



Daniel R. Victor, Esq.
danny@victorandvictorlaw.com
Victor and Victor, PLLC

Guest Article

Antenuptial Agreements: Modern Trends in Pre-Marriage Contracts

This article endeavors to help the reader understand antenuptial agreements ("prenups") in light of modern marriage culture, despite the fact that although more common today, the prenup is actually based on an ancient covenant. The origin of the prenuptial agreement is biblical, and is contained in the Book of Exodus, in which upon marriage, husbands are commanded to provide for the support of their wives in the event of divorce. Modern-day agreements however, are not based on religious grounds, but are supported by state contract law, and are increasingly popular as the factors surrounding dissolution of marriages become more commonplace in American society.

Antenuptial agreements are allowed in all fifty states and the District of Columbia. In fact, over half of the states have adopted the Uniform Premarital Agreement Act (UPAA), which sets forth a specific definition of a prenup as, "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage."¹ Some states, including the State of Michigan, have gone so far as to statutorily codify enforcement of premarital contracts.²

Antenuptial agreements are essentially contracts, and therefore to be valid, the agreement must meet the traditional requirements

of legally binding contracts. The agreement must be in writing and the parties must be of sound mind and free of duress. The terms of the agreement must be supported by sufficient consideration, which in most cases is the marriage itself.³ The terms of the agreement must be based on the facts as they are known to the parties at the time the agreement is made, so that there is a meeting of the minds as to the facts and circumstances surrounding the agreement, and so that there is no fraud committed upon by either party at the time the agreement is executed.

Pre-Prenup Duties ■ ■ ■

In order to alleviate the possibility that the prenuptial agreement will be scrutinized for invalidity, there are some essential elements that should be a part of every prenuptial agreement before the agreement is even drafted. First, and most importantly, is the element of disclosure. In most cases, where there is insufficient disclosure of assets and liabilities, it is impossible for there to be a valid agreement. The parties to a prenup must disclose their assets in the document itself or in a schedule attached to the agreement and the disclosure should be made as close as possible to the time the agreement is executed to ensure an up-to-date assessment of the parties' individual estates.

¹ Those states who have enacted the UPAA are: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, South Dakota, Texas, Utah, and Virginia.

² See MCLA 557.28, which states, "A contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place."

³ Because the marriage itself is the consideration for the agreement, it is worthwhile to state in the agreement itself that the parties would choose not to get married if they could not have the terms of the dissolution of their marriage exactly as prescribed in the prenup.

The parties may engage in formal or informal discovery of each other's assets, and the disclosure of assets should be made under oath. The disclosure should contain agreed upon values of the assets disclosed, as well as any liens, mortgages, or debts that may be associated with the assets. The values of the assets should be well-verified and backed up by the data garnered through discovery if the parties engage in either formal or informal discovery, or based on recent documents and statements that verify the parties' incomes, assets, and liabilities.

The best practice is for both parties to be represented by counsel. When both parties are represented by counsel, there is less of a likelihood that there will be an unfair advantage when it comes to discovery; there will be less of a chance that one party will be taken advantage of during negotiations; and the possibility that one party will put the other under duress is mitigated substantially. Furthermore, because there is no duty for the parties to be represented by counsel, it makes the agreement all the more legitimate and valid if the parties are in fact each represented by an attorney.

Contents of an Antenuptial Agreement ■ ■ ■

The prenup may generally contain any agreement between the parties that would otherwise require adjudication by the court that has jurisdiction over the parties and their assets in the event of one party's death or a dissolution of the marriage for any reason, including but not limited to property division, alimony, assignment of debts and liabilities, ownership and disposition of insurance policy benefits, and determination of child support. The issues of child custody and parenting time are usually not addressed in prenuptial agreements, as there are usually no children born to the couple before the marriage. However, even in cases where the couple has children together prior to the marriage, the court is generally vested with the power to ultimately decide what is in the children's best interests, notwithstanding the parties' own agreement. Despite this, because of the rise in pre-marriage parenting, parties with children from their relationship together are more commonly including language governing their rights to custody and parenting time (visitation) of the children they already have together, as well as children who may be born to them in the future.

An antenuptial agreement is valid and enforceable if certain standards of "fairness" are met. Although the standards vary from state to state, these standards are premised on three basic tenets of equity and contract law, namely the following: the agreement must not have been obtained through fraud, duress or mistake, or misrepresentation or nondisclosure of material fact; the agreement must not have been unconscionable when executed; and the facts and circumstances cannot have changed since the agreement was

executed, so as to make its enforcement unfair and unreasonable. The agreement should be as specific as possible, and to the extent allowable, given what the parties know about each other and marriage in general, there should be as much contemplation given to every possible scenario that the future might hold for the marrying pair. When it comes to setting forth the specific terms to which the parties will be bound in the event the marriage is dissolved, it is best for the parties to explain, as best they can, what will happen to any and all property, assets, income, inheritance, gifts, etc., regardless of how unlikely the couple believes divorce may be.

