PRENUPTIAL AGREEMENTS

Considerations for traditional and non-traditional couples and business owners

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Increasingly, the happy couple planning their ultimate union has added an item to the checklist of matters to address prior to The Big Day. Alongside arranging the wedding site, reception hall, flower, gowns and the like, is more often listed "sign prenuptial agreement".

In a more complex, dual income, fast-paced world, and in a world where no-fault divorce means that either party may choose to terminate "until death do us part" by simply swearing that the parties have not gotten along for at least six months, persons planning to marry, or their parents, or business partners have more frequently begun to delicately approach the subject of preparing a prenuptial agreement.

New York Law provides a weighty frame work to determine the division of spoils at the time of marital breakup, together with maintenance (alimony) and other vital matters such as custody and access to children and providing for their support, college education, and other needs. Just as one who fails to write a Will must rely upon New York State's imagination as to what would have been provided in that Will by way of property distribution, the divorcing couple will have imposed upon it a dissolution plan crafted by the State of New York, unless they do something to control their own destiny in the event of divorce.

Domestic Relations Law Section 236 (C) invites and encourages persons to make their own deal except in the area of child custody or the support of yet unborn children. Plans may be made with respect to future maintenance, unless one of the parties were to be at risk for becoming a "public charge", and then the couple can address how to treat assets both owned before the marriage and accumulated during the marriage.

Even couples who have no prenuptial agreement are entitled to protect those assets that they held prior to saying "I do". Increases in value (called appreciation) however, become marital property. But often, in the course of living a married life, people make routine choices that will be deemed to have evidenced an intent to share the separate property, by placing a spouse's name on a deed or joint bank account for example, (called transmutation) or by mixing marital property (post marriage paychecks for example) in an account that had previously been deemed pre-marital (called comingling).

In the absence of a prenuptial agreement, inheritance monies, gifts from third parties to one of the partners, as well as the fruits of negligence case settlements, all remain the separate property of the individual and are not considered marital property. But the same rules set forth above apply here as well. Therefore an inheritance check placed in the joint account, a negligence settlement invested in a jointly held marital residence, or a gift similarly comingled, would become marital property for purposes of distribution on divorce.

Virtually everything else accrued during the marriage will be "on the table" in the event of a divorce, and will in most instances be split 50% to each party without regard to who "earned" the money or asset and certainly without regard to who was "at fault" in triggering the divorce.

At the same time that equitable distribution is determined, a court will decide whether or not maintenance is payable from one spouse to the other. That decision will be driven by determining if there exists a disparity between the two parties' incomes at the time the divorce action is commenced, coupled with the length of the marriage. The first factor will determine the amount of maintenance to be paid, if any, and the second will be to determine for how long that maintenance should be paid.

In 2010, the New York State Legislature provided some guidance through the creation of a Temporary Maintenance Statute, the object of which was to advise the court as to maintenance obligations during the divorcing process only. But they then failed to ever provide more direction to the courts or litigants as to what maintenance should be paid after the divorce has been finalized. Courts have sought to fill the void through a rule of thumb that applies a "1/4 to 1/3" rule, in combination with the calculations yielded through using the calculations set out in the Temporary Maintenance Statute as if it were anticipated to be the calculator for a post-divorce maintenance award.

Recent proposed legislation would have expanded both the amount of maintenance paid and would also have greatly increased the term for which maintenance was payable. That legislation died in committee, but certainly, over time, some rules regarding amount and term will make its way to the Governor's desk, and once law, its terms may thrill some and shock many.

1. **<u>The Importance of Prenuptial and Post-Nuptial Agreement for Persons owning an interest in a Closely Held Business</u>**

   Prenuptial and post-nuptial agreements (signed sometime after the marriage vows have been taken) should be of particular interest to persons who are owners or part owners in a small business. There are sound and substantial business reasons for married couples and those contemplating marriage to consider the preparation of a prenuptial or post-nuptial agreement.

