Happy beginnings: mediated prenuptial agreements

By Marlo Van Oorschot

The wedding invitations have been mailed; the hotel, caterer and florist have been paid significant deposits; the wedding dress and wedding party's fashion has been pressed, fitted and fabulous. The couple is beaming with happiness until the prenuptial agreement is presented over a candle lit dinner. Now, the conversation turns icy — cold, legal and formal.

The beginning of the above vignette is what we think of a when someone mentions a wedding — rather than the latter, which is going to involve lawyers, meetings and arguments. These two thoughts, joy and prenuptial agreement, often collide due to the adversarial nature of lawyers. This is unfortunate because the happy couple who wants to plan and be prudent about their financial future should not have their joy leading up to their wedding day destroyed. So, how can joy and a prenuptial agreement be reconciled? The answer is: a mediated prenuptial agreement.

Premarital agreements, also known as prenuptial or antenuptial agreements, are an ancient concept. In the Jewish religion, marital contracts called *ketubahs* have been around for more than 2,000 years. Many other ancient cultures also have the equivalent of prenuptial agreements. The modern secular prenuptial agreements that exist in the U.S. can be traced back to 16th-century England. From these historic roots, the modern "prenup" has a basic focus for two people about to marry: setting forth the rights of each person in the property of the other should they later divorce.

From ancient times to the present day, the typical scenario in arriving at a prenuptial agreement for a couple about to marry is for one person (often the wealthier of the two) to have his or her lawyer prepare a prenuptial agreement and then give it to the other person, saying some combination of words which amount to "I love you ... please sign here." The popular perception is that the agreement protects the assets of the wealthier person against a "gold digger" who marries more for money than for love. The person receiving the prenuptial agreement often has little negotiating power other than to call off the wedding. This approach mirrors the adversarial process in our court system.

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It is time to move past the ancient times and outdated, confrontational viewpoints. Rather than being adversaries, soon-to-be-married persons should view themselves as partners in the crafting of a prenuptial agreement. That is the concept behind the mediated prenuptial agreement. The process of preparing such an agreement is as follows:

- The first step is to hire a family law attorney who is a trained mediator. The parties discuss their finances, their concerns, and the goals of the prenuptial agreement in a neutral setting with this mediator. The goal is to start from common ground — rather than from polar opposite positions — as the couple works together to achieve an agreement which protects both of their interests.
- After this first meeting, each party hires their own independent attorney. The importance of this is to ensure that each party fully understands the legal consequences of the terms and agreements discussed in mediation. Although there are three lawyers involved in this process rather than two lawyers in the adversarial model, the overall attorney fees are less. This is because the approach is cooperative rather than adversarial, and it always costs more money to fight rather than to cooperate.
- Next, the mediator will draft the prenuptial agreement for review by each party's attorney.
- A request for further negotiations about or revisions to the terms of the written agreement are presented to the mediator by each party's attorney for discussion and resolution.
- The final agreement is prepared by the mediator and signed by the parties and their attorneys.

Because the mediated prenuptial agreement is a cooperative process rather than an adversarial negotiation, the creation of the agreement takes time. It is recommended that the process for the mediated prenuptial agreement, commencing with the hiring of the mediator, should start three to four months before the wedding date. That should allow adequate time to finalize the agreement in advance of the wedding so the parties can focus on the joy of their big day.

If it later becomes necessary to enforce the prenuptial agreement, it is common for one party to object claiming that they did not enter into it voluntarily, but were instead pressured to sign the agreement under duress. We often see this argument when the prenuptial agreement is the product of the old adversarial model. While there are no cases in California which discuss this issue specifically, it stands to reason that, if the parties spend time in a cooperative process of the mediated prenuptial agreement and each party has an their own attorney who reviewed and approved the final version, the claim of duress will be eliminated or severely weakened. In other words, the chances of enforceability are increased.

There are other potential ways to object against the enforcement of a prenuptial agreement, but working with one's own attorney after meditating the terms of the agreement will help each party to understand those risks and how best to minimize them in the future.

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No lawyer can or should tell any person that any contract or agreement is "iron-clad." This certainly applies to prenuptial agreements, which are subject to an ever-changing body of law. But the real goal of the parties here is to draft an agreement that is used as a tool during the marriage to guide the financial expectations of the parties, which will hopefully avoid a divorce in the future. If the parties ultimately decide to end their marriage, a negotiated prenuptial agreement is more likely to be enforceable and used as the roadmap for a peaceful divorce.

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