Prenuptial Agreements:

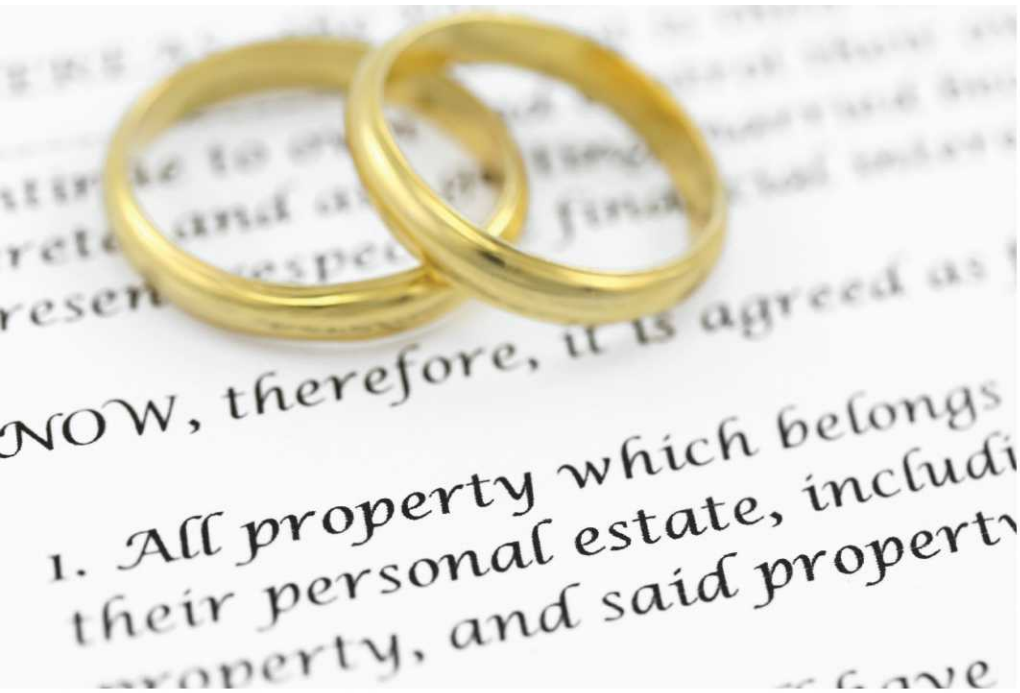
Avoiding Debt, Planning for the Future

A hypothetical case illustrates the considerations involved in writing an effective agreement

By Hilary Vesell

Individuals can no longer realistically enter into a marriage expecting that it will last forever and become a viable alternative to a retirement plan. This is especially true where the marital estate may be small and consists mainly of debt and where support options, if a marriage ends, may be limited.

Your client walks into your office and wants to know if you'd recommend a prenuptial agreement. A minority owner in a construction company, she's in her late 40s and recently engaged. However, her construction business is in shambles. Although there's a construction boom in town and despite her company's competitive bids, the company has no work and is worth virtually nothing. As a result, your client's assets total only $50,000 and include equity in a modest house, a small pension and a few investment accounts given to her by her mother that she would like to keep separate from the marriage. Your client also has some relatively inexpensive jewelry that was gifted to her and is not likely to increase in value. She is also expecting a relatively small inheritance and would like to leave any family heirlooms to her disabled brother.



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Your client's fiancé has a menial job with a large corporation and is making minimum wage. Furthermore, he doesn't have plans to move up in the corporation due to occasional cost-cutting layoffs for those with higher salaries. He wants to play it safe, keeping his benefits, such as his health insurance. Additionally, he was married once before and is still paying off debt from that marriage. His debts, totaling $30,000, include a rental unit that is currently worth less than its second mortgage. His only asset is a Harley-Davidson. Besides the debts and his motorcycle, the only other property he's bringing to the marriage is his cat, Rainbow. If the marriage ends, he would like to keep Rainbow.

Prenuptial agreements in Pennsylvania are generally upheld so that after an agreement is signed, it will be enforceable absent duress, involuntariness in signing the agreement or lack of financial disclosure.

When two individuals marry they often unknowingly enter the realm of the Pennsylvania Divorce Code. A prenuptial agreement allows the parties to opt out of the divorce code. To the extent that issues are not addressed in the prenuptial agreement, the divorce code will determine the outcome.

In Pennsylvania, property or income acquired from the date of marriage to the date of separation or divorce is generally marital property, which upon divorce is subject to equitable distribution. This simply means that the property will be divided in some percentage or in-kind but not necessarily equally, as in community-property states. Marital property also includes the increase or appreciation in value of any separately held, individually titled gifts or inherited property as well as any income generated by that property. However, if an inheritance or gift becomes jointly titled, it can probably be successfully argued that the item was gifted to the marriage to be divided equitably. All gifts between the spouses during the marriage are subject to equitable division.

However, because a prenuptial agreement allows for opting out of the divorce code, these property-division scenarios can be dealt with in any way that the parties wish.

Generally, a prenuptial agreement will specifically detail how jointly held property is to be divided, perhaps evenly, with any initial contributions returned. The prenuptial agreement could alternately have, for example, all of the jewelry going back to the original purchaser or it could stay with the recipient, assuming the property is not on loan.