   Under existing law, a business that is acquired by one party to the marriage during the marriage constitutes marital property. In divorce a valuation of that business will be done by one or more professionals to determine the value of the business to the spouse who holds a direct interest in that business, and some portion of that interest will then be allocated to the non-titled spouse in recognition of his or her "indirect contribution" to the business owner's success. A common example is a spouse who may never have set foot on the business property, but nonetheless cared for the children, the household, entertained prospective clients, and in other ways created an environment that assisted in the business owner's success. Obviously, where the marriage is long term and the business successful, the amount owed to the non-titled spouse can be quite significant. That circumstance can cause liquidity issues for the business holder.

   In many instances the titled spouse is only a part owner in the business. While being a part owner will suppress the value assigned to the business, and while it is very unlikely that the non-titled spouse will actually be invited to a place at the table as a part owner themselves, particularly if the closely held business has followed generally accepted business management policies in the drafting of legal documents pertaining to the

business, nonetheless the non-titled spouse's share can be sufficiently high so that it is impossible for the titled spouse to produce the necessary cash immediately to occasion "the buy out" of the non-titled spouse.

Additionally, the business valuation process by its nature requires an intrusive interference with the day to day functions of the business. Accounting and business valuation experts pore over years of business records, visit the facility, and undertake other tasks in the exercise of due diligence in order to properly value the business as if it were to be sold in the open market.
Even where the business is owned by the titled spouse prior to marriage, the examination may well proceed to determine the non-titled spouse's interest in the appreciation of the business since marriage. That requires an expert to express an opinion as to the date of marriage value of the enterprise, and the business owner's share therein, and to compare that with the value of the business owners' share at the time of the filing of the divorce action. Therefore, appreciation on the business may still be a marital asset subject to distribution, even though a business may have been in the titled spouse's family for generations.

Business owners increasingly wish to avoid such a lengthy and obstructive process, and seek to "make their own deal", in advance, to be pulled from the drawer and dusted off only in the event of ultimate divorce.

Just as closely held businesses find it valuable to purchase life insurance sufficient to buy out a deceased partner's share in the business in order that business operations may move along in his or her absence, business owners would do well to consider the preparation of a prenuptial or post-nuptial agreement that addresses the similar issue of the divorcing partner. Such agreements may be self-tailored to address only the business interests themselves, or more broadly crafted to address other property interests and maintenance as well.

While it is certainly the case that a prenuptial or post-nuptial agreement can be written in draconian fashion so as to exclude one party and empower the other, fairly and properly crafted documents may instead attend to each person's interests and sense of what is fair and just.

There is much case law to support the principal that courts welcome a couple's effort to fashion their own deal. Such agreements, introduced at the time of divorce, will be read according to standard principals of contract law, albeit with some of deference to the "special relationship" that the marriage "business" entails. Those agreements that include full and honest disclosure prior to the execution of the agreement, sufficient opportunity for both parties to operate with the advice of counsel, and under circumstances that do not in and of themselves create undue pressure on the later divorcing couple will be enforced.

Divorce is a difficult, emotionally charged, and stressful undertaking. A prenuptial or post-nuptial agreement will not alleviate all of this stress and little of the emotion. But such an agreement, crafted in the light of happier times, may make far more simple the effort of fairly establishing one's rights to maintenance and the appropriate allocation to a non-titled spouse of his or her share in both pre-marital and post-marital business interests.

2. Marriage Is About Collaboration; Shouldn't Drafting A Prenuptial Agreement Be Collaborative As Well?

Some of the challenges to broaching the topic of a prenuptial are the anxiety, fear, and resentment that such a discussion can have, particularly in the heart of the prospective spouse who "has less". Either or both parties may worry that damage to the relationship on the eve of the "best day of their lives" might be occasioned if money is talked about, future circumstances anticipated, and cogent thought actually applied to the idea, as they anticipate this happy day, someday being under such emotional strife that one party might "pull the trigger" on a no-fault divorce.

Traditionally, prenuptial and post-nuptial documents have either been fully negotiated with each party obtaining separate counsel, and having that counsel exchange letters, phone calls, and various drafts of agreements in negotiating in the best interests of their client, or alternatively the more powerful "future spouse" presenting a document to the less well-heeled prospective spouse and cajoling them to sign a document so that the wedding may proceed.

There is, thankfully, a different option; the method of Collaborative Law. Used to cooperatively fashion end of divorce opting out agreements for many years, Collaboration can also be used in friendlier circumstances to craft a satisfactory prenuptial or post-nuptial agreement.

