BERNSTEIN

Prenuptial Agreements

Survival Guides for Matrimonial Adventure

Marriage is frequently compared to an adventure. It often marks the beginning of a grand journey to places couples have yet to encounter, whether buying a first home, moving to a new state, or starting a family. And like any good adventure, the twists and turns that lie in store can't be predicted with total certainty. That makes healthy communication and a mutual understanding of the resources at a couple's disposal crucial.

One way to build this essential foundation is through a prenuptial agreement.[1] By providing an opportunity to discuss weighty—and sometimes uncomfortable—topics, a prenuptial agreement can serve as a valuable resource. Others liken it to a roadmap for the journey ahead, encouraging couples to dream about their future lifestyle and ambitions, while fostering the creation of a financial plan supporting their long-term goals.

> "
>
> As soon as I saw you, I knew an adventure was going to happen.
>
> —Winnie the Pooh

1 Also known as a "premarital agreement" or an "antenuptial agreement."

Rules of the Road

To better understand how a prenuptial agreement can strengthen a couple's union, let's first consider its basic requirements. These agreements typically have a broad mandate to address a variety of financial matters—including property rights and support obligations during and at the end of a marriage—but cannot address the care or support of a couple's children.[2] Subject to individual states' laws, a prenuptial agreement should adhere to the following general guidelines:[3]

- **The agreement only applies to couples who are not married upon entering into it.**[4] When signed by a married couple, the agreement is known as a "postnuptial agreement," which may be subject to different state laws regarding enforcement. Couples who currently reside in or have previously lived in a state that recognizes common law marriage[5] should consider whether they are already regarded as married under state law prior to executing a prenuptial agreement.
- **The agreement should be in writing.**[6] Historically, agreements made in contemplation of marriage were required to be written down and many state statutes that govern modern-day prenuptial agreements have adopted similar requirements.[7] Some states require additional execution formalities, such as acknowledgement, witnesses, and recording in public records where appropriate, depending on the agreement's specific provisions.[8]
- **The couple must enter into an agreement voluntarily and free from duress or undue influence.**[9] This means that the parties must be able to exercise free will in executing the agreement and must not attempt to mislead to their own advantage.[10] To determine whether a prenuptial agreement meets this standard, a court will typically look at the circumstances surrounding the agreement's negotiation and execution. As such, couples considering a prenuptial agreement should begin discussing the agreement's terms as soon as possible after deciding to get married. Signing the agreement days before the wedding may not impact the agreement's enforceability if the couple engaged in lengthy negotiations beforehand.
- **The parties should understand both the agreement's terms and their impact.**[11] For example, the couple should provide each other with an accurate description of all property and financial obligations. While an express waiver of such disclosure may be permitted under some state laws, this trade of information supports a finding that the couple voluntarily entered into the agreement with a sufficient understanding of its impact. Additionally, parties should each work with independent legal counsel to fully understand how the agreement will alter their respective rights under state law. Again, a party may decide to waive this opportunity but the provision of both time and resources to work with counsel serves as a salient indicator of the agreement's fairness and voluntary execution.
- **Lastly, the prenuptial agreement should not be so overly one-sided as to be deemed unconscionable.**[12] In most states, a court may invalidate a prenuptial agreement that appears so grossly unfair no reasonable person would accept its terms. Further, in a substantial minority of states, a court may invalidate a prenuptial agreement that satisfied the requirements for enforceability at its execution but—due to an unforeseen change in circumstances—results in an injustice to one party at the time of divorce.[13]

