

Approaching Prenuptial Agreements Positively

Today's Speakers



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Ric Roane, Partner, Warner Norcross + Judd

Jennifer Remondino, Partner, Warner Norcross + Judd

September 18, 2019



Ric Roane, Partner, Warner Norcross & Judd LLP

Ric Roane, past chair of the Family Law Practice Group, has practiced family law and domestic relations litigation for 31 years. “My work involves entire families,” he says. “My goal is to find a resolution to the problems facing the family I’m serving. It’s a less contentious approach.” He specializes in divorce, non-marital domestic relationships, LGBT family issues, domestic relations mediation, arbitration and collaborative law, spousal support, child custody and support, complex business valuation distribution, pre- and post-nuptial agreements and all aspects of international family law.



Jennifer Remondino, Executive Partner, Warner Norcross & Judd LLP

Jennifer is an estate planning attorney who is dedicated to building relationships with clients. She finds it rewarding to help clients with some of life's most difficult situations – death and disability. She specializes in sophisticated tax planning, estate and gift tax audits, formation and operation of family offices, trust and estate administration, governance agreements and business succession planning. She takes a practical, yet personal, approach to estate planning and enjoys working with clients residing in both Michigan and Florida to structure inheritances that fit each family's unique circumstances. Jennifer is the Chair of the firm's Trust and Estates Practice Group, the Executive Partner of Warner's Holland Office and a Fellow of the American College of Trust and Estate Counsel. She has received numerous awards, including Best Lawyers in America for Closely Held Company, Family Business Law, and Trusts and Estates, Michigan Super Lawyer Rising Star, and the Grand Rapids Business Journal's 40 Under Forty, which recognizes the area's top business leaders.

Polling Question – Participation Required for CPE



- **Scenarios** – What circumstances might require an agreement
- **Laws** – How prenuptial agreements are governed and what makes an agreement valid/defensible in court
- **Benefits** – How prenuptial agreements can strengthen your relationship and provide positive benefits for both of you
- **Reactions** – Typical reactions to the request for a prenuptial agreement
- **Approach** – A thoughtful approach to raising this topic with your significant other
- **Conflict Resolution** – What to do if raising the subject starts an ugly fight



Ahh...You are in the
bloom of love and living
the excitement of
planning your wedding
and your upcoming lives
together...



...until someone
mentions the
word “prenup.”



Polling Question – Participation Required for CPE





Why would I suggest a prenuptial agreement when I know the reaction might be unfavorable?

You (or your client) are coming into the marriage:

- As a current or future shareholder in a family business
- With family legacy wealth
- With earned and accumulated assets and savings





You (or your client) are coming into the marriage with:

- children from a prior marriage
- a special needs child who may require lifetime care
- a family constitution or other governance vehicle that ***requires*** a Prenuptial Agreement

What does a prenuptial agreement do?

What Is A Prenuptial Agreement's Function in These Scenarios?

A prenuptial agreement (PNA) is a contract that sets forth the couple's intentions prior to the marriage to address issues of:

- income
- support
- household expenses
- ownership and acquisition of assets

...and the division of such items in the event of death while married or dissolution of the marriage.



How Does a PNA Work in the Event of a Divorce?

The prenuptial agreement has already spelled out

- the assets which will remain the exclusive property of each spouse
- which assets are considered marital assets
- how assets acquired during the marriage will be divided
- responsibility for debts
- limits on spousal support (alimony)

This could help to reduce tension, as well as the need for court intervention in handling problems as the divorce proceeds, which may cut down on legal fees and allow the process to move along at a faster pace.



How Does a PNA Work in the Event the Spouse Dies?

In a prenuptial agreement, spouses can decide what property rights each spouse will have after the death of the other.

- The choices agreed to in a prenuptial agreement **override the laws designed to protect a surviving spouse** (such as elective share).
- This means that this contract **sets the floor for what assets your spouse must receive** upon your death. But your spouse could receive more depending on how assets are titled.
- Your agreement could guarantee your spouse specific assets, a percentage of marital assets or a specific payout (lump-sum or over time) among other options.



What Doesn't A Prenuptial Agreement Do?

Prenuptial Agreements should not address agreements regarding custody or support of minor children in the event of dissolution

BECAUSE

The divorce judge always has equitable jurisdiction and authority to make such decisions and parents cannot bargain away that jurisdiction.

What if my spouse dies, and I do not have a prenuptial agreement?

