



PROGRAM MATERIALS
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Prenuptial Agreements in 2019: What Every Lawyer Should Know

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PRENUPTIAL AGREEMENTS IN 2019

WHAT EVERY LAWYER SHOULD KNOW



WHY ARE WE TALKING ABOUT PRENUPTIAL AGREEMENTS?

- Prenuptial Agreements are on the rise, particularly among millennial couples.
- One reason for this trend among millennials is that they are getting married later in life. Often, by the time the couple walks down the aisle, one or both of them already own a house and/or have significant retirement accounts.
- We also see a lot of clients who are entering into a second marriage. Those clients are still bearing the financial and emotional scars of their first divorce and wish to avoid the same fate with their second spouse.
- A smaller category is those cases where one or both of the parties has family money, either an interest in a business or a family trust, that they or their parents want to make sure will not pass to the other spouse in the event of a divorce.

WHY EVERYONE SHOULD HAVE A PRENUPTIAL AGREEMENT?

- Prenuptial agreements are not just for the wealthy. Although the previous slide discussed the types of cases that we generally see, really anyone entering into marriage can and should get a prenuptial agreement.
- A prenuptial agreement is simply an agreement signed by a couple before marriage that states how their marital assets, separate assets and liabilities should be divided in the event that they divorce.
- The agreement only becomes valid if the parties actually get married.
- The parties don't need to have any property yet to agree on how they would distribute it if they get divorced.
- If the couple ultimately does divorce, they won't need to waste lots of money and energy dividing up their estate.
- In short, a prenuptial agreement is doing the financial work of a divorce on the front end so the back end goes quickly and with a lot less animosity than the traditional divorce process.

PRENUPTIAL AGREEMENT BASIC PROVISIONS

- **Prenuptial agreement must have the following basic provisions:**
- A provision stating that the agreement is only valid if the parties wed;
- A provision providing for full disclosure of assets and income;
- A provision indicating how separate property (i.e. property that is not part of the marital estate) is going to be treated if the parties divorce;
- A provision indicating that the parties were represented by counsel, or if not, that the unrepresented party specifically waived their right to counsel; and
- Exhibits detailing the assets and liabilities of the parties as of the preparation of the agreement.
- Practice Tip: A prenuptial agreement is a valid contract between the future husband and future spouse. Therefore, it must contain basic contract language.

SAMPLE: FULL DISCLOSURE PROVISION -SPECIFIC

- “Bonnie’s financial disclosure statement and her 2018 income tax return are attached hereto as **Schedule A**. Bonnie has made a full and fair disclosure of her financial worth and **Schedule A** is a statement of her financial worth as of the date of execution of this Agreement. Bonnie has an interest in a number of assets which have been reflected on **Schedule A** based upon her estimates of their market value and which are not susceptible of precise valuation. If other methods of valuation were employed, Bonnie’s net worth could be substantially greater than that indicated on the statement. It is understood that the figures and amounts contained in **Schedule A** are approximately correct and are intended to be reasonably accurate.
- Bonnie acknowledges that she have been given opportunity to make additional inquiries as to Clyde’s assets and has been advised of her right to obtain counsel to make additional inquiries as to Clyde’s assets. Bonnie does not wish to receive any additional information concerning the economic valuation.”

SAMPLE: FULL DISCLOSURE PROVISION-GENERAL

- “Both parties are fully cognizant of the right to a full and fair financial disclosure, have provided such disclosure to the other party, and are satisfied that they each received such disclosures. The parties acknowledge that it is impossible to predict the rate of appreciation, if any, in the value of his or her respective separate property. Each party knowingly and intelligently waives his or her respective right (if any) to any additional financial disclosures. Each of the parties acknowledges that he or she considers the provisions of this Agreement to be fair, just, and reasonable, that each enters into it freely and voluntarily, and that each does not desire to have or become possessed of any property of the other party or any interest therein which the other party now owns or hereafter may own, except as expressly provided in this Agreement.”

SAMPLE: TREATMENT OF SEPARATE PROPERTY

- “Notwithstanding any language to the contrary contained in the Pennsylvania 1980 Divorce Code, as amended, or any other Pennsylvania law or the law of any other jurisdiction, all assets set forth in Bonnie’s financial disclosure statement, attached hereto as **Schedule A**, plus increases in value of, income produced thereon, and all property acquired in exchange therefor, shall constitute Bonnie’s separate property (“Separate Property”). Except as otherwise set forth in this Agreement, all other assets, real or personal, titled in Bonnie’s name, whether acquired before or after the marriage date, plus increases in value thereon, shall constitute Bonnie’s separate property. Under no circumstances shall any Separate Property, or the growth or appreciation in value of said property, be subject to a claim by the other party or considered as a factor at equitable distribution. Tax consequences, including all transfer taxes, and capital gains for Bonnie’s separately held assets shall be her sole responsibility.”
- Practice Tip: Make sure you include growth on separate property if you don’t want increase in value of that asset to be considered marital and subject to division!

