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Prenuptial Agreements are increasingly common in modern life. No longer the exclusive domain of the rich and famous, prenuptial agreements make sense to many who are approaching matrimony, often not for the first time, with a degree of caution and concern. Such concern is reasonable, given the statistics that more than four out of ten marriages end in divorce. According to one source, some 20% of remarried couples use prenuptial agreements, and premarital agreements have quintupled overall in frequency in the past twenty years.[1]

In addition to remarriage, there are numerous other situations that could benefit from prenuptial discussion -- planning and agreement, including obligations of one partner to third parties such as children from prior marriages, business partners, former spouses, or other creditors.

It is likely that more formal, substantive planning for marriage would be beneficial, and may even have an ameliorative effect on divorce statistics. Unfortunately, the prevailing adversarial model for negotiating prenuptial agreements works to discourage this sort of planning.

This article posits that the prevailing adversarial model for negotiating prenuptial agreements deters many from considering them, and limits the benefits that might otherwise be achieved for couples by prenuptial planning. This article posits that the collaborative law process offers an effective method for developing prenuptial agreements, one that is far better suited to the needs of persons who are about to marry than the traditional model. This article concludes that the standard of care for prenuptial agreements should mandate the use of the collaborative process for most cases.

THE WAY THEY WERE, OR FEAR & LOATHING ON THE WAY TO THE ALTAR

The traditional legal approach to the prenuptial agreement is adversarial in nature. The attorney for the initiating party (usually the one with assets to protect) perceives that his or her duty requires a single-minded focus on protecting the interests of his client from potential encroachment by the other party. Typically, there is little focus on determining or delineating any joint goals or objec-

1. ARLENE DUBIN, PRENUPS FOR LOVERS: A ROMANTIC GUIDE TO PRENUPTIAL AGREEMENTS (Random House 1999).

tives of the parties. Often, elaborate provisions are made for the disposition of property in the event of a failure of the marriage. Although the parties are on the brink of what is arguably the most significant joint enterprise that adults can undertake, nevertheless, the traditional legal focus is on the crafting of stop-loss provisions to limit the potential downside to one participant should the venture fail.

This approach is analogous to drafting a partnership agreement that contains only the "exit" provisions in the event of the dissolution of the partnership. Most business attorneys would never omit the provisions that are commonly included in partnership agreements detailing the shared goals and objectives. They point out that such clauses are useful in that they set out the context for the relationship of the partners, and include provisions defining the purpose of the venture, the anticipated contributions of each party, the management of the venture, maintenance of books and records and access thereto, distribution of profits and losses, and the like. In this respect, prospective business partners are often accorded more care by the legal profession than prospective marriage partners.

The fact that the traditional prenuptial agreement frequently fails to reflect any agreement about the governance of the ongoing marital enterprise is one of its chief shortcomings. In this important respect, the traditional process wastes the opportunity presented to educate the parties about the legal and financial aspects of marriage. While proceeding to alter the jurisdiction's statutorily imposed structure for marriage, it fails to undertake the work necessary to develop a set of shared agreements to take their place.

THE PROBLEM WITH (TRADITIONAL) PRENUPS

The very notion of a prenuptial agreement makes many people uncomfortable. Some believe that this queasiness stems from an idea that love and money do not mix well, and the less said about it, the better. It has often been observed that North Americans would rather talk about their sex lives than their finances. There is an additional dimension to this reluctance for two people who are to marry one another. This dimension has been described by one observer as "an aversion to dealing with the contradiction between the 'ours' that is suggested by becoming marital partners and the 'mine' that is characteristic of the formal legal document."[2] After all, many prenuptial-seekers are asking for provisions that limit or eliminate valuable rights that would otherwise accrue to the other party by reason of the marriage. The traditional process offers nothing to assist the couple with coming to terms in a thoughtful way with this dichotomy.

In the traditional process, the agreement-seeking party generally meets with his or her own attorney, who then develops a first draft of the proposed agree-

2. Chip Rose, Comment to *Collaborative Law Listserv*, (Dec. 2003), *available at* http://groups.yahoo.com/group/collablaw/.

ment. This first draft addresses mainly the issues of concern to the proposing party and often represents a "best case/home run scenario" or an "opening offer." The details of the agreement will generally not have been discussed by the couple before the first draft is prepared.

