with the result that the burden shifted to the party seeking to sustain the agreement to disprove fraud or overreaching. Therefore, freedom from fraud, deception, undue influence and overreaching required a scrutiny of the

agreement beyond that of ordinary commercial transactions. Consequently, the agreement must be free from “undue and unfair advantage”.

C. Content of the Prenuptial Agreement.

Historically and prior to the advent of the Equitable Distribution Law in New York in 1980 (Domestic Relations Law §236 Part B), prenuptial agreements dealt primarily with the regulation of estate rights or the waiver or partial waiver of them. Sometimes they contained provisions regarding the support of one of the parties to the agreement in the event of the death of a party or a dissolution of the marriage. They rarely contemplated a division of what is now known as "marital property" for the reason that the concept of marital property had not yet become the law of New York. Although community property and marital property existed elsewhere in the United States, most prenuptial agreements in New York overlooked the fact that the parties could subsequently live in a community property or marital property jurisdiction or that the law then extant in New York would change. However, with the increasingly transient nature of society, it is now necessary to consider in a prenuptial agreement not only marital property as that expression is interpreted in New York but community property and other types of property as may exist in other jurisdictions as well.

The structure of the prenuptial agreement commonly begins with recitals. Although recitals in an agreement are not considered a part of the actual agreement of the parties, nevertheless they are included in order to indicate the parties' intent and to aid in the interpretation of the instrument. Recitals in a prenuptial agreement commonly indicate the fact that each of the parties has known the other for a sufficiently long period of time in order to make a determination that a prenuptial agreement is appropriate. Recitals also usually reflect that disclosure has been

made and that each of the parties may have earnings, liabilities, assets and obligations for which the agreement will seek to protect or insulate them against the other to the extent indicated by the agreement itself. In a typical prenuptial agreement, there is the expressed intent that each party own and dispose of property in the future without being restricted by provisions of law which may limit the exercise of those property and income rights. The recitals should be based upon the factual circumstances of the parties and should not, under any circumstances, be simply a copy from a form agreement, such as the one which is annexed as Appendix A to these materials. The illustration contained in Appendix A presumes that each party has independent income and has no need for financial support from the other. It also indicates in the recitals that although each of the parties may be financially independent, one may have significantly greater income and/or the other. Care should be taken to modify the recitals in any form agreement to conform strictly to the facts of the case. Failure to do so may provide a handle for one of the parties to grasp in seeking to attack the agreement at a subsequent time. The recitals are critical in that they set the tone for the entire agreement, in addition to the possibility that they may be referred to if the agreement should require interpretation at a subsequent date.

The recitals shown in the form agreement in Appendix A reflect an intent that each party may acquire property in the future, may dispose of it and may deal with it in any manner that the party chooses, irrespective of requirements of law which may otherwise be applicable. Before inserting such a recital in a prenuptial agreement, the attorney should be aware that such an intent is actual in the case at hand.

The agreement should be written in as simple terms as possible. Prenuptial agreements that often extend for 15 or 20 or more pages may become a burden for parties to read and to



understand. To the extent possible, plain language should be employed with precision and conciseness.

The form agreement contained in Appendix A is structured so that the parties may readily identify the content of each paragraph by paragraph headings. Separately treated are rights with respect to presently held property and also property to be acquired in the future. There is also a provision for property in which the parties wish to share an ownership interest, which may be held in their joint names. For example, the parties may wish to retain their separate, premarital property and also after-acquired property. However, they may purchase a residence in which they wish to share title jointly. Under New York State Banking Law §675, there is a rebuttable presumption that a bank account held in the joint names of parties is owned by each of two parties in undivided equal shares. The parties may wish to alter that percentage either by a designation when opening the account or by a separate document. If a residence is subsequently purchased in the joint names of the parties as husband and wife, they are treated as owning the property as tenants by the entirety, which gives survivorship rights in the event of the death of either of them and partition rights on a 50-50 basis if the marriage should be terminated by divorce or annulment. Here again, the parties may choose to take title as tenants-in-common in whatever percentage ownership they may choose, or they may eliminate survivorship rights or deal with the property in any other manner. The form prenuptial agreement (Appendix "A") affords the parties those options.

