

# LAYERS OF LAWYERS

In a litigation-prone world, many couples have turned to drafting legally binding contracts clarifying exactly what will be his and hers beyond that set of bathroom towels. While prenuptial agreements may remove some of the romance of “happily ever after,” they don’t mean couples have lost that lovin’ feelin’. We spoke to Deborah J. Blue, an attorney at Dickinson & Gibbons, P.A. and an authority on marital and family law, to learn what to put in writing before you say, “I do.”

## THIS MONTH: PRENUPTIAL AGREEMENTS

### DO YOU SEE AN INCREASED TREND TOWARD PRENUPTIAL AGREEMENTS?

DB: Prenuptial agreements are certainly more prevalent in today’s society. Part of the reason is because close to 50% of first marriages end in divorce. A party who has been through a divorce is more likely to want to have a plan in place, i.e., a prenuptial agreement, in case it happens again.

Additionally, some of the stigma regarding prenuptial agreements has been removed by all the news about celebrities who have prenuptial agreements. However, far more couples appear to get married without a prenuptial agreement, than those who do.

### WOULD YOU CAUTION A WOMAN TO BE CONCERNED IF HER FIANCÉE ASKS FOR A PRENUP?

DB: A request for a prenuptial agreement can raise issues of trust. However, it also forces a couple to have a serious discussion about the financial aspects of a marriage and what each party’s expectations are as it relates to mutual goals and financial planning. The spouse with greater income and assets may be concerned about preserving those assets if the marriage does not work out. The spouse with lesser income and assets will likely be concerned about building some sort of joint financial security with the other spouse and having a financial safety net if the marriage does not work out. There is always some middle ground whereby the parties are able to reach a satisfactory compromise.



### WHAT STEPS SHOULD A PERSON TAKE WHEN THEY APPROACH THEIR FIANCÉE REGARDING A PRENUPTIAL AGREEMENT?

DB: The first step would be to articulate your reasons for wanting/not wanting a prenuptial agreement. If you are the party wanting the prenuptial agreement, you might say, “I lost half my assets after 5 years of marriage and I don’t want to go through that again.” If you are the party who is not seeking the prenuptial agreement, you might say, “I will be interrupting my career to have children and make a home and those lost opportunities will be difficult to recapture.”

Once it appears that a prenuptial agreement is in your future, both parties should seek the assistance of a separate, competent, independent lawyer. A prenuptial agreement is a binding legal agreement that will affect your life substantially, should your marriage end in divorce.

**PROBLEMS TYPICALLY ARISE** when the issue of a prenuptial agreement is first mentioned or discussed in close temporal proximity to a wedding. Allow a lengthy period of time for these discussions so they do not add to the ordinary stresses of planning a wedding. This has legal benefits, too: legal challenges may be asserted on grounds of duress if there is not an adequate amount of time between the execution of the prenuptial agreement and the wedding.

*In this series, we'll highlight different areas of the law, and offer strategies to aid you in your search to find the right legal professional to meet your needs.*

#### HOW WOULD YOU COUNSEL A WOMAN TO COMMUNICATE WITH HER FIANCÉE IF SHE IS DISPLEASED AND WANTS TO CHANGE THE DOCUMENT?

DB: I'd advise her to consult with her independent attorney. Be direct and specific about what she needs and wants.

#### CAN PRENUPTIALS BE REVOKED, FOUGHT, OR NEGATED?

DB: Generally speaking prenuptial agreements cannot be revoked, if fully executed prior to marriage, and the marriage occurs, activating the prenuptial agreement. They will be enforced as written contracts, even if someone has made a bad bargain and the agreement appears to be unfair. Fighting to set aside a prenuptial agreement can be difficult and expensive.

Conversely, a prenuptial agreement may reduce the expense of litigation, where neither party challenges the validity of the prenuptial agreement and abides by the terms of the contract. If there are children of the marriage, it may cause less anxiety during the dissolution of marriage for the children, where the dissolution of marriage is uncontested and unlitigated.

#### ARE PRENUPTIALS INCLUDED AS PART OF AN ESTATE PLAN?

DB: Prenuptial agreements are used in estate planning to waive a spouse's homestead rights and the right to a spouse's forced share of the other spouse's estate.