The unilaterally-prepared first draft of the prenuptial agreement is then delivered to the receiving party. It rolls into the middle of pre-marital festivities like a live hand grenade. Its length and painful detail plainly indicate that extensive secret discussions have occurred between the fiancé and his private professional advisors concerning issues of vital importance to the marriage, and that the receiving party has been excluded from all of these discussions. It is made perfectly clear that these professionals are only considering the interests of their individual client. The receiving party is directed to look elsewhere for consultation and legal advice concerning the proposed agreement. An unmistakable message about the power relationships in the proposed marriage has been sent. At some level, for this couple, the party is over and their relationship will never be the same again.

Thus, does the traditional legal process immediately establish for the couple and their prenuptial negotiation an "Us vs. Them" environment? In this setting, the closest ally of each party becomes not their intended spouse, but rather that party's own attorney. The arrangement conveys the message that there are no important common interests of the parties at stake, and that the issues are so divisive that they cannot be discussed in person, but rather must be passed through professional envoys. In this way, the traditional process establishes a model for the management of important issues in the marriage that is competitive and adversarial rather than cooperative.

The traditional process moves forward through a pressured flurry of back-and-forth moves involving letters between lawyers, proposals and counter-proposals. The stakes are high for everyone involved. Time pressures associated with a rapidly-approaching wedding date can be as fraught as those associated with an impending divorce trial date. The contrast can be stark between the joyous social festivities leading up to a wedding and bare-knuckled adversarial pre-nuptial negotiations over the business aspects of the marriage. The engaged couple typically experiences the whole process as stressful and alienating. The couple is seeing their future together being defined in this adversarial crucible.

Even when the process is concluded, powerful feelings about it linger and resonate into the couple's relationship as marriage partners. As San Francisco

attorney Jennifer Jackson observes, "One can end up feeling like one is marrying an enemy."[3]

THE NEW PRENUPTIAL PROCESS

The collaborative law process offers a profoundly different approach to prenuptial agreements. When the collaborative process is used, the written agreement is prepared last, and only after the partners have discussed the issues and concerns important to them and their shared life, and have reached shared agreements about those concerns. The collaborative prenuptial agreement becomes a mutually developed blueprint for the marriage.

In the collaborative process, no first drafts of a prenuptial agreement are prepared. Instead, the two parties and their attorneys come together for one or more four-way meetings in which the issues and concerns of each party are identified are addressed. Typically, one to four such meetings will be sufficient to address all of the issues and jointly review a written draft. The entire process may take about two months, and legal fees are comparable to those using traditional process.

The fundamental issues that make prenuptial agreements so difficult are still present in collaborative prenuptials. The couple must still address the tough questions: What is mine? What is ours? What will happen if we divorce? The difference is that the collaborative process provides a safe and supportive setting for exploring these questions and more, and, in so doing, enhances the couple's togetherness rather than emphasizing their separateness. This serves as a method for the couple jointly deal with other difficult issues, ones which will almost certainly arise during their marriage. Using the collaborative process in this way demonstrates that it is both possible and normal to address difficult subjects in a productive way that yields a result that is satisfactory to both parties to the marriage.

Legal information and advice is built into the process. Each party has the assistance of their own collaborative attorneys before, during and after each four-way meeting. These attorneys have special training and skills in working collaboratively. Often they have extensive mediation and facilitation skills.

"It is important to help one's client look at their own real interests and those of the other party," says Margaret Opatovsky, an attorney from Ontario, Canada. "I make sure that both parties feel respected and their concerns are validated and heard. My goal is that both parties will be equally powerful in their discussions."