400 BCE
earliest known document resembling a prenup*

2 This restriction includes matters relating to child support, custody, or visitation. Additionally, a minority of states bar a waiver of spousal support, while Louisiana restricts an individual's ability to waive certain inheritance rights. Linda J. Ravdin, Premarital Agreements: Drafting and Negotiation, 1, 13-14 (American Bar Association 2017).
3 Twenty-eight states and the District of Columbia have enacted the Uniform Premarital Agreement Act (the "UPAA") that dictates enforceability requirements for a prenuptial agreement, subject to each state's existing case law and additional statutes.
4 UPAA § 1. While UPAA § 2 provides that a prenuptial agreement may be enforced without consideration (that is, it may be enforced without each party receiving a benefit in exchange for such party's contractual obligations), the marriage, itself, traditionally provided sufficient consideration. See Ravdin, supra note 2 at 16.
5 Currently, only Colorado, Washington DC, Iowa, Kansas, Montana, Oklahoma, Rhode Island, Texas, and Utah recognize common law marriage for all purposes, while New Hampshire recognizes a common law marriage only at the death of one spouse. Jeffrey A. Schoenblum, Family, Kinship, Descent, and Distribution, 858-2nd TAX MGMT. PORT. (BNA), W2 (2023).
6 UPAA § 2.
7 American Law Institute, Principles of the Law of Family Dissolution, §7.04 (2022), at cmt. a.
8 See Ravdin, supra note 2 at 15-16.
9 Id. at 58-75; UPAA § 6(a)(1).
10 Note that duress or undue influence may be a high standard to meet. For example, while a pregnant, single mother presented with a prenuptial agreement a week before her wedding faced a difficult choice, these circumstances did not rob her of the free will necessary to enter into an enforceable agreement, especially as she had sufficient time to obtain the agreement's review by independent counsel. Biliouris v. Biliouris, 852 N.E.2d 687 (Mass. App. Ct. 2006).
11 UPAA § 6(a)(2); Ravdin, supra note 2, at 75-103.
12 UPAA § 6(a)(2); Ravdin, supra note 2, at 103-116.
13 For example, were one party to become wholly incapacitated due to an accident, a preexisting prenuptial agreement that bars the party from spousal support at divorce may no longer be enforceable.
*Chloe Murdock, Not Your Parents' Prenup: How the Contract Has Evolved, St. Paul Legal Ledger (October 25, 2022)

Creating a Financial Itinerary

Moving beyond what a prenuptial agreement could include, what issues should the agreement address? Prenuptial agreements typically cover two scenarios that most couples hope to avoid—divorce and death. Let's begin by focusing on issues pertaining to divorce that a couple should consider under their agreement.

3% of all married/engaged individuals had a prenup in 2010*

What's Mine, Yours, and Ours?

As a first step in negotiating a prenuptial agreement, couples should consider the classification of property brought into or acquired during the marriage. By and large, society has historically viewed a married couple as a single economic unit—hence the ability to file income taxes jointly.[14] For that reason, state law has traditionally characterized property acquired or earned during the marriage as generated by the marital unit, directly or indirectly, and thus subject to division between the parties at divorce with varying levels of court involvement.[15] States that employ a common law property system refer to this as "marital property," while states relying on a community property system refer to it as "community property."[16] In contrast, "separate property" refers to assets that either spouse acquired or earned prior to or after the marriage, property exchanged for separate property, or property that one spouse received as a gift or inheritance from a third party.[17] With some exceptions, parties may retain their separate property at divorce without interference by the court.[18] Notably, these definitions vary among states and may change over time, meaning that a couple entering into a prenuptial agreement should define at the outset the boundaries of their separate versus marital or community property to avoid an unexpected or unwelcome change in classification.

In tailoring these definitions, couples should be mindful that state law may allow for the conversion of separate property into marital or community property, or *vice versa*—often referred to as "transmutation." Depending on the state law in question, transmutation can occur through an agreement between the parties or the simple commingling of property.[19] To prevent the unintentional transmutation of property, a prenuptial agreement might outline stricter requirements for transmutation, such as an express written agreement. Alternatively, a couple could impose limitations on actions otherwise likely to trigger transmutation, like titling separate property into their joint names.

Consider Hassan and Minh, a 45-year-old engaged couple living in a common law property state who hope to buy their first home together following their wedding. Both high earners with salaries of $400,000 each, the pair have already picked out their "dream home." It's listed for $1.5 million in a desirable neighborhood with an annual home appreciation rate of 4%. Hassan and Minh plan to provide an equal amount toward the home's $300,000 down payment and pay their yearly mortgage of $121,000 and annual living expenses of $200,000 from their joint account. They've seeded the account with $1.8 million of savings and will each contribute their after-tax salary to it. Additionally, Minh is the beneficiary of a $3 million trust set up by her aunt.

35% of unmarried individuals say they're likely to sign a prenup someday*

Minh previously told Hassan that she's comfortable using her trust funds to pay the couple's expenses in an emergency. Yet, Hassan worries that Minh might resent the outlay if he experiences a professional setback and can no longer earn at the same level. Hassan has heard that contributing separate property funds to a jointly held

14 IRC § 1.
15 American Law Institute, supra note 9, at § 4.03, cmt. b. and § 4.09, cmt. a.
16 Id. at § 4.09, Reporter's Notes, cmt. b.
17 Id. at § 4.03, cmt. b.
18 Id. at § 4.11.
19 While some states require that a transmutation agreement be in writing, others may recognize an informal agreement evidenced by the couple's behavior. William D. Farber, Transmutation of Separate Property into Community Property, 37 AM. JUR. PROOF OF FACTS 2d 379, § 5 (Oct. 2022), citing Pittman v. Pittman, 754 S.E.2d 501 (S.C. 2014) (husband's separate property business was transmuted to marital property based on parties' agreement that wife would cut back her hours at a preexisting job, thereby reducing her retirement savings, to allow her to work for the husband's business and receive a larger salary under the assumption that this would benefit the couple jointly during retirement).
*****Harris Interactive, https://theharrispoll.com/briefs/popularity-of-prenups-rising-2022/

