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# 'Til Death Do Us Part? What Every Legal Practitioner Should Know About Premarital Agreements: A Law Student's Perspective

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# 'Til Death Do Us Part?

## What Every Legal Practitioner Should Know About Premarital Agreements: A Law Student's Perspective

By Lauren Ludvigsen

It is rare that a couple will enter into a marriage expecting to divorce each other. It may be the romance or the excitement of the impending nuptials, but couples do not include an expiration date on their marriage certificate. However, not all marriages last until "death do us part." The United States Census Bureau conducted its first survey into marriages, divorces, and widowhood in America in 2009, finding that 9.2 of every 1,000 men and 9.7 of every 1,000 women over the age of fifteen reported being divorced.<sup>1</sup> Despite these rates, research suggests that only one-fourth of Americans believe that premarital agreements (also known as prenuptial agreements or a "prenup") are financially smart for those contemplating marriage.<sup>2</sup> As a legal practitioner, it is imperative to be able to draft a valid, all-encompassing premarital agreement while navigating state law and the ethical considerations involved in the process.<sup>3</sup> This guide will provide you with the necessary resources to draft a solid, comprehensive premarital agreement for your love-struck clients.

A premarital agreement is a written stipulation between prospective spouses in contemplation of marriage that sets forth each party's rights and responsibilities with respect to the division of assets and property upon dissolution of the marriage, separation, or death.<sup>4</sup> It is made before the marriage and must be in writing, signed by the parties, and acknowledged in the same manner required for a deed to be recorded in order to be valid and enforceable.<sup>5</sup> A prenup may include a stipulation to allow for the testamentary provision of any right in a will, the waiver of any right to a testamentary provision of a will, or even for the ownership, division, and distribution of separate and marital property.<sup>6</sup> It may also provide for spousal support and maintenance, or the waiver of such.<sup>7</sup> Provisions for the custody, care, education, and maintenance of the parties' children may be included in a prenup, but they are subject to the state statute governing custody, visitation, and child support.<sup>8</sup> However, a marrying couple cannot contract within a prenup to dissolve or alter their marriage or to relieve their obligation to support each other in such a manner that he or she will be incapable of self-support and likely to become a public charge.<sup>9</sup>

Historically, prenups were a way to protect a decedent's estate rights and to protect women, who could not legally contract, by spelling out the financial obligations of her new husband and to establish her dowry.<sup>10</sup> In modern times, New York's adoption of equitable distribution of marital property, combined with the increase of multiple marriages and their resulting children, has given rise to both men and women seeking prenups in order to protect

their personal assets.<sup>11</sup> Individuals who have children from a previous relationship, are entering a second or subsequent marriage, own a business, or have acquired substantial assets or wealth should especially consider a prenup in order to protect their economic future.<sup>12</sup> Modern women are also increasingly interested in safeguarding tangible assets with a prenup as due to their rising participation in the workforce as well as the likelihood of them marrying at a later age than in previous eras, they are bringing more into their marriages.<sup>13</sup> Furthermore, prenups can also be written to safeguard the property rights of children from previous relationships and can limit, at least to a certain extent, the liability for spousal maintenance in the event of a divorce.<sup>14</sup> Those who are making a significant lifestyle change or are relocating for the marriage should also consider a prenup in exchange for giving up those rights.<sup>15</sup> The prevalence of divorce and remarriage has prompted many marrying couples to consider prenups in order to realistically plan for and protect their economic futures.<sup>16</sup>

Although this is a logical perspective on marriage and divorce, it may be difficult for your clients to shake their romantic notions of love long enough to sign a prenup. One study found that despite couples' knowledge of the near fifty-percent divorce rate in the United States, participants believed their own chance of divorce was only 11%.<sup>17</sup> Approximately 62% of those same participants felt that asking their partner to sign a prenup was a sign of uncertainty in the success of the impending marriage.<sup>18</sup> However, discussing the provisions of a prenup promotes financial planning and discussion of the variety of issues and obligations that a couple may confront during their marriage.<sup>19</sup> Encouraging honest and open communication regarding the personal and financial terms of a prenup and each other's emotional expectations of the marriage can strengthen the relationship between the marrying couple.<sup>20</sup> Not only can these discussions increase the chances of a peaceful and successful marriage, but also in the event of a divorce, a prenup can help a divorce to run more smoothly.<sup>21</sup> These points may be helpful to tell your clients to quell their fears about discussing a prenup with their future spouse.