SAMPLE:TREATMENT OF MARITAL PROPERTY

- “Property not specified in **Schedules A** and **B** herein shall be presumed to be marital property unless gifted to one another or made the subject of a separate written agreement signed by both parties. Marital property shall be divided as set forth in Paragraph 18 of this Agreement.
- Paragraph 18:The marital property and marital debt (including net equity to be divided in the parties’ real property as set forth in Paragraph 10 above) shall be equally (50/50) divided.”
- Practice Tip: Make sure you specify how marital property is going to be allocated, i.e. 50/50, 70/30, etc. Equitable does not mean equal!

SAMPLE: COUNSEL/WAIVER OF COUNSEL

- The provisions of this Agreement and their legal effect have been fully explained to Clyde by his counsel, Elizabeth J. Billies, Esquire, and that he fully understand the facts and has been fully informed of his legal rights and obligations under the Agreement.
- Bonnie has specifically waived her right to obtain counsel to represent her in this matter despite being advised of her right to same. Notwithstanding, Bonnie fully understand the facts and her legal rights and obligations under the Agreement.

SAMPLE: SCHEDULE A BONNIE'S FINANCIAL DISCLOSURE

- **See other handout!**
- Practice Tips:
 - Be as specific as possible regarding accounts, values and dates of values.
 - Include everything of value.
 - Attach a most recent copy of the parties' tax returns.
 - Have the parties initial or sign the Financial Disclosure.
 - Do not allow the parties to sign the agreement without this financial disclosure completed or attached.

Presenter to read NY Code

This code is required for all attorneys wishing to receive CLE credit in the state of NY

Please notate it carefully

The presenter will only be able to read the code twice and will not be able to repeat it or email it to you.

Thank you!

THINGS TO LOOK FOR IF YOU ARE REVIEWING A PRENUPTIAL AGREEMENT

- In addition to making sure that the basic prenuptial agreement provisions are included, you also want to make sure that the agreement includes the following:
- Specific values for assets and liabilities: Failure to include those could result in a lack of full disclosure issue if the parties divorce and one attempts to argue the agreement is invalid. If the value of an asset is unknown because the parties have chosen not to get it appraised, particularly a business interest, then make sure that you say that. Also, make sure you attach a business tax return (if applicable) or a K-1 to the agreement.
- Alimony/spousal support or a waiver of same: Sometimes clients don't understand that the agreement waives their right to alimony/spousal support. This happens when the couple doesn't discuss it and then the other lawyer includes the waiver almost as *pro forma*. If the agreement does waive the parties' rights to such support claims, then you need to explain this to your client and make sure this is what they agreed to before they sign.
- What happens if they put separate property into a joint asset?: Does the contributing party get a refund at divorce or is it considered a gift to the marital estate? Make sure you understand the parties' intentions and the agreement makes it clear.

WHAT INFORMATION IS NEEDED TO PREPARE A PRENUP?

- Date of marriage;
- Recent tax return and proof of income;
- Appraisals for real estate, business interests and valuable personal property;
- Current statements for any financial accounts and retirement assets;
- Current statements for any liabilities, including student loans, mortgages and credit cards; and
- Kelly Blue Book valuation for vehicles.
- Practice tip: If clients want to give you a list of their assets and liabilities, similar to a Personal Financial Statement, that is okay as long as you note that this is what you were given in the agreement. This protects you as the attorney should there be issues with lack of full disclosure at a later date.

STRATEGIES FOR NEGOTIATING A PRENUPTIAL AGREEMENT

- Remember, these parties are likely going to get married even if you think the prenuptial agreement is not fair to your client.
- You can not talk to the client about their intended in the same manner that you would talk to a divorce client about their soon to be ex-spouse.
- Unlike divorcing parties, this couple is still in communication with one another. In fact, they likely live together. Keep this in mind when you deliver certain information to your client about the negotiation process or when you are conveying certain information to opposing counsel.
- Try your best to not stress your client out with the negotiation process. They are likely under pressure regarding wedding planning, dealing with family issues, etc. Make sure that you are minimizing the back and forth and maximizing any time that you speak to the client about the agreement.
- Do not wait to resolve issues until the last minute! Again, there is a deadline to get this done., i.e. wedding day. No one wants to deal with this days before their wedding. Do your best to get the agreement signed as early as possible.

