PROGRAM MATERIALS
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Prenuptial Agreements 101: How to Create Enforceable Terms in Premarital Agreements

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Prenuptial Agreements 101 — An Overview for Attorneys

LEGAL REQUIREMENTS AND DRAFTING TIPS

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& Family Law Group
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DISCLAIMER

This presentation contains general information and does not constitute legal advice.

Be sure to direct specific questions about your own situation to an attorney.

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- Author.
- Frequent Keynote Speaker.
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- Published in New Jersey Lawyer Magazine, New Jersey Law Journal, Matrimonial Strategist, and more.
- New Jersey Law Journal Top Woman in the Law, 2018

"Bari was wonderful!! She always explained the law thoroughly. I understood every part of the process. She was supportive, smart & professional. Everyone said "You need a shark", I said "I need a stingray". Bari has an amazing combination of elegance & intelligence & can fight the fight…"

Tara M.

Course Outline

- Legal Requirements of Prenuptial Agreements
- Client Interviews and Client Education
- Document Collection and Review
- What to Include in the Prenup
- What Not to Include in a Prenup

LEGAL REQUIREMENTS OF PRENUPTIAL AGREEMENTS

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Uniform Prenuptial Agreement Act (UPAA)

- Approved by the Uniform Law Commission (UCL) in 1983 in an effort to create uniformity from state to state.
- Prioritizes predictability of enforcement over substantive fairness and mandates an easy to comply with process:
  - **Voluntary execution of a written agreement (no duress or fraud), and**
  - **Either fair financial disclosure (actual or constructive) OR an express and voluntary waiver of disclosure,**
- Provides that agreements are enforceable even if unconscionable:
  - **at the time of divorce, or**
  - **at the time of execution as long as other requirements have been fulfilled,**
- Provides that waivers of spousal support are enforceable unless the result is to make a party a public charge,
- Puts the burden of proof on the challenging party.

UPAA Did Not Create Uniformity

- The UPAA was not very successful in creating uniformity.
- Many states were not ready to go that far in recognizing the enforceability of prenups.
- About half the states adopted the UPAA, but many made significant changes, usually to add more requirements.
- In 2012, the UCL approved the Uniform Premarital and Marital Agreements Act (UPMAA), which was intended to replace the UPAA.

Uniform Premarital and Marital Agreements Act (UPMAA)

- Applies to contracts between spouses (marital contracts or "postnups") as well as to premarital contracts.
- Adds requirements:
  - **Adequate financial disclosures,**
  - **Reasonable time and financial means to obtain advice of legal counsel,**
  - **If a party declines counsel, the agreement must include a clear waiver of rights, or an explanation in plain language of marital rights or obligations modified or waived,**
  - **Any term of an agreement may be unenforceable if:**
    - **in the context of the agreement as a whole, the term was unconscionable at execution, or**
    - **if enforcement would result in substantial hardship for a party due to material change in circumstances post-execution.**

Bottom Line: No Consensus Among States

- Only two states (Colorado and North Dakota) have adopted the UPMAA.
- Different states may have very different laws.
- Because laws have changed a lot over the years, agreements entered into in the same state but on different dates may be also be subject to different requirements.
- Many states apply stricter standards to contracts between spouses than to prenups because of the fiduciary or confidential relationship the law ascribes to married couples.
- General trend is toward making agreements much harder to set aside.

Review Your State Law:

Formation. Whether affidavits and/or acknowledgments are required in addition to a signed writing.

Financial disclosures. What must be disclosed and what constitutes a valid waiver; burden of proof re adequacy.

Consideration. Whether any consideration is required beyond the marriage itself (most states say no for prenups but may require more for postnups).

Exactly What Can be Addressed. E.g., are there limits to waivers of spousal support?

Advice of counsel. Whether it is required or when and how it can be waived.

Fairness requirements. Must the agreement be fair, or is it only required to not be "unconscionable"? How are these terms defined, and do they apply at the time of execution, at the time of the divorce, or at both?

