

Devils and Details

Drafting a prenuptial agreement requires patience, honesty and a remarkable amount of foresight.

By Judy Martel

Family Practice

JACK, A TWICE-DIVORCED entrepreneur, describes divorce in martial terms: "You and your spouse each hire a gladiator, and it's literally like being in the Colosseum in Rome, and your gladiator is trying to kill the other gladiator."* To avoid such battles, Jack, who is remarried, drafted a prenuptial agreement with his new wife to ensure they clearly understood all financial obligations and roles before they recited their marriage vows. And in the process, he says they gained a deeper understanding of each other's goals and values.

Some couples feel that the most difficult element of a prenuptial agreement is broaching the subject with their intended (the subject of last month's article; see "From Deadlock to Wedlock," March 2004, page 114), but the initial discussion is often only the first hurdle. Depending on the complexity of the agreement, two to four months may be required to draft the document, and the process can be just as trying as the relationship itself.

Jack, the wealthier of the two, regards the process as a trial run for the marriage. "If you have trouble communicating about prenups, you'll probably have trouble all the way through the marriage," he notes. "Prenups are a great early warning indicator for how you'll deal with issues." His views carry the benefit of experience: He did not have a prenup with his first wife, but did have one in his second marriage, as he does in his current one.

Brent, an entrepreneur who recently remarried, admits his experience negotiating the prenup was not always smooth sailing. Although he says he and his fiancée enjoyed a "total compatibility that made it easy to put our lives together," they found the process of drafting the contract painful at times because of disagreements over details, such as the duration of the contract.

Both men believe their relationships are stronger now because they reached accord over the financial aspects of their marriages before they tied the knot. And both remain proponents of the prenup as a prerequisite to matrimony—no matter how complex the parley. "Personally, I wouldn't leave home without it," quips Jack.

PASTNUPTIALS

Hashing out financial responsibilities before entering into marriage is not a recent fad. Marriage contracts have been

commonplace throughout history: Such documents have been unearthed by archaeologists sifting through the remains of the ancient Egyptian and Babylonian civilizations, and both the early Muslims and the Elizabethan English were known to practice this safeguard. A marriage contract dating to 311 BC was found in Egypt, buried in the cartonnage of a mummified crocodile.

Attorneys advise nearly everyone to have a prenuptial agreement to protect current, as well as future, assets. "Everyone should at least consider a prenup, because the educational process is critical," says Arlene Dubin, a partner with Sonnenschein, Nath & Rosenthal and author of the book *Prenups for Lovers*. "When people are getting married, they are saying 'I do' to state laws," she adds. A prenup not only educates couples on the parameters of these laws, but enables them to override those that conflict with important personal goals. In addition, both individuals exit the process with a clearer understanding of the partner's monetary goals and philosophy.

Moreover, as both Jack and Brent can attest, the cost of a contested divorce can be high. If enough assets are at stake, and there is a real impasse between the two parties, the dissolution of the marriage can be catastrophic. Battles can last for years, leaving both parties emotionally and financially scarred. Losing much—monetarily and personally—in his first divorce, Jack now wants his financial commitment to his new wife to be ironclad. "The emotional price of drafting a prenup is small compared to the emotional cost of a divorce," he observes.

No statistics exist on the number of prenuptials drafted each year, but according to the American Academy of Matrimonial Lawyers, the numbers are on the rise. Attorneys say that the reasons for adopting prenups vary among couples, but the national divorce rate of nearly 50 percent, a remarriage rate of 40 percent, and longer life expectancy all contribute. The baby-boomer generation also has amassed more wealth than its forebears, and so has a greater number of assets to be placed at risk in the event of divorce.

*At the request of the subjects, all the names of the private individuals appearing in this article are pseudonyms.

**DETAILED DISCLOSURE**

Once a couple agrees to a prenuptial agreement, the first, and probably most important, step is to fully disclose both parties' assets and debts. In order for prenups to hold their own in court, each person must fully understand the nature of the other's financial position, including business interests, trusts, insurance contracts, real-estate holdings and collectibles, as well as his or her future earning potential (royalties from books or patents, for example, or an anticipated inheritance). Attorneys will usually attach an accounting of assets and debts to the document.

Prenuptial agreements are binding contracts supported by state law. The National Conference of Commissioners on Uniform State Laws, a group of attorneys that designs model laws for state legislatures, drafted the Uniform Premarital Agreement Act in 1983. Most states have adopted this guideline, or a very similar one, and so a fair degree of consistency in the law can be found throughout the country.

The law and the court's determination of fairness limit the flexibility of prenups. A person cannot, for instance, abandon a spouse to fend for himself or herself, or to go on welfare, in the event of a divorce; nor can an individual be exempted from making child support payments, which are set by the courts. Prenuptials cannot support any illegal activity, nor can they bypass a state's public policy laws or regulations. These vary from state to state. In some states, Dubin points out, it is against public policy for a prenuptial contract to prohibit a wife from getting pregnant, or to insist that she abort the fetus if she does become pregnant.