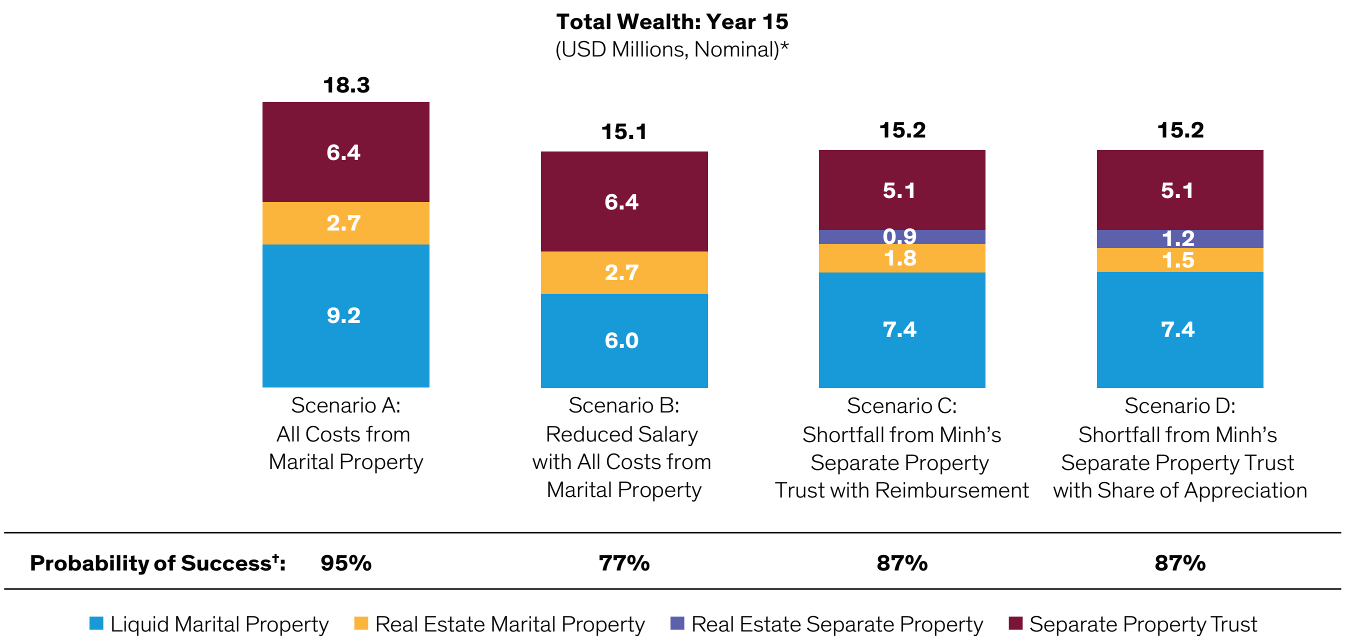
asset—like their home—may convert the separate property into marital property that would be subject to division at divorce. As such, he's concerned about having the freedom to make the right decisions for his career despite potential financial repercussions to Minh. To put Hassan's mind at ease and allow them to move forward, Minh suggests that they sign a prenuptial agreement that will provide some form of reimbursement for any separate property that she puts toward their mortgage.

We set out to help Minh and Hassan better understand how a reduction in his salary might affect the growth of their respective property and their ability to achieve their financial goals. To do so, we utilized the Bernstein Wealth Forecasting System to calculate the growth of such assets over a 15-year period (**Display 1**). First, under Scenario A, we quantified the outcome with no change in Hassan's salary. Then we weighed the impact of a 50% reduction in his salary (from $400,000 to $200,000) under Scenario B. This helped us determine whether a significant drop in liquid marital property might limit the pair's ability to grow their joint assets and achieve their financial goals—assuming they continue paying all expenses from their joint account under the reduced salary scenario. Indeed, if they both work through age 65 and continue spending $200,000 adjusted with inflation, the probability of sustaining their lifestyle from their marital assets throughout retirement would fall from 95% to 77%.

