

Drafting Prenuptial Agreements— Love ‘Em or Leave ‘Em

By Robert Z. Dobrish

The Prenuptial Agreement has become increasingly more popular in recent decades as the pool of married persons has been changing. Although fewer young people dive in, first-time-arounders have never been huge consumers of prenups. Presently, more and more same-sex couples want them as well as persons who are thinking about marrying for the second, third or fourth time. Just as the population clamoring for prenuptials has been altered, so has the law regarding their enforceability. Where New York was once known as a state in which almost any writing would be honored absent demonstrable fraud or overreaching,¹ the sanctity of these contracts has recently been successfully challenged and courts are becoming much more vigilant in protecting the rights of individuals who have entered into unfair agreements without having the kind of protection they needed. Thus waivers of support,³ waivers of counsel fees,⁴ and waivers of temporary maintenance,⁵ have been held to be in violation of an amorphous public policy, which is apparently there to protect the unwary innocent. And now, even equitable distribution waivers, which were once untouchable, are being scrutinized—and seriously skewed waivers sometimes bring down the entire agreement.⁶

Swimming in these treacherous waters is best left to seasoned professionals. Those who only wade in the tributaries are well advised to avoid them completely. Indeed, many of the most accomplished attorneys do just that and leave this task to others. The reasons for this avoidance behavior is that (a) the drafter of a prenuptial is sometimes disqualified from representing the party in a subsequent divorce, particularly if there is a challenge to the agreement; (b) the attorneys involved in the drafting may become witnesses at the time of the uncoupling, subject to deposition and discovery (and who pays for that time?); and (c) the cost of negotiating and drafting these documents is usually significantly more than most people expect or want to pay. The fees earned turn out to be just not worth the time, effort, responsibility, continuing obligation and risk of being sued for malpractice.

Lawyers who do chose to embark on this type of project, despite the many sinkholes, generally fall into three categories: generalists, trusts and estates lawyers, and matrimonial lawyers. Trying to avoid bias and prejudgment, this article will discuss some of the differences in the type of representations given by each of these groups.

Generalists

Attorneys who practice in rural areas, or in neighborhoods where consumers of most personal legal services cannot afford specialized services and pricey lawyers, of necessity are generally generalists who handle criminal defense, personal injury, family law, immigration, housing and real estate as well as wills, among other areas. Generalists ordinarily find it difficult, if not impossible, to keep up with the latest developments in every area of law in which they practice and rely on journals and the internet to obtain the latest word on what is occurring.

Because they handle so many different areas of the law, their experiences are more varied but less intense, and their understanding of subtle issues is likewise so. They have access to forms, of which there are many. In non-complicated matters, they will generally be able to produce very acceptable documents at very modest cost. The best of them sometime perform outstandingly in that they might ask more questions, make unconventional demands that are nevertheless meaningful, and give very good advice. The worst of them produce, at best, very ordinary form agreements to begin with, pay little attention to nuances of each situation, and devote little or no time to complexities.

Trusts and Estates Lawyers

Many lawyers who specialize in trusts and estates are asked to negotiate and draft prenuptial agreements. This is especially true in situations where the idea of an agreement is initiated by the family (particularly parents) of one of the parties. In those cases, it is generally family money, family trusts and family businesses which are seen by the older generations as being at risk in a marriage. Parents are usually most concerned that their children might not receive the full benefit of parental largesse if their children were among the many who got married and then divorced. The parents often turn to their own lawyers, who might be trusts and estates lawyers themselves, or the

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law partners of trusts and estates lawyers. After all, if the concern is the protection of assets which are passed down (often through wills or trusts), who better to deal with the protection of those assets than a wills and trusts lawyer?

Trusts and estates lawyers often approach prenuptial agreements in the same manner as they approach drafting wills and trusts: there is property to protect—draw an instrument that protects it. They know how to do that and they usually do it well. Often the first draft of a prenuptial agreement initiated by a trusts and estates lawyer who is close to the family of the marrying party is a tightly drawn instrument that calls for the total waiver of all rights upon divorce and death, including equitable distribution, spousal support, occupancy of residences, and counsel fees. Total waivers such as these, however, often end up beginning the process in a divisive way that can sometimes prove fatal to the wedding plans in the first place, or fatal to the agreement's enforceability at the end.