Once your client has asked you to draft a prenup for them, the hard work begins. Here is where your law library and Westlaw or LexisNexis accounts come in handy. Chapter 6 of the *New York Practice Series: New York Law of Domestic Relations* should become your best friend.<sup>22</sup> Written by Alan D. Scheinkman, the current Administrative Judge for the 9th Judicial District of New York, Chapter 6 covers almost everything you need to know

about drafting and executing a prenup in New York. It even includes a handy “Practice Checklist” that lists all the important details and issues to address in a prenup.<sup>23</sup> There are references galore to pertinent statutes, particularly Domestic Relations Law § 236 and General Obligations Law §§ 5-303 and 5-311, as well as to important New York case law that is directly on point for each provision. I also highly recommend Chapter 4 of *Matrimonial and Family Law (West’s McKinney’s Forms for New York)*, which provides additional references and forms, such as the child support guidelines clause and provisions for certain waivers, to help get you started.<sup>24</sup> We can thank Judge Scheinkman for *Matrimonial and Family Law (West’s McKinney’s Forms for New York)* as well.

In New York, prenups that address the ownership, division and/or distribution of property must be read in conjunction with Domestic Relations Law § 236(B).<sup>25</sup> Now is the time to pull up Domestic Relations Law § 236(B), because prenups live and die by this New York statute. Take plenty of time to read through the entire statute and then read it again, because this statute is going to be your second best friend during the prenup drafting and execution process. Domestic Relations Law § 236(B) provides for the equitable distribution of marital property while keeping separate property remaining separate at the dissolution of a marriage unless the parties have executed a valid prenuptial agreement.<sup>26</sup> The intent of the parties to override equitable distribution under the statute—whether by keeping as separate property that would otherwise have been deemed marital property or by expressly waiving equitable distribution—must be clearly indicated by the provisions of the prenup.<sup>27</sup> Courts may enforce provisions of the agreement so long as they are not against the law or against public policy.<sup>28</sup> Section 4.7 of *Matrimonial and Family Law (West’s McKinney’s Forms for New York)* provides excellent background on Domestic Relations Law § 236(B) for those who would like more information on the statute and relevant case law.<sup>29</sup>

Fortunate for New York practitioners, there is a wealth of case law that has helped to define the powers and limitations of prenups. Our fine state has a strong public policy favoring validly executed prenups for the simple fact that it allows individuals to bargain between each other and decide their own interests.<sup>30</sup> Prenups are treated like a legal contract—as long as it is clear on its face, a prenup is construed in accordance with the parties’ intent as gleaned from the four corners of the document as a whole.<sup>31</sup> This practical interpretation is utilized in order to meet the parties’ reasonable expectations of the language within the prenup.<sup>32</sup> The prenup should not be interpreted as to leave one of its provisions without substantial effect and force, as such would frustrate the intent of the document.<sup>33</sup> It is proper for the court to consider the circumstances under which the prenup was executed and the obligations and relationship between the parties.<sup>34</sup> However, extrinsic evidence will only be considered in determining the intent of the parties if the court finds the prenup to be ambiguous.<sup>35</sup>