Your client will want to stipulate specifically in a prenuptial agreement that all premarital property remains separate, including assets and debts, along with any increase in value to that property. This could also include any gifts or inheritances, as long as this property is left in the individual name of the recipient and not commingled with martial property. This would mean that your client's investments would remain hers as long as they stay titled in her name only. The same analysis follows for the house. This could save your client the cost of retaining often-expensive appraisers if the marriage should end to determine any increase in value of the marital home during the marriage. As a result, the new couple should have a clear financial picture of where they would stand should the marriage end.

Your client will also want to keep all premarital business interests, such as her struggling construction company, in her name should there ever be an increase in the value of the business. For possible easier division upon divorce, the agreement should also detail the ownership of any businesses created during the marriage.

Your client may want to waive in the prenuptial agreement all support and alimony, both before and after a divorce, including spousal support, alimony pendent lite and alimony, as she is the spouse with the higher earning capacity.

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Prenuptial agreements also generally waive minimum marital inheritance rights by statute in Pennsylvania. However, both parties would still be free to include the other spouse as they wish in their individual wills. This will ensure that your client will be able to leave her brother what she wishes without the possible interference of a spouse, as allowed by statute, if the property comprises more than a third of her estate.

Your client will also want the prenuptial agreement to waive any rights that one spouse may have in the other's pension or retirement benefits or in any other type of spousal benefit. This will be especially important for your client, who will want to continue to save for retirement without potentially forfeiting a sizeable share to her spouse in the event of a divorce. If the parties stay together, they can both use retirement savings. However, these savings may be insufficient to support two separate households.

Most prenuptial agreements call for debt accrued by one party during the marriage to stay in the name of the party who accrued the debt. Any jointly incurred debt could be divided evenly upon a divorce. In this case, I would advise the client to keep all debt separate and maintain no joint credit cards. This is because her fiancé is already in the red and will most likely accrue more debt during the marriage, debt for which she will probably not want to become liable.

I would also advise life insurance and possibly insuring employment income in the form of disability insurance if sufficient property doesn't exist for support. In this case your client might also want to consider that the prenuptial agreement require insurance on her fiancé's life, especially due to his high-risk motorcycle hobby. Because he isn't a high-income earner, the policy likely won't be expensive but would leave your client with funds should he meet an

untimely death on the overcrowded and dangerous local roads.

A prenuptial agreement also generally requires that each party signs all paperwork necessary to effectuate a divorce as quickly as possible. This would save your client litigation expenses inherent in a long, drawn-out divorce. The agreement should detail who will stay in the marital home and pay the mortgage, taxes, insurance and utilities in the case of a separation or divorce.

Generally, a premarital pet remains with the owner of the pet, and marital pets are personal property of the marriage to be divided by agreement of the spouses. Inevitably, both parties will become attached to the pets and may refuse to settle the divorce unless the court intervenes, which it won't. Therefore, it is advisable to delineate exactly where pets acquired both before and after marriage will go in the event of a divorce. In this case your client would be happy to have Rainbow go with the fiancé.

Your client may not be rich, but if she has a good credit score it is equivalent to cash to someone who has no credit to obtain loans or credit cards. If your client plans to marry someone with a poor financial picture, such as her current prospect, she should find out what steps this potential spouse is taking to pay back his debts. Is he making regular payments and working hard to do this or waiting for someone, such as a potential spouse, to bail him out?

Accordingly, it is important to know the finances of a potential spouse, which a prenuptial agreement requires. Your client will want to know if her potential spouse has debt and, therefore, may be likely to continue to live in the red. Of course, the prenuptial agreement doesn't prevent one spouse from dissipating or hiding elsewhere any available cash during the marriage that would otherwise be accessible in the form of joint bank accounts.

Additionally, any child produced by the parties will be entitled to child support. Child support is the right of the child and cannot be contracted away. This child support goes to the lower-earning spouse who has at least shared physical custody. The premise is that the child should live at the standard of the higher-earning parent.

My advice to the client would be not to marry without a prenuptial agreement. If the marriage ends, your client's financial picture will most likely be bleaker as a result of the marriage. While intellectual and physical compatibility are certainly important, financial compatibility may be just as important and vital to the future of your client, especially if she is hoping to retire someday. She will want to know that her pension is hers alone and that her assets will not be equitably divided (likely only after hiring pricy appraisers) with someone who possibly never contributed intellectually or financially to their existence.

Your client is also curious to know in what cases you would not recommend obtaining a prenuptial agreement. There are times when the divorce code could work in her favor; for example, if the other party has the larger income. This is because assets previously held will remain premarital to the extent they remain titled in the other party's name. Only their increase in value would become marital, which could be minimal, depending on the asset and the length of the marriage. Parties may want to discuss their expectations for standard of living and cost-sharing during the marriage as well as their employment viability should the marriage end.

Without the proper planning, divorce can leave one, if not both parties, in financial ruin. Long, drawn-out litigation as well as trying to support two households on the same income may be unsustainable for many people. This is especially true for those with little income and assets to draw upon, a situation that your client would be smart to avoid altogether through a prenuptial agreement. ⚖

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