It is still not easy for some clients to deal with these issues in close proximity to their loved one. "I say to my client, 'If you're reluctant to sit down and talk with your spouse-to-be about fundamental things like money, assets and

3. Conversation with the author, January, 2004.

debts, what is causing this reluctance,'" posits Opatovsky. "'If you can't talk about these issues now, in this safe and facilitated process, what will you do after you marry? We can offer this as a safe and non-confrontational means of getting at these issues. Take advantage of it. You'll see the value later.'"[4]

MONEY AND MORE

When handled collaboratively, the request for a prenuptial agreement becomes an opportunity to engage in education and planning for the marriage. Financial and property issues are generally on the agenda. But other crucial issues can also be addressed: creating a family, plans for children and the roles of each partner in child rearing; allocation of labor and resources during the marriage; what will be joint endeavors and joint property; what will be separate endeavors and separate property; what resources will be applied to debts; what hopes or expectations do they have about savings, investment, and retirement?

By exploring each party's views on these issues in advance, the couple can make a joint plan for how their partnership will operate on a practical basis. Will they have joint accounts? If they plan to blend their finances or make earnings during marriage joint property, would they be more comfortable having a certain amount designated as "my own money?" Will they be acquiring a joint family home or living in the residence of one of them? Are there emotional implications involved in the legal rights associated with the family residence that are more significant than for other assets?

In the course of their four-way discussions, the couple can plan for the major foreseeable life transactions that are likely to occur during their marriage, such as acquisition of a family home, the bearing of children, the trajectory of careers, planning for the family's protection in the event of the disability or death of one of the partners. The process thus becomes a valuable exercise in thoughtful planning for the health and well-being of the marriage and the new family itself. It becomes far more than a paper moat around one party's separate property. The prenuptial process becomes more about planning for the marriage itself than about planning for the possible event of divorce, although that is certainly included.

4. Conversation with author, January, 2004.

This new approach strengthens the couple's relationship through experiencing the joint development of a mutually satisfactory plan for their marriage.

By providing the parties an opportunity to develop shared understandings which then are memorialized in the agreement, the collaborative process provides significant advantages over the traditional process.

The collaborative process is much better understood by the engaged couple than the traditional legalistic model. The parties appreciate having a discussion with each other, rather than having a fight. The engaged couple generally appreciates the importance of "win-win" negotiations.

A REPRESENTATIVE CASE

Attorney Mike Stratton of Ontario, Canada, found himself in a collaborative prenuptial process almost by accident. A middle-aged couple had come to him to prepare wills for them, some fourteen days before they were to be married. It was the second marriage for both; both had property and children from prior relationships. The parties had already seen a financial planner; they brought with them asset and obligation schedules and income projections. During the discussion, it became clear to Stratton that the couple actually needed a prenuptial agreement that included some estate planning provisions.

By agreement of all, Stratton kept the prospective wife as his client and sent the prospective husband to find another attorney. Stratton then prepared a first draft of the prenuptial agreement he believed the parties wanted.

Meanwhile, Margaret Opatovsky, also of Ontario, was retained by the prospective husband. When she reviewed the first draft, she noticed two things. One, she believed the first draft did not address her client's major concerns, and two, she noticed that Stratton was a member of the local collaborative law practice group of which she is also a member: the Niagra Collaborative Law Group. So with her client's permission, she telephoned Stratton and asked if he would consider a four-way meeting. He agreed. Both attorneys state that they did not believe that they needed any elaborate consent arrangements with their clients to proceed in this way. After all, their clients had jointly sought legal counsel, and there was no current or impending litigation between the two. "Given the circumstances, we attorneys pretty much decided that the collaborative process would be appropriate here, and we arranged a four-way meeting," says Stratton. "That was fine with our clients."

With the wedding only one week away, the attorneys convened a four-way meeting. They discussed the collaborative process itself, with its emphasis on full disclosure and outcomes that work well for both parties. They then began to address the substantive issues. Their one hour meeting went on for three hours as they realized the need to talk more about various estate planning questions.

At the conclusion of the meeting, the parties had a written memorandum of understanding. The lawyers were assigned the task of working out the specifics and drafting what now would become a post-nuptial agreement.

Two months after the wedding, a subsequent four-way meeting was convened to review jointly a draft of the agreement, this one prepared by both lawyers. After further changes were made during that meeting, the agreement was revised on the spot and signed.

