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“Current Trends in a Growth Area: Prenuptial Agreements”

By Arlene Dubin and Rebecca A. Provder

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Prenuptial agreements have proliferated in the last few years for many reasons, including the challenging economy, the trend toward later-in-life marriages, high divorce rates, the recognition of same-sex marriages, increased public acceptance, and globalization.

This article will address several current trends in prenuptial agreements: (1) the use of the collaborative process; (2) special issues relating to same-sex and transgender prenuptial agreements; (3) provisions responsive to legislation; and (4) the heightened use of prenuptial "cousins," such as postnuptial, cohabitation and relationship agreements.

Prenups in High Demand

In the early millennial years, as the economy was booming, the demand for prenuptial agreements skyrocketed as people sought to protect their expanding net worths. Following the downturn of the economy in 2008, prenuptial agreements became invaluable as people scrambled to protect the property that they had left.

The substantial increase in the average age of individuals marrying for the first time has sparked more prenuptial agreements. The median age of women marrying for the first time was 20.6 in 1970, 23.7 in 1988, and 26.5 in 2009.¹ Likewise, the median age of men marrying for the first time was 22.5 in 1970, 25.5 in 1988, and 28.4 in 2009.² As couples are marrying later in life, it is more common to enter the marriage with assets. If they do not have assets, they may have prospects—degrees, licenses, careers and businesses. If they do not have assets or prospects, they may have debts—student loans and credit card debts.

More women are initiating prenuptial agreements than ever before.³ From 1984 to 2009, the number of women in the workforce increased by 44.2 percent.⁴ With more women in the workforce, they seek to protect their careers and assets. They also have been proactive about ensuring they are equal partners in a marriage and that they are compensated for their non-monetary contributions, such as raising children.

The traditional customers—the older, established couple with children from prior marriages—continue to desire prenuptial agreements. They seek to protect their assets, especially since the divorce rate is higher for remarriages than for first marriages.⁵

A growing number of people enter into a prenuptial agreement to protect their inheritances. Within the next 50 years, \$20 trillion is expected to be inherited.⁶ This constitutes the largest transfer of wealth in American history.⁷

The population eligible to marry has increased due to the legalization of same-sex marriage. On June 24, 2011, New York passed the Marriage Equality Act, which legalized same-sex marriage. Currently, same-sex marriage is legal in six states, plus Washington, D.C.⁸ As reflected by President Barack Obama's recent public endorsement of same-sex marriage, the movement continues to gain momentum.

Although prenuptial agreements remain a controversial topic, most Americans approve of them. A poll among the nation's top matrimonial lawyers showed that 73 percent of those surveyed reported an increase in prenuptial agreements.⁹

More countries around the globe are embracing prenuptial agreements. For example, in October 2010, the Supreme Court in the United Kingdom enforced a prenuptial agreement for the first time in the seminal case *Radmacher (formerly Granatino) v. Granatino*.¹⁰ In upholding the prenuptial agreement, entered into by a German heiress with a fortune of €106 million and a French investment banker, the Supreme Court indicated that "in the right case" a prenuptial agreement would be entitled to decisive weight.¹¹

A Collaborative Approach

On the cutting edge are collaborative prenuptial agreements. The hallmark of the collaborative process is that the parties and their attorneys develop the terms of the agreement during the course of four-way meetings. The collaborative process provides a non-adversarial and transparent approach to negotiation, which naturally resonates with many engaged couples.

A couple who elects to have a collaborative prenuptial agreement starts the process by signing a Collaborative Practice Participation Agreement. The document sets forth agreed-upon terms that will govern the process, such as providing all financial information that may be considered important by the other party (whether or not requested), avoiding economic threats during negotiations, and dealing honestly and respectfully with each other.

Non-legal professionals may participate in the collaborative process. A mental health professional may serve as a neutral coach to foster financial discussions and a positive dialogue about each party's expectations from the marriage. Financial disclosure and discussions with a neutral financial professional can foster an atmosphere of openness at the outset and head off money issues during the marriage—a leading cause of divorce. A financial expert also can help bridge any power imbalance if one party has more limited financial resources and/or expertise.

Orientation Issues

The legalization of same-sex marriage in New York last year broadened the clientele for prenuptial agreements. Although same-sex marriage is legal in New York, it is not recognized by the federal government because of the Defense of Marriage Act (DOMA), which defines

marriage as between a man and a woman.¹² It is also not legal in the majority of sister states. Therefore, there are special issues involved in same-sex and transgender prenuptial agreements that do not exist in opposite-sex prenuptial agreements.

Different tax issues exist with regard to property division upon divorce. For opposite-sex couples, inter-spousal transfers during the marriage and upon divorce are tax free. Because of DOMA, in a same-sex marriage, inter-spousal transfers of property (for example, transfer of the marital home or retirement plan accounts) may be subject to federal income or gift taxation.

Special tax issues also arise in the area of spousal maintenance. For opposite-sex spouses, maintenance usually is structured to be tax deductible to the payor and includible in income to the payee. Due to DOMA, these federal tax consequences may not ensue for same-sex couples. Therefore, upon divorce, the monied spouse in the same-sex marriage may be required to pay temporary and/or post-divorce maintenance without receiving the federal tax benefits. Compounding the problem is that same-sex spouses may not be eligible for Social Security spousal or survivor benefits.¹³

A prenuptial agreement may be used by same-sex couples to waive the state statutory right of election or intestacy in the same way that opposite-sex couples do. With respect to the federal estate tax, because of DOMA, practitioners must be mindful that same-sex spouses may not be entitled to the unlimited federal marital deduction accorded to U.S. citizens with opposite-sex surviving spouses.¹⁴

Another issue is that, in our increasingly mobile society, what happens if the couple moves to a state that does not recognize same-sex marriage and, by extension, same-sex divorce? Accordingly, it is prudent to include a provision in the prenuptial agreement stating that New York law will govern and that, to the extent allowable by law, the parties agree and consent to jurisdiction and venue in New York.

