

## THE TOP 10 REASONS 21ST-CENTURY COUPLES SHOULD CONSIDER A PRENUPTIAL AGREEMENT: PART 2

*Second in a two-part series*

by Burton A. Mitchell and Elaine Leichter

*This article was published in Elite Advisor Forum. Reprinted with permission.  
February 16, 2011*

In Part 1 of this two-part series, we discussed five of the top ten reasons that couples should consider a prenuptial agreement, including protecting inherited wealth, family businesses and separate property assets. We now bring you five more reasons that high-net-worth individuals should consider a prenuptial agreement.

Experienced professionals who advise high-net-worth clients through a period of divorce understand all too well why prenuptial agreements are important. If you have clients contemplating marriage, this series may help you make the case that a prenuptial agreement should be considered.

### MORE ON MAINTAINING SEPARATE WEALTH

What if one member of the couple is engaged in a high-risk business? Or has substantial premarital debt? Both of these are good reasons for a prenuptial agreement. If one member of the couple is in a high-risk business, a prenuptial agreement may allocate certain funds to one spouse for conservative investing as separate property while allocating certain assets to the other spouse, as separate property, for the high-risk business.

**REASON 6. *Creditor protection.*** In the case of one person bringing substantial debt to the marriage, the best interests of the family as a

#### KEY TAKEAWAYS

- If one member of the couple is in a high-risk business or has substantial premarital debt, a prenuptial agreement can provide protection.
- A prenuptial agreement can be made portable, so that it follows the couple from jurisdiction to jurisdiction (subject to enforceability limits within the new jurisdiction).
- A prenuptial agreement can address unique co-ownership issues as well as the complex needs of a blended family.
- If discussions break down, the impasse is almost always temporary.

whole are often served by sheltering the marital assets from that person's debts. This is particularly important in California, where community property assets can be reached by the creditors of either spouse for debts arising **before** or **during** the marriage. A future spouse who brings substantial premarital obligations to the marriage can undermine the creation of a net community property estate. A prenuptial agreement can limit the debtor spouse's creditors to his/her separate property assets and earnings while allowing the non-debtor spouse to accumulate savings.

Spouses cannot transfer marital assets in hindrance of creditors. In a community property state, this can create difficulties if one spouse has creditor problems, because both spouses have a present and equal undivided interest in

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the community property. Before the couple is married, while there is no marital property estate, they should be able to arrange their affairs as they wish. However, if significant creditor concerns exist, appropriate counsel should be consulted so that the best course of action can be taken for each individual and for the family as a whole.

### FAMILIES WITH MORE THAN ONE DOMICILE

#### **REASON 7. A *multi-jurisdictional family*.**

Some couples know before they get married that their work or family circumstances will expose them to multiple jurisdictions. This is common among families with transnational business interests and domiciles in more than one country. For example, imagine a man from a common-law jurisdiction in the U.S. (Country A) who is working abroad in Country B and proposes to a woman with dual citizenship in Country C. The wedding is planned to take place in California, where neither fiancé has ever lived, but where the future husband says they are “definitely” moving, although he does not know when, exactly. Should he and his fiancé have a California prenuptial agreement? Will the agreement be effective in Country B if they divorce before moving? Can each fiancé select a preferred court or jurisdiction (i.e., “forum shop”) if they split up, regardless of whether the individual’s actual country of domicile at that time was Country B, Country C or the U.S. (Country A)? What happens if one of the spouses dies and more than one jurisdiction claims the deceased spouse as a domiciliary for estate tax purposes?

If substantial premarital assets or high incomes are involved, the couple should have a prenuptial agreement.

While a prenuptial agreement can never provide a guarantee, it may provide another expression of the deceased spouse’s intent if two states are claiming the domicile of a decedent. In a forum-shopping battle, a prenuptial agreement may be helpful; however, the result will turn upon the weight that the foreign jurisdiction gives the prenuptial agreement and how the foreign court construes its provisions. A couple that knows there will be exposure to multiple jurisdictions should discuss a potential prenuptial agreement with estate planning and family law counsel in each of the jurisdictions most likely to touch their lives. One unfriendly jurisdiction does not negate the value of a prenuptial agreement. At the same time, the parties should understand the limits of enforceability and the potential for forum shopping.

### CONSIDERATIONS FOR SECOND (OR SUBSEQUENT) MARRIAGES

Second marriages often come with “baggage.” As advisors, we can point out that the new spouse should not bear the sins of the first spouse. However, the scars left by a failed marriage are too often the basis for a prenuptial agreement. You can hope that your client is getting help with those other issues and forge ahead, while trying to keep the client in a positive frame of mind. The reasons for a prenuptial agreement before a second marriage are compelling.

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### **REASON 8. Address the needs of a blended family.**

Unique co-ownership issues. Even if the couple is married “until death do us part,” the marriage will eventually end, usually leaving one survivor. For a family that has significant assets, the survivor should consider a prenuptial agreement if he or she remarries. The survivor is probably a beneficiary and/or trustee of one or more trusts funded with the first spouse’s assets. The surviving spouse has his or her own separate property and a beneficial interest in some or all of the deceased spouse’s assets. Ordinarily, we do not think about how to manage the former spouse’s assets when they may risk being comingled with the current spouse’s respective separate property and the marital property.