"I felt the process was productive and fruitful," says Stratton. "The collaborative approach is well-suited to marriage contracts, in which the parties' interests are potentially adversarial, but the conflicts are not the same type as with an actual breakdown of the marriage." Opatovsky states, "We used typical collaborative skills in conducting the four-way meetings. We canvassed the issues, asked about what each of them wanted to accomplish and what was worrying or concerning them that they hoped to address by their agreement. We explained the impact of our family law statutes on their goals and objectives, and then explored options for meeting their goals."

"If what you want to accomplish is X and Y,'" adds Stratton, "we said, let's look at some possibilities, some options and the consequences of those options."

Stratton and Opatovsky advised their clients immediately that, once they were married, there was no obligation to sign a marriage contract. But both clients expressed that being able to talk openly and together about these issues enhanced their relationship. It allowed each of them to talk about the respect and consideration they had for the other, and help them assure that their eventual agreement reflected these values.[5]

HOW TO DO PRENUPTIAL AGREEMENTS, THE COLLABORATIVE WAY

"After my first meeting with a client who wants a prenuptial agreement, I always ask for a four-way meeting," says Los Angeles attorney Judith Nesburn. "My policy is to avoid first drafts."

In the initial four-way meeting, normal collaborative law methods are used. For example, the attorneys begin by identifying the importance of full disclosure and the respectful consideration of each party's concerns. Common collaborative law documents, such as the Principles and Guidelines Agreement or the Stipulation for Collaborative Law, which are required for divorce cases using the collaborative process, have so far not been used in the prenuptial setting, and may not be technically necessary. However, attorneys are careful to emphasize

5. Conversations with the author, January, 2004.

with clients the importance of full disclosure and fair dealing, noting that these elements are often key to enforceability of the agreement, no matter what process is used.

"I discuss what the Family Code would provide as the default arrangement," says San Francisco attorney Jennifer Jackson. "Then I ask, 'What is not acceptable about these default arrangements? What are your concerns? What are you trying to achieve?'"

The parties are asked to talk about their employment, children, and disciplining styles. "Will they live in one party's house? What if that person dies first?" asks Los Angeles attorney Larry Ginsberg. "And the big question: Have you talked to your adult children about your remarriage and how it will affect their financial interests?" Ginsburg notes that the reservations of adult children about the remarriage of their parent, because of concerns about their own expectations about inheritance, are sensitive issues that are best dealt with by planning and communicating.

"The process methods are very similar to mediating," says Nesburn. "First we identify the issues, then we brainstorm. There is no criticizing during brainstorming. I work to make sure everyone is contributing to the discussion in order to ensure mutuality."

Every effort is made so that the eventual draft of the agreement will not be a surprise to anyone, but rather will be the sum total of their work together. Some attorneys create a written deal memo to read aloud at the close of each session.

Attorneys help the parties to prioritize the issues. After that, they deal with the easier issues first, so people can build on successes. Some attorneys are concerned about demonstrating the course of the negotiations, as an aid to enforceability. Multiple drafts and lengthy letters flowing back and forth are the traditional way to prove that the agreement was heavily negotiated (a plus in enforcement litigation), but it is certainly not the only way. The same purpose can be served by preparing minutes of the discussions that take place at each four-way meeting during the collaborative process.

TECHNICAL ISSUES

The collaborative process is ideal for prenuptial agreements, says Arlene Dubin. "I have for years recommended that people seek out attorneys who are accomplished negotiators, not litigators, when they want a prenuptial agreement." Dubin took collaborative law training specifically for the purpose of using the process for prenuptial agreements. "With the collaborative process," she notes, "clients get the negotiation advantages of a transaction lawyer and, at the same time, the litigation savvy of a divorce lawyer . . .This is the right combination for the job," she says.

Built-in legal advice without adversarial conduct is the hallmark of the collaborative process. Each prospective spouse has his or her own attorney, with a full-featured attorney-client relationship. The attorney makes certain that there is full disclosure of assets, liabilities and obligations to others. The attorney ensures that his client is fully advised regarding the options available to meet the client's needs and the impact of them.

