

RETHINKING THE PRENUP CREATION PROCESS: THE COLLABORATIVE PRENUP

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It's time to change the default model for creating a premarital agreement. For too long, premarital agreements have been created using an adversarial model, mirroring the traditional litigation model. While the beginning of a marriage and the end of a marriage are not the same, attorneys have approached the process similarly. This article argues that attorneys can, and should, do better for their clients who are entering into a marital relationship, using their professional role to support the relationship and the parties' communication and at the same time providing legal support and advice to the client.

This is a kick to the lazy practice of "but that's the way we've always done it" and allows for a fresh take on negotiating and preparing premarital agreements.

What's the Traditional Model? The traditional model for creating a premarital agreement is similar to the traditional model of creating a divorce agreement, in which communication is through the attorneys and the attorneys are acting as mouth pieces for the parties. The party who primarily wants the agreement meets exclusively with his or her attorney. The communication about the prenup is by his or her attorney, acting as a proxy for his or her client. While the engaged parties surely talk about the prenup in passing, perhaps over their morning coffee, the conversation is likely not a thorough or knowledge-based conversation. Goal development is unilateral—based only on the initiator of the process. That is, even though both parties would be signing the agreement and living through its provisions, the purpose and goals of the agreement are created by and directed by the initiator of the process, communicated to and through the lawyers. The closest ally of each party becomes not their intended spouse but rather that party's own attorney.

The attorney for the party initiating the premarital agreement creates the first draft and provides it to the other attorney. This first draft presented is usually a "best case" home-run scenario for the one who wanted the agreement, based on the traditional litigation mindset of putting an aggressive anchor in place as a negotiation strategy.

The non-initiating party receives the draft agreement through his or her attorney, with little warning or with warning but without knowing the specifics of the proposed agreement, in language that is opaque, legalese, and mostly unknowable, except to a family



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their family transitions through mediation and collaborative processes, including process and strategy coaching.

law lawyer. Even for the initiator of the agreement, the provisions and language of the agreement are still likely to be mysterious and based on perhaps his or her lawyer's standard provisions.

The next step involves attorneys negotiating with each other, with the parties in the background. The parties may talk on their own but anything uncomfortable can just be booted to the lawyers, using the lawyer as a shield. From the client's perspective, it's a unilateral event. From the attorney's perspective, it's a divorce planning instrument.

What is a Non-Traditional Option? A Collaborative Model.¹ The collaborative premarital agreement is profoundly different. The agreement is prepared last, only after the partners have discussed the issues and concerns important to them and their shared life, guided by their attorneys. The cornerstone of the agreement and the development of the agreement is the goals and interests of the parties. The goals and interests are the anchors for the development of the agreement's provisions.

The collaborative premarital agreement process begins with a four-way meeting with the two parties and the two attorneys. (The meetings are productive whether in person or in a Zoom-type format.) This first meeting sets the foundation for the process. *Attached is a sample agenda for the first four-way meeting.* The agenda begins with an overview of the whole process so

that the parties know what to expect. Next the parties share their goals and interests for the process and for the premarital agreement, along with their fears. The emotional aspect of creating a premarital agreement is not ignored but is instead addressed head on. (Incidentally, the traditional model may appeal to some parties due to the emotional aspects, since in the traditional model, the parties are shielded from direct communications with their soon-to-be-spouse on what they perceive as uncomfortable or unpleasant topics.)

After exploring their goals and interests, the parties share their financial profile and background, perhaps the only time each has had a full narrative and overview of the other party's financial picture. Last in this first meeting is education. The purpose of a premarital agreement is largely to change the default law or reinforce the default law—but the parties need to know the default law before they can reflect on what they like about it and what needs adjusting, based on their own particular goals and interests. All marriages end—in either death or divorce—and the default laws largely apply to both ends. While the parties benefit from a default law overview, they also benefit from hearing the different perspectives of the lawyers on the default law. Explaining spousal support is a great example. There may be no two lawyers who understand and explain the law of spousal support in California the same way.