> Couples should define the boundaries of their separate versus marital or community property at the outset

DISPLAY 1: PREMARITAL AGREEMENTS CAN ENSURE SEPARATE PROPERTY PRESERVATION

Evaluate the Impact of Spending Down and Reimbursing Separate Property



*Based on AB's estimates of the range of returns for the applicable capital market over the next 15 years. Assumes starting liquid marital assets of $2.1 million and separate property trust assets of $3.0 million allocated 70% global equities and 30% bonds. Further assume that real estate value appreciates at annual rate of 4%. Assumes a $300K (20%) down payment with $1.2 million mortgage (6% fixed rate with 15-year term). Scenarios A and B assume down payment and 100% of mortgage payments ($121K/year) are paid from marital assets. Scenario C assumes down payment and 50% of mortgage payments ($61K/year) are paid from marital assets, remaining 50% of mortgage payments ($61K/year) are paid from Minh's separate property trust, and Minh's separate property trust receives repayment of mortgage payments at end of marriage. Scenario D assumes same facts as Scenario C except that Minh's separate property trust receives share of appreciation based on percentage of acquisition payments made by trust.
†Probability of assets greater than $0 in year 49, assuming Hassan and Minh both work through age 65. Annual pretax salary and living expenses are modeled to adjust with inflation.
Data do not represent past performance and are not a promise of actual future results or a range of future results. Asset values represent the estimated market value; if the assets were liquidated, additional capital gains or losses would be realized that are not reflected here. See Assumptions and Notes on the Wealth Forecasting System in the Appendix for further details.

Seeing the results, the couple agree that Minh may need to supplement their income with her separate property if Hassan were to take a substantial pay cut. In fact, their probability of long-term financial success jumps to 87% if Minh were to pay half of the mortgage—just over $60,000—from her trust funds (*Scenarios C and D*). But how would this impact her financial interests? Without the benefit of a prenuptial agreement, her distributions would decrease the trust's total value by approximately $1.3 million. Plus, such an arrangement may cause the distributed funds to be recharacterized as marital assets subject to division between Minh and Hassan at divorce.

> Most states treat passive appreciation of separate property as further separate property

To address this, we explored the impact of a reimbursement provision under a prenuptial agreement. For instance, the agreement could stipulate that Minh would be repaid for such mortgage payments upon the sale of their home following a divorce. As *Scenario C* illustrates, Minh would recoup her separate property but receive no compensation for the loss of the distributed funds' earning potential over the 15-year period.

Alternatively, the couple could agree to follow *Scenario D* and divide the home's sale proceeds between marital property and Minh's separate property in proportion to the source of the home's acquisition costs (that is, the down payment and all mortgage payments). Doing so would allow Minh to benefit from the home's appreciation, thereby making her whole for both the mortgage payments and their investment potential. After reviewing the analysis, Minh and Hassan decide to incorporate the reimbursement provisions laid out under *Scenario D* into their prenuptial agreement, thereby allowing Minh to benefit from the home's appreciation in exchange for using her separate property to support them, if necessary.

How Do We Share in Each Other's Success?

The last example introduces an important point. Couples entering into a prenuptial agreement should evaluate the treatment of any appreciation in the value of separate property occurring during their marriage. Most states treat passive appreciation of separate property (that is, appreciation that occurs without the efforts of either spouse) as further separate property. In other words, if one spouse brings previously owned marketable securities to the union and keeps them separate from the couple's marital or community property, any increase in the value of these securities due to general market conditions will qualify as separate property.

2 in 5

18–34 year-old married/engaged individuals have signed a prenup today*

If instead such property increases in value due to the efforts of either spouse during the marriage (sometimes referred to as "active appreciation"), this change in value may be characterized as marital or community assets.[20] Notably, state law varies on whether the marital efforts required to generate active appreciation may be those of either spouse, as well as the types of efforts that are recognized. For example, some states may treat one party's separate property appreciation as marital or community assets due to the non-owning spouse's homemaking efforts—assuming such activity enables the owning spouse to dedicate more time and energy to the separate property's growth.[21] Other states, however, may recognize active appreciation only if the non-owning spouse is directly involved in the separate property's management or care.[22]

20 Id. at § 4.04, Reporter's Notes, cmt. a.
21 Brett R. Turner, Equitable Distribution of Property, § 5.56 (Dec. 2021), citing Price v. Price, 69 N.Y.2d 8 (1986).
22 Id.
***** Syd Stone, Here's Why More Millennials Are Getting Prenups, MarketWatch (Sept. 26, 2022), https://www.marketwatch.com/story/heres-why-more-millennials-are-getting-prenups-11663950442

Further, states differ in their method of allocating active appreciation between the couples' marital or community assets and their separate property. For example, some states value one spouse's efforts during marriage—and thus the marital or community assets share of any resulting appreciation—based on market compensation rates for these efforts. Consider a rental property's active appreciation from the owning spouse's uncompensated efforts as property manager. Here, a court might allocate to the couple's marital or community assets the equivalent compensation a third party would have paid for the owning spouse's services. The balance of the property's appreciation would then be earmarked as the owning spouse's separate property.