Statute of limitations on enforcement. How long is it and when does it begin to run?

General Drafting and Enforcement Tips

- State boilerplate can be a start, but every situation is different so terms must be customized.
- Beware of client pressure for a cheap a one-size fits all document—you will be responsible.
- Flat rate charges can be appropriate once you get an idea of how much time an agreement takes.
- Specify when terms apply—when a complaint is filed? When a party moves out? When a party gives notice of divorce?
- If English is not your client's first language, get a translation before finalizing.
- Contract laws of interpretation generally apply.
- The more facts you have that add up to fraud or duress, the less likely the agreement is to be enforceable.
- Advise clients to abide by terms, keep separate property separate, and revisit every few years to see if an update is advisable.

CLIENT INTERVIEWS AND CLIENT EDUCATION

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Initial Client Interview Questions

When is the wedding and have you discussed this with your fiancé yet?

- The earlier the prenup is done, the better, so if the wedding date is set, then the fiancé needs to know about the possibility of a prenup asap.
- Prenups take time, and a rushed agreement is subject to attack, so its really not advisable to attempt to prepare a prenup for someone less than about 6 weeks before a wedding.

Does the fiancé have an attorney?

- You need to make it clear that you can only be the attorney for one party, and that even if the law allows waiver of separate counsel, the agreement will be much stronger if each party has a lawyer.
- You can also let them know that its common, and often even expected, that the party who is more financially well off will pay the fees for the other party's lawyer (but not actually choose the lawyer).

Why do you think you need a prenup?

Common Reasons People Consider a Prenup:

- **Children from a previous relationship**. Many people want to protect their children's rights to certain assets.
- **Business ownership**. Businesses can be complicated and expensive to divide in a divorce, so making decisions up front and putting these in writing can be a way to avoid this.
- **Substantial separate property of any kind.** This could be real estate, a retirement account, or any other kind of asset that one party wants to protect from division in divorce.
- **High income (or anticipation of high income).** High income earners often want to set terms to limit potential spousal support or to change rules that designate all income earned during marriage as marital or community property.
- **High debt.** One party may be coming into the marriage with high debt or planning to incur high debt (e.g., student loans).
- **Anticipation of a substantial inheritance or gift.** These people may actually come in at the urging of the family member who plans to make the bequest.
- **Second Marriage.** This can just be someone who has gone through one difficult divorce and doesn't want another.

Include a Questionnaire in Your Interview Process

- A client may come in with a set idea of why a prenup is necessary, and a questionnaire could clarify this as well as reveal other items that should be addressed in an agreement.
- A basic questionnaire can be a time saver and an outline for your follow-up interview with the client.
- Ask the client to fill it out and just note N/A for anything that doesn’t apply and put a question mark by anything they have no knowledge of.
- Include a checklist for assets and debts of both parties.
- Include blanks for client to fill in details, such as percentage ownership for corporations or partnerships.

Educate the Client on Property Distribution and Spousal Support Under State Law.

- After you have some idea of the client's situation, give them an overview of what would happen without a prenup.
- Include a discussion of where they plan to live and potential differences in state law.
- Certain aspects of distribution and support law are the same from state to state, but there are also many state variations:
  - **Property Distribution**. Equitable distribution is the law in most states, but there are nine community property states (Louisiana, Arizona, California, Texas, Washington, Idaho, Nevada, New Mexico, and Wisconsin).
  - **Alimony (Sometimes called spousal support or maintenance)**. States differ markedly regarding when and for how long one spouse can receive support from the other.

How is property division different in equitable vs. community states?

- Equitable distribution requires a fair division of marital property—not an exactly equal division.
- Community property states require a 50/50 split of all community property.

What is marital property or community property?