Historically and typically, a prenuptial agreement contains a waiver on the part of at least one party (commonly both parties) to share in the estate of the other as a beneficiary and a fiduciary. The agreement should be explicit regarding the waiver of rights. The form agreement

in Appendix A specifically makes reference to selected portions of the Estates, Powers and Trust Law to eliminate any question regarding the nature and the extent of the waiver. An Alabama case, *Steele v. Steele*, 623 So. 2d 1140 (Sup. Ct., Alabama 1993) held that a waiver of estate rights in general terms did not constitute a waiver on the part of a surviving spouse in asserting a claim for the wrongful death of the decedent. That waiver was not specifically set forth in the prenuptial agreement in that case and, therefore, was held not applicable.

Because prenuptial agreements are strictly construed, any waiver of rights is similarly viewed narrowly, and no waiver will be presumed unless it is specifically set forth. A further illustration is where a woman has waived her right to serve as administratrix or executrix "as the surviving spouse of the decedent". However, she may be the mother and custodial parent of a child of the parties, and the child may be the primary beneficiary of the estate. If the decedent died intestate, the surviving wife may make a claim that although she waived her right as administratrix "as the surviving wife of the decedent", she did not waive her right to serve in that capacity by virtue of her being the custodial parent of the principal beneficiary of the estate. Probably, she would prevail in her argument and would achieve the status of administratrix of the estate, not by virtue of any spousal right (which had been waived), but rather because of her right as the custodial parent of the prime beneficiary of the estate. The waiver of fiduciary rights should be sufficiently broad to eliminate any theory by which a surviving spouse may seek to obtain the status as a fiduciary.

Nevertheless, it is quite frequent that subsequent to the marriage, one or both of the parties may wish to provide in a last will and testament for the other party and/or to designate the other party as a fiduciary. In order to eliminate any claim that the future right to participate in estates

has been waived by the prenuptial agreement despite a subsequently executed will, that argument may be eliminated by a provision in the prenuptial agreement that a subsequently executed testamentary writing will prevail.

A prenuptial agreement may also constitute the waiver of maintenance in the event of a dissolution of the marriage. This is a particularly vexatious clause among older persons, particularly where one of them may seek Medicaid benefits. General Obligations Law §5-311 specifically provides that an agreement may not eliminate the obligation of a spouse to support the other if the other spouse is or is likely to become a public charge. A Medicaid recipient constitutes a party receiving public assistance funds. In a sense, therefore, the recipient becomes a public charge. Social Services Law §101 requires a spouse of a recipient of public assistance to be responsible for the support of such a person, if the obligor (called the "community spouse") is of sufficient financial means. (See also Family Court Act §415.) Under Social Services Law §366.4 (h), the recipient of public assistance, as a condition for eligibility, must assign to the public authority any claim for support from the community spouse to reimburse the public authority for the cost of care of the institutionalized or needy spouse. The refusal on the part of the community spouse to support the needy person is called "spousal refusal". Not all counties will pursue rights of reimbursement under Social Securities Law §366.4 (h) on the basis of political considerations. Consequently, the absolute waiver of any obligation for support in a prenuptial agreement (as well as a postnuptial agreement) may not be valid. In that case, it is particularly important that the agreement contain a separability clause to protect other provisions of the agreement.

Another common provision in a prenuptial agreement is the predetermination of who will be responsible for debts and obligations which may be incurred by either or both of the parties after the marriage. The form agreement in Appendix A contains an indemnity provision so that if there is a violation of the obligation with respect to debts, the aggrieved party may recover not only the amount paid to a creditor but also any legal and other costs which might have resulted from a breach on the part of the other party.

