

ON FAMILY LAW

# Prenuptial agreements: The busy season is upon us



By Howard Soypher

Summer is almost here. The birds are back in the trees, the flowers are in bloom and the back-ups have begun at the Bay Bridge. It's the season for weddings, and for many domestic relations and estate planning attorneys, this means it's also the season for prenuptial agreements. While many of us are asked to draft them throughout the year, the busy season starts in the spring and runs through Labor Day.

In an opinion issued this year—*Cannon v. Cannon*—the Court of Appeals examined the nature of the “confidential relationship” that exists between parties entering into a prenuptial agreement, including the need to avoid “overreaching”—unfairness or inequity in the result of the agreement or its procurement—and to provide “full, frank and truthful” disclosure of assets. However, before the prenuptial process reaches the stage discussed in *Cannon*—the negotiation of the actual agreement—the attorney must first look at the big picture and determine his client’s purpose in seeking a prenuptial agreement.

In light of the Court of Appeals’ recent decision and the season now being upon us, it’s particularly timely to discuss how an attorney needs to appreciate the uniqueness of each client’s circumstance and how the agreement should be tailored to fit the situation.

## Goal-oriented drafting

Why does the client feel that she needs a prenuptial agreement? Is she looking to provide an inheritance for children from a prior marriage? Is she looking to minimize the risk of a court-ordered value division by establishing an agreement as to the division of value or property in the event of divorce?

Quite often the objectives include a hybrid of several concerns.

One of the more common objectives of the prenuptial agreement is to provide for the disposition of assets upon the death of the parties.

Most jurisdictions provide a surviving spouse with the right to elect to receive a certain share of the spouse’s estate, regardless of whether the last will and testament may provide the spouse with a lesser distribution or no distribution at all. For example, in Maryland, if a decedent spouse’s last will and testament provides for distribution of the entire estate to children and grandchildren, the surviving spouse can elect to receive one-third of the estate, thereby defeating the testamentary scheme of the decedent spouse.

One of the few ways to avoid this unintended result is to include a provision in a prenuptial agreement by which the parties agree to waive their right to receive this statutory share.

In Maryland, a party retains the right to receive a statutory share until the effective date of the parties’ divorce. Therefore, if one spouse dies during the course of a lengthy period of separation or even during the pendency of a divorce proceeding, his spouse may elect to receive the statutory share, even if the parties have not lived as husband and wife for a number of years and the decedent recently executed a new last will and testament that did not provide a distribution to the spouse. If appropriate under the circumstances, an attorney can prevent this from happening by including a provision that provides for a waiver of statutory shares that is effective upon the parties’ separation, rather than waiting for the entry of a judgment of absolute divorce to control.

Just as the attorney meticulously drafts language to present and protect a client’s goals, similar care should also be taken to ensure that “boilerplate” provisions are *not* used if they don’t serve the client’s goals.

For example, many agreements contain blanket waivers of rights of inheritance upon the death of a spouse. However, if neither party has children from a prior relationship or a need to provide financial security for elderly parents, they may not be as concerned with the disposition of assets upon their death as they are in establishing a framework for the division of assets and support in the event of divorce. In the event that one of the parties dies prior to separation or divorce, it may be her desire for her spouse to inherit all or part of her property upon his death.

Under this scenario, the inclusion of blanket waivers of inheritance would be inappropriate and and would defeat the client’s objectives.

Thus, an attorney should not be tempted to utilize his “form” agreement and simply change the names from client to client. One would not expect the prenuptial agreement for the house-pension-life insurance owning widower who wants to provide a larger inheritance for his children to be the same as the one drafted for the hot-shot young real estate investor who is concerned about his ability to retain those properties free from the claims of his spouse upon divorce.

## Death and divorce

From a domestic relations perspective, prenuptial agreements are often used to establish non-modifiable limitations for the amount and duration of alimony that a party may receive upon divorce. In the absence of such an agreement, a party is entitled to seek an alimony award that is always modifiable in amount and duration.

Generally, clients tend to look toward domestic relations or estate planning attorneys to draft prenuptial agreements. Because these agreements often impact an individual’s rights upon both divorce and death, an attorney drafting a prenuptial agreement should be sufficiently versed in both areas of the law.

If the estate planning attorney is unfamiliar with the framework that a court employs in determining a division of property or establishing alimony upon divorce, it is unlikely she will be able to address the client’s objectives to preserve assets in the event of the parties’ divorce or separation.

For example, does the agreement fully address the disposition of assets that the parties owned prior to the marriage, but that have increased in value during the marriage? Does it matter whether the increase in value is attributable to market conditions, the active efforts and financial contributions of one of the parties or some combination of both?

Quite often, these are the types of questions that clients don’t know to ask, but of which their attorney must be mindful. An attorney who is not sufficiently versed in both of these substantive areas of law does a disservice to his client if he attempts to prepare a prenuptial agreement that addresses both of these areas of law.

## Conclusion

It is clear that the attorney must consider the myriad of issues that may be addressed in the prenuptial agreement. The challenge is to determine the best way to meet the client’s stated goals without relying on the “standard” language that may not be consistent with those objectives.

Brides, get ready to throw those bouquets. Attorneys, get ready to ask—and fully understand the answers to—lots of prenuptial agreement-related questions. After all, it is that time of year again.

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