One area in which there has been great difficulty in drafting a sufficient prenup provision is the waiver of retirement and pension benefits.<sup>36</sup> Now is the time to call your friend who is a trusts and estates attorney. Don’t have one? Grab your copy of *New York Practice Series: New York Law of Domestic Relations* or go to Westlaw’s version and turn/click to §§ 6.12 and 6.13 for a superb discussion of Estates, Powers, and Trusts Law and how that fits in with Domestic Relations Law § 236(B), plus the case law you need to keep from drowning in the stormy sea of retirement waiver provisions.<sup>37</sup> The reason retirement and pension benefit waivers are so difficult to perfectly craft is because these provisions are subject to not only state laws involving the validity of a prenup but also to federal law involving retirement and pension benefits.<sup>38</sup> The Retirement Equity Act of 1984 (REA), which amended the Employee Retirement Income Security Act of 1974 (ERISA), provides that qualified retirement plans must pay certain benefits to a married plan beneficiary and his/her spouse.<sup>39</sup> Under the REA, the plan beneficiary and/or his/her spouse will receive either a Qualified Joint and Survivor Annuity (QJSA) or a Qualified Preretirement Survivor Annuity (QPSA), depending on whether the plan beneficiary dies before or after retirement.<sup>40</sup> Although REA does not prohibit the waiver of these benefits through a validly executed prenup, the provision in the prenup waiving those benefits must conform to strict waiver requirements provided for in the ERISA.<sup>41</sup>

If your client does not have a retirement or pension to worry about, consider yourself lucky. Regardless, drafting a prenup should not be taken lightly, as the lawyer must play the dual roles of advocating for the client’s wishes while reflecting his/her expectations for the marriage and of protecting him/herself from any malpractice landmines that may pose a threat.<sup>42</sup> As always, document everything and maintain complete records of all correspondence with your client and with opposing counsel and follow up with your client after the marriage to handle any outstanding issues and postnuptial obligations.<sup>43</sup> It may be helpful to consult other attorneys, such as a trusts and estates attorney or a commercial attorney, or any other professional who specializes in any subject matter your client would like to include in the prenup.<sup>44</sup> Not only is this important when you are unfamiliar with the subject matter at hand (for example, if your client owns his own business and wants to protect those interests), but it also will help reduce your liability by asking for advice from these other professionals or by recommending that your client consult with them.<sup>45</sup>

Volume 45 of *New York Jurisprudence 2d* is another great resource for all family and matrimonial law practitioners who wish to better understand prenups.<sup>46</sup> *New York Jurisprudence 2d* goes quite in-depth with all aspects of prenups and provides a wealth of case law, statutes, and other resources that will hone your prenup-writing skills. The “Antenuptial and Postnuptial” section is organized into numbered categories and subcategories for easy searching and referencing.<sup>47</sup> I highly recommend check-

ing out Chapter 11 of *New York Matrimonial Practice*, which will be of great help when drafting a prenup.<sup>48</sup> Not only is there a form for each of your heart's desires, there are also four appendices containing the full text of frequently cited statutes and case law. If you are a family and matrimonial law practitioner, you should already have this binder and sleep with it under your pillow every night. It is also available on Westlaw if you would rather not wake up with a stiff neck.

The most important safeguard is to consistently and thoroughly inform your client throughout the drafting and execution of the prenup. Educate your client about the law, about his/her rights with or without an agreement, and weigh the pros and cons of each provision your client wishes to include in the prenup.<sup>49</sup> Just keep reminding yourself that your client most likely will not have the same knowledge and understanding of the legal mechanisms of what you do, so nothing should be thought of as self-explanatory.<sup>50</sup>

In sum, every engaged couple should consider signing a prenup before getting married. Whether they have a million dollars in the bank or they are swimming in debt, no one knows what their financial future holds. Romance and the fear of upsetting his/her partner should not stop someone from protecting their economic rights from a potentially messy divorce. Although no one gets married expecting to one day have to disentangle their lives from their spouse, it is an unfortunate reality that divorce is prevalent in this country. Use the plentiful resources available to draft and execute a valid, all-encompassing prenup for your clients that will protect them even after the romance is gone.