Alternatively, some states allocate to the owning spouse's separate property a reasonable rate of return on the property's initial value as if an identical amount of cash had been invested in the stock market over the course of the marriage. Depending on a couple's circumstances, the allocation method applied by a state court could hugely impact the couple's post-divorce finances. For that reason, such matters should ideally be decided under the provisions of a prenuptial agreement.

Let's consider how these contrasting allocation methods might impact Sam and Andy, an engaged couple exploring the merits of a prenuptial agreement in a common law property state. Both Sam and Andy are successful professionally, with Sam devoted to running his start-up. He draws a nominal annual salary of $50,000 from the company, which is currently valued at $6 million. During a meeting with his attorney, Sam learns that his initial ownership interest will constitute separate property, as Sam created the company prior to the couple's union. However, his ongoing efforts during their marriage to expand the business will convert part of its growth into marital property under their state's laws over time.

More specifically, Sam learns that only a reasonable rate of return on the company's initial value (for our purposes 6.2%) will be attributed to his separate property. Meanwhile, any further increase in the company's value will be considered marital property. In place of this default allocation, Sam's attorney suggests that he agree to take a larger annual salary of either $200,000 or $300,000. This amount would be added to the couple's marital assets in exchange for Andy's agreement that any boost in the company's value during their marriage will remain Sam's separate property.

To help Sam evaluate this suggestion, we first compared the impact on the company's growth from setting his salary at $50,000, $200,000, and $300,000—with an annual 2% cost of living increase—over a ten-year period. To measure the varying effects, we modeled the company's growth at an annual rate of 12% in each case prior to paying Sam's draw. We also assumed that the couple invested Sam's excess after-tax salary (that is, the extent to which his salary exceeded $50,000) in 80% equities and 20% bonds.

44%

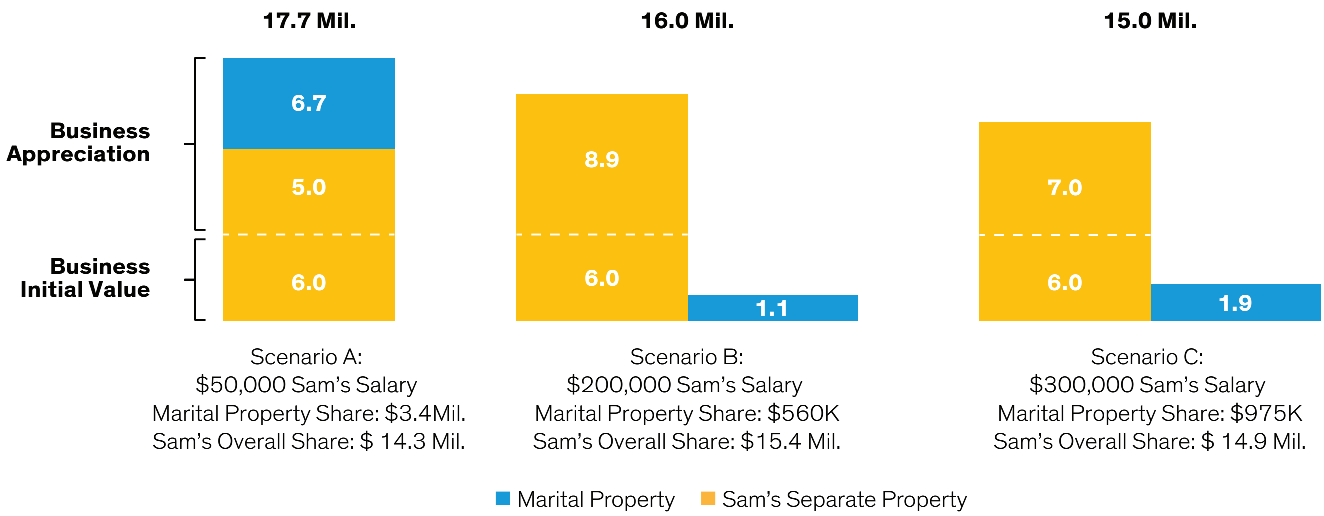
believe prenups are time sensitive*

***YouGov poll for Legal Shield, New Data Reveal Misconceptions Around Prenups (August 2-4, 2022) https://www.businesswire.com/news/home/20220922005246/en/New-Data-Reveal-Misconceptions-Around-Prenups

DISPLAY 2: HOW TO HANDLE APPRECIATION IN A CLOSELY HELD BUSINESS?