Of course, parties seeking a prenuptial agreement cannot turn to a court to resolve differences between them concerning it, much like potential business partners cannot force others to go into business with them (forgetting hostile takeovers and their ilk). It is the essence of a transactional event. The parties must either come to a satisfactory agreement or they will not get married.

In this setting, collaborative skills are far more useful than litigation skills. Both parties dearly want the negotiation to succeed. Both parties recognize the need to reach an agreement with which they can both feel comfortable. "In this particular negotiation, if either side is a big winner over the other, then both are losers," observes Nesburn.

INTERDISCIPLINARY OPTIONS

The collaborative development of a prenuptial agreement can include interdisciplinary components as may be appropriate for the couple. Other professionals can provide targeted skill sets that are often necessary when there are financial, legal or emotional complexities involved. For example, financial planners can assist not only with compiling disclosure documents, but also can give the couple a financial check-up, assist with money management advice and budgeting, financial planning for children, home purchase, college, and retirement. Financial planners can also educate clients about the typical insurance needs of married people, including life, health and disability insurance.

Attorneys specializing in estate planning can be called upon for counsel and drafting assistance when the couple wishes to address estate planning issues in their prenuptial agreement. Such specialists can also prepare estate planning documents such as wills, trusts, and durable powers of attorney for healthcare and the like in order to coordinate with the prenuptial agreement's provisions.

Premarital counseling on personal issues is sometimes offered through a couple's religious community. But far too many couples embark upon the endeavor of marriage with little or no guidance. James P. Hutt, Ph.D., M.F.C.C. observes, "Since we all know how difficult it is to keep a marriage together, let alone live within it in a content, happy and spiritual state, why don't we first, in

an organized and formal way, receive counseling, and also seek the wisdom of those with successful, fulfilling marriages who have preceded us?"[6]

A counselor can help the couple develop better communication skills, especially concerning difficult issues like sex, money, in-laws or children from prior relationships. Counselors can help the couple understand the role models provided by their respective parents, and what aspects of those role models the couple wishes to keep and which to avoid. Counselors can help the parties understand how they actually resolve arguments and how to move beyond destructive patterns. And, if a couple is having difficulty reaching an agreement on any particular point in the negotiations, counseling may help.

NO DISQUALIFICATION CONCERNS

Many attorneys who appreciate the value of a collaborative approach to family law matters nevertheless have reservations about the disqualification provision that is central to the collaborative process for divorce cases. That disqualification provision requires that if the collaborative process does not succeed, the collaborative attorney will be disqualified from representing either party in litigation. Since no court or adjudicatory process is available for those attempting to reach a prenuptial agreement, no disqualification of attorney in the prenuptial process is contemplated or necessary.

Some attorneys believe that a collaborative disqualification stipulation might nevertheless be useful in the prenuptial setting, to provide that neither attorney will represent either party in any later marital action between them. However, if the validity or interpretation of the prenuptial agreement itself were to become an issue in a later dissolution proceeding, then presumably traditional conflict rules would apply to prevent a percipient attorney from representing the former client in that proceeding. Such conflicts of interest rules would also naturally prevent an attorney from representing the other party to the prenuptial agreement.

In a marriage dissolution setting, cost control considerations can lead some parties to advocate for a single professional such as a mediator, instead of two collaborative attorneys. The mediator may not even be an attorney. By contrast, in the prenuptial setting, most jurisdictions encourage or require independent legal advice for each party because of the gravity of altering the statutory protections of marriage. As a result, both prospective spouses will generally have legal advice. The desire to control costs is off-set by the desire to enhance the enforceability of the prenuptial agreement. Parties, who, at divorce, might resist funding legal counsel for their spouse, are quite willing to fund the retainer of their prospective spouse for a prenuptial agreement. This incentive to enhance

6. James P. Hutt, Ph.D, M.F.C.C., *Premarital Counseling*, 1 THE COUNSELOR LETTER, *available at* http:www.counselorlink.com/counsletter5.html.

the enforceability of the agreement, by ensuring independent legal advice, means that in practice most couples signing a prenuptial agreement will each be represented by an attorney. They will both be best served if those appointed are collaborative counsel.