## Endnotes

1. Diana B. Elliot & Tavia Simmons, U.S. CENSUS BUREAU, AM. CMTY. SURV. REPORTS, MARITAL EVENTS OF AMERICANS: 2009, at 2 (2011), available at <http://www.census.gov/prod/2011pubs/acs-13.pdf>.
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3. Paul S. Leinoff & Natalie S. Lemos, *The Perils of A Prenup: First Do No Harm—to Your Client or Yourself*, 33 FAM ADVOC., no.3, 2011, at 8, 9.
4. Melvyn B. Frumkes, *Why A Prenuptial Agreement?*, 33 FAM. ADVOC., no. 3, 2011, at 7.
5. N.Y. DOM. REL. LAW § 236(B)(3) (McKinney 2010).
6. *Id.*
7. *Id.*
8. 45 N.Y. JUR.2D *Domestic Relations* § 193 (2012).
9. N.Y. GEN. OBLIG. LAW § 5-311 (McKinney 1980).
10. Willard H. DaSilva, *Changing Population Trends Spur New Interest in Prenup Agreements for Love, Money and Security*, 74 N.Y. ST. B. ASSOC. J., no. 2, 2002, at 8.
11. *Id.*
12. Frumkes, *supra* note 4, at 7.
13. Poliacoff, *supra* note 2, at 13.
14. DaSilva, *supra* note 10, at 8.
15. Frumkes, *supra* note 4, at 7.
16. Poliacoff, *supra* note 2, at 13.
17. *Id.*
18. *Id.*
19. Frumkes, *supra* note 4, at 7.
20. Poliacoff, *supra* note 2, at 15.
21. *Id.*
22. Alan D. Scheinkman, *New York Practice Series: New York Law of Domestic Relations* § 6 (2nd ed. 2011). *See also id.* §§ 6.1-6.26.
23. *Id.* at § 6.26.
24. Alan D. Scheinkman, *West's McKinney's Forms for New York: Matrimonial and Family Law* § 4 (2012).
25. *Strong v. Dubin*, 901 N.Y.S.2d 214, 217 (App. Div. 2012). *See also Van Kipnis v. Van Kipnis*, 900 N.E.2d 977, 979-80 (N.Y. 2008).
26. *Strong v. Dubin*, 901 N.Y.S.2d at 214.
27. *Id.*
28. *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983).
29. Scheinkman, *Matrimonial and Family Law*, *supra* note 24, § 4.7.
30. *See Katsaros v. Katsaros*, 914 N.Y.S.2d 910 (App. Div. 2011). *See also Van Kipnis*, 900 N.E.2d 977 (N.Y. 2008); *Bloomfield v. Bloomfield*, 764 N.E.2d 950 (N.Y. 2001).
31. *Katsaros v. Katsaros*, 914 N.Y.S.2d at 910; *see also, Genovese v. Axel*, 835 N.Y.S.2d 684 (App. Div. 2007); *Strong v. Dubin*, 901 N.Y.S.2d at 214.
32. *Katsaros v. Katsaros*, 914 N.Y.S.2d at 910.
33. *Strong v. Dubin*, 901 N.Y.S.2d at 217.
34. *Genovese v. Axel*, 835 N.Y.S.2d at 685-86.
35. *Van Kipnis v. Van Kipnis*, 900 N.E.2d at 979.
36. Anne Pachciarek & Julie Laeace, *Can Prenups Waive Pension Benefits?*, 24 FAM. ADVOC., no. 3, 2001, at 41.
37. Scheinkman, *New York Law of Domestic Relations*, *supra* note 22, § 6.12-3.
38. *Id.*
39. *Id.* *See also* 29 U.S.C. § 1055 (2006).
40. *Id.*
41. Pachciarek & Laeace, *supra* note 36, at 41-2. *See also Strong*, 901 N.Y.S.2d at 219.
42. *Leinoff & Lemos*, *supra* note 3, at 8.
43. *Id.* at 19.
44. *Id.* at 8.
45. *Id.* at 19.
46. 45 N.Y. JUR.2D *Domestic Relations* §§ 155-98 (2012).
47. *Id.* at §§ 155-60.
48. WILLARD H. DASILVA, *NEW YORK MATRIMONIAL PRACTICE* § 11 (2d ed. 2011).
49. *Leinoff & Lemos*, *supra* note 3, at 9.
50. *Id.*

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