It is always in the best interests of the parties to a prenuptial agreement to set forth the specific reasons why the couple is choosing to have the agreement in the first place. For example, many agreements set forth the parties' understanding that they are familiar with divorce proceedings and that they desire to be in full control of all variables that could be determinative in the event of their own divorce, rather than leave anything to chance by going to trial or engaging in settlement negotiations. Couples also usually specifically acknowledge that they understand that if they did not have their prenuptial agreement, the outcome in the event of a divorce could be different—better, worse, or otherwise—and that instead of taking that risk, they desire to be bound to an agreement for certainty's sake. The more specific each party's understanding of why the prenup has value, the greater the chance that it will be upheld if the agreement is challenged in the future.

Once these "recitals" are set forth, the specific terms of the agreement are stated. These terms can be as simple as, "neither party shall be entitled to alimony" or as complex as setting forth a detailed scheme and schedule of alimony obligations based on the length of the marriage, the incomes of the parties, the needs of the parties, or any other factor that the couple believes should be contained in the agreement. Regardless of how straightforward or complex the agreement, in order for the prenup to be upheld in the future, it is imperative that the agreement sets forth each and every provision in clear, unambiguous language, which will not be subject to multiple interpretations by a third party or the divorce court.

One of the most important elements in prenuptial agreements recently is a provision that pertains to the law applicable to interpreting the agreement if the parties move to a different state during the marriage. For example, at the time the agreement is entered, the parties may reside in the State of Illinois, which is not a community property state.⁴ Subsequently, the couple may move and reside in California—which is a community property state. To avoid a conflict and to clarify the true intent of the parties, they should include a provision such as:

⁴ In a community property jurisdiction, most property acquired during the marriage (except for gifts or inheritances) is owned jointly by both spouses and is divided equally upon divorce, annulment or death. Joint ownership is automatically presumed by law in the absence of specific evidence that would point to a contrary conclusion for a particular piece of property. Non-community property states, also referred to as "Equitable Property" states make no presumptions about the ownership of assets and instead look to specific factors about the origination and maintenance of the asset regardless of when the asset was acquired.

It is the intention of husband and wife that regardless of where they may from time to time hereafter reside and be domiciled; that the income or property from all of the separate property now owned by or which may hereafter be acquired by husband shall be the sole property of husband; and that wife hereby forever waives and disclaims onto husband any community or equitable property interest in and to husband's income and property.

The most precise agreements also include language that dictates the parties' rights to spousal support (alimony) after the marriage has ended. Alimony for the support or lifestyle maintenance of one party (periodic alimony) is different than alimony in gross, which is actually not spousal support at all, but instead, the payment of one party's property rights over a specific period of time. To the extent necessary, this distinction should be made clearly by the parties within the alimony provision of the agreement.

Since one of the most important functions of a prenup is to eliminate the speculation that results from possible litigation, it is increasingly popular to insert a provision in the agreement, whereby if one party challenges the validity of the agreement, the prevailing party is awarded attorney fees for having to defend against the other party's attempt to invalidate the agreement. It is also becoming commonplace for parties to assign varying rights to each other in the event of one party's death versus a dissolution of the marriage and making a clear distinction between the two—since the termination of the marriage because of the death of

one of the parties occurs under much different circumstances than the marriage ending because of divorce. In the event the agreement dictates the disposition of the parties' estates upon death, it is important that the parties' trust and estate documents are either drafted or amended *after* the parties execute the prenuptial agreement.

In conclusion, although the modern prenuptial agreement is not related to the husband's duties to his wife as set forth in the Bible, the function of the prenuptial agreement is unchanged: to provide for future certainty given a change of status, and to turn the risk of the unknown into the security of the specific and reliable. With marriage divorce rates remaining relatively constant, it is advisable that any person contemplating marriage at least investigate whether or not to enter into a prenuptial agreement. There is no guarantee a person will know what will happen during the marriage—but that does not mean people should not use their foresight and wisdom to protect themselves if the marriage ends for any reason at any time in the future.

Daniel R. Victor, Esq. is the managing partner of Victor and Victor, PLLC in Bloomfield Hills, Michigan. Mr. Victor annually tops the lists of Michigan's top lawyers and is included in the Best Lawyers of America for 2011. Michigan Lawyers Weekly listed Mr. Victor as a Leader in the Law in complex matrimonial matters and Crain's Detroit Business listed Victor and Victor, PLLC as a Tier One law firm in the Detroit area. Mr. Victor can be reached at +1.248.646.7177 or danny@victorandvictorlaw.com.

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William Jefferson Black
wblack@srr.com
+1.312.752.3386

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