There may be other purposes, but I practice family law and not estate planning and would associate or consult with an estate planning lawyer, if necessary, depending on the specific facts of the situation. What I have noticed is prenuptial agreements drafted solely for estate-planning purposes are typically not sufficient for family law purposes. Such agreements typically fail to address such issues as reserving a party's income solely to that party (if desired), which in turn can lead to unintentional commingling of non-marital assets with marital assets, making them all marital.

Such estate planning prenuptial agreements also typically fail to reserve passive and active appreciation of non-marital property solely to the owner of that property, making part of the non-marital property, unintentionally, marital and subject to division.

#### THE CRITICAL FACTOR

in prenuptial agreements being upheld or set aside by the court is whether or not there was full-and-fair disclosure of the assets, liabilities, and income of the spouses.

## terms

#### PRENUPTIAL AGREEMENT

a contract entered into by two people, before marriage, in which the parties agree as to how their respective incomes and assets will be treated and owned during the marriage and after the marriage and whether a claim for alimony will be waived or limited. Becomes effective when the parties marry.

#### POSTNUPTIAL AGREEMENT

an agreement entered into after the marriage regarding division of assets, property, debts, and whether one party will pay alimony to the other party. A postnuptial agreement does not necessitate an actual dissolution of marriage; however, if a dissolution of marriage is sought by either party, it will apply to the equitable distribution and alimony claims asserted by either party.

#### MARITAL PROPERTY

property acquired during the marriage that the law says is jointly owned (even if separately titled) and which is subject to "equitable distribution," which begins with a presumption of a 50/50 division.

#### NON-MARITAL PROPERTY

property owned prior to the marriage, or received by inheritance, which is separately titled, never commingled with marital property and never enhanced in value by "marital labor" or "marital funds."

#### MARITAL FUNDS

funds earned by either party to the marriage, during the period of the marriage. If you earn it during the marriage, it is marital.

## prenup dos & don'ts

### ▶ do

- 1 Hire separate attorneys who complete the execution of the prenuptial agreement no later than one month before the wedding.
- 2 Provide complete financial disclosures, including assets, liabilities, and values on same and current income.
- 3 Allow both parties to negotiate and have input into the terms of the prenuptial agreement.
- 4 Draft a prenuptial agreement that addresses the needs and concerns of both parties and is fair in some sense to both parties
- 5 Keep a copy of the fully executed agreement in a place where it can be located years in the future, if necessary.

#### TWO COMMON REASONS TO ENTER INTO A PRENUPTIAL AGREEMENT

- ▶ One spouse has accumulated significant property or assets prior to the marriage and has children from a prior marriage and wants to preserve some of that prior-owned property to gift to the children, pay for college education, or to leave as an inheritance for the children.
- ▶ One spouse may have acquired property or assets prior to marriage and does not want to lose one-half of those assets upon divorce.

### ▶ don't

- 1 Sign the prenuptial agreement in a hotel in Las Vegas the night before the wedding.
- 2 Sign in a coercive atmosphere. Choose an attorney to represent you who is from out of state and not licensed to practice law in Florida.
- 3 Sign the agreement before any attachments, e.g., financial disclosure, are fully attached to the prenuptial agreement.
- 4 Draft an agreement that is so one-sided a court will look for a reason to set it aside in the future.



**DEBORAH J. BLUE** is certified in marital and family law by the Florida Bar and specializes in handling complex marital and family law cases involving equitable distribution, business valuation(s), alimony, child support, parental responsibility and timesharing, preparation and enforcement of prenuptial and postnuptial agreements, paternity, and any other family-law related matters.

Ms. Blue is a shareholder at Dickinson & Gibbons, P.A. and has been honored on the Florida Super Lawyers list from 2006-2012, and in 2015, in family law. She has been designated for the Martindale-Hubbell Bar Register of Preeminent Women Lawyers since 2011 and has been rated AV preeminent since 2003. Ms. Blue is a board member of Legal Aid of Manasota, and president and a founding member of Sarasota Collaborative Family Law Professionals.

#### • CREDENTIALS COUNT

Find a prenuptial lawyer who is board certified by the Florida Bar in marital and family law (or who has extensive experience and an established reputation in the community). Keep in mind, only attorneys who are board certified are able to hold themselves out as specialists in marital and family law.

Interview 2-3 lawyers to determine the scope of their experience in drafting prenuptial agreements, then decide who is best to represent you in the negotiation of the prenuptial agreement.

Confirm the attorney has the time available to meet the deadline. Typically, a reasonable time frame to execute a prenuptial agreement is 30 days prior to the wedding.