- Marital property or community property includes all assets (and debts) that either or both spouses acquire during marriage.
- It generally does not include "separate property," which is property owned before marriage, inherited property, and gifts from someone other than the spouse, as well as new property purchased with funds from disposition of separate property.
- State law determines whether income from separate property remains separate or is considered marital or community property.
- A few states include separate property in the distribution at least sometimes. These "all property" or "kitchen sink" states include Connecticut, Indiana, Kansas, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, North and South Dakota, Oregon, Vermont, Washington, and Wyoming. Eight other states will include separate property when the court finds a need. These are Alabama, Alaska, Arkansas, Hawaii, Iowa, Minnesota, Ohio, Wisconsin.

Alimony, Maintenance, Spousal Support
Know the Law in Your State

- Many jurisdictions have formulas governing temporary alimony during divorce proceedings; most do not have formulas for post-divorce alimony.
- Awards are based on one spouse’s need and the other spouse’s ability to pay.
- Traditionally “need” has been based on the marital standard of living (SOL); if a luxurious SOL was the norm during the marriage and the high earner can continue paying for this, the lifestyle may be maintained for some period of time through alimony.
- There is broad state to state variation, so knowing the law and the trend in your state is critical.
- The trend in most states has been toward alimony reform, limiting both the duration and the potential amount of alimony.
- An alimony claim requires preparation of detailed budgets tallying expenses during the marriage and expenses post-separation, and sometimes a full “lifestyle analysis” prepared by a forensic accountant.
- A prenup can save the time and expense of litigating an alimony claim during divorce.

DOCUMENT COLLECTION AND REVIEW

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Collect All Relevant Documents

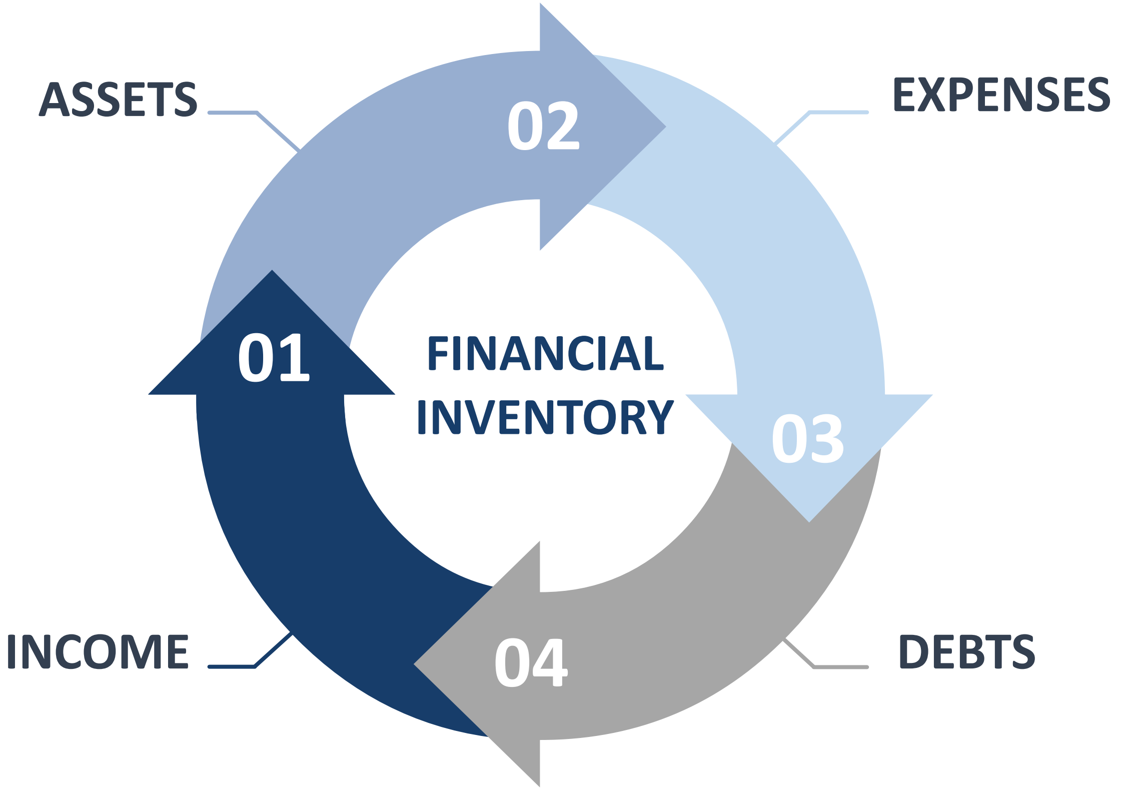
Before you start drafting collect all relevant document, including:

- personal federal and state tax returns for the past three years,
- pay stubs for the past three months,
- all financial account statements for at least the past year,
- the last three years' tax returns for any closely-held or family businesses,
- additional financial business records such as profit and loss statements and balance sheets for at least the past year for any closely-held or family businesses,
- a professional valuation of any closely-held or family business, or an estimate of the range of possible values with a statement of justification for the estimate,
- purchase documents or deeds for all real property and any personal property of significant value,
- a professional valuation of all real property and any personal property of significant value, or an estimate of the range of possible values with a statement of justification for such estimate.

Review Documents and Consult with Financial Advisors as Necessary:

- The list of documents is just a starting point.
- Review your client's answers to interview questions and the interview questionnaire to identify anything else you might need.
- Be sure that you understand all the documents, especially as they relate to ownership issues.
- If your client produces complicated or confusing information, ask if you can consult with their accountant or financial advisor.

Financial Disclosure Needs to Include All of the Following



WHAT TO INCLUDE IN THE PRENUP

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What Can Be Addressed in a Prenup?

Under the UPAA, parties to a premarital agreement may contract about the following issues:

- Rights and obligations of each of the parties to any property owned by both or either of them, whenever and wherever acquired or located;
- Rights to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
- Disposition of property upon separation, marital dissolution, death, or any other event;
- Modification or elimination of spousal support;
- Making of a will, trust, or other arrangement to carry out the provisions of the agreement;
- Ownership rights in and disposition of the death benefit from a life insurance policy;
- Choice of law governing the construction of the agreement; and
- Any other matter, including personal rights and obligations, not in violation of public policy or criminal statutes.
- A specifically listed exception is that an agreement cannot adversely affect the right to child support.

Examples of Property

The UPAA defines property as: an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

PERSONAL PROPERTY

- Vehicles, such as cars, boats, or private planes
- Clothing
- Jewelry
- Furniture
- Art work, antiques, collectibles
- Cash or cash value assets, such as checking and savings accounts, stocks and bonds
- Retirement accounts
- Stock options
- Certain types of intangible property, such as trademarks or patents
- Certain legal awards, depending on type and state law (e.g., lost wages)
- Pets (in most states, but not California)

BUSINESS INTERESTS

- Closely held corporations
- Partnerships
- Professional practices

REAL ESTATE

- Marital homes
- Vacation homes
- Investment properties
- Time shares

Examples of Liabilities and Debts

Liabilities include items such as:

- Mortgages
- Credit card and credit line balances
- Alimony payments owed to a former spouse
- Vehicle financing
- Personal loans
- Debts of a closely held business, partnership or professional practice
- Tax liabilities
- Student debt

Common Provisions in Prenuptial Agreements

DISTRIBUTING MARITAL PROPERTY

- Advance declarations of how jointly accumulated assets and debts are to be divided in divorce.

PREDETERMINING ALIMONY

- Negotiating amount and duration of alimony.
- Specifying a lump sum tied to years of marriage.
- Temporary right to occupy family home.
- Life insurance to secure alimony.
- Waiver/forfeiture provisions.

PET CUSTODY AND CARE

- Can sometimes seem silly depending on the pet's age, but still popular

ESTABLISHING OWNERSHIP AND DISPOSITION OF LIFE INSURANCE BENEFITS

KEEPING SEPARATE PROPERTY SEPARATE (OR NOT)

- Protecting previously accumulated wealth or specific previously owned assets.
- Awarding designated property to spouse in divorce.

ESTABLISHING TERMS FOR WILLS, TRUSTS OR OTHER ARRANGEMENTS

- Waiving intestate or elective shares
- Establishing trusts, such as those protecting children from previous relationships.