2019 PRENUPTIAL AGREEMENT TOPICS-PETS

- While pets are still considered personal property in some states, they have increasingly become thought of as members of the family, particularly among millennials.
- In fact some couples are including pet provisions in their prenuptial agreements, a/k/a petnuptials.
- These provisions can address:
 - Who will retain certain pets in the event of a divorce;
 - Right of first refusal: If one party has to give up a pet after the divorce they have to offer the pet to the other party first before seeking a third party home;
 - Allocation of vet expenses after a divorce; and
 - Visitation schedule. (Note: This may not be enforceable in Court. If one party violates the terms).

2019 PRENUPTIAL AGREEMENT TOPICS: EMBRYOS

- The disposition of embryos has increasingly become an issue in divorce cases.
- Parties can set forth what they want to do with embryos in their prenuptial agreement to avoid this issue after separation.
- Make sure that this language is consistent to whatever is set forth in the contract with the fertility clinic.
- Do your research and make sure that the parties are not contracting for anything that is not valid under the laws of your state.

2019 PRENUPTIAL AGREEMENT TOPICS: INTELLECTUAL PROPERTY/CODES

- What kind of assets are these? Anything that you could obtain a patent for, phone apps, and computer programs.
- The biggest issue with these assets is how to value them if they have not yet been valued by a third party.
- Most parties do not want to get a valuation for the prenuptial agreement alone.
- If you are not going to have these assets valued then you need to list the asset with a value of “unknown” in the Financial Disclosure. Be as specific as possible.
- Also include a provision specifically stating that the parties are aware that party A has this intellectual property and that party B has specifically chosen not to have it valued.
- If there is a patent application, we would suggest attaching it to the agreement so it's clear what asset you are referring to in the agreement. This is important if party A goes on to create more intellectual property during the marriage and you want to make sure this property is excluded from division while anything created later is not.

2019 PRENUPTIAL AGREEMENT TOPICS (BLOGGING/VLOGGING)

- This applies to cases where one or both of the parties have websites or YouTube channels.
- These sites vary. Some are simply a hobby. Others can be a party's full-time occupation.
- The biggest issue to consider is whether the party's online presence is income or an asset. If it is income, then it is not an asset that can be divided in a prenuptial agreement, except that the monies can be considered in determining alimony (if alimony is not precluded). If it is an asset, then it should be listed in the party's Financial Disclosure.
- How do you know which applies?
 - Some websites are created just to be sold. If that is the case then you can argue that the site is an asset.
 - Does the website create products or have employees? Then it is a business that can be valued as an asset.
 - Does the website simply provide passive income through ad revenue or perhaps the sale of online courses? Then it is likely going to be considered income to the website owner.
- Practice Tip: Make sure to attach a copy of the parties' tax return if it is going to be considered income. You can also mention how you treated it in the agreement.

2019 PRENUPTIAL AGREEMENT TOPICS: WAIVER OF RIGHTS/REMEDIES

- “The parties forever waive any future right to challenge the validity or enforceability of this Agreement, or any portion of it, based upon: (1) the absence of full and fair disclosure by the other party, (2) a claim that the Agreement is inequitable, (3) a claim that the Agreement is unconscionable, (4) a claim that the Agreement does not make a reasonable provision for one or the other of them, (5) a claim of inadequate or no legal representation, (6) a claim of failure to fully realize the extent and nature of any rights waived, (7) a claim that new statutory or decisional law overrides the enforceability of the Agreement or renders it invalid because of public policy, (8) a claim that the laws of a different jurisdiction render the Agreement unenforceable, (9) a claim that the Agreement was executed under duress, or (10) any other defense to the enforcement of the Agreement.”
- Practice Tip: You should also include a knowing waiver regarding the specific spousal rights that the parties are giving up that they would be entitled under the laws of your states but for this agreement. In general those are, spousal support, estate rights, and claims available to them under the divorce code such as property division, counsel fees, etc.

QUESTIONS?

- **If you have any questions, please feel free to contact us at:**
 - Elizabeth Billies, ebillies@dischellbartle.com
 - Inna Materese, imaterese@dischellbartle.com
 - If you are interested in more information about divorces and other family law topics, feel free to check out my website <https://thedivorcelawyerlife.com>.
- THANK YOU!!!

SCHEDULE A

BONNIE'S FINANCIAL DISCLOSURE

Real Estate:

123 Main Street, Philadelphia, PA

Fair Market Value: \$310,000

Mortgage Balance: \$157,000

Bank Accounts:

Wells Fargo Account x9999

Value: \$2,940 as of June 1, 2019

Business

456 Pets, Inc.

Value unknown

Retirement:

Fidelity 401(k)

Value: \$45,732 as of June 1, 2019

Fidelity IRA

Value: \$210,000 as of June 7, 2019

Stock:

Big Company Stock

Value: Approximately \$30,000

Life Insurance:

\$100,000 term life insurance policy with no cash surrender value

Jewelry/Personal Property:

Engagement Ring 2ct.

Value: \$25,000

Debt (other than mortgage):

None