Weigh the Trade-offs

Business Related Property Values: Year 10
(USD Millions, Nominal)*
Assumes an even division of marital property in the event of a divorce.



*Assumes separate property business with an initial value of $6.0 million, growing by 12% annually and distributing $50K, $200K, or $300K with a 2% COLA adjustment. Additionally, assumes salary in excess of $50K subject to top marginal federal income tax rates and balance invested in 80% global equities and 20% bonds.

Keeping Sam's salary at $50,000 allows the company to attain to a much higher value of $17.7 million after ten years, but it also results in allocating $6.7 million of the company's value toward marital assets (**Display 2**, *Scenario A*). Assuming the couple splits their marital property equally after a decade of marriage, Sam would retain $14.3 million in company interests in the event of divorce. While Sam longs for his company to grow, he worries that he might ultimately part with $3.4 million of equity in the company if they split up—unless he can find the liquidity to buy his stake back from Andy.

Bearing this in mind, Sam turns to the increased salary options (**Display 2**, *Scenarios B and C*). He immediately notices that a salary jump means less overall family wealth since Sam must pay income tax on his salary at ordinary income tax rates. Plus, their liquid investments don't offer the same level of return as a stake in Sam's company. However, Sam takes comfort in knowing he'll maintain full control over his founding vision in the event of a divorce. While boosting his salary to $200,000 generates less overall wealth for the pair, Sam feels that it leaves him better off financially in the event of a divorce, assuming an even division of their marital assets.

After Sam shares the analysis with Andy, they agree to pursue the option that will generate the greatest overall wealth for them as a couple—meaning Sam will continue to take a nominal salary. However, to ease Sam's mind about a potential loss of control over his business, they decide to execute a prenuptial agreement. The agreement will give Sam the option to buy back any company interest passing to Andy in exchange for either (i) a promissory note accruing interest at the then-applicable federal rate or (ii) by taking a smaller share of the couple's other marital assets , if any.

> The allocation method applied by a state court could hugely impact a couple's post-divorce finances

Is Equal Equitable?

As these examples show, the characterization of property is inextricably linked to the framework that's applied to dividing assets. In other words, those entering into a prenuptial agreement should also consider the division of marital or community assets in the event of divorce. Common law states typically authorize courts to split such property and any related debt between the parties to achieve an "equitable distribution," with some states using an equal division as a starting point.[23]

In finding an equitable result, the court must consider a list of statutory factors—which may include the duration of the marriage, the health and earning power of each spouse, each spouse's financial and non-financial contribution toward the marital property, and so on—without bright lines outlining each factor's relative weight.[24] When it comes to community property states, three require equal division, while the balance empower the court to equitably allot community property between the spouses with varying levels of preference for an equal division.[25] Instead of living with such uncertainty, a couple entering into a prenuptial agreement may agree to set the division, equal or otherwise, based on their goals, needs, and hopes for the future.

While the factors may be similar, the award of spousal support is distinct from the distribution of marital or community assets

Providing Support Now and in the Future

Turning away from property division and toward spousal support obligations, a divorce court may award payments based on factors like those considered under an equitable distribution standard. This includes the age of the spouses, their health, earning capacities, length of the marriage, and the standard of living enjoyed during the marriage.[26] Yet while the factors considered may be similar, the award of spousal support is distinct from the distribution of marital or community assets.

The concept of marital or community assets reflects the belief that the marital unit made such property acquisition possible, while spousal support seeks to bolster the economically less well-off spouse due to a financial reliance or disadvantage occurring during the marriage.[27] However, as with the equitable division of property, court involvement may yield a wide range of results. By addressing this issue under a prenuptial agreement, a couple may achieve greater comfort in making economically beneficial decisions that might disproportionately impact one spouse over another.

For example, consider yet another engaged couple, Paul and Alicia, living in a common law property state. Alicia, who is the beneficiary of a $15 million trust created by her parents, recently accepted a new position with an annual salary of $445,000. As the couple hopes to expand their family soon, they have discussed Paul staying home to provide childcare while managing their home and other personal affairs. Yet, Paul worries that exiting the workforce might leave him unable to support his desired lifestyle if the couple were to go their separate ways. Neither wants to leave the issue up to a court to dictate spousal support payments. To maintain control over their future finances and address Paul's concerns, Alicia suggests executing a prenuptial agreement that will establish a pool of joint, marital assets along with a one-time lump sum payment to Paul in the event of a divorce.

23 American Law Institute, supra note 9, at § 4.09, cmt. a.
24 Id.; D.C. Code § 16-910.
25 Charlotte K. Goldberg, Community Property, 513-514 (Wolters Kluwer 2014).
26 See e.g. D.C. Code § 16-913.
27 American Law Institute, supra note 9, at § 5.02, cmt. a.