ESTABLISHING RIGHTS TO RETIREMENT ASSETS

- Designating retirement and pensions as separate property.
- Specifying terms for division of retirement assets.

DESIGNATING CHOICE OF STATE LAW

INCOME DURING MARRIAGE

- All earned income of either party during marriage is ordinarily marital or community property.
- Parties can agree to change this and keep separate accounts for specified earnings, designating those accounts as separate property.
- This may include an agreement to keep other specified amounts in a joint account.
- Amounts in a joint account will generally be considered marital or community property regardless of agreement.

Will the lower earning spouse receive a distributive cash award in divorce?

If so, how much—e.g., a percentage of net worth tied to date of divorce?

When will it will be paid?

Separate Property

Protection from Commingling and Transmutation

- Absent a prenuptial agreement, a spouse asserting that an asset is separate property generally has the initial responsibility of providing proof.
- Proof requires "tracing" the separate source. This can be challenging if the property has become mixed—or "commingled"—with marital or community property.
- State laws differ regarding whether or not certain actions can amount to transmutation of separate property into marital or community property, or vice versa.
- A prenuptial agreement can prevent uncertainty by setting out the express intentions in a written agreement.
- The agreement can specify that certain property will remain separate and that if the property is transferred, any property received in exchange or as proceeds of sale will also be separate property.

Separate Property

Addressing Marital Contributions

- A frequent issue arises in divorce when one spouse owns real estate or a business separately prior to marriage and the other spouse makes personal or financial contributions, or contributions are made from marital earnings.
- In some states, such as the equitable distribution state of New Jersey, any increase in the equity of separate property that results from marital financial contributions becomes marital property.
- An increase in property value due to the hands-on efforts of either spouse (as opposed to passive or market forces) may also be treated as marital property.
- In other states, such as the community property state of California, appreciation of separate property does not become community property, but the spouse can obtain reimbursement of financial contributions.
- A prenuptial agreement can clarify that without regard to active or passive spousal contributions:
  - Specified separate property, and all increases in the value of said property, will remain separate, or
  - A specified item of separate property, or a specified percentage of the value of specified separate property (which may increase on certain anniversary dates) shall be awarded to the spouse in divorce.

Marital or Community Property

Addressing Separate Property Contributions

Agreement can specify how a party is to be reimbursed for contributions of separate property to marital property—a down payment or mortgage payments on a marital residence, for example:

- What contributions are included?
- Will the reimbursement be paid in full out of sale proceeds?
- If one party keeps the property, will there be an installment agreement for the reimbursement to the other party?
- Will the reimbursement be dollar for dollar or will it include a pro rata share of any appreciation?

Marital or Community Property: Specifying Distribution

Agreement can specify how marital or community property will be distributed in divorce:

- Assign certain property to one spouse or the other.
- Specify a fixed percentage, for all assets or for specific assets.
- State that percentages will change under specified conditions or upon certain anniversary dates of the marriage.

Agreement can also simply specify that the law at the time of divorce will control the distribution:

- Fixing assignment usually makes more sense because the purpose of the prenup is to avoid the kind of issues that can arise in trying to apply distribution law.

Agreement can also specify:

- How appraiser's fees will be paid, and
- What kind of valuation method is to be applied (caution—this may require expert advice).

Business and Professional Practices

Protecting from Potential Impact of Divorce

- The desire to protect a business from division in divorce can be a compelling reason for a prenuptial agreement.
- If it is a family business, the agreement may be necessary to protect other family members from discovery, intrusion and loss of control.
- Some people want to protect a future business as well.
- Business division in divorce can be especially complicated and expensive, so the prenup can be a real cost-savings measure.
- The agreement can explicitly assign the business interest to the separate owner or the most involved party after divorce.
- Alternatively the agreement can assign the spouse a predetermined portion of the value of the business, and specify the method of distribution.
- If appropriate the agreement can also specify limits on discovery and appraisal methods for determining the value of the business upon divorce.

