

FAMILY LAW

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NUPTIAL AGREEMENT

this Agreement is entered into on the ____ day
 ____ (“Prospective Husband”) and ____
 ____ (collectively, the “Parties”).

Parties contemplate legal marriage under the
 ____ and it is their mutual desire to enter into this
 ____ and control their own property described in S
 ____ getting married because of their love for each
 ____ ve financial interests be changed by their ma

e, it is agreed as follows:

which belongs to each of
 estate, including all i
 said property shall r

s shall have at all times
 have if not married, to u
 longs to

PRENUPS AND MILLENNIALS:

A NEW ERA

By Judith L. Poller, Esq. & Paul A. Fotovat, Esq.

Prenuptial agreements have been around in various forms for thousands of years, stretching back to ancient Egypt and later into Jewish tradition with the introduction of the *ketubah*, a Jewish wedding contract, a pillar of Jewish marriage. In more modern times, prenuptial agreements (“prenups”) are more specifically crafted by a couple to set forth how their property will be divided or distributed in the event of divorce or death and to address spousal support rights. In the absence of a prenup, these matters are governed by the law of the state in which the couple is residing at the time of the divorce or death.

Laws governing the distribution of assets in a divorce vary by state. For example, under some states’ laws (“community property” states, such as California and Texas), all property acquired during the marriage is deemed marital and in the event of a divorce, it would be divided equally between them. In contrast, under the laws of the majority of states (“equitable distribution” states), marital property is divided *equitably* between the parties. As a result, distributing marital property equitably can lead to protracted and costly litigation. Many couples in both community property and equitable distribution states, choose to override such laws by entering into prenups where they control if and how assets will be distributed. Spousal support or alimony also differs state by state and people often want certainty in the event of a divorce as to what their obligations might be or what they might be entitled to without resorting to litigation.

Although prenups may be “ancient”, practitioners are now faced with a new reality in crafting prenups: Millennials.¹

Millennials grew up watching the world go through monumental societal changes and the explosion

of the divorce rate. As a result, Millennials approach relationships and marriage differently than previous generations did and they are entering into prenups more than Baby Boomers or Gen X did.² Millennials are not uncomfortable talking about the possibility of divorce with their soon-to-be spouse and they understand the benefit of planning for the worst while hoping for the best.

Millennials are a new breed; they buck trends. They change jobs more frequently than the generations before them and they are more frequently working in startups than older generations. Millennials have an appetite, or at least a tolerance for risk that prior generations did not and they hold more unique assets because of their openness to modern financial tools and instruments, like crypto-assets or NFTs. They are also creating intellectual property at warp speed.

Millennials marry later and as a result, typically marry with assets of their own (which could include corresponding debts, like student loans), they marry with pets and they even marry with children, whether they are children in common or not. Given their later-in-age marriages, by the time they do marry, Millennials have a preexisting, independent relationship with money. Therefore, prenups are far more relevant to Millennials than they may have been to prior generations.

Unique characteristics in Millennial prenups

Beside the traditional areas focused on in prenups, Millennials have some more unusual areas of concern: (i) startups and related employment issues, including the various and unique forms of compensation paid to Millennials, (ii) genetic material and children, (iii) social media, and even (iv) pets.

2. A “Baby Boomer” is anyone born from 1946 to 1964, and Gen X is anyone born from 1965 to 1980.

1. Anyone born from 1980 to 1995.

Working in a startup presents challenges to a couple in the crafting of their prenup. Much of the compensation could come in the form of equity, some of which may not be paid until some future date, with any potential value highly volatile. If that equity turns into a major “payday,” is there a marital component to it or would that entire increase be separate? How will the value of a party’s interest in a startup be determined, and by whom? Valuations of business interests are expensive and invasive for the parties and if the spouse is still employed by the startup at the time of divorce, it could present challenges for their employer who may not be comfortable with outsiders reviewing and analysing their books and records and potentially their intellectual property. If the parties agree to waive all interests each may have in a startup or any other business, they could streamline any possible future divorce and avoid the complication of paying the non-titled spouse for his or her interest in any such appraised business. If the parties are in relatively similar financial situations, the waiver could be mutual, and if not, where there is a waiver by the non-titled spouse to any business interest, there can be a benefit received elsewhere, like an increased share in other assets or an offsetting, fixed payment.

The enforceability of a prenup which addresses children is not entirely clear and varies by state. To the extent a prenup seeks to address child support or custody for the parties’ already-born children, it is more likely to be enforceable than a prenup which seeks to address support or custody for unborn children. Courts may be hesitant to enforce such provisions as there are countless variables which may change in either party’s or a child’s life between the time a prenup is signed and the time of a divorce or a party’s death.

Similarly, Millennials may wish to address their genetic material – what happens in the event of divorce with embryos created by the parties? Can one spouse keep the embryos? If so, what custody rights or support obligations would exist in connection with any child(ren) created? Will the embryos be destroyed? Will they be donated to a couple in need, or, for research?

Who pays for any associated costs? All of these concerns can, and should, be addressed in a prenup.

With the rise of social media, including social media influencers, parties are concerned with (1) privacy, including as it relates to preservation of each party’s brand-image and monetized content, and (2) what to do with any jointly created social media “property,” for instance, a shared public account or individual accounts which work in tandem with one another in which each party may have an independent interest. Also, Millennial relationships can live on into eternity on iMessage, WhatsApp, Instagram and Facebook. Therefore, Millennials want to ensure confidentiality and privacy generally to avoid future embarrassment and thus, often include confidentiality provisions in their prenups.

With regard to their furry friends, Millennials are increasingly including provisions whereby they agree in advance who would retain custody of a pet, or they agree to shared custody. Although these provisions are relatively new to the world of prenups, Millennials may have learned a lesson from Baby Boomers and Gen X who had increased divorce litigation surrounding pets.

Lastly, over the next several decades the largest intergenerational wealth transfer in history will take place, where an estimated \$30 trillion in inheritance will pass down from Baby Boomers (and Gen X), to Millennials. Therefore, Millennials (or their parents) want to ensure that such gifts and inheritances remain separate, above and beyond what the law already provides.

What should be clear to both practitioners of Millennials looking to get married is that Millennials are not a copy-paste generation. They desire and require agile, articulate and future-proof prenups which will anticipate the myriad ways in which their assets and investments could grow, change or evolve.

Given the world’s evolving financial landscape, prenups need to be crisply drafted to account for whatever the future may hold, even today’s unimaginable.



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Ms Poller serves on the Board of Managers for the American Academy of Matrimonial Lawyers’ New York chapter, is on the Executive Committee of the New York State Bar Association’s Family Law Section, and is a member of the International Academy of Family Lawyers.



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