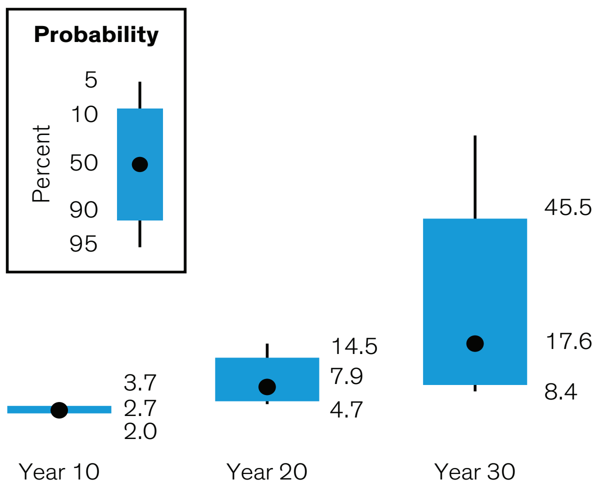
DISPLAY 3: SPOUSAL SUPPORT CAN BE DECIDED IN ADVANCE

Provide Comfort Regarding Each Spouse's Financial Future

Value of Marital Assets: Spending $300K*

After Taxes and Cash Flows (USD Millions, Nominal)

Marital Liquid Assets



Proposed Schedule of Payments†

Assets Needed to Support Sustainable Spending of $150,000

Length of Marriage	Paul's Expected Earnings (US Dollars)	50% of Marital Assets (USD Millions, Nominal)*	Lump Sum Payment (USD Millions, Nominal)*
10 Years	75,000	1.35	4.81
20 Years	40,000	3.96	4.70
30 Years	0	8.80	2.45

*Based on AB's estimates of the range of returns for the applicable capital market over the next 30 years. Assumes annual pretax income of $445K from ages 30-65 plus after-tax trust distributions of $200K, and annual spending of $300K. Income, trust distributions, and spending are adjusted with inflation. Assets are allocated 80% global equities and 20% bonds.

†Sustainable spending based on projected growth of portfolio prior to spending, assuming a glide path confidence level that increases to 90% as human capital declines. Paul's expected earnings and spending are in today's dollars, grown with inflation, beginning in year 11, 21, or 31, respectively.

Data do not represent past performance and are not a promise of actual future results or a range of future results. Asset values represent the estimated market value; if the assets were liquidated, additional capital gains or losses would be realized that are not reflected here. See Assumptions and Notes on the Wealth Forecasting System in the Appendix for further details.

Based on the couple's desire to spend $300,000 annually, we initially determined that they would need to save approximately $180,000 per year to support Alicia's retirement at age 65. After paying taxes, contributing $22,500 to her 401(k), and transferring $180,000 to a joint brokerage account, this meant Alicia and Paul would spend the balance of Alicia's salary plus $200,000 from her trust each year.

We also quantified the growth of the couple's marital "nest egg" over the next thirty years assuming an asset allocation of 80% stocks and 20% bonds. Here, we projected the pair could expect $2.7 million, $7.9 million, and $17.6 million in median markets at years 10, 20, and 30, respectively (**Display 3**). Finally, after factoring in an equal division of the couple's growing pool of marital assets—and estimates for Paul's salary were he to eventually rejoin the workforce—we pinpointed payouts that would likely support Paul's spending needs if the couple's marriage dissolved. Relieved to have a data-driven settlement structure that avoided haggling, the couple decided to incorporate an illustration of the lump sum payouts into their prenuptial agreement[28] and move forward with Paul's new role at home.

Blended Families and Differing Goals

Thus far we have discussed the impact of divorce on a married couple's finances. But those entering into a prenuptial agreement may also wish to consider waiving or modifying certain property interests that arise at the death of one spouse. Specifically, state law generally grants a surviving spouse a right to a percentage of the deceased spouse's estate, regardless of the disposition of such estate under the deceased spouse's will. In a common law state, a surviving spouse of a decedent who dies intestate (that is, without a will) will inherit a share of the decedent's estate under applicable intestacy rules. On the other hand, the surviving spouse of a testate decedent (that is, someone

28 For simplicity's sake, we have ignored the possibility of Paul returning to work during the couple's marriage. However, the couple would likely want to consider incorporating a means of adjusting any required lump sum payment under the prenuptial agreement were this to occur.

who dies with a will) may elect against the will to claim a share of the estate. In each case, the percentage of the deceased spouse's estate to which the surviving spouse is entitled varies under state law and may depend on the identity of the decedent's other surviving family members. In a community property state, a surviving spouse retains the right to one-half of any community property, with no additional claim to the other half or the deceased spouse's separate property outside of that granted under the deceased spouse's estate plan.[29]