Financial Statement Ratio Analysis
Your Company, inc.
2009

	Historical Year 1	Projected Year 2
Profitability Analysis		
Sales	$9,188,748	$10,000,000
Cost of Sales	$6,844,915	$6,900,000
Gross Profit	$2,343,833	$3,100,000
Income from Operations	$522,274	$522,274
Net Income	$310,178	$310,178
Gross Profit Margin	25.5%	31.0%
Operating Profit Margin	5.7%	5.2%
Net Profit Margin	3.4%	3.1%
Debt Ratios		
Total Assets	$5,300,000	$5,500,000
Total Liabilities	$4,100,000	$3,900,000
Total Owners' Equity	$1,200,000	$1,600,000
Debt to Assets	77.4%	70.9%
Debt to Equity	342%	244%
Investment Return		
Net Income	$310,178	$310,178
Total Assets	$5,300,000	$5,500,000
Return on Investment	5.9%	5.6%

www.report-templates.org/financial-statement-ratios-analysis.html

Protecting Intellectual Property

- A prenup can protect assets yet to be manifested in tangible form by providing that the creator retains sole rights to such assets.
- Examples:
    - **Any assets arising out of a specific "idea."**
    - **Any artistic works created within a certain time period.**
    - **Any future versions of a specific novel in progress.**
    - **Any written works regardless of date created.**
- Be as specific as possible to ensure protection.

Retirement Accounts

Keeping Marital Contributions Separate

- Where one spouse has a premarital interest in a pension or retirement account and continues to make contributions during marriage, the account will be partly marital and partly separate.
- The spouse claiming a separate property interest will have to prove the value of that interest and may need to hire a forensic accountant for this purpose.
- Proof generally requires documentation of the account balance as of the date of marriage, and throughout the marriage, and a calculation of how much of the current balance consists of premarital contributions and gains on such contributions and how much consists of marital contributions and gains on those.
- Parties can agree that all contributions to retirement accounts remain separate property, or can specify a particular division.
- Determining how to divide retirement benefits up front can avoid an expensive calculation process later.

Retirement Accounts

ERISA and Waiver Requirements

- Most corporate retirement accounts, such as 401(k) or 403(b) accounts, are subject to a federal law called the Employee Retirement Income Security Act of 1974 (ERISA).
- ERISA requires a Qualified Domestic Relations Order (QDRO) approved by the plan administrator for distribution of proceeds to the spouse of the plan participant as an alternate payee.
- Some plans, including government pension plans, are not subject to ERISA but have their own rules governing division, which may or may not be similar to ERISA rules.
- Including a clause in a prenuptial agreement that waives beneficiary rights to the proceeds of a plan subject to ERISA is not enough to enact an actual spousal waiver.
- A non-participant spouse's rights can only be waived by compliance with the consent requirements of ERISA.
- Spousal rights cannot be waived by someone who is not yet a spouse.
- The spouse waiving rights must sign notarized documents directly informing the plan administrator of the waiver—*after* the parties are married.

Addressing Temporary and Post Divorce Spousal Support

- Both parties can simply waive all rights to support.
- Agreement can specify how much is to be paid and for how long.
- Agreement could specify a particular calculation to be applied at the time of divorce.
- Be sure to check enforceability of a waiver under your state law.
- Check other requirements as well, e.g., does your state require that the agreement specify what maintenance would have been without a prenup?

Extravagant Life Style Funded by Gifts, Trusts & Inheritances

- Gifts, trusts or inheritances from the wealthy family of one spouse sometimes help establish an extravagant lifestyle for the couple.
- The wealthy spouse, or a family member of that spouse, may want to protect such income sources from being considered as part of the marital SOL in divorce, which could result in a high alimony award.
- Determining alimony in advance can generally prevent this.
- If a trust is involved, a consultation with a trusts and estates attorney may be in order.

