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How (and Why) to Bring-up a Prenup

By Arlene G. Dubin

Long before you pop the “M” word, you should pop the “P” word.

As a result of the high divorce rate, changing divorce laws, the trend toward marrying later and great longevity, the number of prenuptial agreements has increased exponentially. The idea of bringing up a prenuptial agreement, however, still makes many people uncomfortable. Many people carry preconceived notions and baggage about prenups. While prenups have received a lot of public and media attention recently, many people still don’t understand their value or how to broach the subject.

Why?

Bringing up the subject of a prenuptial agreement can be a great way to learn more about one another’s expectations, dreams and hopes. Whether you have a high net worth or are just starting out, have children or don't, there are dozens of reasons a prenup is beneficial to you and your future spouse. Here are just a few:

- To protect your pre-marriage nest egg (such as your home, pension plan, stock portfolio, or property with sentimental value)
- To protect gifts and inheritances you receive
- To ensure that in the event of death or divorce, you will avoid difficult disputes over property (such as family businesses, stock options, professional degrees, licenses and practices, pension plans, and copyrights)
- To ensure that children from a prior marriage receive their intended inheritance
- To insulate ownership in a professional practice or business
- To protect yourself from your partner’s pre-marriage debt, e.g., credit card debt or student loans
- To establish the value of non-monetary contributions to a marriage, such as being a stay-at-home spouse and making career sacrifices

When?

Sliding a prenup across the dinner table a week before the wedding is not the appropriate time to bring up this important topic. Conversations about concerns, expectations and responsibilities are best conducted early in the relationship while dating. As your relationship gets more serious, your conversations should get more detailed and specific.

Where?

Where do you normally discuss topics important to your partnership, such as life goals, finances or family? Find or create a calm, neutral spot where you will both feel open, at ease and unpressured. Whether you’re sitting at your living room sofa, taking an afternoon walk or having a quiet dinner, you'll want to create an environment where both of you are most comfortable -- mentally and physically.

How?

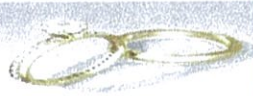
Even when couples understand the reasons for marriage contracts, many aren't sure just how to initiate the discussion. Here are some suggestions to get you started:

- Be open, honest and direct
- State your specific concerns
- Present an idea to be implemented by the two of you over time
- Invite discussion about any underlying issues that arise
- Work out your issues collaboratively

Prenup No-no's

- Presenting the idea of a prenup as a fait accompli
- Springing a prenup upon your intended at the last moment
- Being overbearing or heavy handed

REMEMBER: Don't let a prenup fall to the bottom of your "To Do" list. The longer you wait, the harder it will become. The discussions you have revolving around the prenup are conversations you will have once you are married. Getting to know your partner's position on these important aspects early can help head off more difficult discussions during the marriage. If you can't talk about touchy issues during courtship, it doesn't bode well for the marriage.



Relocation: Where Can I Go From Here?

By [Rebecca A. Provder](#)

Very little is black and white in family law, and relocation cases are no exception. They are governed by a nebulous standard. The parent seeking to relocate has the burden of demonstrating that the proposed relocation is in the best interests of the child.

Key Factors

In determining whether relocation is likely in the child's best interests, a primary factor is the impact the move will have on the relationship between the child and the non-relocating parent. Additional considerations are:

- The reasons for seeking or opposing the move
- The quality of the child's relationship with each parent
- The degree to which the relocation might enhance the child's life emotionally, economically and educationally
- The extent that the move may improve the life of the parent seeking to relocate
- The feasibility of preserving the relationship between the non-relocating parent and the child

Stability and consistency are significant in custody cases. In the context of relocation, the case law definition of stability and consistency is largely in terms of geography.

The case *Hirtz v. Hirtz*, 108 A.D.3d 712 (2d Dept. 2013), highlights the significance of the children's current residence in relocation cases. In *Hirtz*, a father who had primary custody brought an application to relocate with the parties' two children because he received military orders reassigning him from New York to North Carolina. In denying the relocation, the Court determined that it was in the children's best interests to continue at their school, participate in the same extracurricular activities, and retain relationships with their friends, doctors, therapists, and religious community.