This first four-way meeting and subsequent four-way meetings in no way interfere with the partisan advice and individual representation provided by the attorney. The four-way meetings, however, support the communication of the parties, goal development, and structure of the agreement-creation process.

Subsequent four-way meetings begin the process of developing options for the premarital agreement based on the parties' particular goals and interests. Once there is a meeting of the minds on the provisions the parties would like to see in their agreement, usually reduced to a term sheet or idea list, only then is the premarital agreement drafted, tailored to the unique perspectives and agreements of this particular couple. Drafting the agreement is the last act and only after the couple has reached shared agreements that meet their shared goals. When the agreement is provided to the parties, nothing in it should be a surprise.

The tough questions presented in a collaborative model are the same as the ones presented in a traditional model, including considerations of what's yours, mine, and ours. What happens if the marriage ends in divorce? What happens if the marriage ends in death? Do we want to have independent financial lives during marriage? The process of addressing those difficult questions, however, is done through working together instead of directed through the proxy of the lawyer.

Other Members of the Collaborative Premarital Agreement Team. In addition to each party having his or her own attorney, the parties could opt to include other professionals to support goal development and analysis, including a mental health professional, who helps them with the emotional issues that emerge when exploring financial issues, and a financial professional, who can help model and explore different financial scenarios.

Premarital Communications Coach. The purpose of working with a mental health professional, called a Premarital Communications Coach in this model, is to recognize the heavy financial and emotional underpinning in tackling a premarital agreement. The issues that plague couples are more about the emotional perspectives their financial positions convey, not the financial positions themselves. The coach can help the couple explore their feelings associated with creating the premarital agreement, gain skills in non-defense communication to strengthen the relationship, manage reactivity and emotions, increase confidence in problem solving, and explore attitudes and differences about finances. The process of working with a coach can involve one or two or more meetings with the parties alone, or the coach can be integrated into the meetings with the attorneys and the parties.

Premarital Financial Specialist. Another possible additional team member is a financial specialist. A financial specialist can offer tools to help the couple improve their understanding of the financial concerns and issues of one another and can help the couple approach the process from a financial planning perspective. They can create an atmosphere from “do a contract” to a “focus on planning for marriage.” The financial specialist can help the couple with money management and budgeting advice, and for example, help with planning for children's college, the purchase of a new home and retirement, and philanthropic objectives. They can also discuss the needs of married people, including life, health, and disability insurance and the more practical decisions such as, will they have joint bank accounts and how will that work. The financial specialist can provide projections for different options, helping the parties understand the short- and long-term implications. When the couple can understand the financial impact of various options, it creates an opportunity for discussion, compromise, and problem-solving. The financial specialist can also assist in creating the financial disclosures. The financial specialist increases the couple's assurance that the financial agreements they are making are ones that they can truly understand.

Good for the couple, good for the lawyer, good for the agreement. I would argue that the collaborative process makes for a more durable agreement and a more enforceable agreement. There is nothing jammed through or last minute with this process. It takes careful

and methodical time and consideration. No agreement is entered into without careful thought and time.

For the couple, the collaborative nature of developing the premarital agreement can create a foundation for their marriage, with the couple being able to find a shared vision for their future together. For the future challenges that will absolutely arise, as no relationship is without challenges and hardships, the couple will not be able to hide behind their lawyer as they would have done with the traditional model. The success of creating the premarital agreement together may give them confidence to deal with other challenges that will arise during their marriage. The collaborative process allows a safe and structured way of talking about milestones in the marriage—buying houses, children, etc.—leading to life planning. The parties are able to express how they would want the surviving spouse to be taken care of if the marriage ends in death, not divorce.