A marriage involving a transgender individual may present the question of whether the couple is considered same-sex or opposite-sex in the eyes of the law. In New York, in order to satisfy the identification requirements for a marriage license, the applicant needs to submit either a valid photo-ID, or provide two utility bills and letters from a government agency.¹⁵ The sex or gender listed on a New York state driver license can be changed.¹⁶ Therefore, it appears that a marriage between a transgender man and a woman or a transgender woman and a man may be classified as an opposite-sex marriage in New York. However, such laws vary by state, so it is prudent to draft prenuptial agreements to take into account the potential complications that arise in the same-sex arena.

Responsive Clauses

In 2010, the law governing temporary spousal and post-divorce maintenance was amended. In an attempt to achieve greater uniformity, Domestic Relations Law (DRL) §236(B)(5-a) now sets forth a presumptive formula to calculate temporary maintenance awards.¹⁷ It also sets forth new factors courts must consider in determining post-divorce maintenance awards, such as the need to incur education or training expenses and the loss of health insurance benefits upon divorce.¹⁸

In prenuptial agreements, couples may opt out of the amended law and waive maintenance or make provisions for maintenance that vary from the statutory numerical guidelines. In such cases, a specific reference to DRL §236(B)(5-a) is advisable.

DRL §237, which governs the award of counsel fees in a matrimonial case, also was revised in 2010. Previously, the burden in a counsel fee application was on the moving party.¹⁹ Under the present law, the burden shifts to the monied spouse and there is a rebuttable presumption that counsel fees should be awarded to the less monied spouse.²⁰ As with the maintenance provisions, couples may deviate from the statute by setting forth counsel fee waivers or counsel fee caps in their prenuptial agreements. In such cases, a specific reference to DRL §237 is helpful.

The time, expense and emotional toll of matrimonial litigation are well known. Therefore, in an attempt to avoid costly litigation, more couples have been including in their prenuptial agreements that they will mediate, arbitrate or participate in the collaborative process in the event of divorce.

Postnuptial Agreements

Postnuptial agreements are also growing in popularity.²¹ Prenuptial and postnuptial agreements are both governed by DRL §236(B)(3). They are similar, but a postnuptial agreement is entered into after marriage. A postnuptial agreement differs from a separation agreement because it is written in contemplation of an ongoing marriage, rather than a divorce.

In a development that could be called the "Tiger Woods syndrome," more and more postnuptial agreements are being used when a couple seeks to reconcile after infidelity has occurred, and the couple decides to enter into a postnuptial agreement in the event that the reconciliation does not take place.

Cohabitation Agreements

Recently, there has been a dramatic growth in unmarried couples living together. From 2000 to 2010, there was a 41 percent increase in unmarried couples living together.²² Neither common law marriage nor "palimony" exists in New York. Therefore, if an unmarried household dissolves, the couples are generally treated as legal strangers regardless of the length of the cohabitation. Couples need to take the initiative in order to achieve a contrary result, such as through estate planning and cohabitation agreements.

In a poll taken by the American Academy of Matrimonial Lawyers last year, 39 percent of the lawyers reported an increase in cohabitation agreements in the previous five years.²³ Nearly half of the surveyed lawyers reported an increase in litigation between couples who had cohabited.²⁴

Relationship Agreements

It has been reported that before Priscilla Chan moved to California to be near Facebook billionaire Mark Zuckerberg, the couple entered into a "relationship agreement."²⁵ Their

relationship agreement allegedly included a provision that they will have one date night and 100 minutes together a week—outside of his apartment and Facebook office.²⁶

"Dating" or relationship agreements primarily serve as a wish list, outlining each other's rights and responsibilities in the relationship. They may mark a heightened seriousness in the relationship, but are largely believed to be unenforceable.

Recent Cases

Recent cases highlight that New York is very hospitable to prenuptial agreements. New York's favorable treatment of prenuptial agreements, in turn, reinforces demand from clients.

In *Barocas v. Barocas*, the court upheld the property division provisions of the parties' prenuptial agreement. Consequently, despite a 15-year marriage, the husband was entitled to property valued at approximately \$4.6 million and the wife was entitled to property valued at only about \$30,550.²⁷

Likewise, in *Cohen v. Cohen*, the wife moved to vacate or set aside the parties' prenuptial agreement where she was pregnant at the time of its execution, was not represented by counsel, and faced with threats that the wedding would be canceled if she did not sign the prenuptial agreement.²⁸ However, the parties' prenuptial agreement was upheld.

According to statute, a prenuptial agreement must be "acknowledged or proven in the manner required to entitle a deed to be recorded."²⁹ Nevertheless, in *Galetta v. Galetta*, the court upheld a prenuptial agreement that was not properly acknowledged, finding that the defect was curable.³⁰

Conclusion

It is axiomatic—but nevertheless worth stating—that all marriages come to an end, either by death or divorce. More and more clients understand the crucial role that prenuptial agreements can play in planning for the inevitable outcome. In addition, clients are appreciating that the prenuptial process can facilitate communication and compromise on all-important money issues, thus creating a firmer foundation for marriage.

Arlene G. Dubin, a partner and co-chair of the matrimonial and family law practice group at *Moses & Singer*, is the author of *"Prenups for Lovers: A Romantic Guide to Prenuptial Agreements"* (Villard Books 2001). **Rebecca A. Provder** is an associate in the group.

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Arlene Dubin and Rebecca A. Provder
New York, N.Y.

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