Some prenuptial agreements contain a provision that one or both of the parties waive pension and other forms of deferred compensation rights in plans of the other party. Where any of those plans have been qualified under ERISA, it has been held that such a waiver is invalid. See *Hurwitz v. Sher*, 15 E.B.C. 1257, 92-1 USTC pp. no. 50,213 (USDC, SDNY, 1992, 91 Civ. 3486 (RTP)). This decision conforms to Treasury Regulations which similarly bar waiver in a prenuptial agreement of pension rights acquired by a spouse after the marriage. The rationale is that only a "spouse" may waive rights in an ERISA deferred compensation plan, and a person signing a prenuptial agreement is not yet a "spouse". If the plan is not qualified under ERISA, such as an IRA, then the rule does not apply. One solution to the problem, if applicable, is to "roll over" ERISA pension benefits into an IRA prior to the marriage. The prenuptial waiver will then apply to the IRA, whereas it would not to the ERISA pension plan.

In an effort to overcome the foregoing impediment, the form agreement in Appendix A sets forth language to carry out the intention of the parties with respect to the waiver of pension rights. It imposes upon each of the parties an obligation, after the marriage has taken place, to effectuate a proper waiver of spousal pension rights. The possible ability of a party to enforce that provision of the prenuptial agreement was indicated in dictum in *Richards v. Richards*, 167 Misc. 2d 392,

640 N.Y.S.2d 709 (Sup. Ct., N.Y. Co., 1995), *affd.* 232 A.D.2d 303, 648 N.Y.S.2d 589 (1<sup>st</sup> Dept., 1996).

There follow in the form prenuptial agreement in Appendix A additional clauses, commonly referred to as "boiler plate". One should not be deceived by relying upon the language in those clauses. Instead, each of them must be specifically tailored to the requirements and facts of each case. There is a recitation of disclosure as well as a provision for indicating the attorneys representing each of the parties. The general provisions should also be examined to determine whether or not changes should be made.

Sample provisions relating to disclosure are contained in the form agreement. Immediately following the form are additional alternative paragraphs in the event that maintenance payments are to be included in the agreement upon a dissolution of the marriage. Life insurance benefits and a limitation of the waiver of estate rights may also be the basis for alternate provisions in the agreement.

It is not uncommon, especially among elderly persons, for parties to be concerned about the continued residence of the survivor in the event of the death of the other party. Consequently, a provision may be included in the prenuptial agreement which provides for the continued occupancy of a surviving spouse. The clause in the form is skeletal in nature and should be expanded or changed as appropriate.

A further provision common to prenuptial agreements among older persons relates to a consideration for long-term care in the event of a disability of one or both of the spouses. Here again, the paragraph suggested in the form is only a beginning and a simple illustration, which will require embellishment in an appropriate manner.

Good draftsmanship of any agreement mandates that any expressions which are used be clearly defined. The prenuptial agreement in Appendix A is no exception. Because the word "remarriage" and the period of time when parties are "married" have highly significant consequences, it is absolutely essential that those expressions be defined in a manner in which the parties intend. The definitions shown in the paragraph in the form are only suggested and are not designed to be anything more than samples of what may be considered. They should be changed in appropriate circumstances to carry out the actual intent of the parties for whom the agreement is being drafted.

Despite the many cautions of tailoring any form agreement to the specific requirements of a case, there persists a continuing inclination simply to copy suggested provisions. In a prenuptial agreement, in particular, the practice is extremely dangerous. The form should be considered as merely an illustration of some of the types of concerns which should be given consideration, and the provisions should be changed, expanded or eliminated in order to carry out the specific desires of the parties involved.

Clearly, prenuptial agreements should not be drafted by copying forms. Changes in the law mandate specialized provisions. The facts of each case must be carefully analyzed so that the agreement will truly carry out the intent of the parties. The negotiation of the terms against a backdrop of the attitudes and reactions of the parties will often bring to the surface underlying fears, concerns and desires. In an appropriate case, it may be wise to collaborate with a skilled matrimonial attorney experienced in prenuptial agreements, particularly when substantial assets are involved or complex legal issues exist.

D. Query.

At some point, a party may be presented with the difficult determination of the true basis for the contemplated marriage —is it love? Is it money? Is it security? Or is there a different agenda? The elements of trust, confidence in the relationship, and even greed, often become a part of the scenario.

It is then that the relationship between the parties is really challenged, underlying motives and concerns are revealed and the agreement becomes the true test of trust, confidence —and love.