The marital residence (which is often a central asset in the negotiation of a prenuptial agreement) is illustrative. The residence may be co-owned by the survivor (through a “survivor’s trust”) and a “decedent’s trust,” and possibly a “marital trust.” The assets of the decedent’s trust and marital trust are probably earmarked for eventual distribution to the children of the first marriage. Even if the survivor wishes to convert the residence to community property or make it a marital asset, he or she has no right to do that with the interest(s) in the residence owned by the decedent’s trust and/or marital trust. If nothing else, negotiating the prenuptial agreement will force the new couple to address these unique co-ownership issues. The deceased spouse may have been the wealthier spouse. A prenuptial agreement cannot change that; however, the facts should come to light

during the negotiations on the prenuptial agreement.

Special issues for young families. If the first spouses divorced with young families, the issues are complex and dynamic. For example: (1) One or both of the new spouses could be paying spousal support and child support; (2) The second marriage could cause one of the spouses to cease to qualify for spousal support; (3) Children of one or both parties may live with, and may be supported by, the nonparent spouse. If so, which payments should be subject to reimbursement and which should presumptively be gifts? The new spouses will be melding assets that each received in marital settlements from their prior marriages. All of these—and a host of others—are reasons that the new couple needs a prenuptial agreement to arrange their financial and property affairs.

### **REASON 9. Promote successful relationships by providing security for a new spouse and managing the expectations of adult stepchildren.**

**Provide security for a new spouse of a retired/nonworking wealthy spouse.** The proponent of a prenuptial agreement usually is the wealthier fiancé. However, when the wealthy spouse is retired and the less wealthy spouse must take early retirement for the sake of the marriage, the person who actually may need the prenuptial agreement is the less wealthy spouse. The new spouse’s prospects to rejoin the workforce if the marriage ends in divorce will be limited, but the marriage will probably not have gone on long enough to result in a

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reasonable amount of spousal support (absent a negotiated amount under a prenuptial agreement). No meaningful marital property will accumulate (especially in a community property state where measuring community property is a matter of arithmetic). Neither spouse is working, and they probably enjoy an expensive lifestyle. In this case, a prenuptial agreement can provide for the security of the less wealthy spouse.

### **Manage adult stepchild/stepparent conflicts.**

A prenuptial agreement can also be used to manage conflicts between adult stepchildren and the new stepparents. The wealthy fiancé often cannot bear the thought of the stepchildren inheriting from him or her through the new spouse. The children of the wealthy fiancé often cannot bear the thought that the “evil stepparent” (who may be their contemporary) has hoodwinked their parent and is brazenly making off with their birthright. While these issues can be addressed in the estate plan, backing up the estate plan with a prenuptial agreement can prevent future overreaching by either side.

## **CONSIDERATIONS FOR ULTRA-HIGH-NET-WORTH INDIVIDUALS**

**REASON 10. *Income support mitigation.*** An ultra-high-net-worth or ultra-high-income individual who marries will probably have a prenuptial agreement for at least one of the other reasons listed above. However, another reason is to provide an alternative to the unreasonably high support amounts that could be calculated by computer software used by the court to estimate support in a divorce scenario.

The prenuptial agreement can cap spousal support or can provide a pre-negotiated marital property settlement in lieu of spousal support.

Although a prenuptial agreement cannot restrict the jurisdiction of the family court to rule on matters affecting child custody and support, the prenuptial agreement can include an acknowledgment by the parties that the wealthier fiancé's income is anticipated to exceed the amount necessary to support the expected marital lifestyle by an extraordinary amount. The parties can agree that measuring the child support award based upon the supporting party's income would be damaging to the well-being of their minor children. The prenuptial agreement can recommend, instead, that a potential future award of child support should be limited to the amounts needed to maintain the marital lifestyle enjoyed by the family prior to the breakdown of the marriage.

### **BE PATIENT**

Recognize that negotiating a prenuptial agreement, even in the best of circumstances, will evoke strong emotions. (This is a good time for the couple not to be living together.) If discussions break down or seem to reach an impasse, as they often do, it is almost always temporary. The parties should give each other the benefit of the doubt, take a break, and resume discussions when they have had time to consider each other's positions.

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### **PRENUPTIAL AGREEMENT— YES OR NO?**

Advisors should remind their clients that a marital property agreement is imposed upon every couple, regardless of whether they have a prenuptial agreement. It is the one that's written for them by the laws of the state in which they marry and is amended by laws of the state in which they may live during their marriage. This seems to work for "happily ever after" couples who start with nothing and build their lives together—"until death do they part." For everyone else, the marital property rules created by state law could probably use some tweaking, but at what cost, emotionally and financially?

Advisors should keep in mind that a custom-drafted prenuptial agreement should be created only if it can help the couple solidify the partnership that they must develop in order for their marriage to succeed. This requires the parties to be as fair, honest and understanding with one another as they can be. It also requires the expertise of attorneys on both sides of the table who understand family law, estate planning and relevant tax issues. Advisors must also encourage their respective clients to consider various possible outcomes (positive and negative) and to work cooperatively to create an agreement that works for both parties.



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