Under collaboration, the image of negotiation between attorneys in their respective offices, jockeying for maximum advantage, is replaced with the image of persons gathered around a conference table, discussing together their wishes and worries, aspirations and anxieties, about their financial future. The "cards can be put on the table", assets and liabilities "white-boarded" and a full conversation had as to what will serve both person's interests better than what the legislature has created, resulting in an agreement neither hope to use, but which addresses the vagaries of life.

The result of such collaboration is a calm, well informed and fair agreement that is acceptable to both parties. It is an agreement that is very unlikely to be rejected by a court. Claims of duress, overreaching, unconscionability, or the failure to share fully information regarding assets and liabilities frequently are raised as reasons why courts should reject prenuptial or post-nuptial agreements. In the collaborative setting there are two attorneys, each representing one of the parties, and a coach/therapist to assist the couple in grappling with difficult issues. Disclosure is complete, analysis full, and participation equal. The product of such a process will in most instances be exactly what the courts and legislature intended when they encouraged parties to fashion their own agreement.

While preparing a collaborative prenuptial or post-nuptial agreement will still not be as much fun as planning the guest list, venue or honeymoon, nonetheless it can be an important element to a complete marriage plan, particularly where one of the parties has obligations from a prior marriage, or where there is a substantial imbalance in wealth and future economic opportunity.

3. Special Considerations For Same Sex Couples Considering Prenuptial Or Post-Nuptial Agreements

Prenuptial and post-nuptial agreements can become a particularly interesting way of addressing perceived unfairness or imbalances created by the laws surrounding same sex marriages. As same sex couples rejoice at the willingness of a legal system to recognize their union, it is important that we pause to note the special circumstances surrounding the short time that such marriages have been legally available, and the special problems that may arise in the event of divorce.

It would not be at all uncommon for a now married same sex couple to have considered themselves as a family unit for many years or decades. That same sex couple may have acquired real property, personal property, bank accounts, and other assets, and indeed may have adopted or given birth to children during their relationship. One partner may have paid for the other to attend advanced schooling, earn a degree or license, or may have created a business with the indirect support of the other partner. In the minds of the couple, and in their hearts, they have long been a unit. But in the eyes of the law they became so but a short time ago.

Were a couple to become divorced today that became married twenty-four months ago, but who lived together for twenty years, they would have participated, legally, in a "short-term marriage". The opportunity for the person earning less income to receive maintenance from the higher bread-winner would be limited to a period of months. There would be no recognition of property acquired prior to the legal union of the couple in one party's name, no recognition of sacrifices made in indirect contributions in the growth of one partner's business, or assistance provided in one partner obtaining an advanced degree or license. A piece of real property acquired by one as a matter of convenience, or bank account opened in the name of the other simply because that person was closest to the bank that day, could result in a distribution of property that would be vastly different than the traditional married couple next door experiencing similar circumstances.

The Domestic Relations Law, as set forth above, welcomes persons to fashion their own "marriage deal" so long as it complies with statute. A couple whose physical union has been of long duration, but whose legal marriage has been short could decide that Domestic Relations Law Section 236 would not be "fair" in their eyes. At a time when the marriage relationship seemed strong and healthy, the couple could project how they would handle future discord. One partner who, prior to a "legal marriage", became a doctor, professor, lawyer or accountant could prepare an agreement that would recognize, in the event of divorce, the other partner's contribution. Partners could state that they would ignore the law of title, and instead embrace the idea that even if only one partner holds title to property after a certain date, that the value of that property would be split in an ultimate divorce.

While parties could not provide in a prenuptial agreement how they would handle custody or child support for unborn children, they certainly could address issues regarding existing children, and imagine a schedule of maintenance (alimony) that would extend beyond what the court would provide, in recognition of a long standing relationship and sacrifices made by one partner during their relationship.

A prenuptial agreement is a tool, and that tool can meet many purposes. While traditionally used to limit or at least clearly define within the context of "traditional marriage" how assets should be distributed and disparities in income addressed, this statute could also be used to recognize the longstanding existence of a union only recently recognized in law.

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