Common law states - Without a prenuptial agreement

- Spouse is entitled to a minimum amount (the elective share), regardless of what your will says.
- Typically a fraction of your estate (1/3 or 1/2), but other factors such as length of marriage or children could vary this.

Community property states - Without a prenuptial agreement

- Spouse is entitled to 1/2 share in income/assets acquired during marriage.
- Your will can designate disposal of your separate property (gifts, inheritances, property you owned before marriage) and your half of the community property.
- Can't dispose of any of spouse's share without his/her permission.



What are the benefits of a PNA?

What are the benefits of a PNA for us as a couple?

It encourages a healthy discussion of finances and expectations for the marriage, similar to that included in premarital counseling required by many religions



What are the benefits to the other partner:

- **Financial security** - to a spouse that has less property and wonders how he will be able to afford the upkeep required of the home in the event of his wife's death
- **Peace of mind** - to a spouse who is moving to a new city/state or quitting a job for the marriage, so she knows that she will have resources available to support her in the event the marriage ends
- **Protection** - for a spouse if there are children from prior marriages. The agreement can document your intentions to provide for your spouse upon your death, avoiding challenges to your estate plan by your children.





What is my fiancé going to say when I ask for a PNA?

Despite the benefits, sometimes the reaction to your request may be:

My dear, you seem to love your money more than you love me??!



Other Less Than Positive Reactions:

“I’m NOT going to sign that...”

“I can’t afford a lawyer to advise me...”

“I cannot believe you are doing this to me (to us)...”



Polling Question – Participation Required for CPE





Is there a right way to ask the one you love for a PNA?

A positive approach to the whole process can help to avoid or at least mitigate unfavorable reactions.



This positive approach requires some thought and preparation prior to broaching the subject, and an understanding of the appropriate time and place to discuss this topic.

Five considerations for you...

1. Give thought to what your fiancé's **concerns or fears** might be so that you can be better prepared to address those in your discussions.
 - Is your fiancé financially secure in his or her own right, or will the agreement need to provide additional financial security?
 - Will your fiancé view a prenuptial agreement as contrary to the idea and partnership of marriage?
 - Will the agreement be viewed as establishing power and control, or conversely, eliminating power and control?



2. Give thought to the ***purposes*** of the agreement, and the ***reasons*** for those purposes, so that you can communicate clearly why the agreement is important to you, and perhaps to others.

For example:

- Are you wanting to protect very specific assets, such as ownership in a business? (*Is there a company policy or agreement among the owners that ownership remain within the hands of current owners and their descendants?*)
- Do you have children whom you need to support or whom you want to inherit assets at your death?

3. Consider *how and where* you will approach the subject with your fiancé.

- A private, calm setting is best to allow thoughts, concerns and emotions to be fully shared.
- After the topic has been raised, subsequent meetings can be held with a trusted family advisor or attorney to assist with explaining the concept, reasons or process.



TIME...TIME...TIME

Nearly the most important aspect of addressing a Prenuptial Agreement.



4. Broach the subject as *far in advance* of the wedding as possible, and preferably prior to or immediately following the engagement:

- Ideally need a minimum of 3 - 6 months prior to the wedding, as drafting and negotiating the agreement can take several months.
- You both will need time to consult with your attorneys (you will need separate attorneys).
- Neither of you will feel secure or positive about a last minute negotiation, and a hurried document is less likely to hold up in court later.
- **Your goal should be to have the agreement completed before you send out your wedding invitations.** You do NOT want to be discussing, let alone negotiating, the terms of a PNA while you are addressing invitations and going to cake tastings and scheduling dress or formal wear fittings!





THE DANGER ZONE

I don't get involved in negotiating PNA's
less than 30 days before a wedding.

5. When you are ready to broach the topic, start the discussion **gradually and communicate fully**.
- If your company has a policy that all owners have prenuptial agreements, inform your intended about this before the engagement.
 - Express your reasons for desiring a prenuptial agreement, and **be prepared to address your fiancé's anticipated concerns** about entering one.
 - Make sure to include the benefits you have identified for creating the agreement.





**My fiancé understands and has agreed
to a PNA? What do I need to know
about the process?**

Once you have a green light to move forward on creating an agreement, be prepared to follow some rules to make sure your agreement will be valid in court.

Rule #1 - PNA cannot be obtained through

- fraud
- duress
- mistake
- non-disclosure of material fact





Full Disclosure of Material Facts Includes:

- ✓ wealth
- ✓ assets
- ✓ income
- ✓ debts

Tips for Financial Disclosure:

1. Create comprehensive asset, debt and income schedule - A and B - for each fiancé
 - Disclosure of net worth can be challenging, especially if your fiancé has little indication of your net worth.
 - Be prepared to discuss how you view your wealth and what it means to you, and, if it is family wealth, your sense of responsibility to honor your family's legacy.