For the agreement, it was created through deliberate and thoughtful care. It did not drop into someone's email box in the dark of night but instead with its receipt expected and containing expected and understood provisions. As agreements that are created together have more durability, arguably so will the collaborative premarital agreement. Essentially, there's more buy-in to an agreement that is created with careful planning, thought, and collaboration; leading to less consternation and rejection of its provisions if the marriage does end in divorce.

For the attorney, arguably the process of creating a collaborative premarital agreement reduces the risk to practitioners of malpractice lawsuits. As the agreement was developed by the joint efforts of the parties and their attorneys with significant thought, care, and time, it would appear to be less likely to be challenged. This is because the parties understand that the agreement was jointly created and both parties' concerns were heard and affirmatively

addressed. Additionally, the process of working with your attorney counterpart can be more satisfying than the adversarial model. The collaborative process enhances your problem-solving skills, a benefit that transcends the collaborative premarital agreement process. It can frankly be a more satisfying way to practice law, to work with and not against your attorney counterpart.

The collaborative premarital agreement process does not guarantee a successful outcome or that it will be easy. It may be that conversations are strained because starkly different perspectives are highlighted or that having these difficult conversations reveals unmitigable differences. These are not deterrents to the process however. Such differences and difficult conversations cannot be avoided. They will inevitably arise during the parties' marriage. One might suggest that it is better to see if such differences can be addressed before the marriage starts, if they can be resolved at all.

The way it's always been done is not an acceptable reason for continuing to treat the creation of premarital agreements similarly to the way a marital settlement agreement is created. By changing the paradigm about how prenups are created, utilizing the collaborative premarital agreement model, the process for the clients and lawyers is improved and the resulting premarital agreement is superior.

1 While mediation is also a viable option to the traditional model, this article focuses on the collaborative model. Note that the concepts and perspectives of this article equally apply to postmarital agreements. Also, compliments to Donna Beck Weaver, a retired family law attorney in Southern California who promoted this topic back in 2004 through her article in the Pepperdine Dispute Resolution Law Journal, Volume 4, Issue 3, entitled The Collaborative Law Process for Prenuptial Agreements. I am sure there are others who deserve praise for their early adoption of this model.

SAMPLE AGENDA FOR FIRST COLLABORATIVE PREMARITAL AGREEMENT MEETING

1. PROCESS OVERVIEW

- a. Discuss goals, interests, fears
- b. Legal education
- c. Prepare disclosure of assets, debts, income
- d. Generate options
- e. Prepare draft of agreement, additional discussions, revisions
- f. Sign agreement

2. GOALS AND FEARS

- a. What goals do you hope to achieve through this process?
- b. What are your fears about this process?

3. TRADITIONAL PURPOSES OF PREMARITAL AGREEMENT

- a. Consider marriage
- b. Consider death
- c. Consider divorce

4. FINANCIAL BACKGROUND

- a. For example: assets, debts, employment, estate plans, inheritance information

5. NON-LEGAL ISSUES TO CONSIDER

- a. Flexibility of terms over time or depending on circumstances
- b. Strengthening the marriage and its likelihood of success
- c. Recognizing the effect time has on a relationship
- d. Recognizing the effect of children on a relationship. Continue working?
- e. Recognizing emotional issues tied with financial issues and their impact on relationship
- f. No longer “free agents”?

6. LEGAL ISSUES TO CONSIDER

- a. Separate property versus community property
 - i. Default rules versus the rules you create
 - ii. Different assets can be treated differently
- b. Categories of assets
 - i. Earnings
 - ii. Stock
 - iii. Equity compensation
 - iv. Retirement
 - v. Investments
 - vi. Real property—investment, vacation, and home
- c. Consideration of debts
- d. Reimbursement issues
- e. Determining definition and payment of “joint expenses”
- f. Fiduciary duties
 - i. Management of accounts
 - ii. Investment opportunities
- g. Expenses related to children from a prior marriage such as child support or child related expenses.
- h. Expenses related to taking care of parents
- i. Spousal support
 - i. Amount
 - ii. Duration

7. NEXT STEPS