Establishing Occupancy Rights

- Agreement can specify who will move out of the marital residence and when:
  - **If there are multiple residences, each party may get occupancy of one residence.**
  - **May not want to be too specific because circumstances can change and parties may not even own the designated properties if and when divorce eventually occurs.**
- A common provision is that if there are minor children, neither party will be obligated to move before there is an agreement regarding child custody.
- Agreement can also specify that if there are no minor children, one designated party will vacate within a certain number of days after the other gives verbal notice of a divorce, or files a complaint for divorce.

Sunset Clauses

Can apply to entire agreement or to specified clauses.

For example:

- Can specify that the entire agreement will be void after 20, 25, etc., years.
- Can include graduated step-downs for things like separate property credits—credit could go to 75% after five years, 50% at 10 years, 25% at 15 years, etc.

Counsel Fee Waivers

- Its common for the moneyed spouse to pay the fees for other spouse.
- The agreement should be clear about what this covers—some spouses are understandably resistant to paying fees for a divorce when also paying for a prenup to avoid expensive divorce litigation.
- The flip side is that limiting one spouse's access to counsel fees puts that spouse at a significant disadvantage in a divorce.
- One option is to carve out certain areas where counsel fee payments are waived or capped--e.g., cap fees for financial issues, but not issues affecting children (be sure you can separate these for accounting purposes).

Estate Planning with a Prenup

- Its quite common to use a prenup as an estate planning device, particularly for couples with children from prior relationships, family businesses, or anticipation of large inheritances.
- A prenup can be used to:
  - **waive the "elective share," that most states establish as the minimum amount a spouse can inherit, regardless of the terms of a will (such as 1/3 or 1/2 of the estate).**
  - **Establish alternate provisions for the spouse.**
  - **Establish trusts to protect children from previous relationships.**
  - **Name administrator of estate.**
- There can be important technical requirements in estate planning, so if you are not an expert in this area of the law, you may need to consult with an attorney who is.

Jurisdiction and Choice of Law

A prenup can include a clause agreeing that the laws of a particular state will apply.

If the couple spends their whole married life in another state, then the first state isn't going to take the case.

Consider where the client is getting married and where they plan to live and make sure you understand the law in those states.

If necessary consult with an attorney in the state they plan to reside in.

WHAT NOT TO INCLUDE IN A PRENUPTIAL AGREEMENT

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Child Custody and Child Support

- Courts decide issues of child custody according to the best interests of the child at the time of a divorce.
- Clients should know that they can state their wishes, but they will likely have little weight.
- If the agreement relates to children that already exist, the court may pay more attention to the agreement in the prenup, but the court will always perform its own review and always retains the power to impose its own decisions for the children's best interests.
- Child support is governed by state statute and any agreement that does not meet the children’s needs will not be upheld.

Regulating Conduct: Lifestyle Clauses

- Most lifestyle clauses are not enforceable in court and if a prenup includes these, there is a risk that the entire agreement might not appear serious.
- Examples of this kind of thing include:
  - How often the couple will have sex,
  - How much weight each spouse is allowed to gain,
  - How they are going to divide housework,
  - How often they'll go on vacation together.
- You might want to suggest that the couple keep a separate agreement just for themselves that sets out their unenforceable relationship rules.

Regulating Conduct: Infidelity

- Depending on the state, a court might or might not uphold a penalty for infidelity, but the clause would have to define what exactly constitutes infidelity and exactly how this would be proven.
- Some people want to include this type of clause even if they know it would probably not be enforceable because of its potential deterrent quality, or because the spouse might acquiesce to the stated penalty rather than have the details of an affair rolled out in a public proceeding.
- Make sure to be clear with the client about any provisions that might not be enforceable.
- Make sure to include a severability clause.

Do you have other questions?

CALL US: **(888) 888-0919**   EMAIL US: **help@WLG.com**

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(888) 888-0919

The process and information contained in this presentation pertains to New Jersey Divorce Law.

This presentation is for information purposes only and does not constitute legal advice.

For guidance on your specific situation, please contact a divorce attorney.

SCHEDULE A FREE CONFIDENTIAL LEGAL CONSULTATION TO DISCUSS YOUR DIVORCE IN NEW JERSEY

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