A prenuptial agreement is a special kind of contract. Unlike other contracts for real estate, services or widgets it is not possible to find a replacement product should the negotiations fail to achieve a result. There is rarely an alternative spouse available in the wings waiting to take the place of the walk-away affianced. This is a deal that must be done. But the trusts and estates lawyer who drafts the ironclad waivers may nevertheless insist that those waivers be accepted after they are questioned by opposing counsel. "Sign, or there will be no wedding" becomes the mantra. Clearly the latter choice results in a situation where love is not able to conquer all—not even at its most romantic moments. So the loving couple is left to engage in private negotiations ("It is just for my family. We will rip it up after we're married" or "Don't worry, I would never enforce this thing. It doesn't mean anything" or "Don't listen to your lawyer (s)he is just in it for the money."). These discussions, which take place in private, will sometimes result in the agreement being signed over the objections (or even after the walkout) of the lawyer of the non-monied party. In such a case, the lawyer for the monied party might believe a good job has been done; however, courts have been known to overthrow the agreement.⁷

The Matrimonial Lawyer

Many, if not most, prenuptial agreements are drawn by matrimonial lawyers. This is particularly true in situations where one or both of the parties have been married before or where the party opting for the agreement has significant wealth. The reason for this distinction has to do with the fact that in those cases, it is divorce which is uppermost in the mind of the monied spouse, not death. Often the estate waiver is deemed to be important only in the early years of a marriage since

the occasion of death in a successful marriage may be the time of the greatest need for economic support.

The matrimonial lawyer may not know as much about estate or trust issues as trusts and estates lawyers, but certainly knows more about divorce—about what happens during a divorce and about what leads up to a divorce. Thus, divorce lawyers will often raise concerns about exclusive occupancy of a residence, about children not being asked to move while school is in session, about moving costs and counsel fees upon divorce, about use of vehicles, household staff and pets following a separation. Also, matrimonial lawyers will sometimes want to suggest mechanisms that preserve separation of assets, but do not cause resentment during the marriage—such as ways to divide jointly used property which is purchased with one party's separate property, or the creation of joint investment accounts to provide both an asset to be delivered or divided upon divorce and a feeling of joint entrepreneurship during the marriage, which is sometimes eliminated by some of the waivers. Certain waivers might be subjected to a "sunset clause"—disappearing after a certain amount of time.

Of course there are trusts and estates lawyers who take all these things into consideration, just as there are sophisticated matrimonial lawyers who know more than enough about the uses of trusts and inheritance laws. A good lawyer knows what (s)he does not know and knows how to find the answers and solutions when necessary.

Some Additional Points

There is a great deal of litigation over prenuptial agreements though there is not a plethora of written decisions. In many of the cases which survive summary judgment motions, the lawyers who drafted the agreements are deposed and/or called as witnesses. As such, they may be disqualified to act as counsel in the divorce proceeding. As witnesses, there may be a question regarding their entitlement to be paid for their time, since they are not serving as expert witnesses, but as fact witnesses. Some lawyers may be farsighted enough to provide for future payment in their retainer agreements. Some lawyers charge very significant minimum fees in order to take into consideration the responsibilities and possible future involvement.

Another reason to not draft has to do with malpractice claims. Disgruntled (or disappointed) litigants often want to blame former attorneys for the mistakes they themselves made.⁸ While there is ordinarily a three-year statute of limitations for such a claim,⁹ the statute of limitations on prenuptial agreement claims has been held to be tolled during the marriage, so it is conceivable that the malpractice claim may not ripen until the divorce action is commenced.¹⁰ By the time the agreement

is challenged, the lawyer (who still has a file) may have forgotten some of the details. Thus it becomes important to keep notes of the conversations and to have memos of meetings and copies of emails or letters to the client to preserve a record of the advice given.

All of that being said, there is something appealing about drafting prenuptial agreements. It is supposed to be a time of joy for the parties and the lawyer has the chance to protect the client from the antagonisms that sometimes result during these types of negotiations. Since this is a deal which "must be done," a lawyer is given the opportunity to craft creative compromises designed to satisfy legitimate objections and needs. In the end, having saved the wedding, one might even be saved a piece of the wedding cake.

Endnotes

1. *Bloomfield v. Bloomfield*, 97 N.Y.2d 188,194 (2001); *see also Stawski v. Stawski*, 43 A.D.3d 776 (1st Dep't 2007).
2. *Smith v. Smith*, 129 A.D.3d 934, 935 (2d Dep't 2015) citing *Petracca v. Petracca*, 101 A.D.3d 695, 698 (2d Dep't 2012).
3. *Cron v. Cron*, 8 A.D.3d 186 (1st Dep't 2004); *see also Molodofsky v. Molodofsky*, 43 A.D.3d 1011 (2d Dep't 2007).
4. *Kessler v. Kessler*, 33 A.D.3d 42 (2d Dep't 2006); *see also Anonymous v. Anonymous*, 123 A.D.3d 581 (1st Dep't 2014).
5. *Lenox v. Weberman*, 109 A.D.3d 703 (1st Dep't 2013); *see also Vinik v. Lee*, 96 A.D.3d 522 (1st Dep't 2012).
6. *Petracca v. Petracca*, *supra*.
7. *Cioffi-Petrakis v. Petrakis*, 103 A.D.3d 766 (2d Dep't 2013).
8. Dobrish, R.Z., *Mal(Content) Practice Cases: Disgruntled Litigants and Unpaid Fees*, NYLJ, April 13, 2011.
9. *See* N.Y.C.P.L.R. §§ 203 (g) and 213 (1)(8).
10. *Bloomfield v. Bloomfield*, *supra*.

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