2. Explain where values came from in the Financial Disclosure:

“The values here are not based upon a formal appraisal but are a good faith estimate of the value of the item as of the date stated.”

OR

“The value stated is based upon an appraisal by Meyer Appraisal Service dated September 18, 2019.”

OR

“The values stated are based upon the Wells Fargo Account Statement dated August 31, 2019.”



In some jurisdictions, full disclosure includes other facts (facts where the disclosure of them may have led a party not to marry or at least to take precautions) such as:

- ✓ alcohol or substance abuse history
- ✓ history of domestic violence
- ✓ mental health history/commitments
- ✓ sexually transmitted diseases

Best practices to retain privacy as much as possible:

Disclose any such items in a letter to opposing counsel



Rule #2 - The PNA cannot be unconscionable when executed.



Other Considerations regarding validity:

- Under the Uniform Act, the Prenuptial Agreement **MUST** be presented to the responding spouse at least 7 days before signing it, to allow time to review it with independent legal counsel.
- For states which are not a signatory to the Uniform Prenuptial Agreement Act, there are no specific pre-signing deadlines other than by state statute or case law - in Michigan, there is no specific rule.
- In the event of a divorce or death, have facts and circumstances changed since signing the agreement that render enforcement of it unfair or unreasonable?



Prenuptial agreement laws differ by state

Uniform Prenuptial Agreement Act states - 26 states plus DC

Arizona	Arkansas	California	Connecticut	Delaware	DC
Florida	Hawaii	Idaho	Illinois	Indiana	Iowa
Kansas	Maine	Montana	Nebraska	Nevada	New Jersey
New Mexico	North Carolina	North Dakota	Oregon	Rhode Island	South Dakota
Texas	Utah	Virginia			

Note: Michigan is NOT a signatory to the Uniform Prenuptial Agreement Act.





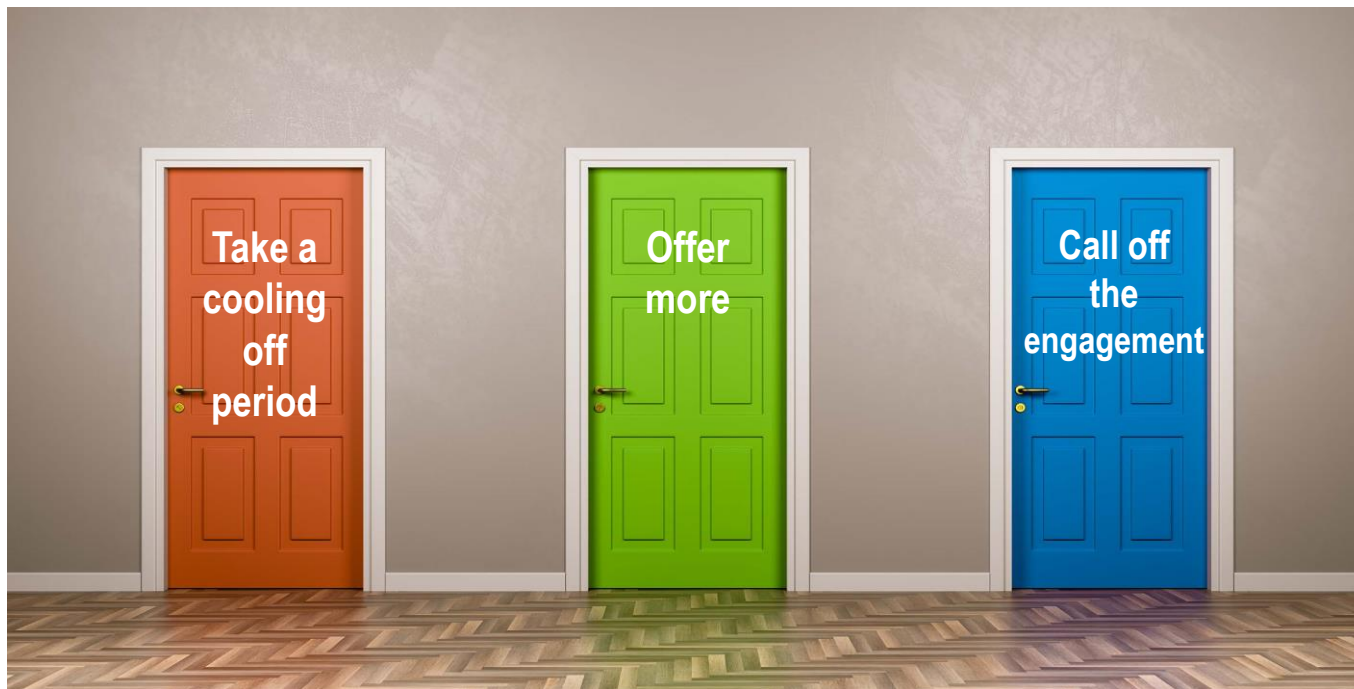
**My fiancé is unhappy about having a
PNA. What do I do now?**