Prenups can, however, override varying state laws regarding division of marital property. Nine states use a so-called community property approach (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin), meaning that upon divorce, property is usually designated as belonging equally to both parties. The remaining 41 states adhere to an equitable distribution system under which the property is divided according to a variety of factors determined by a judge, such as length of marriage, whether there are children, and the age of the couple. Some states have a provision called "elective share," or automatic spousal benefits. In Florida and New York, for example, spouses are entitled to one-third of a couple's property in the event of divorce or death. Prenuptials can override this benefit.

BATTLING CONTRACTS

Because they both involve the disposition of property, our prenuptial agreements should be carefully coordinated with our wills. For example, if a man in New York wanted to leave all his property to his daughter in his

will, elective share would override this provision, giving his widow an automatic right to a one-third share of the estate, unless a signed prenup stated otherwise. Usually when a couple marries, they draft new wills, and this provides an excellent opportunity to align the terms of both. Indeed, Ken Edelman, an estate planning attorney in the Boca Raton, Fla., office of Arnstein & Lehr, argues that all documents—those pertaining to titling of assets, trusts, wills, life insurance and so forth—need to be coordinated as well.

Because a couple's business and personal interests can change over the years, a prenuptial agreement will need to be flexible. Issues relating to family businesses are often difficult. Edelman cautions that when establishing the disposition of a family business in a prenup, couples should take into account the fact that the business may grow in value over time: They must determine whether both parties will share in its appreciation. This in particular was a critical issue for Jack. He and his second wife formed a business, but their prenuptial agreement clearly defined her ownership percentage. Also, couples should agree on a business valuation formula or method, which should be precisely defined in their prenup; failure to do so can result in the forced liquidation of a business for the purpose of establishing a valuation in the event of divorce.

Some couples flirt with the idea of adding so-called "lifestyle provisions" to their prenups, but attorneys recommend avoiding these stipulations, which range from details about who does the dishes to how many times a week a couple will enjoy marital relations. While these issues may be important to discuss, they should not be included in the prenup for the simple reason that if such private agreements are ever challenged, the courts will not enforce them. Moreover, these points detract from the true function of the prenuptial agreement—to protect each spouse financially.

Edelman also has been asked by clients to include infidelity clauses in contracts that equate an act of adultery to an initiation of divorce proceedings. He counsels against these additions, as infidelity is difficult to establish in court. Dubin agrees that violations of these "bad boy or bad girl" clauses are hard to prove, noting also that "you never know who started what." A prenup that stipulates that the spouse who initiates the divorce receives a lesser amount of money may be deemed unfair, she explains, because "sometimes the person who initiates divorce is actually the victim of abuse or infidelity."

TOP VIEW | A prenuptial agreement is designed not only to protect both spouses in the event of a divorce, but also as a forum for full disclosure and discussion of our financial positions and goals. For the documents to effectively fulfill their purpose, we must ensure they are both legally sound and flexible enough to adapt to our changing fortunes.

LIFE CYCLE

Prenuptial agreements do not have to apply in perpetuity; sunset provisions can terminate the agreement after a specified period of time. Occasionally, couples will simply decide to nullify their prenuptial agreement; however, this can only be done if both parties agree in writing—usually after the couple has been married for an extended period of time, Edelman notes.

For Brent and his wife, the sunset provision of their prenuptial agreement became the point of greatest contention during the drafting process. “She wanted 10 years, and I wanted 20,” Brent says. In the end, they agreed on 20 years, but Brent remains open to the possibility that they may want to terminate the contract earlier. According to Dubin, 60 percent of divorces occur in the first eight years, and so sunset provisions serve as a source of comfort and reassurance to some couples. “With the passage of time,” she says, “there’s a greater commitment.”

Ultimately, whatever the legal underpinnings of a prenuptial agreement, its effectiveness as a foundation for the financial aspects of a marriage depends upon the commitment of the individual couple. Though drafting the documents may seem an incommensurate chore at the outset, most couples find it well worth the trouble in the end. “The prenup doesn’t stop after it’s signed,” observes Brent. “It takes on a positive air as it gives us the opportunity to continue to discuss finances and stay involved.”

Before and After

IF COUPLES FIND THAT their original prenuptial agreement no longer addresses their lifestyle or circumstances, they may want to redraft it, drawing up a postnuptial agreement. Postnuptial (sometimes called internuptial or midnuptial) agreements can be useful to married couples who have experienced changes in their fortunes. The sale of a family business, receipt of an inheritance, or an agreement that one spouse will leave the workforce to care for children or elderly parents are common situations that might prompt a postnuptial.

Though most states either have adopted or recognize some form of the Uniform Premarital Agreement Act as it relates to prenups, these guidelines do not apply to postnuptials, which are governed by no specific laws. While some states (Colorado, for example) have recognized the act as being valid for both types of documents, most rely upon the general laws regarding contractual agreements to regulate postnuptials.