High levels of anger or distrust at divorce make some parties and attorneys pessimistic about or unwilling to use a collaborative process. Parties often say that, while they themselves would be good candidates for a collaborative process, their spouse is too hostile or uncooperative to make an effort to use a worthwhile collaborative process. By contrast, parties who are about to marry one another typically have a high store of mutual goodwill, concern for, and optimism about one another. For these parties, it is the collaborative process that is the more natural process fit for their state of mind and state of relationship. For such couples, it is the traditional adversarial legal process that is a poor fit and should be avoided by conscientious practitioners.

Finally, couples at time of dissolution often are exhausted from years of conflict and are at the end of their tethers. They may be cynical about diplomatic interventions and drawn to the seductive allure of a pre-emptive first strike. Many parties at the brink of dissolution cannot imagine that their situation could become even worse as a result of prolonged exposure to a competitive and adversarial legal process.

By contrast, engaged couples are buoyed by a history of positive experiences with one another and are confident that together they can work things out satisfactorily. The collaborative process provides a supportive formal structure with disclosure guarantees that are far more suitable to these parties than an adversarial one.

For all of the foregoing reasons, the collaborative process in the prenuptial arena presents many advantages and few drawbacks from a client perspective. Those perceived risks of using the collaborative process in the dissolution of marriage setting are absent in the prenuptial setting.

The chief remaining concern then, is potential discomfort associated with dealing with such intensely personal issues in close proximity with the beloved, namely, in four-way meetings. For those who are especially uncomfortable in this area, mental health coaches or collaborative attorneys with high levels of interpersonal skills can be particularly helpful.

CONCERNS PARTICULAR TO THE PROFESSIONAL

For many, assisting clients with prenuptial agreements has become less and less desirable professional work even as such agreements become more and more common in the culture. Concerns are generally collected under the head-

ing of "professional liability" and include reservations about the impact of the agreement on the weaker party and implications flowing therefrom, concern that the financial concessions wrested in the prenuptial agreement will reverberate in the marriage and make divorce and litigation more likely rather than less likely as prenuptial participants often hope, concern about trying to anticipate all possible future contingencies, and concern that the agreement will be challenged, embroiling the professional in litigation about it.

The collaborative process offers many potential advantages to those brave souls who continue to practice in this area. Lawyers utilizing the collaborative process are likely to find the experience much more satisfactory, as productive legal planning and their liability concerns are reduced.

The couple's relationship is likely to be strengthened through the use of the collaborative process. Time will tell whether this results in a reduced likelihood of marital discord and divorce. However, the process of identifying concerns and working through them to mutually acceptable arrangements is one of the best ways known to strengthen the relationship and increase confidence in the couple's ability to work together in the future when issues inevitably arise. The frank discussions that occur in the four-way meetings help to avoid misunderstandings and unsupported expectations.

A prenuptial agreement that has been developed by the joint efforts of the parties and their collaborative counsel would appear to be less likely to be attacked. This is because the agreement is understood as being owned jointly by both of them, rather than being a one-sided document. Moreover, each party has had his or her own concerns heard and addressed in the process of developing the agreement. In other arenas, this has been shown to reduce risks to practitioners of malpractice suits, which often arise out of a general dissatisfaction with the way a party perceives himself to have been treated, and his concerns dismissed, in the legal process.

Another benefit is that attorneys will find in the prenuptial arena an ideal venue in which to employ and refine collaborative skills, a venue in which those skills are particularly valued and in fact favored over litigation skills. Attorneys newer to collaborative practice may be more comfortable sooner in the prenuptial setting, since the challenging aspects of interpersonal conflict associated with divorce are absent or muted.

CONCLUSION

Using the collaborative law process for prenuptial agreements is particularly gratifying for practitioners who understand the broader social benefits of collaborative work. For professionals who often minister to the end of relationships, it can be especially rewarding to introduce the benefits of collaboration to those at the beginning of their marital journey. As Margaret Opatovsky puts it,

"Using collaborative law for prenuptial agreements is the ideal expression of the goals of this process."