It often comes as a surprise that remarriage does not pave a clear path to relocation. For example, in *Matter of Sylvain v. Paul*, 68 A.D.3d 883 (2d Dept. 2009), a mother sought an order allowing her to relocate with the child from New York to Florida because she wanted to live with her new husband. The child had a close relationship with his father and his father's extended family. The application was denied, as the mother's desire to reside with her new husband was deemed an insufficient basis to relocate with the child.

Notables Before Bags Are Packed

Once you have a child, you are not always free to move from place to place - whether within New York City, New York State, the United States, or to a foreign country. Generally, relocation cases are an uphill battle. However, it is not impossible to prevail in a relocation case. The best interests of the child are paramount.

Who Gets the Embryo?

By [Carole M. Bass](#)

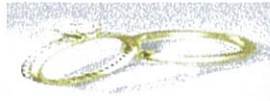
More than 400,000 embryos are stored in the United States, mostly for personal reproductive use. What happens to stored embryos if the couple who created them separates or divorces?

Several courts across the country have considered the issue of what becomes of the embryos if the couple disagrees. In doing so, courts have: (i) taken a contractual approach, enforcing clinic contracts governing disposition of embryos so long as the contract does not violate public policy; (ii) applied the contemporaneous mutual consent model, which requires the contemporaneous mutual consent of both parties for the use, donation or destruction of the embryos; or (iii) applied a balancing test, weighing the competing interests of the parties. Regardless of the approach taken, until a recent 2012 Pennsylvania case, the universal result had been that no party had been awarded embryos for reproductive use over the current objection of the other party.

New York follows the contractual approach. In 1998, New York's highest court held that the disposition of stored embryos is governed by the express agreement of the parties, where such an agreement exists. *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998). Thus, the court refused to award the embryos to the wife over the husband's objection where the clinic agreement signed by the parties provided that in the event of a dispute over disposition, the embryos would be donated to science.

A few points to keep in mind:

- Individuals should be mindful of the consent forms and other documents that are provided by clinics or physicians. These can have a controlling impact on the disposition of embryos in the event of separation or divorce.
- If an individual is using his or her own genetic material and foresees that he or she may not be able to use his or her own genetic material in the future (for example, if he or she will be undergoing chemotherapy or other treatment that may affect fertility), the individual may wish to consider banking his sperm or her unfertilized eggs in addition to the embryos.
- The law of assisted reproductive technology is unsettled and is still developing. If one party agrees that the other can use the embryos in the event of separation or divorce, it is unclear whether such party effectively can be relieved from future support claims in connection with any resulting child.



Your Spouse Owns a Business, Do You?

By [Laura V. Levy](#)

A business formed during marriage constitutes a marital asset, as does the increase in value of a business created before marriage. Both are subject to equitable distribution upon divorce.

How much is it worth?

There is not a uniform way of determining the value of a business. Generally, for purposes of a divorce case, the value will be determined by "fair market value."

Fair market value is the price at which property would change hands between a willing seller and a willing buyer, both having reasonable knowledge of the relevant facts. The factors that are usually taken into consideration are:

- nature of the business
- economic outlook of the business
- outlook of the particular industry
- financial condition of the business
- earnings capacity of the business
- existence of goodwill or any other form of intangible value

Other valuation methods include the excess earnings method, capitalization of earnings method, the liquidation method, and the adjusted book value method.

Depending on the facts of the case, either a neutral appraiser will be appointed by the court to value the business or each side will hire an expert appraiser. An independent appraiser also can be engaged by a party to contest the neutral appraiser's determinations.

How much does the non-titled spouse get?

Next, it must be determined how the value should be equitably distributed between spouses. The percentage of the value of a business granted to a non-titled spouse varies greatly depending on the facts of the case.

The non-titled spouse must be able to demonstrate the impact that his/her contributions to the marriage had on the business and its success, if any. Both direct and indirect contributions, such as taking care of the parties' children, are taken into account.

Under New York equitable distribution law, the non-titled spouse is entitled to share equitably in the value of a marital business upon a divorce. It is important to remember that in the context of divorce, equitable distribution of a business does not generally mean equal distribution.

Moses & Singer's **Matrimonial and Family Law Practice Group** assists clients in all aspects of matrimonial and family law. This includes divorce (negotiated, litigated, collaborative and mediated), custody, equitable distribution, spousal support, child support, relocation cases, issues impacting same-sex couples, taxation, prenuptial agreements, postnuptial agreements, cohabitation agreements and post-judgment matters.

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