> A prenup can help couples embrace the excitement of marriage while shedding any anxiety about future conflict

The statutory inheritance rights described above may prove especially problematic for couples with differing beneficiaries. For example, imagine a couple living in a common law property state where one spouse has children from a prior relationship. Assume the parent spouse passes away first with a will leaving everything to their children. Here, the nonparent spouse may elect against the will to receive a set percentage of the estate, thwarting the parent spouse's intent. Waiving elective share rights under a prenuptial agreement instead will give the parent spouse—not to mention their children—confidence that their estate plan will be respected.

What if the nonparent spouse wants to honor the parent spouse's wishes but worries that waiving their elective share rights could leave them without the financial resources to support their lifestyle in the event of an untimely death? Couples frequently address these types of concerns by providing support to the less wealthy spouse under the prenuptial agreement from a source other than the wealthy spouse's estate. For example, the wealthier spouse may purchase an insurance policy on their own life that will be left to the less wealthy spouse to ensure such spouse's continued financial support.

Additionally, if one or both members of a couple anticipate engaging in federal estate tax planning, the couple may wish to address a surviving spouse's use of the deceased spousal unused exclusion ("DSUE") amount under their prenuptial agreement. Currently, each US citizen and permanent resident can give away up to $12.92 million during life and at death free from federal gift and estate tax (the "basic exclusion amount" or "BEA").[30] To the extent that an individual's BEA goes unused, a surviving spouse may preserve the remaining balance—the DSUE—through a portability election made on the deceased spouse's timely filed federal estate tax return.[31] The surviving spouse may then use the DSUE to make tax-free transfers during life and at death. While a return filed solely for portability purposes benefits from certain simplifying regulations,[32] beneficiaries of a deceased spouse—if not the same beneficiaries of the surviving spouse—may not feel up for the task. Yet what if the surviving spouse has a large estate and use of the DSUE would save the surviving spouse's beneficiaries a 40% estate tax on the DSUE amount? It would be well worth negotiating the filing of an estate tax return under a prenuptial agreement to secure such substantial savings.

Additional Issues

A couple contemplating a prenuptial agreement may consider addressing a wide range of other issues, beyond those mentioned herein, including:

- definitions for separate and marital debt and a description of the parties' respective obligations for each;
- the impact of the couple's marital separation prior to a finalized divorce or the death of one party;
- the couple's intent to file their income taxes jointly or separately and their respective responsibility for any taxes owed on marital and/or separate assets;
- the preferred terms of purchase or sale for illiquid marital property, including artwork, collectibles, or the couple's primary or vacation residence;
- the state's law that will apply in interpreting and enforcing the agreement;
- the means by which the parties may amend or terminate the agreement.

Adventure Awaits

A prenuptial agreement can help a couple embrace the excitement of marriage while shedding any anxiety about future financial need or conflict.[33] Indeed, even in those situations not expressly addressed by the agreement, the couple can let the communication skills and shared familial vision shaped during the agreement's original negotiation lead the way. In this way, a prenuptial agreement can ready a couple for the long, exciting road ahead.

29 Goldberg, supra note 24 at 549.
30 Note that the basic exclusion amount will drop to approximately $6.9 million per person in 2026 without congressional action. I.R.C. § 2010(c)(3).
31 I.R.C. § 2010(c)(4)-(5).
32 Treas. Reg. § 20.2010-2(a)(7).
33 For more information about how families can integrate prenuptial agreements into their governance structures, see "Families in Flux: How Governance Helps Preserve Relationships and Wealth Amid Shifting Family Structures": https://www.bernstein.com/our-insights/insights/2022/whitepaper/familiesinflux.html.

Notes on the Bernstein Wealth Forecasting System℠

The Bernstein Wealth Forecasting System℠ uses a Monte Carlo model that simulates 10,000 plausible paths of return for each asset class and inflation and produces a probability distribution of outcomes. The model does not draw randomly from a set of historical returns to produce estimates for the future. Instead, the forecasts: (1) are based on the building blocks of asset returns, such as inflation, yields, yield spreads, stock earnings, and price multiples; (2) incorporate the linkages that exist among the returns of various asset classes; (3) take into account current market conditions at the beginning of the analysis; and (4) factor in a reasonable degree of randomness and unpredictability. Moreover, actual future results may not meet Bernstein's estimates of the range of market returns, as these results are subject to a variety of economic, market, and other variables. Accordingly, the analysis should not be construed as a promise of actual future results, the actual range of future results, or the actual probability that these results will be realized.

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