If you reach a point where you are having difficulty discussing the agreement with your fiancé or moving past an issue, ***consider professional help, such as pre-marital counseling.***

A marriage counselor, faith leader, trusted friend or advisor can work wonders to facilitate a healthy discussion of money and partnership, and counseling prior to marriage can result in a stronger, healthier marriage.



When Things Seem To Be Failing...



My fiancé refuses to sign a prenup, but I still want to get married. Do I have other options for protecting my assets?

- Trusts
- Domestic Asset Protection Trust (DAPT)
- Buy-Sell Agreement Triggers
- DO NOT MINGLE INHERITANCE ASSETS WITH MARITAL ASSETS!

Is a Domestic Asset Protection Trust Right For You?

Steffel, James | March 12, 2019



Last week was the second anniversary of an Act in Michigan that authorized the creation, funding and administration of domestic asset protection trusts (DAPTs). This statutory recognition of DAPTs gives Michigan residents a significant new opportunity to protect assets from the claims of third-party creditors.

How a DAPT Can Protect You

Without a DAPT, if you control the use and enjoyment of an asset, that asset is generally subject to the valid claims of your creditors (whether arising under judgments from loans, malpractice, car accidents or otherwise). In other words, if you own it or control it (e.g., through rights under a trust), your creditors can get to it. However, with a properly-drafted and funded DAPT, you can now retain "certain" rights to the assets transferred into the trust, while restricting your creditors' access to those assets.

<http://www.wnj.com/Blogs/Private-Client-and-Family-Office-Blog>



**We have our agreement signed. Am I
all set?**

No...you must update your estate planning to accommodate the new prenuptial agreement.

- Update your will
- Update your beneficiary designations on insurance, retirement accounts, bank accounts, etc.
- Evaluate trust titling and funding

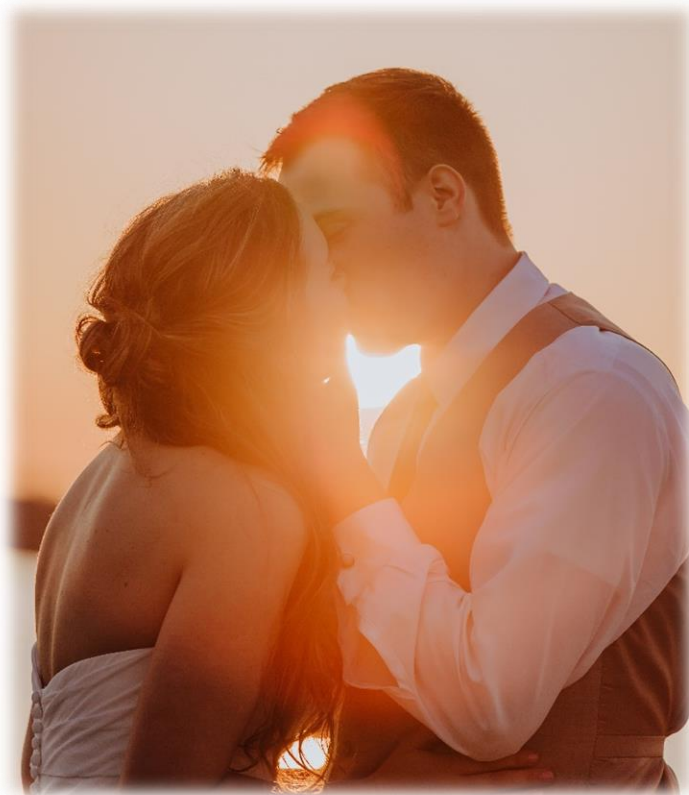




The Takeaway

Keep in mind throughout this process that the end goal is to get married and to have a happy marriage.

The agreement you are working on should strengthen, not weaken, your relationship and partnership.





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